

ARTICLE 15 COMMUNICATION TO THE ICC OFFICE OF THE PROSECUTOR REGARDING THE TARGETING OF THE PRO-BIAFRAN INDEPENDENCE MOVEMENT IN NIGERIA

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I. INTRODUCTION

1. This communication is hereby filed to the Office of the Prosecutor (the ‘OTP’) of the International Criminal Court (the ‘ICC’) pursuant to Article 15 of the Rome Statute (the ‘Statute’) by Professor Göran Sluiter¹ and Andrew Ianuzzi² on behalf of the Indigenous People of Biafra (‘IPOB’), a movement dedicated to the self-determination of the former Republic of Biafra in South-Eastern Nigeria, as well as on behalf of 17 individual citizens of Nigeria³ (the ‘Victims’) (collectively, with the IPOB, the ‘Petitioners’).
2. The Petitioners submit that, based on the information set out herein, there is reason to believe that crimes against humanity within the jurisdiction of the ICC—in particular: murder, unlawful imprisonment, torture, enforced disappearance, other inhumane acts, and persecution—have been committed in the context of politically- and ethnically-motivated state violence against, primarily, IPOB members and the Igbo people of South-Eastern Nigeria. Due to the absence of domestic criminal proceedings with respect to those potentially bearing the greatest responsibility for these crimes—in particular, but not limited to, Nigeria’s current president Muhammadu Buhari—and in the light of the gravity of the acts committed, the Petitioners further submit that the case would be admissible under Article 17 of the Statute. Moreover, based on the available information, there is no reason to believe that the opening of a preliminary

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² Mr Ianuzzi is an independent legal consultant and human-rights investigator.

³ The Victims’ statements are attached hereto as Annex A, and summaries of their individual accounts are set out in some detail below. *See para 64 infra. N.b.* In order to ensure their safety and protect their privacy, the identities of the Victims—who have specifically expressed security concerns—will not be disclosed to the OTP at this stage. Depending on the nature and scope of any protective measures that could be put in place, the Victims may be prepared to cooperate with the OTP in criminal investigations.

investigation 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 of the Statute.

3. In support of this communication, the Petitioners have relied upon a selected number of publicly available reports documenting Nigeria's political background, the Nigerian Civil War of 1967–70 (also known as the Biafran War), the recent and violent crimes committed in South-Eastern Nigeria, the Nigerian Federal Government's involvement in those crimes (including its lack of any remedial action whatsoever in response to the bloodshed), and the OTP's preliminary findings with respect to its ongoing investigation into the situation in Nigeria.⁴

II. RELEVANT FACTS

A. Nigeria's Fraught Political History

4. The Federal Republic of Nigeria gained its independence from the United Kingdom in 1960. From the outset, the country's government reflected the geographical and ethnic divides of Africa's most populous nation. Since independence, tense and often violent relations—largely (but by no means simply) between the Muslim north and the Christian south—have been the norm. Cultural and political differences between Nigeria's dominant ethnic groups—the Hausa/Fulani ('Northerners'), the Igbo ('South-Easterners'), and the Yoruba ('South-Westerners')—have consistently wreaked havoc on the country's political landscape.⁵ While the late 60s were marked by coups and the brutal Biafran civil

⁴ *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', 5 August 2013 (hereinafter, the 'Nigeria Article 5 Report').

⁵ See, e.g., Nigeria Article 5 Report, para 24 ('Nigeria is a federation comprising 36 States and 774 local government areas [...] with a population of over 168 million people. The country has more than 250 ethnic groups. 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 south-west; and the Igbo, most of whom are Christians, and can be found primarily in the south-east. Ethnic and religious identities often overlap and correlate with the pattern of political parties as well as with voting behavior.')

war, the oil boom of the 70s ushered in a long-running series of military juntas that lasted nearly thirty years.⁶

5. One in this series was briefly presided over by President Buhari. His twenty-month term in power—stretching from late-December 1983 to late-August 1985—was marked by, among other things, a poor human-rights record and ‘ethno-religious chauvinism’.⁷ In particular, then-General Buhari systematically repressed freedom of expression through the jailing of journalists, public intellectuals, and student protesters.⁸ Additionally, he is ‘credited’ with politically-motivated executions,⁹ the so-called Dikko Affair,¹⁰ the draconian

⁶ Excluding the short-lived ‘Second Republic’, which lasted from 1979 until 1983. Between independence in 1960 and 1999, Nigeria produced only two elected governments—both later overthrown in military coups. Nigeria’s military ruled the country for nearly 30 of its first 40 years of independence.

⁷ Dr Nkwachukwu Orji and Nkiru Uzodi, ‘Post-Election Violence in Nigeria: Experience with the 2011 Elections’, Policy and Legal Advocacy Center, 2012 (hereinafter, the ‘PLAC Report’), p 37; see also Adam Nossiter, ‘Beleaguered, Nigerians Seek to Restore a General to Power’, *International New York Times*, 23 January 2015 (‘As military ruler, Mr. Buhari showed little respect for the democratic process, rising to power in a coup that swept aside a civilian government and promising to include the political participation of Nigerian citizens “at some point”.’)

⁸ During his tenure, Buhari passed the 1984 Public Officers (Protection against False Accusations) Act (the so-called ‘Decree No 4’), which gave his government the power ‘to close down any public medium whose existence was deemed “detrimental” to the Federation of Nigeria’. It also gave government the power to press charges against journalists for ‘publishing false stories allegedly ridiculing, or bringing into disrepute, any public official’. Trials under the law were held before one judge and three military officers, with no right of appeal; this ‘clearly violated [...] previous Nigerian practice’. Rhoda E Howard-Hassmann, *Human Rights in Commonwealth Africa* (Rowman and Littlefield: Totowa, NJ 1986). Several well-known journalists were held under the law during Buhari’s time in power, and it was additionally used to expel foreign academics and UN-affiliated researchers. John Maikwano, ‘Nigeria: Buhari Squeezes his Critics’, *Review of African Political Economy*, Vol 12, No 33 (Summer 1985), pp 100–101. Buhari also passed the 1984 State Security (Detention of Persons) Decree (the so-called ‘Decree No 2’), permitted the indefinite detention of Nigerians committing ‘acts prejudicial to state security or (contributing) to the economic adversity of the nation’. *Ibid.* The case of Busari Adhlakun is but one example. Adhlakun was a grassroots political activist during Nigeria’s Second Republic who had campaigned on behalf of Dr Omololu Olunloyo in an August 1983 gubernatorial election. Olunloyo triumphed and took up his post in October 1983. Three months later, a group of soldiers led by General Buhari overthrew the democratic government, and Buhari assumed power. A commentator describes the aftermath: ‘One of those arrested by the new junta was Adhlakun. He was herded into jail alongside other politicians. While Adhlakun was not put on trial, he was nonetheless kept in jail despite his poor health, he was an ulcer patient who needed regular treatment and a special diet. But he was denied proper treatment and food; leading Adhlakun to suffer in prison until he died. Even after his death, the military junta would not release the corpse to his family. He was yet another Second Republic politician who met his untimely death as a result of the in-human conditions he was subjected to in Buhari’s detention camps.’ Shaka Momodu, ‘Buhari: History and the Wilfully Blind’, *This Day Live*, 10 January 2015.

⁹ General Buhari’s government is accused of having executed Bernard Ogedengbe for an action not legally proscribed as a capital offence. It is not disputed that Ogedengbe was executed by firing squad. Buhari has also been criticized for subsequently silencing the press about the issue. See Wole Soyinka, ‘The Nigerian Nation Against General Buhari’, *Sahara Reporters*, 14 January 2007. According to one account: ‘Bartholomew Owoh (26) [...], Bernard Ogedengbe (29), and Lawal Ojuolape (30), were executed by firing squad after being arrested and tried for drug trafficking. The

'War Against Indiscipline',¹¹ and other repressive measures.¹² In 2007, Nigerian playwright and poet Wole Soyinka (recipient of the 1986 Nobel Prize for Literature) accused General Buhari of treating the Oputa Panel—a national human-rights commission set up to review Buhari's time in power—with

case of Bartholomew Owoh, the youngest of them all, was particularly tragic. At the time of his arrest, the crime did not carry capital forfeiture—the punishment was six months imprisonment. But Decree No 20 was hurriedly promulgated and back-dated by one whole year to take effect from when he and others committed the crime and on the basis of that they were all tried, found guilty, and executed by firing squad.' Shaka Momodu, 'Buhari: History and the Wilfully Blind', *This Day Live*, 10 January 2015.

¹⁰ See Adam Nossiter, 'Beleaguered, Nigerians Seek to Restore a General to Power', *International New York Times*, 23 January 2015 ('His government also carried out a bizarre kidnapping plot targeting a former minister who had fled to London. It involved Israeli secret agents, giant packing crates and anesthetic drugs.') This was an extraordinary diplomatic incident in which Buhari's government was accused by the UK government of kidnapping a dual Nigerian-UK citizen from the UK, anesthetizing him, and shipping him in a crate to Nigeria. The attempt was foiled in progress by British customs officers. Buhari's government denied responsibility, but the UK held the Nigerian government fully responsible and the High Commissioner was declared *persona non grata*: diplomatic relations soured for some years. In direct response, to the British detention of the Nigerian plane that was to fly Dikko out of the country, Nigeria detained a British Caledonian plane. In direct response to the British arrest of the Mossad agents and anesthetist, Buhari's government was accused of having arrested and jailed two British engineers working in Nigeria.

¹¹ The BBC has recently (December 2014) described Buhari's rule as 'a period remembered for a strict campaign against indiscipline and corruption, and for its human rights abuses. [...] The verdict on Mr Buhari's 20 months as Nigeria's leader is mixed. [...] He also introduced a notorious decree to restrict press freedom, under which two journalists were jailed'. The War against Indiscipline was, according to Larry Diamond, Professor of Sociology and Political Science at Stanford, a period of 'unprecedented repression' unleashed by Buhari. Diamond argues that it was on the 'wave of popular revulsion' against this repression that Buhari's successor, General Babadinda, 'rode to power in August 1985'. In their discussion of the War against Indiscipline, Adebayo Olukoshi and Tajudeen Abdulraheem in the Review of African Political Economy (ROAPE) note that a 'litany of decrees was enacted promising draconian sentences' for crimes that included examination malpractices, among other more serious crimes like arson. They further describe how the government banned the NANS (the students' association), the NMA (Nigerian Medical Association), the NARD (National Association of Resident Doctors), and fired doctors participating in strikes—which was seen as a warning to other trades unions. The authors also speak about Buhari's hostility toward Southern journalists and privately-owned newspapers, which he threatened with closure on federal radio, and about Buhari's failure to prosecute corrupt members of the Shagari civilian regime. They call the failure to prosecute these figures—compared with the hot pursuit of campaigners, academics, and journalists—'patently unjustifiable'. Larry Diamond, 'Nigeria's Search for a New Political Order', *Peace Review: A Journal of Social Justice*, Volume 3, Issue 4, 1991, pp 32–37. 'Buhari justified the military's seizure of power by castigating the civilian government as hopelessly corrupt, and his administration subsequently initiated a public campaign against indiscipline known as "War Against Indiscipline" (WAI). Aspects of this campaign included public humiliation of civil servants who arrived late for work whilst guards were armed with whips to ensure orderly queues at bus stops.' *Ibid*; see also Adam Nossiter, 'Beleaguered, Nigerians Seek to Restore a General to Power', *International New York Times*, 23 January 2015 ('His self-proclaimed "war against indiscipline" was carried to "sadistic levels, glorying in the humiliation of a people," wrote the Nobel laureate and writer Wole Soyinka. Mr Buhari forced tardy civil servants, even older ones, to perform frog jumps, jailed journalists for critical articles, and expelled tens of thousands of immigrants from other West African countries, blaming them for the country's problems.')

¹² See, e.g., Acidosis, 'Why Did Buhari Sentence Fela Kuti To 10 Years In Prison?', Nairaland Forum, 10 November 2014 ('He also moved to silence critics of his administration, passing decrees curbing press freedoms and allowing for opponents to be detained up to three months without formal charges. He also banned strikes and lockouts by workers and founded Nigeria's first secret police force, the National Security Organization. His government sentenced popular musician and political critic Fela Kuti to ten years in prison on charges that Amnesty International denounced as fabricated and politically motivated. Kuti was later pardoned and released by Buhari's successor.')

‘unconcealed disdain’ by refusing to appear ‘even though complaints that were tabled against him involved a career of gross abuses of power and blatant assault on the fundamental human rights of the Nigerian citizenry’.¹³

6. The end of the 1990s saw the return of nominal democracy and civilian administration. Since then, the Federal Republic has been ruled by four elected heads-of-state: Olusegun Obasanjo (1999–2007), Umaru Yar’Adua (2007–2010), Goodluck Jonathan (2010–2015),¹⁴ and—following a fractious and, at times, fatally violent campaign—the once and current President Buhari.

B. Historical Roots of Biafran Claims for Self-Determination

7. The seeds of Igbo claims to self-determination were planted long before Nigeria’s independence. Shortly before his death in early 2013, one of Nigeria’s most preeminent intellectuals, the author Chinua Achebe (himself an Igbo from the South-East) published a memoir that, among other things, addressed the foundations of the current Biafran self-determination struggle.¹⁵ As in many of Africa’s post-colonial and contemporary struggles, the root cause was the infamous Berlin Conference of 1885 and subsequent ‘Scramble for Africa’, which ‘created new boundaries that did violence to Africa’s ancient societies and resulted in tension-prone modern states’.¹⁶ At that meeting of the dominant colonial powers of the day, ‘Great Britain was handed the area of West Africa that would later become Nigeria, like a piece of chocolate cake at a birthday party’.¹⁷ As Achebe put it: ‘If the Berlin Conference sealed [Nigeria’s] fate, then the amalgamation of the southern and northern protectorates inextricably complicated Nigeria’s destiny.’¹⁸

¹³ Wole Soyinka, ‘The Nigerian Nation Against General Buhari’, *Sahara Reporters*, 14 January 2007.

¹⁴ *N.b.* Yar’Adua died in office and Jonathan, his vice-president, assumed control. Jonathan was elected president in 2011.

¹⁵ See Chinua Achebe, *There Was a Country* (New York: Penguin 2012).

¹⁶ Achebe, *There Was a Country*, p 1.

¹⁷ Achebe, *There Was a Country*, p 1.

¹⁸ Achebe, *There Was a Country*, p 2.

8. From the beginning of Britain's colonial enterprise in Nigeria, '[i]ndirect rule in Igbo land proved [...] challenging to implement'.¹⁹ And by 1951, the British 'had divided the country into the Northern, Eastern, and Western Regions, with their own respective houses of assembly, to contain the rising threat' of 'inter-ethnic tensions and posturing for power among the three main ethnic groups', namely (as mentioned above): the Hausa/Fulani, the Igbo, and the Yoruba.²⁰

9. Britain's choice for Nigeria's first post-independence prime minister was Abubakar Tafawa Balewa, a Muslim Hausa/Fulani from the northern city of Bauchi.²¹ Indeed, it is believed that the country's first 'election' was designed to ensure that the UK's 'compliant friends in [Northern Nigeria] would win power, dominate the country, and serve British interests after independence'.²² As Achebe put it:

The structure of the country was such that there was an inbuilt power struggle among the ethnic groups, and of course those who were in power wanted to stay in power. The easiest and simplest way to retain it, even in a limited area, was to appeal to tribal sentiments, so they were egregiously exploited in the 1950s and 1960s.²³

Consequently, Balewa was installed as prime minister as the British formally (though not yet as a matter of economic or political fact) ceded its colonial dominion over Nigeria.

10. Following independence in 1960, 'Nigeria was rocked by one crisis after another [...]. First the Nigerian census crisis of 1963–64 shook the nation, then the federal election crisis of 1964, which was followed by the Western Nigeria election crisis of 1965—which threatened to split the country at its seams'.²⁴ Worse to come was the military coup of 15 January 1966: '[L]ed by a group of junior officers, most of them Igbo', the ring-leader, Major Chukwuma Nzeogwu,

¹⁹ Achebe, *There Was a Country*, p 2.

²⁰ Achebe, *There Was a Country*, p 47.

²¹ See Achebe, *There Was a Country*, p 50 ('It is now widely known that Sir James Robertson [the last British Governor-General of Nigeria] played an important role in overseeing the elections (or lack thereof) at independence, throwing his weight behind Abubakar Tafawa Balewa, who had been tapped to become Nigeria's first prime minister.')

²² Achebe, *There Was a Country*, p 50.

²³ Achebe, *There Was a Country*, p 51.

²⁴ Achebe, *There Was a Country*, p 64.

hailed from the northern city of Kaduna.²⁵ As the current economic and political state of the South-East sadly demonstrates, that coup ‘is something Nigeria has never really recovered from’.²⁶

11. Rumors quickly spread ‘that the military coup, which at first had been so well received, was in fact a sinister plot by the ambitious Igbos of the East to seize control of Nigeria’.²⁷ Soon after, the anti-Igbo pogroms began:

The weeks following the coup saw Easterners attacked both randomly and in an organized fashion. There seemed to be a lust for revenge, which meant an excuse for Nigerians to take out their resentments on the Igbos who led the nation in virtually every sector—politics, education, commerce, and the arts. This group, the Igbo, that gave the colonizing British so many headaches and then literally drove them out of Nigeria was now an open target, scapegoats for the failings and grievances of colonial and post-independence Nigeria.²⁸

It was a desperate time. Soldiers were being used by elements in power to commit a number of crimes against Igbos, Nigerian citizens. Military officers were rounding up people and summarily executing them, particularly in the North, we were told by victims fleeing the pogroms.²⁹

There were more and more reports of massacres, and not only in the North, but also in the West and in Lagos. People were hounded out of their homes, as we were in Lagos, and returned to the East.³⁰

As was the case, both then and now: ‘One found some ethnic or religious element supporting whatever one was trying to make sense of.’³¹

12. Widespread resentment of the Igbo ‘is as old as Nigeria and quite as complicated’.³² According to Achebe:

The Igbo culture, being receptive to change, individualistic, and highly competitive, gave the Igbo man an unquestioned advantage over his compatriots in securing

²⁵ Achebe, *There Was a Country*, p 65.

²⁶ Achebe, *There Was a Country*, p 65.

²⁷ Achebe, *There Was a Country*, p 66. *N.b.* ‘It is pertinent to note that within the military there had been for at least half a decade preceding the coup a great sense of alienation from and disillusionment with the political class in Nigeria. They shared that feeling with a growing number of ordinary Nigerians, and clearly with the writers and intellectuals. The political class, oblivious of the growing disenchantment permeating literally every strata of Nigerian society, was consumed with individual and ethnic pursuits, and with the accumulation of material and other resources. Corruption was widespread, and those in power were “using every means at their disposal, including bribery, intimidation, and blackmail, to cling to power”.’ Achebe, *There Was a Country*, p 72 (internal citation omitted).

²⁸ Achebe, *There Was a Country*, pp 66–67.

²⁹ Achebe, *There Was a Country*, p 67.

³⁰ Achebe, *There Was a Country*, p 68.

³¹ Achebe, *There Was a Country*, p 66.

³² Achebe, *There Was a Country*, p 74.

credentials for advancement in Nigerian colonial society. Unlike the Hausa/Fulani he was unhindered by a wary religion, and unlike the Yoruba he was unhampered by traditional hierarchies. This kind of creature, fearing no god or man, was custom-made to grasp the opportunities, such as they were, of the white man's dispensations. And the Igbo did so with both hands.³³

As one commentator put it: 'With unparalleled rapidity, the Igbos advanced fastest in the shortest period of time of all of Nigeria's ethnic groups. Like the Jews, to whom they have been frequently likened, they progressed despite being a minority in the country, filling the ranks of the nation's educated, prosperous upper classes [...].'³⁴

13. 'Superficially it was understandable to conclude that this was indeed "an Igbo coup".'³⁵ However:

Looking back, the naively idealistic coup of January 15, 1966, proved a terrible disaster. It was interpreted with plausibility as a plot by the ambitious Igbo of the East to take control of Nigeria from the Hausa/Fulani North. Six months later, I watched horrified as Northern officers carried out a revenge coup in which they killed Igbo officers and men in large numbers. If it had ended there, the matter might have been seen as a very tragic interlude in nation building, a horrendous tit for tat. But the Northerners turned on Igbo civilians living in the North and unleashed waves of brutal massacres that Colin Legum of *The Observer* (UK) was the first to describe as a pogrom. Thirty thousand civilian men, women, and children were slaughtered, hundreds of thousands were wounded, maimed and violated, their homes and property looted and burned—and no one asked any questions.³⁶

As a Sierra Leonean living in Northern Nigeria at the time put it: 'The killing of the Igbos has become a state industry in Nigeria.'³⁷

14. A bloody counter-coup was quickly organized 'by Northern officers led by Murtala Muhammed'.³⁸ Executions followed, in which President Buhari is said to have played a role:

[One reason] offered by the Igbos who dislike Buhari [...] is that he is historically anti-Igbo, evident from his participation in the 1966 counter-coup in which Nigeria's first military Head of State General Aguiyi Ironsi, an ethnic Igbo, and several other

³³ Achebe, *There Was a Country*, p 74.

³⁴ Achebe, *There Was a Country*, p 75 (quoting Paul Anber, 'Modernization and Political Disintegration: Nigeria and the Igbos', *Journal of Modern African Studies* 5, no 2 (September 1967), pp 163–179). *N.b.* This comparison to the Jews is perhaps the reason behind the name of the Biafran Zionist Movement. See para 22, *infra*.

³⁵ Achebe, *There Was a Country*, p 79.

³⁶ Achebe, *There Was a Country*, p 82.

³⁷ Achebe, *There Was a Country*, p 82.

³⁸ Achebe, *There Was a Country*, pp 81–82.

Igbo military officers were assassinated. This led to the anti-Igbo pogrom in the north that would eventually lead to the Nigerian Civil War in which an estimated 3 million Igbos died—and Buhari’s military rule two decades later during which he was accused of marginalizing the Igbos.³⁹

The counter-coup and resulting pogroms ignited a mass Igbo migration: ‘It was said at the time that the number of displaced Nigerian citizens fleeing from other parts of the nation back to Eastern Nigeria was close to a million.’⁴⁰ Amid attempts at negotiation and talk of confederation, ‘[c]alls in the East for independence grew louder, and threats from the deferral government grew more ominous, in a vicious cycle’.⁴¹ The so-called Aburi Accord—seen as the last chance of avoiding all out war—ended in failure: ‘There was a strong sense that Nigeria was no longer habitable for the Igbo and many other peoples from Eastern Nigeria.’⁴²

15. Finally, on 27 May 1967, the Eastern Region’s Consultative Assembly ‘mandated [the Eastern Region’s leader] Colonel [Chukwuemeka Odumegwu] Ojukwu to declare, at the earliest practicable date, Eastern Nigeria a free sovereign and independent state by the name and title of the Republic of Biafra’.⁴³ In response, General Yakubu Gowon—who had been named head of state following the counter-coup—‘responded to Ojukwu’s “assault on Nigeria’s unity and blatant revenue appropriation”, as the federal government saw it, by calling a state of emergency and dividing the nation into twelve states’.⁴⁴ Three days later, Ojukwu made his next move:

[C]iting a variety of malevolent acts directed at the mainly Igbo Easterners—such as the pogrom that claimed over thirty thousand lives; the federal government’s failure to ensure the safety of Easterners in the presence of organized genocide; and the direct incrimination of the government in the murders of its own citizens—[he] proclaimed the independence of the Republic of Biafra from Nigeria, with the full backing of the Eastern House Constituent Assembly. By taking this action Ojukwu had committed [the country] to full-blown war.⁴⁵

³⁹ Onyedimmakachukwu Obiukwu, ‘Opinion: Why Pro-Biafra Agitations Are Actually Anti-Buhari Protests’, *Ventures Africa*, 6 December 2015; see also Hilary Uguru, ‘Nigerian Separatists Claim Police Kill 8 in Biafra Protest’, *Associated Press*, 18 January 2016 (‘Buhari, a former military dictator in the 1980s, was a brigade major who commanded troops in Biafra during the war in which soldiers were accused of mass atrocities.’)

⁴⁰ Achebe, *There Was a Country*, p 83.

⁴¹ Achebe, *There Was a Country*, p 85.

⁴² Achebe, *There Was a Country*, p 87.

⁴³ Achebe, *There Was a Country*, p 91.

⁴⁴ Achebe, *There Was a Country*, p 91.

⁴⁵ Achebe, *There Was a Country*, p 92.

According to Achebe, 'Nigeria would never be the same again'.⁴⁶

16. Some reactions were sympathetic: 'Tanzania's [President Julius] Nyerere, one of the few survivors of the cold war tussle on the continent and a towering African statesman of the era, saw Biafra's attempts to secede through the lens of "the Jews seeking a homeland following the Holocaust in Nazi Germany and elsewhere in Europe".⁴⁷ Noted international thinkers of the day, such as Auberon Waugh, Kurt Vonnegut, and Connor Cruise O'Brien, 'were so appalled by the Biafran tragedy that they took it upon themselves to pay the breakaway republic a visit and get a firsthand look at the suffering, the destitution, and the starvation'.⁴⁸ However, for three years to follow, the harrowing episode became a Cold-War geopolitical event entangling the UK, France, USA, USSR, Portugal, and China: '[A]ll told, the callous interference of the great powers led to great despair and a prolongation of the tragedy.'⁴⁹

C. The Republic of Biafra and the Nigerian Civil War of 1967–70

17. The war began 'soon after [...] Ojukwu's proclamation of secession'⁵⁰ and 'created a humanitarian emergency of epic proportions'.⁵¹ Characterized by its extreme deprivations, most of the world looked on in horror: 'The agony was everywhere. The economic blockade put in place by Nigeria's federal government resulted in shortages of every imaginable necessity, from food and clean water to blankets and medicines.'⁵² An already bleak situation turned even worse: 'Widespread starvation and disease of every kind soon set in.'⁵³ And General 'Gowon [...] succeeded in cutting Biafra off from the sea, robbing its inhabitants of shipping ports to receive military and humanitarian supplies.'⁵⁴

⁴⁶ Achebe, *There Was a Country*, p 92.

⁴⁷ Achebe, *There Was a Country*, p 97.

⁴⁸ Achebe, *There Was a Country*, p 105.

⁴⁹ Achebe, *There Was a Country*, p 105.

⁵⁰ Achebe, *There Was a Country*, p 128.

⁵¹ Achebe, *There Was a Country*, p 169.

⁵² Achebe, *There Was a Country*, p 199.

⁵³ Achebe, *There Was a Country*, p 200.

⁵⁴ Achebe, *There Was a Country*, p 210.

18. Eventually, 'Biafra collapsed'.⁵⁵ After some thirty months of resistance, it was reduced to 'a vast smoldering rubble'.⁵⁶ By one estimate, '[t]he head count [...] was perhaps three million dead, which was approximately 20 percent of the entire population', making 'it one of the bloodiest civil wars in human history'.⁵⁷
19. President Buhari, who served in the Nigerian Army from 1961, was an integral part of General Gowon's campaign to crush the Biafran resistance by all means necessary.⁵⁸ Indeed, Buhari 'is accused of committing crimes in Biafra. According to some reports, he headed military operations in Nsukka, Abagana, and Nkpor Junction [...] where soldiers, under his leadership, allegedly destroyed villages and attacked civilians.'⁵⁹

D. Post-Conflict Igbo Marginalization

20. Although '[General Gowon's] "no victor, no vanquished" speech, as it has come to be known, strove to strike a conciliatory tone, calling for the full reintegration of Igbos into the fabric of Nigerian life',⁶⁰ a number of post-conflict efforts were made to financially hamstring the Igbos and severely limit their economic recovery in South-Eastern Nigeria:
 - a. A crippling banking policy was put in place by the Federal Government, whereby all accounts that had been in use by Biafrans during the war were effectively liquidated in exchange for a one-time payment of twenty Nigerian Pounds.⁶¹

⁵⁵ Achebe, *There Was a Country*, p 226.

⁵⁶ Achebe, *There Was a Country*, p 227.

⁵⁷ Achebe, *There Was a Country*, p 227; see also Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015 ('In 1967, Nigerian military officer Odumegwu Ojukwu declared the republic of Biafra, an area mainly populated by the Igbo ethnic group, as independent in southeastern Nigeria. The Nigerian military consequently entered into civil war with the Biafrans, encircling the region and blockading supplies from reaching the population. As a result, more than one million people died, many due to starvation.')

⁵⁸ See para 14, *supra*.

⁵⁹ Ludovica Iaccino, 'Nigerians call for second Biafra: "We are Israelites of Africa"', *International Business Times*, 1 July 2015; see *ibid* ('Biafrans are not happy with Buhari as president', noting that "[his] role in the 1966–1970 genocidal campaigns against the peoples of Biafra remains starkly unaddressed and presents a grave concern to our peoples".')

⁶⁰ Achebe, *There Was a Country*, p 226.

⁶¹ See Achebe, *There Was a Country*, p 234 ('The federal government's actions soon after the war could be seen not as conciliatory but as outright hostile. After the conflict ended: "the same hard-

- b. The importation of key Igbo trade items—secondhand clothing and stockfish—was banned from the recuperating market towns of Onitsha, Alba, and Nnewi.⁶²
- c. A law known as the Indigenization Decree of 1972—on its face, a measure designed to shift majority control of all companies operating in Nigeria from foreign to domestic hands—was passed at the very moment when the population of the South-East was least able to raise the necessary capital required to participate in the transfers.⁶³
- d. After General Gowon left office in 1975, Igbo-owned property that had been abandoned during the war was bought and used as collateral for non-Igbo business ventures with the collusion of banks known to be controlled by anti-Igbo individuals.⁶⁴

liners in the Federal government of Nigeria cast Igbos in the role of treasonable felons and wreckers of the nation and got the regime to adopt a banking policy which nullified any bank account which had been operated during the war by the Biafrans. A flat sum of twenty pounds was approved for each Igbo depositor of the Nigerian currency, regardless of the amount of deposit.” If there was ever a measure put in place to stunt, or even obliterate, the economy of a people, this was it.’) (quoting Oha-Na-Ese Ndi Igbo, ‘The Violations of Human and Civil Rights of Ndi Igbo in the Federation of Nigeria (1966–1969)’, October 1999).

⁶² See Achebe, *There Was a Country*, p 234 ([T]he leaders of the federal government of Nigeria sought to devastate the resilient and emerging Eastern commercial sector even further by banning the importation of secondhand clothing and stockfish—two trade items that they knew the burgeoning market towns of Onitsha, Alba, and Nnewi needed to reemerge. Their fear was that these communities, fully reconstituted, would then serve as the economic engines for the reconstruction of the entire Eastern Region.)

⁶³ See Achebe, *There Was a Country*, pp 234–235 (‘The [Nigerian] Enterprises Promotion Decree of [1972], also known as the Indigenization Decree, was ostensibly pushed through by the leaders of the federal government in order to force foreign holders of majority shares of companies operating in Nigeria to hand over the preponderance of stocks, bonds, and shares to local Nigerian business interests. The move was sold to the public as some sort of “pro-African liberation strategy” to empower Nigerian businesses and shareholders. The chicanery of the entire scheme of course was quite evident. Having stripped a third of the Nigerian population of the means to acquire capital, the leaders of the government of Nigeria knew that the former Biafrans, by and large, would not have the financial muscle to participate in this plot. The end result, they hoped, would be a permanent shifting of the balance of economic power away from the East to other constituencies. Consequently, very few Igbos participated, and many of the jobs and positions in most of the sectors of the economy previously occupied by Easterners went to those from other parts of the country.’)

⁶⁴ See Achebe, *There Was a Country*, pp 236–237 (‘PINI JASON [the late Nigerian journalist]: Another issue was that of abandoned property, especially in Rivers State, and the context in which your government allowed some property belonging to the Igbo to be taken over. The case was made by the new Rivers State government that its people were like tenants in their own state. After you left office it became clear that several individuals actively exploited the issue, buying up former Igbo-owned property and using these properties as collaterals for business ventures, often obtaining loans from banks controlled by certain people with anti-Igbo sentiments. Many blamed

As Achebe wrote shortly before his death in 2013, such ‘persecution of Igbos still persists in Nigeria, as the legacy of the [Biafran Civil War] continues to haunt the nation’.⁶⁵

E. Contemporary Biafran Independence Movements

1. The Movement for the Actualization of the Sovereign State of Biafra

21. Founded in 1999, the Movement for the Actualization of the Sovereign State of Biafra (‘MASSOB’) was the first contemporary group to push for independence:

For over a decade, agitation for Biafra’s restoration was championed by [MASSOB], [...] led by Ralph Uwazuruike. The group pledged to be non-violent but, over time, its members, alleging provocation, clashed with police repeatedly, resulting in several members [being] killed.⁶⁶

Accused of violence by the Nigerian government, ‘Uwazuruike, was arrested in 2005 on treason charges. He was released two years later.’⁶⁷ In May 2013, then-President Jonathan ‘listed the movement [...] as an “extremist group” threatening Nigeria’s security’.⁶⁸ In the face of increasing accusations of violence, MASSOB has recently fractured. ‘On 30 November 2015, a major faction tried to expel Uwazuruike, alleging he had compromised the secessionist cause and pocketed some 100 million naira (about \$500,000) of the group’s funds’.⁶⁹ On 6 December, Uwazuruike announced that MASSOB had been renamed the Biafra Independence Movement (‘BIM’), explaining ‘the decision was necessary following violent actions by internal dissidents’.⁷⁰

[this] series of developments around abandoned property on you. GOWON: There was no doubt that it was a very knotty issue.’) (quoting Chinua Achebe Foundation interview: Gowon in conversation with Pini Jason, 2005).

⁶⁵ Afua Hirsch, ‘Nigeria charges more than 100 Biafra independence activists with treason’, *Guardian* (UK), 6 November 2012.

⁶⁶ Nnamdi Obasi, ‘Nigeria’s Biafran Separatist Upsurge’, *International Crisis Group*, 4 December 2015 (hereinafter, the ‘ICG Report’).

⁶⁷ Ludovica Iaccino, ‘Nigerians call for second Biafra: “We are Israelites of Africa”’, *International Business Times*, 1 July 2015.

⁶⁸ ICG Report.

⁶⁹ ICG Report.

⁷⁰ Ludovica Iaccino, ‘Nigeria: Police deny killings of pro-Biafrans in Anambra and call for dialogue’, *International Business Times*, 7 December 2015; see also Vincent Ehiabhi, ‘Biafra Crisis: Uwazuruike Berates Kanu, Renames MASSOB’, *Naij*, 6 December 2015 (‘Following the continued violence perpetuated by Biafra protesters, chief Ralph Uwazuruike, the leader of [MASSOB] has

2. The Biafran Zionist Movement/Front

22. In September 2010, a MASSOB splinter group formed the Biafra Zionist Movement ('BZM'), later renamed the Biafran Zionist Front ('BZF').⁷¹ Led by Benjamin Igwe Onwuka,⁷² BZF 're-declared the Republic of Biafra' at a rally in Enugu on 5 November 2012.⁷³ Onwuka 'and about 100 members were promptly arrested and charged with treason, but granted bail'.⁷⁴ In a statement released after the incident, 'the group explained it had lost faith in the country following years of neglect and continuous killing of Igbos'.⁷⁵ On 8 March 2014, 'Onwuka and BZF members tried to seize an Enugu-state-owned radio station and broadcast another Biafra declaration: they were arrested by police and are now on trial'.⁷⁶

3. The Indigenous People of Biafra

23. IPOB was created as yet another MASSOB splinter group when Nnamdi Kanu, 'the figure at the centre of the current unrest, fell out with Uwazuruike in 2009 and emerged as the leader of IPOB in 2012'.⁷⁷ Shortly thereafter, Kanu established Radio Biafra, which is directed from London and officially banned in

renamed the group. Vanguard reports that Uwazuruike who made this known on Sunday, December 6, in a statement issued in Owerri, said the name of MASSOB has been changed to Biafra Independent Movement (BIM). The BIM leader said the decision became necessary as some dissidents of MASSOB were giving the group a bad corporate image; a development he revealed was very annoying. He said: "The change in name became absolutely necessary because of the sad introduction of violence by the disgruntled dissidents and this is at variance with the non-violence stance of MASSOB over the years." According to him, the dedicated loyalists of MASSOB are embarrassed to be associated with violence, assuring that plans were already ongoing to reorganize MASSOB and turn it to the youth wing of the Biafra Independent Movement.)

⁷¹ See ICG Report (The group 'claimed international links and even an "alliance" with Israel'.); see also Ludovica Iaccino, 'Nigerians call for second Biafra: "We are Israelites of Africa"', *International Business Times*, 1 July 2015.

⁷² Ludovica Iaccino, 'Nigerians call for second Biafra: "We are Israelites of Africa"', *International Business Times*, 1 July 2015.

⁷³ ICG Report; see also Afua Hirsch, 'Nigeria charges more than 100 Biafra independence activists with treason', *Guardian* (UK), 6 November 2012.

⁷⁴ *Ibid.*

⁷⁵ Ludovica Iaccino, 'Nigerians call for second Biafra: "We are Israelites of Africa"', *International Business Times*, 1 July 2015.

⁷⁶ ICG Report.

⁷⁷ ICG Report.

Nigeria.⁷⁸ Since its inception, IPOB has been the vanguard of the current Biafran independence movement.⁷⁹ IPOB and MASSOB have consistently claimed they are unrelated: 'According to IPOB members, violent actions blamed on MASSOB smear pro-Biafrans' reputation and are used by the government to claim the whole movement is violent.'⁸⁰

4. Common Motivations and Aims

24. Despite inevitable leadership clashes and tactical differences, IPOB and the other Biafran independence movements are largely motivated by the same deeply-held historical grievances:

'Across the board in Nigeria there is a deepening sense of disaffection with the idea of Nigeria, [it] has really failed to become a meaningful political community. And so what you see is a reflection of that sense of profound disappointment,' said Nigerian writer Okey Ndibe in a radio interview. 'The issues of injustice that caused [the Biafran War] have not been addressed.'⁸¹

The southeast [of Nigeria], like much of the country, suffers from deficient and dilapidated infrastructure and widespread youth unemployment. The resulting economic frustration feeds into longstanding complaints that the federal government never fully rehabilitated the region after the civil war. Critics hold that administrative changes (such as the creation of new states and local government areas) decreed by northern-led military governments from 1983 to 1999 diminished the region's share of federal appointments, revenue and development projects.⁸²

In a way, [contemporary agitation] is a new attempt to attract attention and spending from the central government, but it is based on a cocktail of longstanding and recent economic and political grievances. Some pre-date the three years during which Biafra fought to establish its independence in 1967–70.⁸³

In short, the situation in South-Eastern Nigeria appears to most Biafrans to be the same as it ever was. As one analyst put it, Igbos remain isolated from powerful positions in government: '2015 looks like 1960s Nigeria from the

⁷⁸ See ICG Report.

⁷⁹ See ICG Report.

⁸⁰ Ludovica Iaccino, 'Nigeria: Police deny killings of pro-Biafrans in Anambra and call for dialogue', *International Business Times*, 7 December 2015.

⁸¹ Afua Hirsch, 'Nigeria charges more than 100 Biafra independence activists with treason', *Guardian* (UK), 6 November 2012.

⁸² ICG Report; see also Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015 ('[Nnabuike Nnadede, editor of pro-Biafran media outlet Voice of Biafra] says that the Igbo people of the region that was previously Biafra still suffer from a lack of resources and investment by the central government. He claims there is a dearth of hospitals and that women are forced to give birth in the streets.').

⁸³ ICG Report.

Biafran perspective. If you're looking at the political map and political dominance, nothing's changed'.⁸⁴

25. As a result, what many Biafrans desire is a renewed chance at, if not complete independence, at least some form of self-determination in accordance with internationally-accepted principles:

[Nnabuike Nnadede, editor of pro-Biafran media outlet Voice of Biafra] maintains [...] that the pro-Biafran movement is simply requesting a degree of self-determination that its supporters believe is currently being denied to the Igbo people. 'Our movement has remained peaceful. Over 99 percent of our people are peaceful,' says Nnadede. 'We want a Biafra where we will choose our own leaders, not somebody from Sokoto or Kano imposing people on us.'⁸⁵

[Ifeanyi Adibe of IPOB] said: 'It is not a crime to demand to be independent. No one is killing British people for demanding to renegotiate the terms of [their] relationship with [the] European Union or opt out of it.' [...] 'A major part of the work going on at the moment is sensitizing efforts and awareness campaign,' he said. 'We have been reaching out to world governments and organizations that believe in the inalienable rights of every nation to be free and independent. We know it is an uphill task, but we're confident that if the likes of former Soviet Union, Yugoslavia, even recently Sudan/South Sudan can, we will also make it.'⁸⁶

'The suffering is too much, and that is why we've decided to say, "Look, we cannot continue to be in Nigeria. We have suffered enough, we want the opportunity to vote to have an independence referendum",' says Nnadede. He claims that the movement is entirely peaceful, however, and says that if the Igbo people voted against the secession of Biafra, he and his colleagues would accept the result and be 'proud Nigerian citizens'.⁸⁷

Whether or not such a referendum would ever be entertained by the Federal Government is obvious from its heavy-handed reactions to peaceful pro-Biafran agitation in recent months.

26. Nevertheless, there are divergent practical interpretations as to the desired political outcome, let alone the precise geographic contours, of any aspirationally emergent state of Biafra:

⁸⁴ Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015 (quoting Manji Cheto, sub-Saharan Africa political risk analyst at global consultancy Teneo Intelligence).

⁸⁵ Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015.

⁸⁶ Ludovica Iaccino 'IPOB, MASSOB and Buhari's government: How is Nigeria dealing with pro-Biafran separatist movements?', *International Business Times*, 28 July 2015.

⁸⁷ Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015.

[T]he separatists are not clear about how they see the territory of the 'new Biafra'. Some claim it would include all areas inhabited by people of [Igbo] descent, including parts of the oil-rich Niger Delta to the south and Benue state to the north, but the other peoples of these regions vehemently oppose inclusion in any new Biafra. Other separatists say a restored Biafra would be limited to the five core [Igbo] states—Abia, Anambra, Ebonyi, Enugu, and Imo—referred to administratively as Nigeria's 'South-East Zone'. Nigeria's last national census in 2006 counted 18.9 million people in the five states of the South-East Zone. There were no questions about ethnicity in the census, but in these five states, [Igbos] constitute nearly all of the population. The trouble for Biafran separatists is that the South-East Zone is landlocked and has only marginal natural resources. Its agricultural land is already densely populated and overworked, and, should ethnic conflict intensify, certainly could not sustain many of the millions of [Igbos] who live in other parts of Nigeria.⁸⁸

The [Igbo] of the southeast and minority groups in the Niger Delta share common feelings of marginalization. IPOB has strong following among the [Igbo] in Rivers State, particularly in its chief city, Port Harcourt. MASSOB's leaders and some ex-militant Niger Delta leaders have exchanged solidarity visits and jointly called for the right to self-determination. However, the [Igbo] and delta groups are sharply divided over their practical interpretation of what to do with that right. Most groups in the delta are demanding regional autonomy and the right to control their petroleum resources within Nigeria. They are fiercely opposed to any suggestion of joining the [Igbos] in a breakaway Biafra. Armed Niger Delta groups could be a source of weapons, but will not join any insurrection in support of Biafra.⁸⁹

The size of the recent protests (rallying over 10,000 people in some cities) suggests the pro-Biafra groups may be gaining a stronger following. However, while many [Igbos] are nostalgic about Biafra and feel marginalized by the federation, there is, for now, hardly any enthusiasm for actions that could lead to another secessionist war. The umbrella [Igbo] socio-cultural organization, *Ohanaeze Ndigbo*, has called for both Kanu's unconditional release and also for an end to the unrest. Many [Igbo] leaders, however, quietly support the agitation, not to achieve secession but as a means of compelling the federal government to respond to the region's grievances. Initially ambivalent, the five [Igbo]-dominated state governments in the South-East Zone have denounced the agitation, especially as it is disrupting trade and transportation in the region. In nearby Rivers state, which has a large [Igbo] population, the government has banned all rallies and demonstrations.⁹⁰

In any case, the crux of the matter is clear: pro-Biafran '[a]gitators say the southeast is [simply] not getting its due from the country's federal system'.⁹¹

F. Escalating Tensions as Nigeria Transitions Into the Buhari Regime

27. In the lead-up to Nigeria's 2015 presidential elections, a posting on the Nairaland Forum made the following claim:

⁸⁸ ICG Report.

⁸⁹ ICG Report.

⁹⁰ ICG Report.

⁹¹ ICG Report.

[Then-APC presidential candidate] Maj Gen Muhammadu Buhari has dropped the bombshell, on the reason he has been losing [the] election in Igboland and parts of Nigeria where Igbos are residing, stating that it is because he was involved in the Nigerian civil war. The former dictator speaking today on BBC Hausa services monitored in Kaduna, said with regrets that, ‘the Igbos hate him for what happened during the Biafran war’. *‘I don’t have any regret, and as such do not owe any apology to them, in fact if there is a repeat of the civil war again, I will kill more Igbos to save the country.’*⁹²

Several months later, following Buhari’s electoral victory, a similar claim was apparently broadcast on Radio Biafra. A spokesperson for President Buhari, denied the accusation, insinuating that the recording had been faked⁹³ and claiming that the BBC Hausa Service’s editor had ‘dissociated the BBC from the interview clip “being ascribed by the pirate radio station to President Buhari”’.⁹⁴

28. Well into the new administration, Igbo sentiment in the South-East remains one of marginalization:

During the March 2015 presidential elections, a majority of southeastern Nigeria voted for the political party of the incumbent president, Goodluck Jonathan. Many Igbos feared that Mr Jonathan’s challenger, Muhammadu Buhari, a northern Muslim Fulani who led a military coup in 1983, would act on a latent hatred for Igbos, despite his promises to rebuild the country’s ‘broken walls’. The fact that very few Igbos have been given strategic appointments in his cabinet has not quelled those concerns. Ben Nwabueze, an acclaimed academic and a co-founder of the Igbo interest group Ohaneze Ndigbo, openly accuses Mr Buhari of favoring his fellow northerners and claims that Nigeria’s ‘No 1 enemy is the North-South divide’.⁹⁵

Since Buhari’s return to power, calls for Biafran independence have increased.

29. Government reactions turned violent as early as 22 August 2015, with the Nigerian police targeting pro-Biafran separatists: ‘Two persons, suspected to be members of [...] MASSOB, were [...] feared dead in Onitsha, Anambra State, while four others, including a policeman, were critically injured in a bloody clash

⁹² Makazona, “‘Igbos Hate Me Because of Biafra War’ – Buhari on BBC Hausa’, Nairaland, 31 January 2015 (emphasis added) (available at <http://www.nairaland.com/2123236/igbos-hate-me-because-biafra#30304081>).

⁹³ See ‘Radio Biafra lying against me – Buhari’, *Premium Times*, 15 July 2015 (The spokesperson Garba ‘Shehu said the voice being ascribed to President Buhari in the recording, repeatedly played back by the pirate station, is definitely not the president’s’.)

⁹⁴ ‘Radio Biafra lying against me – Buhari’, *Premium Times*, 15 July 2015.

⁹⁵ Enuma Okoro, ‘Facing Down Nigeria’s Ghosts’, *International New York Times*, Op-Ed, 20 December 2015.

[...].⁹⁶ Approximately one week later, again in Onitsha, reports indicated that unarmed IPOB members had been killed by government forces:

The Nigerian police have refuted allegations that pro-Biafran separatists were shot dead during a protest in Onitsha, Anambra state, Nigeria on 30 August [2015]. [...] [IPOB] alleged that at least two members were killed and nine wounded when Anambra's police and navy started shooting during what they said was a 'peaceful manifestation'.

However, Anambra State commissioner of police, Mr Hassan Karma, said reports of the killings were incorrect and that police and navy shot to disperse people after being provoked by the pro-Biafrans [...]: 'Nobody died, nobody was killed. I expect them to take the corpses at the police station as I speak to you now. Where are the dead bodies? Nobody has seen them.'

[...] Ikechukwu Okoye, IPOB coordinator for the Anambra state, denied that a member of the navy was injured and accused the police and navy of excessive violence against what he reiterated were members of IPOB, not MASSOB. He explained that on 30 August, around 5,000 IPOB members decided to go on [a so-called] 'evangelism march' on the streets to hand out flyers and 'educate people on Biafra'. He alleged that while the demonstrators were heading to River Niger Bridge Head in Onitsha, they encountered members of the police and navy who shot two people dead and injured several others. [...] [S]even IPOB members, including Okoye, who were allegedly injured during the march [...] all said they were shot in the legs 'for no reason' by the police and the army and were taken to the Toronto Hospital where they received treatment.⁹⁷

Reacting to claims, IPOB denied that 'it has any weapons and alleged the government uses MASSOB, which has been widely condemned for violent activities, to smear the reputation of all pro-Biafrans'.⁹⁸ IPOB further denied that 'pro-Biafrans are joining forces with Niger Delta militants, deeming the allegation "a big lie".⁹⁹

⁹⁶ Nwabueze Okonkwo, '2 die, 4 injured as police, MASSOB clash in Onitsha', *Vanguard*, 23 August 2015; see *ibid* ('The Police Area Commander for Onitsha [...] confirmed the incident, but referred Sunday Vanguard to the Divisional Police Officer in charge of the Central Police Station [...], who said information about the cause of the incident had not yet been ascertained because the policeman was so critically injured that he could not talk from his intensive care unit of the hospital where he is currently receiving treatment. However, the Divisional Police Officer [...] in charge of Inland Police Station [...], who also confirmed the incident, explained that the MASSOB members, who were coming back from their meeting, had first confronted the policemen on their way to buy fuel and met at the point of the incident.')

⁹⁷ Ludovica Iaccino, 'Nigeria: Police deny pro-Biafrans killed in Onitsha', *International Business Times*, 17 September 2015; see also Ludovica Iaccino, 'Nigeria: Credible evidence that pro-Biafrans are targeted by police says Amnesty International', *International Business Times*, 9 September 2015.

⁹⁸ Ludovica Iaccino, 'Nigeria: Police deny pro-Biafrans killed in Onitsha', *International Business Times*, 17 September 2015.

⁹⁹ *Ibid*.

G. Announcement of a Systematic Police Crackdown

30. In the wake of the initial round of Federal Government violence in Onitsha, the Nigeria Police Force announced an operation specifically aimed at rounding up pro-Biafran protestors on 8 September 2015:

The Inspector-General of Police, IGP Solomon E Arase [...] has ordered an immediate clamp down on person or group of persons inciting violence and social disorder across the country.

This directive becomes imperative owing to recent activities of members of [MASSOB] and [IPOB] in some parts of the country.

This operational order empowers the police to arrest anybody fomenting any act of violence or disorder, or any act inimical to the security of the nation. So far the following arrests have been made viz: Anambra State - 4; Imo State - 6; Delta State -11; and Abia State - 1.

The IGP further warns that all person so arrested for inciting violence, irrespective of their class or status in the society would be charged to court accordingly.¹⁰⁰

The Federal Government's message was clear: the question of self-determination in Biafra would be treated as a national-security matter; participants would be dealt with swiftly and harshly.

31. Reacting 'one day after dozens of people belonging to groups advocating for a separate state were arrested',¹⁰¹ a representative of Amnesty International cited 'evidence that pro-Biafran separatists in Nigeria are targeted by police'.¹⁰²

It is believed that dozens of members of [MASSOB] were arrested after the inspector general of police, Solomon E Arase, released a statement urging authorities to clamp down on people who behaved violently across the country. [...]

The number of people arrested, originally thought to be around 200, was confirmed by the police to stand at 22. [...] They were all MASSOB members.

Amnesty said that after speaking with 'dozens of Biafran activists' in the last few years, they believe that pro-Biafrans are targeted by police. A spokesperson for the group said: '*There is credible evidence that they have been arbitrarily arrested, tortured, and jailed in the past. They are still targeted by the police.*'

The spokesperson added that according to estimates from one of the group's researchers, there could be '*at least two dozen Biafran activists in almost every prison in the southeast of Nigeria*'.¹⁰³

¹⁰⁰ Press Release, 'IGP Directs Operation Round Up Persons Inciting Violence Nationwide', *Nigeria Police Force*, 8 September 2015.

¹⁰¹ Ludovica Iaccino, 'Nigeria: Credible evidence that pro-Biafrans are targeted by police says Amnesty International', *International Business Times*, 9 September 2015.

¹⁰² *Ibid.*

Amnesty's claim that Nigerian authorities routinely react violently against pro-Biafrans was supported by IPOB's Ifeanyi Adibe:

[M]ass arrests, kidnappings, torture, and killings of pro-Biafrans are 'not a new thing'. He alleged: 'Hundreds are known to have been abducted in the middle of the night from their homes and [they] undergo torture in various underground Nigerian torture chambers. Many more are unaccounted for. The number of those already killed cannot yet be established, but we know many are missing.'¹⁰⁴

Biafrans, it seems, were already well acquainted with '[t]he Nigerian military's warning of dire consequences for anyone who tries to carry out what they refer to as treasonable acts'.¹⁰⁵

H. Arrest of Nnamdi Kanu and Resulting Bloodshed

32. On or around 17 October 2015, IPOB leader and Radio Biafra director Nnamdi Kanu—upon returning to Nigeria from the UK—'was apprehended [in a Lagos hotel¹⁰⁶] on charges of criminal conspiracy, intimidation and belonging to an unlawful society. [Two days later], he pleaded not guilty'¹⁰⁷ before a federal magistrate court in Abuja, which ordered his immediate release on bail.¹⁰⁸

¹⁰³ *Ibid* (emphasis added).

¹⁰⁴ Ludovica Iaccino, 'Nigeria: Credible evidence that pro-Biafrans are targeted by police says Amnesty International', *International Business Times*, 9 September 2015.

¹⁰⁵ Mannir Dan Ali, 'Letter from Africa: Should new calls for Biafra worry Nigerians?', *BBC*, 30 November 2015.

¹⁰⁶ See Eric Ikhilae, 'How Biafra Radio Chief Kanu Was Arrested In Lagos, By DSS', *Sahara Reporters*, 28 December 2015 ('A DSS operative, Temisan John, who led the team that arrested Kanu [...], said Kanu was apprehended in the company of a woman at the Golden Tulip Essential Lagos Airport Hotel [...] "He was subsequently arrested and taken to the command headquarters."')

¹⁰⁷ Ludovica Iaccino, 'Nnamdi Kanu's wife speaks: "My husband is a prisoner of conscience"', *International Business Times*, 1 December 2015; 'Decades After Nigeria's War, New Biafra Movement Grows', *International New York Times* (Reuters), 30 November 2015 (IPOB leader Nnamdi Kanu—an activist who divides his time between the UK and Nigeria, spreading his ethos on social media and Radio Biafra—was arrested last month on charges of criminal conspiracy and belonging to an illegal society.)

¹⁰⁸ 'Nigeria protests over Biafra activist's arrest', *BBC*, 10 November 2015 ('The director of banned Radio Biafra was arrested last month and is still being held despite a court order to free him, his mainly ethnic Igbo supporters say.');

see also ICG Report ('The immediate trigger was the 19 October arrest by the Department of State Services (DSS) of Nnamdi Nwannekaenyi Kanu, leader of a separatist organization, [IPOB] and director of Radio Biafra, an unlicensed station urging violent struggle to achieve independence for Biafra in Nigeria's southeast. Charges against him include sedition, ethnic incitement and treasonable felony. Some of these offences carry heavy penalties, from long jail terms to the death sentence.');

Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015 ('Nigeria's Department of State Services arrested Nnamdi Kanu, a prominent Biafran spokesperson and activist, on October 19, according to the International Crisis Group (ICG). Kanu lives in London but often

However, the Federal Government sought and obtained a 90-day detention order from the Abuja High Court pursuant to additional charges leveled under Nigeria's anti-terrorism legislation.¹⁰⁹ Kanu remained in the custody of Nigeria's State Security Service (the 'SSS'), also known as the Department of State Services (the 'DSS').

33. The arrest and initial detention set off a fresh wave of demonstrations and protests, 'demanding [Kanu's] freedom, but also calling for the restoration of Biafra as an independent country'.¹¹⁰

Nic Cheeseman, associate professor in African politics at the African Studies Centre at the University of Oxford, says Kanu's arrest has acted as a 'short-term trigger' to the resurgence in pro-Biafran sentiment. Cheeseman adds that the protests are a result of similar factors that led to the original Biafran uprising, in particular, a sense of political disenfranchisement among the Igbo people. 'Some of the wounds of the civil war have not healed,' says Cheeseman.¹¹¹

As well as the release of Kanu and other Biafran activists, pro-Biafrans want the Nigerian government to put a date on an independence referendum, according to Nnabuike Nnadede, editor of pro-Biafran media outlet Voice of Biafra. 'We want them to release all the Biafran activists first. Then ... we want them to debate about the time for a referendum', says Nnadede, who is based in London and is part of a disparate pro-Biafran group.¹¹²

Unfortunately, the stage had been set for worse things to come.

34. The Federal Government's continued failure to release Kanu, despite the original release order, sparked further unrest in November 2015:

travels to Nigeria and was reportedly apprehended in Lagos. He is the leader of [IPOB], a secessionist group supporting the revival of the Biafran state and independence from Nigeria. Kanu is also the director of Radio Biafra, it broadcasts pro-Biafran material from London but the Nigerian government seek to ban it.); Mannir Dan Ali, 'Letter from Africa: Should new calls for Biafra worry Nigerians?', *BBC*, 30 November 2015 ('He came to Nigeria last month and was arrested by the authorities, accused of treason. [...] He has already appeared in court but is still under detention as his trial is yet to get off the ground.')

¹⁰⁹ See Hilary Uguru and Michelle Faul, '8 Civilians, 2 Police Officers Killed in Biafra Protest', *Associated Press*, 2 December 2015 (A lawyer for the accused, Vincent Egechukwu, announced that Kanu 'is being investigated for terrorism. He already has been charged with criminal conspiracy and is accused of "hate speech" after he broadcast a call to arms to fight for a Biafran state.') *N.b.* The anti-terrorism law in question appears to be the Terrorism (Prevention) (Amendment) Act 2013.

¹¹⁰ ICG Report; see also Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015 ('Since his arrest, pro-Biafran protesters have conducted marches in southeastern Nigeria, demanding Kanu's release.');

Mannir Dan Ali, 'Letter from Africa: Should new calls for Biafra worry Nigerians?', *BBC*, 30 November 2015 ('The latest protests were triggered by the detention of Mr Kanu, the UK-based leader of the IPOB.')

¹¹¹ Conor Gaffey, 'What is Biafra and Why are Some Nigerians Calling for Independence?', *Newsweek*, 7 December 2015.

¹¹² *Ibid.*

Activists told the BBC that five people were killed and several others injured after police fired shots and teargas to disperse the protesters in Port Harcourt—the largest city in the [South-East] region.

But police spokesman Ahmad Muhammad said this was untrue.

'Measures have been put in place to handle the situation in such a way that public peace is not disrupted and to ensure life and property are protected,' he told the AFP news agency.

Protests were also held on Tuesday in the city of Owerri in Imo state, a day after the region's biggest market in the city of Aba was reportedly shut down by protesters.

Our correspondent says the protests started peacefully on Friday in the oil-rich Delta state and has since taken place in five other major cities in the region.

The demonstrators are mostly young men holding Biafra flags and banners with pictures of Mr Kanu, who is also a leader in the secessionist [IPOB]. [...]

An IPOB leader, Uchemna Madu, told the BBC that the group was fighting against the 'injustice and inequality' ethnic Igbos faced in Nigeria.

'We believe in Nigeria, we have businesses everywhere in the country but we are getting nothing apart from political and social marginalization,' he said.

'Our lives and properties are not secured, we want to live on our own.'¹¹³

Thousands of people took to the streets.¹¹⁴

35. Whatever its intention, the Federal Government's heavy-handed response to calls for self-determination had brought unresolved issues yet again to the fore:

Now, like then, Igbos say they have been marginalized—excluded from key government posts and denied vital funding for infrastructure development, schools, and hospitals. [...]

Political analyst Okereke Chukwunolye said the decision to arrest Kanu, previously a little known figure whose social media following outweighed actual support on the ground, was a mistake because it "increased his popularity and made him more visible".

The sight of the red, black, green and yellow Biafran flag at largely peaceful protests in the southeastern cities of Port Harcourt and Aba, and the capital, Abuja, has prompted secessionist debates in newspapers, on radio and social media.

¹¹³ 'Nigeria protests over Biafra activist's arrest', *BBC*, 10 November 2015; see also Conor Gaffey, 'What Should President Buhari Do About Calls for a Free Biafra?', *Newsweek*, 10 December 2015 ('In November, there were reports that police had used tear gas and fired shots into the air to disperse protesters in the southern city of Port Harcourt.')

¹¹⁴ See Mannir Dan Ali, 'Letter from Africa: Should new calls for Biafra worry Nigerians?', *BBC*, 30 November 2015 ('The last few weeks have seen thousands of young people trooping to the streets of southern Nigeria to protest about the continued detention of a leading Biafra activist, Nnamdi Kanu.')

'The issues that brought about the Biafran-Nigerian civil war have remained unresolved', said Chukwunolye. [...]

When the civil war ended, Yakubu Gowon, the general who led the government side to victory over Biafra, declared that there should be 'no victor, no vanquished', in a pledge of reconciliation. But the Igbos feel left behind.

Local people say the demise of Enugu's industries, a decline that coincided with the oil boom in Africa's top crude producer, led to widespread unemployment and was a consequence of the federal government failing to fund projects in the region.

At a market in Asata, an impoverished city center district of Enugu, it is hard to find anyone who supports the government. [...]

A common complaint is that Nigeria's presidents have tended to come from the north or southwest—areas dominated by Hausa and Yoruba people—which, some say, has led to Igbos not being appointed to influential government positions. [...]

Tensions are rising. IPOB campaigners say they are committed to peaceful protests, but their demonstrations prompted the military to issue an 'unequivocal warning' that efforts to bring about the 'dismemberment of the country' would be crushed.¹¹⁵

By the end of November 2015, the Kanu affair was a cause célèbre in Nigeria.

36. Speaking to the international press on 1 December 2015, Kanu's wife, Uchechi Okwu-Kanu, expressed concern over her husband's prolonged detention and described him as a prisoner of conscience.¹¹⁶ Fearing 'for her husband's well-being', she 'alleged he is being tortured by' the DSS:¹¹⁷

Okwu-Kanu said she had been able to speak with Kanu only once since he was arrested by the DSS as he travelled to Nigeria from London in October. She warned her husband's health is worsening as he is no longer able to take medicine for 'his life-threatening ulcer'. [...]

Okwu-Kanu defended her husband's struggle for independence and argued pro-Biafrans have the right to self-determination. She also urged the Nigerian government to release her husband and engage in dialogue rather than arresting people 'who agitate for freedom'. [...]

[Kanu's lawyer Vincent] Obeta and Kanu's sister, Princess Chinwe Kanu, also expressed concern over what they described as Kanu's 'deteriorating health' after seeing him in court on 23 November.¹¹⁸

Although the DSS made no comment with respect to the allegations of torture, Nigerian Army spokesman Colonel Sani Usman was brutally honest as to the

¹¹⁵ 'Decades After Nigeria's War, New Biafra Movement Grows', *International New York Times* (Reuters), 30 November 2015.

¹¹⁶ Ludovica Iaccino, 'Nnamdi Kanu's wife speaks: "My husband is a prisoner of conscience"', *International Business Times*, 1 December 2015.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

Federal Government's intended response to further demonstrations: 'The message to the Biafrans is clear: The army and police might use the Rules of Engagement on security operations to the fullest depending on the circumstances.'¹¹⁹

37. As if on cue, fatal violence erupted in Onitsha the following day:

Ten people including two police officers died in the latest protests Wednesday [2 December] over renewed demands for a Biafran state to secede from Nigeria's southeast, police and a protest leader said.

Such protests were banned last month by southern governors concerned by the increasing violence around new demands for a Biafran state [...].

Police Deputy Superintendent Ali Okechukwu said he has reports that at least two officers were killed when protesters opened fire Wednesday in Onitsha city of Anambra state.

[An IPOB leader] Ugochukwu Chinweuba, gave a contradictory account, saying police opened fire indiscriminately, killing at least eight people including bystanders. Chinweuba said dozens of protesters have been wounded, some critically.

He said a peaceful protest was disrupted by agitators who set businesses, homes and trucks ablaze. Markets and shops closed, fearing looting.

The violence erupted a day after Nigeria's chief of police, Inspector General Solomon Arase, warned protesters to desist or face 'the full weight of the law'.

Arase said police already are holding 134 activists from recent protests.¹²⁰

Events were soon clarified when it was reported that the Nigerian military's Joint Task Force (the 'JTF')—which operates with impunity in and around the Niger Delta¹²¹—had opened fire on a large unarmed crowd of Biafran protestors:

At least nine people have allegedly been killed and 18 injured by the [JTF] during a pro-Biafra protest in Onitsha, Anambra state. Thousands of members from [IPOB] and other pro-Biafrans took to the streets of Onitsha on 2 December calling for the release of their leader Nnamdi Kanu.

At least 20,000 demonstrators blocked the Niger Bridge, connecting south-eastern Nigeria with the rest of the country, causing a traffic jam for several hours. The JTF is believed to have opened fire on protesters after they refused to move from the bridge.

¹¹⁹ Ludovica Iaccino, 'Nnamdi Kanu's wife speaks: "My husband is a prisoner of conscience"', *International Business Times*, 1 December 2015.

¹²⁰ Hilary Uguru and Michelle Faul, '8 Civilians, 2 Police Officers Killed in Biafra Protest', *Associated Press*, 2 December 2015.

¹²¹ See para 65, *infra*.

In a statement published on Twitter on 2 December, the Nigerian Police Force warned [IPOB and MASSOB] against disrupting peace.¹²²

Ministry of Defence spokesman Rabe Abubakar defended the police action, noting that 'nobody is above the law and authorities cannot allow some people to cause mayhem on the streets'.¹²³ However, pro-Biafra demonstrators insisted that the march had been peaceful that the JTF had fired on demonstrators indiscriminately. 'Several IPOB members confirmed [...] that nine people were shot dead.'¹²⁴ And IPOB's Uchena Madu, suspected the work of agents provocateurs: 'the culprits might be people who disguised as members of the pro-Biafra protesters, so as to tarnish the group's image'.¹²⁵

38. Nigerian civil-liberties groups reacted strongly to the Federal Government violence and called for judicial accountability:

The Civil Liberties Organization (CLO) has accused members of the [JTF] of shooting at unarmed pro-Biafra protesters on 2 December 2015, in the commercial city of Onitsha, Anambra State. In a statement, the CLO's executive director, Ibuchukwu Ohabuenyi Ezike, claimed that the task force members killed one Vivian Emeka and 10 others and left many protesters with severe injuries. The group also added that more than 100 protesters are being held in custody in Abuja, calling the detentions an abuse of court orders. The CLO is demanding a full investigation. Mr Ezike stated that a contingent of the heavily armed [JTF], consisting of personnel from the army, navy, police, and Nigeria Security and Civil Defense Corps, last Wednesday attacked thousands of unarmed [IPOB] members [...]. The CLO stated that the continued detention of Mr Kanu violated a court order, noting that the government had not appealed the ruling granting bail to the IPOB spokesman.¹²⁶

The Human Rights Writers Association of Nigeria (HURIWA) has said it would hold the Inspector General of Police (IGP), Mr Solomon Arase responsible for the killing of unarmed pro-Biafra protesters in Onitsha. In a statement signed jointly by the National Coordinator Comrade Emmanuel Onwubiko and the National Media affairs Director, Miss Zainab Yusuf, HURIWA said it was gravely disturbed that the IGP could abuse his privileged position by publicly ordering the confrontation by his armed operatives against unarmed protesters. They said the protesters were attacked 24 hours after the IGP asked his armed operatives to quell the peaceful protests by [IPOB and Kanu] supporters [...].¹²⁷

¹²² Ludovica Iaccino, 'Nigeria: Nine killed by JTF military during pro-Biafra protest in Onitsha claims IPOB', *International Business Times*, 3 December 2015.

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ Dana Christensen, 'Onitsha On Lockdown As Pro-Biafra Members Ground Activites', *Press Telegraph*, 5 December 2015.

¹²⁶ Pro-Biafra Protests: Group Accuses Military Of Killing 11, Wounding More', *Sahara Reporters*, 5 December 2015.

¹²⁷ Onyedika Agbedo, 'We'll hold police responsible for killing unarmed pro-Biafra protesters, says HURIWA', *Guardian* (Nigeria), 8 December 2015.

[HURIWA] said it has gathered evidence of the killings. 'The killings took place as forces were trying to quell the protest,' HURIWA's national coordinator Emmanuel Onwubiko told IB Times UK. 'As we speak, the people killed are being buried. If the police are claiming that no one was killed, they are simply not telling the truth. There is evidence all over social media.' Onwubiko added that HURIWA would send a letter along with evidence of the killings to the ministry of justice. 'The killings are unlawful and the Nigerian government must investigate them,' he said. 'We also demand that Inspector General of Police, Mr Solomon Arase, be brought to justice. We hold him accountable for the killings, which occurred not long after he issued a statement warning that police would take action to stop the protest.'¹²⁸

As of the date of this filing, there is no indication that any government investigations have been initiated.

39. On 7 December 2015, Kanu's lawyers moved for his release before the High Court in Abuja, arguing—among other things—that the ex parte motion dated and filed on Oct 26 by the DSS and upon which the permission to detain him was granted was an abuse of court process brought in complete bad faith'.¹²⁹ The motion additionally sought an injunction 'directing the [DSS] to obey an order of the Chief Magistrate Court which had earlier granted [Kanu] bail'.¹³⁰ For its part, the Federal Government opposed the application on national-security grounds, citing attempts by Kanu to procure weapons.¹³¹ However, no weapons were found in Kanu's possession at the time of his arrest.¹³²

¹²⁸ Ludovica Iaccino, 'Biafra: Nigeria must investigate unlawful killings in Onitsha, urges rights group', *International Business Times*, 8 December 2015.

¹²⁹ Senator Iroegbu 'Biafra: Kanu Asks Court to Set Aside DSS' 90 Days Detention Period', *This Day Live*, 8 December 2015.

¹³⁰ Senator Iroegbu 'Biafra: Kanu Asks Court to Set Aside DSS' 90 Days Detention Period', *This Day Live*, 8 December 2015; see also 'Seven Reasons Nnamdi Kanu Wants Bail Granted', *Naija*, 10 December 2015 (setting out all grounds put forward on behalf of Kanu: '1. The motion ex-parte dated and filed on Monday, October 26, which the court heard and granted on Tuesday, November 10 is an abuse of court process brought in complete bad faith by the respondent and did not reveal to the Federal High Court that fact of pendency of a criminal charge brought by the SSS against Kanu. 2. The respondent suppressed the fact of the active pendency of a criminal action brought by the SSS against Kanu where the chief magistrate sitting in Abuja granted bail to the Biafra agitator but the Nigerian government deliberately refused to comply with the orders of the magistrate. 3. The order of this court was obtained fraudulently by the SSS. 4. The magistrate court where Kanu was arraigned is a creation of statute and recognised under the laws of Nigeria and all its decisions and proceedings bind the parties until set aside by an appeal. 5. No materials exists for the bare allegations made by the SSS that the accused person is a terrorist and is preparing to take arms against the Nigerian state. 6. The continued detention of the applicant in the face of an order of a court that Kanu be released is a trespass on the person of the applicant and a violation of the basic freedoms of Kanu as guaranteed by the constitution of the Federal Republic of Nigeria 1999 as amended. 7. Sections 27(1) of the Terrorism (Prevention) (Amendment) Act 2013 and any provision that the act which empowers the court to make an order for the detention of the Biafra agitator or anybody else any time beyond 24 hours without trial is ultra vires the constitution as amended.')

¹³¹ See Jerry Lenbang, 'Why FG Cannot Order The Release Of Radio Biafra's Nnamdi Kanu Now', *360 Nobs*, 9 December 2015 ('The FG claimed that in the course of its investigations, Kanu, who it

40. At the oral hearing held one week later on 14 December 2015, 'Kanu's lawyer Vincent Obetta reiterated [...] that Kanu's prolonged detention was in violation of the [Nigerian] constitution and the African Charter on Human Rights'.¹³³ Prosecutor Moses Idakwo emphasized the terrorism charges, adding that 'the DSS had evidence of bank accounts owned by Kanu where monies were allegedly used for financing terrorist acts against Nigeria'.¹³⁴ In response to the Federal Government's claim that Kanu was also a flight risk given his UK passport, Obetta assured the court that, if released, Kanu intended 'to attend his trial in Nigeria'.¹³⁵
41. Meanwhile, eight members of IPOB remained in custody in Port Harcourt on treasonable felony charges of conspiring to wage war against the Federal Government, pending a bail hearing before the High Court of that city.¹³⁶

identified as the brain behind recent demand for the creation of 'Biafra Republic', had already received huge sums of money to purchase weapons. In a counter-affidavit before the court, FG said prior to his arrest, Kanu had made enquiries about prices of the weapons he intends to purchase. In the counter-affidavit by a senior officer with the Department of State Services, DSS, Mr Ayo Ibitoye, it insisted that it would be in the interest of justice, peace and order, to allow the IPOB leader to remain in custody of the security agency.)

¹³² See 'Nnamdi Kanu Of Radio Biafra Had No Weapons In His Possession At Time Of Arrest', *Sahara Reporters*, 9 January 2016 ('Leader of [IPOB], Nnamdi Kanu, did not have any weapons in his possessions when agents of the [DSS] arrested him on October 15, 2015. A document compiled by the DSS and exclusively obtained by Sahara Reporters show that no weapons were among the personal items in Mr Kanu's possession at the time of his arrest. Mr Kanu is also the director of Radio Biafra, a clandestine station that broadcasts pro-Biafra messages. Since Mr Kanu's arrest at Tulip Hotel in Lagos, Lagos State, there had been rumors on social media that Nigerian security agents had discovered several guns and other weapons among his belongings. The handwritten DSS document show that the list of items belonging to Mr Kanu included numerous pieces of technology and digital communications equipment. The Biafran agitator had four laptop computers, two iPads, five computer modems, six mobile phones, thirty-eight SIM cards for various mobile networks, one Alexis Multimix transmitter, and several mixers and microphone equipment for recording. The DSS document did not specify whether the technical and communications equipment were being actively used for Radio Biafra broadcasts at the time of Mr Kanu's arrest.')

¹³³ Ludovica Iaccino, 'Nnamdi Kanu: Bail ruling set for 17 December amid claims IPOB leader supports terrorism', *International Business Times*, 15 December 2015.

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ See 'Court Remands Eight Pro-Biafra Protesters In Prison', *Naija*, 9 December 2015 ('A Federal High Court in Port Harcourt, the Rivers State capital, has fixed Thursday, December 17 to hear the bail applications of eight suspected members of [IPOB] charged with treasonable felony and planning to persecuting war against the nation. The eight suspects were arrested by the police in connection with the pro-Biafra protests in Port Harcourt which was held recently. They are standing trial on a two-count charge of treason, conspiring to wage war against the Federal Government and breach of public peace by unlawfully demonstrating and chanting war songs. The presiding judge Justice Hassan Quadri adjourned the hearing of the bail applications of the accused persons till Thursday, December 17, to enable their lawyers' effect proper service of court process of the bail applications on the police. The court remanded the accused persons prison custody pending

42. On 16 December 2015, IPOB filed suit against the Federal Government 'seeking compensation for members who were either killed or injured by security operatives'¹³⁷ during the recent pro-Biafra protests in the South-East:

Represented by the Kingdom Human Rights Foundation International, the pro-Biafra group is demanding N100 million for families of each of the nine IPOB members who were killed and N50 million for each of the 18 injured ones during protests which took place on October 20 and December 2, in Onitsha, Anambra State, in Owerri, Imo State and in Ebonyi, Bayelsa, Rivers and Delta states respectively.

Joined in the suit are the President; Attorney-General of the Federation; the National Assembly; Chief of Army Staff; Inspector General of Police, Commissioners of Police in Imo, Anambra, Abia, Enugu, Ebonyi, Delta, Bayelsa, and Rivers states; Commandant-General, Nigeria Security and Civil Defence Corps; and Director-General, State Security Service.

In the Motion on Notice filed before a Federal High Court, sitting in Abuja, the group also sought the order of the court to declare the onslaught against IPOB members by security agencies as a crime against humanity, unlawful, cruel, inhuman and a violation of their rights to peaceful assembly, freedom of association and right to self determination. [...]

In the suit [...], the Trustees of Kingdom Human Rights Foundation International also urged the court for an order 'granting the unconditional and immediate release of members of IPOB who are in detention in prisons, police and Army custody and further restrain respondents from further harassment of the applicants who are peacefully and non-violently exercising their rights to self-determination, freedom of association and expression'.¹³⁸

Again, as of the date of this filing, there is no indication that the Federal Government is looking into the matter in any way.

43. While demonstrations had been halted temporarily by IPOB and MASSOB in an attempt to engage in dialog with the Federal Government,¹³⁹ such truce was

the hearing and determination of their bail application on the said date. It would be recalled that the supporters of IPOB had protested twice in Port Harcourt disrupting social and economic activities in the capital city of Rivers.)

¹³⁷ Akeeb Alarape, 'Pro-Biafra protest: IPOB drags FG to court', *The Sun*, 16 December 2015.

¹³⁸ *Ibid.*

¹³⁹ See Francis Igata, 'Biafra: MASSOB, IPOB to halt demonstrations', *Vanguard*, 8 December 2015 ('The ground swell protests staged by the members of [MASSOB] and [IPOB] over the continued detention of the Director, Radio Biafra, Nnamdi Kanu, has been halted, following the resolve of the two pro-Biafra groups to give Federal Government room for dialogue. [...] In a joint resolution signed by Ugwuoke Ibem, National Secretary, MASSOB, and Emma Powerful, Spokesman of IPOB, which read in parts: "We have decided to halt our demonstration protest to pave way for the much published dialogue on Nnamdi Kanu's release. Our withdrawal from the major cities of Biafraland is not out of cowardice but to prove maturity, professionalism as a decent self determined group. We hereby issue an ultimatum to the Federal Government to prove their seriousness and sincerity on the much published dialogue on the release of Nnamdi Kanu. We

short-lived. On 10 December 2015, dialog was officially rejected pending Kanu's release:

Pro-Biafran groups have rejected calls by government members to start a dialogue on the issue of Biafra. Both [IPOB] and [MASSOB] said no talks will occur unless the government releases IPOB leader Nnamdi Kanu. [...] An IPOB coordinator who lives in Anamabra said that the government is speaking to the wrong people. The source said: 'Unless, he [President Muhammadu Buhari] releases Nnamdi Kanu, no dialogue will hold with IPOB representatives in attendance.'¹⁴⁰

Meanwhile, Washington-based NGO Organization of Emerging African States (OEAS)—which advocates for people's right to self determination—warned that Nigeria could risk a 'civil strife' if pro-Biafrans' demands are not met. In a statement released on 4 December, the organization also said Nigeria should hold a referendum on the Biafra issue within 90 days with independent observers supervising the polls.¹⁴¹

Up to this point, President Buhari had made no comment on the ongoing calls for Kanu's release or for a referendum on the question of Biafran self-determination.

44. In response to pro-Biafran rallies planned for Lagos on 16 and 17 December 2015, 'the State chapter of the [ruling] All Progressives Congress (APC) [...] warned anyone planning to hold a demonstration in the State under any umbrella to discontinue such an attempt'.¹⁴² Lagos security agencies, 'led by the State Commissioner of Police Fatai Owoseni [...] vowed *to deal ruthlessly* with anybody or group found to be involved in such protests'.¹⁴³
45. The protests went ahead, this time without incident.¹⁴⁴ And, on 16 December 2015, criminal charges against Kanu—conspiracy, managing and belonging to an unlawful society, and indulging in criminal intimidation—were dropped by the Chief Magistrates Court in Abuja upon recommendation of the DSS. Yet it was unclear whether the terrorism charges approved by the Abuja High Court

shall continue with our non violence self determination on Biafra. MASSOB, IPOB will never relent or backside on the agitation for Biafra actualization. We condemn the stupidity, sabotage statement of Ralph Uwazuruike that IPOB, MASSOB introduced violence in Biafra struggle.”)

¹⁴⁰ Ludovica Iaccino, 'Nnamdi Kanu: Pro-Biafran groups claim no peace talks unless IPOB leader is released', *International Business Times*, 11 December 2015.

¹⁴¹ *Ibid.*

¹⁴² 'Steer clear of Lagos, APC warns pro-Biafra protesters', *Vanguard*, 15 December 2015.

¹⁴³ *Ibid.* (emphasis added).

¹⁴⁴ See 'Nigerian court releases detained Biafra campaigner', *AFP*, 17 December 2015 ('On Wednesday, the protesters stormed Lagos, the nation's commercial capital, demanding Kanu's release and Biafran independence.')

remained in place.¹⁴⁵ However, the following day, that court seemed to clarify matters by ordering Kanu's immediate release: "I set aside the orders of November 10, 2015 and order the release of the applicant [Kanu] on bail unconditionally," Judge Adeniyi Ademola said, reversing an earlier order. He said there was no need to further detain Kanu because "there is no charge before any competent court of jurisdiction" against him.¹⁴⁶

46. While a sense of relief prevailed, 'many [family members and supporters] expressed concern as [Kanu] was not in court at the time of the ruling'.¹⁴⁷ And

¹⁴⁵ See Ludovica Iaccino, 'Nnamdi Kanu: DSS drops charges against Ijob leader and Radio Biafra director', *International Business Times*, 16 December 2015 ('A Nigerian magistrates court has discharged Nnamdi Kanu following his arrest in Lagos. The court in the federal capital of Abuja, Wuse Zone 2, discharged the controversial director of Radio Biafra of all counts of criminal conspiracy, as well as ownership of an unlawful society. The judge said that the state security service (DSS)—who arrested Kanu in Lagos earlier in October—dropped the charges against him, local media reported. "The accused person is hereby discharged and the case struck out," the court confirmed.); Ikechukwu Nnochiri, Anayo Okoli, Chris Ochayi, Dapo Akinrefon, Nkiruka Nnorom, Nwabueze Okonkwo & Ugochukwu Alaribe, 'Biafra protesters move to Lagos as Court strikes out charge against Kanu', *Vanguard*, 17 December 2015 ('An Abuja Chief Magistrate Court, yesterday, struck out the one-count criminal charge the Federal Government preferred against the leader of [IJOB], Mr Nnamdi Kanu. In a ruling yesterday, Chief Magistrate Shauibu Usman discharged Kanu following an application by the [DSS] to withdraw the charge against him. The court granted the motion for discontinuance of the matter, filed and argued by counsel to the DSS, Mr Moses Idakwo. The FG had urged the Magistrate Court to terminate further hearing on the charge, saying it has concluded plans to take the matter before a higher court. Idakwo told the court that the government secured an order of the Federal High Court in Abuja to further detain Kanu for 90 days. He said the order which was granted by Justice Ademola Adeniyi was to enable the government to conclude investigation into an allegation that Kanu was involved in terrorism financing. Consequently, the DSS applied to withdraw the initial First Information Report, FIR, pending against the defendant. Idakwo specifically asked Magistrate Usman to step down from the trial on the ground that his court lacked the power and jurisdiction to prosecute terrorism charges.');

see also 'Nigeria withdraws criminal charges against Biafra campaigner', *AFP*, 16 December 2015.

¹⁴⁶ 'Nigerian court releases detained Biafra campaigner', *AFP*, 17 December 2015; see also Ludovica Iaccino, 'Nigeria: Radio Biafra director and IJOB leader Nnamdi Kanu released as DSS detention ruled "unlawful"', *International Business Times*, 17 December 2015 ('The High Federal Court of Abuja has ordered the release of controversial director of Radio Biafra, Nnamdi Kanu. He was arrested in October by the [DSS] on charges of criminal conspiracy and belonging to an unlawful organization. The DSS refused to release Kanu after the magistrate court in Abuja had granted him bail in October. The DSS argued the conditions for the bail were not met and obtained permission from the High Court to detain Kanu for a further 90 days to investigate on alleged terrorism charges. The DSS later dropped the criminal charges against Kanu but maintained the Biafran leader instigated terrorism. However, the High court ruled that the prolonged detention of Kanu—leader of [IJOB]—was unlawful. The announcement came as thousands of IJOB members are holding a two-day demonstration in Lagos, Nigeria's commercial hub.')

¹⁴⁷ Ludovica Iaccino, 'Nnamdi Kanu free: Supporters rejoice but fears spread as IJOB leader was not in court', *International Business Times*, 17 December 2015; see *ibid* ('Kanu's wife, Uchechi Okwu-Kanu, told IB Times UK: "He has been released unconditionally but he was not brought to court. What have they done with my husband? I will wait till he's been seen. I am only worried at the rate the DSS is evading his presence to the public. I am now putting in a motion to look into his state of health asap as his life is in danger." Mazi Mmaduabuchi Anyagulu, a member of IJOB, told IB Times UK: "Yes, he has been granted an unconditional release by the federal high court. We await

the DSS did not immediately comply with the High Court's order,¹⁴⁸ 'as the police [said] they are still investigating his alleged involvement in terrorist activities'.¹⁴⁹

47. Later in the day on 17 December, celebrations turned to bloodshed as—yet again—government forces executed pro-Biafrans on the streets of Onitsha:

A celebratory march in Onitsha by supporters of Nnamdi Kanu [...] turned ugly as Nigerian soldiers stationed in the commercial [center] opened fire on them, killing five of them. According to reports, the peaceful marchers came to the streets to celebrate the declaration by an Abuja Federal High Court that the DSS release Kanu unconditionally. [...] An eye witness, Mr Festus Uyanna, told newsmen that the incident occurred as the jubilant group proceeded toward the Bridge Head and were halted by the military joint task force stationed in the hotspot. Uyanna said the insistence of the IPOB members to converge at the Dim Chukwuemeka Ojukwu Gateway resulted to sporadic shooting during which the task force overpowered them. 'Trouble started when the jubilating IPOB members were asked to stop their march toward the Bridge Head, but the group bluntly refused. It was at this juncture that the soldiers started shooting sporadically to scare the crowd,' he said. Also speaking, the Coordinator of Campaign for Democracy in the South-East, a pressure group, Mr Uzor Uzor, said he rushed some injured IPOB members to the hospital. 'I have been here since I heard of the shooting. They were unarmed and wanted to converge at the Dim Chukwuemeka Ojukwu Gateway when they were asked to turn back but they refused. As I am talking to you, five of them are lying dead in various hospitals and we have been following up about 15 others in critical conditions,' he said. [...] Reacting to the development, an assistant commissioner of police in the state police command, Mr Philip Ezekiel, confirmed that there were deaths from the incident but that he could ascertain the number. Ezekiel said that the IPOB members wanted to subdue the task force and take over the Bridge Head but were over-powered by the troops. 'Yes, Onitsha was in crisis in the early part of today, IPOB members attacked the soldiers at the Bridge Head but they were over-powered. There were deaths but I cannot confirm that now because they are not under me but everything is normal now,' he said.¹⁵⁰

his arrival, until then, we can't rejoice. Kanu may have been acquitted of all charges leveled against him by the Nigeria DSS, which may decide to detain our leader against the orders of the court. Therefore, I cannot be joyful until I hear his voice over the radio again.'")

¹⁴⁸ See 'Court orders Nigerian secret police to free Biafra separatist, detention sparked protests', *Associated Press*, 17 December 2015 ('A Federal High Court has ordered Nigeria's secret police to immediately release the leader of a separatist Biafra group—a cause that led to a civil war that killed a million people in the 1960s. Lawyer Vincent Obeta told The Associated Press that the State Security Service had not complied with the order by late Thursday. The prosecution argued for more time to prepare for trial and that a man facing charges of terrorism and financing terrorism is a flight risk.')

¹⁴⁹ 'Nigeria police shoot Biafra supporters', *BBC*, 18 December 2015.

¹⁵⁰ 'Biafra: Soldiers attack peaceful march in Onitsha, 5 feared killed', *The News*, 17 December 2015; see also Ludovica Iaccino, 'Nigeria: Army accused of killing Nnamdi Kanu supporters in Onitsha during celebrations', *International Business Times*, 18 December 2015 ('At least four people are believed to have been killed in Anambra State during celebrations following a high court decision to release controversial director of Radio Biafra. Thousands of people took to the streets of Onitsha, a town in Anambra, on 17 December after learning that charges against Nnamdi Kanu [...] had been dropped. While supporters of Kanu [...] were celebrating, the army allegedly used live bullets on the cheering crowd, some alleged. There are contrasting reports on the number of the alleged victims as local media say the death toll could be as high as ten. Mazi Mmaduabuchi Anyagulu, a member of IPOB, told IB Times UK: "Yesterday (17 December) four of our people, who were rejoicing for the

Amnesty International in Nigeria announced that it was aware of the reports and was currently investigating,¹⁵¹ while IPOB's Ikechukwu Ugwoha vowed to step up protests.¹⁵² One day later, an Onitsha-based human-rights group reported 'that soldiers from Onitsha Military Cantonment have disappeared with the corpses of about five members of the pro-Biafra agitators'.¹⁵³

48. As of 21 December—four days after the High Court's release order—Kanu's whereabouts remained unknown.¹⁵⁴ Pro-Biafran groups continued to call for his release, fearing a serious escalation of violence;¹⁵⁵ and the APC leadership in

release of our leader, were murdered by the Nigerian Army at the Onitsha Bridge Head. Thirteen were hospitalized at the Multicare Hospital. 'Last night around 10 pm, members of the Nigerian army invaded the hospital where they were being treated and took away those at the hospital. They were taken back to the military barracks in Onitsha.' IB Times UK has contacted the army and the defence spokespersons for a comment on the claims, but has not received a response at the time of publishing. [...] Although Kanu's family members and supporters reacted with relief, many expressed concern as the Radio Biafra director has not been seen since the ruling.');

'Five pro-Biafra supporters killed celebrating leader's release', *AFP*, 18 December 2015 ('Nigerian security forces have killed five pro-Biafra campaigners as they celebrated the release of their leader in the commercial city of Onitsha, a spokesman said Friday. An Abuja high court on Thursday ordered the release of Nnamdi Kanu whose arrest since October has sparked a wave of protests across the country, including the economic capital Lagos. "Nigerian security agents shot dead five of our members yesterday in Onitsha as we were celebrating the news of the release of Kanu by the high court in Abuja," Ikechukwu Ugwoha of [IPOB] told AFP. He said the security agents also went to the hospital where eight other members of the group were being treated for gunshot wounds and arrested them.');

'Nigeria police shoot Biafra supporters', *BBC*, 18 December 2015 ('The clashes in Onitsha were prompted by "overzealous police officers firing at unarmed civilians who were celebrating a court victory", IPOB coordinator Uchemna Madu told the BBC Hausa service. Fifteen other people were seriously wounded, he said.')

¹⁵¹ Ludovica Iaccino, 'Nigeria: Army accused of killing Nnamdi Kanu supporters in Onitsha during celebrations', *International Business Times*, 18 December 2015.

¹⁵² See 'Five pro-Biafra supporters killed celebrating leader's release', *AFP*, 18 December 2015 ('"The struggle is beyond the release of our leader. Our agitation for a Biafran state will continue because it is our life. We cannot continue to remain in Nigeria where we are being treated like second-class citizens," he said.')

¹⁵³ Okechukwu Obeta, 'Rights Group Accuses Soldiers Of Disappearing With 5 Killed Pro-Biafra Agitators, 13 Injured Ones', *Leadership*, 19 December 2015 ('The rights group, International Society for Civil Liberties and Rule of Law (Intersociety) further alleged that soldiers from the Cantonment stormed the hospital, Multicare Hospital, Nkpor where 13 other members of the group were receiving treatment for the injuries inflicted from gunshots fired at them by the soldiers and took them to an unknown place. Attempt by this reporter to get the reaction of the Commander of the Military Cantonment, Col Abdullahi, concerning the allegations, however proved abortive as he did not pick any of the several calls made to his mobile phone, though his phone rang.')

¹⁵⁴ See Ludovica Iaccino, 'Biafra: "We must avoid war" urges Olusegun Obasanjo as Nnamdi Kanu whereabouts unknown', *International Business Times*, 21 December 2015 ('Kanu has not been seen since the 17 December ruling [...].'); Dipo Faloyin, 'Biafra Activist Kanu Still in Jail Despite Court Ruling', *Newsweek*, 21 December 2015 ('The [DSS] has kept Kanu, the leader of [IPOB], in detention even after a Federal Court ruling on December 16 that deemed the activist's detention unlawful. [...] The Nigerian government has continually used public safety concerns to justify keeping Kanu in custody.')

¹⁵⁵ See, e.g., Emmanuel Uzodinma, 'Kanu's continued detention can consume Nigeria – Ohanaeze youths', *Daily Post*, 20 December 2015 ('The Ohanaeze Youth Council, OYC, has warned that the

Lagos State renewed its position that protestors should steer clear of that part of the country, 'remind[ing] the pro-Biafra agitators that the state commissioner of police, Fatai Owooseni, had vowed to deal 'ruthlessly with anybody or group found to be involved in such protests'.¹⁵⁶

49. Calls for calm were heard from various quarters:

The Odua Peoples Congress (OPC) has urged the federal government to dialogue with members of [MASSOB and IPOB]. This was the position of the National President of the group, Otuba Gani Adams, who opined that it is only through dialogue that the Biafra agitators can be made to drop the idea of a Biafra state; adding that the use of force is incapable of guaranteeing the unity of the country. [...] Speaking on the Biafra agitation, Adams: 'I will just say that they (Biafra agitators) are entitled to their own self-determination. Look, there is a law in Africa that recognizes right to self-determination. Also, there is a law in United Nations that recognizes right to self-determination. There is a country in the United Nations that has a population of not up to 50,000 and their flag is at the United Nations. You can't use force to co-opt people for the unity of Nigeria; you have to listen to their agitation. If we cannot give you secession, should we give you statism or regionalism? That is a process of negotiating. The British did not use force against Scotland when it seceded from Britain, and there is Catalonia in Spain that wants to pull out, they didn't use force against them.'¹⁵⁷

'Our differences could only be addressed when issues are discussed instead of going to war,' [Former President Olusegun] Obasanjo was quoted by local media as saying during an event in Abia state. 'We do not need another civil war. We had fought one before. I was part of it,' he added referring to the [war of 1967–70].¹⁵⁸

Amnesty International urged all parties to show restraint and 'respect the rule of law and the decision of the Court'.¹⁵⁹ The Federal Government, however, took a different approach.

50. On 22 December, it was announced that the DSS had preferred new charges against Kanu shortly after the High Court issued its decision to release him:

The Nigerian government has charged controversial director of Radio Biafra with treasonable felony days after the federal court of Abuja ruled his detention on

continued detention of the Radio Biafra Director, Nnamdi Kanu by the operatives of the Department of State Services (DSS) despite court rulings could spell doom for Nigeria. OYC, in a statement issued on Sunday, expressed shock that four days after an Abuja High Court gave order for Kanu's unconditional release, the authorities of DSS have "continued to hold him behind bars". [...] OYC, therefore, appealed to President Muhammadu Buhari, to prevail on the authorities of the DSS to free the detained leader of [IPOB] in the interest of peace.'

¹⁵⁶ Seun Opejobi, 'Steer clear of Lagos State – APC warns Biafra protesters', *Daily Post*, 20 December 2015 (emphasis added).

¹⁵⁷ Jerrywright Ukwu, 'OPC Urges FG To Dialogue With Biafra Agitators', *Naij*, 20 December 2015.

¹⁵⁸ Ludovica Iaccino, 'Biafra: "We must avoid war" urges Olusegun Obasanjo as Nnamdi Kanu whereabouts unknown', *International Business Times*, 21 December 2015.

¹⁵⁹ *Ibid.*

terrorism charges was unlawful. [...] However, Kanu was not freed following the verdict. One day after the court ruled he should be released, officials pressed new charges against him [...]. The same charges were also pressed against David Nwawuisi and Benjamin Madubugwu Onwuka. Nwawuisi, an Enugu-based engineer linked to Radio Biafra, was arrested in July.¹⁶⁰

The Nigerian government has accused the leader of [IPOB], Nnamdi Kanu, of plotting to create a breakaway Biafra Republic with Nigeria's present south-south, south-east, and north-central states, as component units. The government on Friday slammed fresh charges against Mr Kanu, shortly after a court ordered his release from custody where he has been held since October. The six-count charge was filed by the office of the Attorney General of the Federation.¹⁶¹

The fresh accusations included the treasonable felony of intending 'to levy war against Nigeria',¹⁶² maintaining an unlawful society,¹⁶³ and concealing an imported radio transmitter.¹⁶⁴ At the presentation of the charges, 'Kanu was represented in court by a new counsel, Mr Ifeanyi Ejiofor'.¹⁶⁵ Reportedly, arraignment proceedings were adjourned based on Kanu's request for a new judge: 'Kanu [...] told the trial judge [...] that he doubted his ability to give a fair trial. This prompted Justice Mohammed to withdraw from the case and direct that the case file be returned to the court's Chief Judge for reassignment to another judge.'¹⁶⁶

¹⁶⁰ Ludovica Iaccino, 'Biafra: Nigeria charges Nnamdi Kanu with treasonable felony for using radio "to levy war"', *International Business Times*, 22 December 2015.

¹⁶¹ Evelyn Okakwu, 'Biafra: Nigerian govt accuses Nnamdi Kanu of plotting to seize Igala, Idoma areas; others', *Premium Times*, 22 December 2015.

¹⁶² *Ibid* ('That you, Nnamdi Kanu and other unknown persons, now at large, at London, United Kingdom, between 2014 and September, 2015 with intention to levy war against Nigeria in order to force the President to change his measures of being the President of the Federation, Head of State and Commander in Chief of the Armed Forces of the Federation as defined in Section 3 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) by doing an act to wit: Broadcast on Radio Biafra your preparations for the states in the South-East geo-political zone, South-South geo-political zone, the Igala Community of Kogi State and the Idoma/Igede Community of Benue State to secede from the Federal Republic of Nigeria and form themselves into a Republic of Biafra.') (citing Nigerian Criminal Code Act, Section 41(c)).

¹⁶³ *Ibid* (citing Nigerian Criminal Code Act, Section 63).

¹⁶⁴ *Ibid* ('That you, Nnamdi Kanu between the months of March and April 2015 imported into Nigeria and kept in Ubulusiuzor town in Ihiala local Government Area of Anambra State within the jurisdiction of this honourable court, a radio transmitter known as TRAM 50L concealed in a container which you described as containing household items, which you so declared and that, you thereby committed an offence punishable under section 47(2) (a) of the Customs and Excise Management Act.')

¹⁶⁵ *Ibid* ('That you, Nnamdi Kanu between the months of March and April 2015 imported into Nigeria and kept in Ubulusiuzor town in Ihiala local Government Area of Anambra State within the jurisdiction of this honourable court, a radio transmitter known as TRAM 50L concealed in a container which you described as containing household items, which you so declared and that, you thereby committed an offence punishable under section 47(2) (a) of the Customs and Excise Management Act.')

¹⁶⁶ Eric Ikhilae, 'How Biafra Radio Chief Kanu Was Arrested In Lagos, By DSS', *Sahara Reporters*, 28 December 2015.

51. On the same day the new charges were announced, ‘various pro-Biafra groups merged to form one umbrella body and initiate what they named a “shadow government”’.¹⁶⁷ The merging groups announced that:

they would function as an interim customary and legitimate organization, affirming that they would not break any Nigerian laws. [...] [IPOB and MASSOB] as well as other pro-Biafra movements merged under one umbrella body named the Customary Government of the Indigenous People of Biafra (CGIPB), a development which brought much jubilation to the agitators. Operations for the CGIPB were flagged off at a government secretariat in Enugu state.¹⁶⁸

A press statement made it clear, however, that IPOB’s governing council remained functional.¹⁶⁹

52. By this time, dozens of Biafrans had been killed and many more injured, while an unknown number remained in Federal-Government custody, including Nnamdi Kanu whose politically-motivated detention has now entered its fourth month.¹⁷⁰

I. The Federal Government’s Official Position

53. As early as July 2015, the government insisted that it was largely unconcerned with the pro-Biafra cause: ‘[G]overnment spokesperson Mike Omeri said the authority does not consider the separatist movements as a threat to the current leadership and defined pro-Biafrans as an “insignificant number of frustrated

¹⁶⁷ ‘Biafra: Pro-Biafrans Unite To Form New “Government”’, *Naij*, 22 December 2015.

¹⁶⁸ *Ibid.*

¹⁶⁹ *Ibid.*

¹⁷⁰ *N.b.* The state of Kanu’s health remains unclear. See, e.g., Dokunola, ‘Biafra: DSS Is Allegedly Planning To Secretly Execute Kanu’, *Naij*, 8 January 2016 (‘According to *The Cable*, Vincent Obetta, Kanu’s lawyer, when contacted, could not say the exact medical state of his client, but said: “I don’t know his state of health. They have refused to give me access to see him. I have made every effort to see him since 23 of December, but I have not been given access. So, I don’t know is condition now. If he is being tortured, I don’t know, but I got the rumor that he is being tortured. I am still pressing to get access to him.”’); Clement Ejiofor, ‘Biafra: Kanu Sick and Denied Access To Medical Care – Brother’, *Naij*, 8 January 2016 (‘A brother to the detained director of Radio Biafra, Nnamdi Kanu on Friday told *Naij.com* that his brother is currently sick. Prince Kanu said he got various reports that his brother has been sick and is being denied access to any form of medical care by the State Security Service (SSS). “Right now, as I speak to you, Nnamdi Kanu is very very sick and he has been denied medical access, that is the information reaching me now,” Prince said. Prince added: “We have been denied access to see him, his lawyer has also been denied access to him.”’)

people who are not a threat to the existence of Nigeria”.¹⁷¹ However, such initial nonchalance has been belied by the ‘heavy-handed’ reactions to date:

Army Chief Lt Gen Tukur Buratai later vowed to ‘crush’ any threat to the country’s unity and territorial integrity, a warning apparently carried out in the 2 [and 17] December shooting of protesters.¹⁷²

Nigeria’s security forces have told protesters they will be uncompromising in dealing with acts of rebellion. Major-General Hassan Umaru, a Nigerian Army officer, said that the army ‘would like to send an unequivocal warning to all those threatening and agitating for the dismemberment of the country, committing treasonable felony and arson as well as wanton destruction of lives and property.’ Umaru warned that soldiers would fulfill their obligation to ‘ensure the enforcement of law and order ... to avoid a breakdown in peace and stability,’ making it clear that this could include the use of armed force. [...].¹⁷³

Much depends on the federal government. MASSOB spokesman Uchenna Madu said Kanu’s arrest and detention assisted ‘immensely in reviving the consciousness and sympathy for Biafra’s actualization’. Reacting to the shootings, he said the killing of protesters showed government gestures toward dialogue were ‘hypocritical and deceitful’. Any further heavy-handed response could earn the agitators wider local sympathy, radicalise their followers and trigger more desperate actions.¹⁷⁴

Defence spokesperson Rabe Abubakar did not comment on the alleged shootings [in Onitsha on 17 December 2015]. He [simply said]: ‘The unity of Nigeria is sacrosanct and we are working to maintain one nation. We want to ensure that this country remains one.’¹⁷⁵

[Oxford Professor Nic] Cheeseman says that the Nigerian government tends to deal with such protests in ‘fairly heavy handed ways’ and fears that an escalation in tensions between both sides could lead to further bloodshed. ‘There genuinely is a possibility that, if both sides mishandle it and both sides exacerbate and ratchet up rather than ratcheting down, the situation could get significantly worse’ [...].¹⁷⁶

The Nigerian government seems to be in two minds as to how to address the issue. The army’s Major General Hassan Umaru recently sent an ‘unequivocal warning’ to protesters—whom he accused of asking for ‘the dismemberment of the country’—that the military would use whatever force necessary to quash any unlawful actions. But later, one of Buhari’s new cabinet ministers publicly stated that the pro-Biafrans’ grievances are ‘completely legitimate’—swiftly following his comment with the insistence that there is ‘no alternative to one united Nigeria’. [...] Nnamdi Obasi, senior analyst on Nigeria at the International Crisis Group (ICG), says Buhari’s response has been ‘ambivalent’ thus far. ‘On one hand, the government says agitation is legitimate, but it has also arrested and detained the lead agitator and affirms the country is indivisible’, says Obasi, who is based in the

¹⁷¹ Ludovica Iaccino ‘IPOB, MASSOB and Buhari’s government: How is Nigeria dealing with pro-Biafran separatist movements?’, *International Business Times*, 28 July 2015.

¹⁷² ICG Report.

¹⁷³ Conor Gaffey, ‘What is Biafra and Why are Some Nigerians Calling for Independence?’, *Newsweek*, 7 December 2015.

¹⁷⁴ ICG Report.

¹⁷⁵ Ludovica Iaccino, ‘Biafra: Nigeria charges Nnamdi Kanu with treasonable felony for using radio “to levy war”’, *International Business Times*, 22 December 2015.

¹⁷⁶ Conor Gaffey, ‘What is Biafra and Why are Some Nigerians Calling for Independence?’, *Newsweek*, 7 December 2015.

Nigerian capital, Abuja. ‘President Buhari needs to speak to the grievances and demands that are fueling the pro-Biafran sentiments.’¹⁷⁷

While the Federal Government has vociferously—through the words and deeds of its various agents—made its position on Biafran self-determination crystal clear, its failure to sound even a single note of protest in the face of atrocities—let alone call anyone to account—amounts to a deafening silence indeed.

54. Speaking publicly for the first time on the situation in Biafra, President Buhari announced that the Federal Government would continue to detain Kanu despite the 17 December unconditional High-Court release order.¹⁷⁸ In a televised end-of-year press conference held in Abuja on 30 December 2015, Buhari—‘who calls himself a born-again democrat’¹⁷⁹—was adamant on this point:

Speaking of Kanu—who is still being detained by the State Security Service (DSS) despite the Abuja High Court’s ruling in favor of his unconditional release—Buhari said: ‘DSS disobeyed court orders, people got legitimate bails from courts, and they are still being held. It’s due to atrocities they committed. They go against the country, and you expect them to jump bail? The one we are calling ‘Kanu’ he has two passports, he brought equipment. Do you know Kanu brought in sophisticated weapons into the country? There’s [a] treasonable felony case against him.’¹⁸⁰

The executive director of Human Rights Watch, Kenneth Roth, reacted immediately on Twitter: ‘Nigeria Pres[ident] Buhari should not be signaling that his government will ignore court orders.’¹⁸¹

55. Kanu’s new lawyer, Ifeanyi Ejiofor, was swift to point out that the charges pending against Kanu are bailable offences under Nigerian law:

¹⁷⁷ Conor Gaffey, ‘What Should President Buhari Do About Calls for a Free Biafra?’, *Newsweek*, 10 December 2015.

¹⁷⁸ See Michelle Faul, ‘Nigerian leader says he won’t release 2 detainees despite court orders’, *Associated Press*, 30 December 2015 (‘Nigeria’s government will not release two prominent detainees despite several court orders for their release, and will not comment on the situation of a third, wounded detainee, President Muhammadu Buhari said Wednesday. Buhari, a former military dictator who calls himself a born-again democrat, did not discuss the propriety of defying court orders when he spoke on national TV. “If you see the atrocities these people committed against this country!” Buhari said in justification. “We can’t allow them to jump bail.” A Federal High Court set no bail conditions and ordered the unconditional release of Biafra separatist leader Nnamdi Kanu on December 17.’)

¹⁷⁹ Michelle Faul, ‘Nigerian leader says he won’t release 2 detainees despite court orders’, *Associated Press*, 30 December 2015.

¹⁸⁰ Ludovica Iaccino, ‘Biafra: Journalist uses “social media poll” to challenge government but President Buhari not worried’, *International Business Times*, 5 January 2016; see also Clement Ejiofor, ‘Buhari Hosts First Media Chat’, *Naij*, 30 December 2015; ‘Biafra: Why I can’t release Kanu – Buhari’, *Vanguard*, 30 December 2015.

¹⁸¹ #kennethroth, *Twitter*, 1 January 2016.

The comment made by the president in regards to the continued detention of Mr Kanu is indeed regrettable. He overstepped his limits by that statement as he has no powers whatsoever to dictate for the judiciary on issues of that. Recall that Mr Kanu is facing only three count charges that bothers on treasonable felony. Treasonable felony is a bailable offence under our laws as clearly provided under Section 118(2) of the Criminal Procedure Act [...] and Sections 158 and 163 of the Administration of Criminal Justice Act 2015.¹⁸²

Ejiofor added that he had filed a new motion for Kanu's release but that a hearing date had yet to be scheduled.¹⁸³

56. According to Kanu's former lawyer, Vincent Obeta, Buhari's 'action had taken Nigeria back to the military era' and 'brought back memories of a time when people were detained indefinitely'.¹⁸⁴ According to Obeta:

We are getting into a reversal or repetition of 1984 where Decree 2 and 4 of 1984 was used to detain people indiscriminately. We are getting back to the era where the burden of proof does not lie with the prosecution anymore; the burden of proof lies with the accused. [...] We started with the charges of leading an unlawful society and all that. When we were able to make them to withdraw that one from the Magistrate court, they came up with the issue of terrorism and terrorism financing. We knocked it out; they came up with treason charges. Why I took you round this is that it is more like a vendetta to arrest a man for more than 120 days and you have not been able to decide on the particular offence you think he has committed. We were also shocked to hear that part of the reasons why he was being held was that he came into Nigeria without a passport. My fear is for that man, who in the course of his profession or work falls into the hands of the state apparatus and then, relying on what the law says which is the Constitution, he picks a lawyer and goes to court and the lawyer secures a bail for him pending trial. The lawyer does his job and presents it before a court of law in the wisdom of the court the man deserves a bail, but in the wisdom of another man, he cannot go because if he goes he will jump bail. Meanwhile, there is already a surety, standing as a requirement of the law that if this man jumps bail we hold this other man.¹⁸⁵

Despite Buhari's claim to be a democrat, the president appears to have little regard for the key democratic concept of separation of powers.

57. Reacting to the situation recently, a senior Nigerian lawyer criticized the president's obvious abuse of executive authority:

Femi Falana, has advised the federal government to obey court orders and immediately release [...] the Biafran agitator, Nnamdi Kanu. Mr Falana [...] warned

¹⁸² Ludovica Iaccino, 'Nnamdi Kanu: Treasonable felony charges "empty" says lawyer as Ijob leader's wife delivers baby boy', *International Business Times*, 6 January 2016.

¹⁸³ See *ibid.*

¹⁸⁴ Ameh Comrade Godwin, 'Biafra: Release Kanu, we are no longer in military era – Lawyer tells Buhari', *Daily Post*, 1 January 2016.

¹⁸⁵ *Ibid.*

that holding on to [...] [Kanu] despite existing court orders was a violation of the rule of law that President Buhari swore to uphold. 'Upon winning the election, President Buhari further pledged to abide by the Rule of Law', Mr Falana said [...]. 'To that extent, he has a duty to ensure that all organs and officials of the Government operate within the ambit of the law.' [...] On the Biafran agitator, Nnamdi Kanu, Mr Falana said 'the order admitting the leader of the Indigenous People of Biafra, Mr Nnamdi Kanu, to bail should also be complied with.' [...] 'If the federal government has other charges [...] it should file them in the court,' Mr Falana said. 'There is no provision for keeping criminal suspects at the pleasure of security officials. Meanwhile, all valid and subsisting orders made by courts in favor of criminal suspects should be obeyed without further delay.'

An avowed Buhari supporter, Falana had been tipped to emerge as Attorney General of the current government.¹⁸⁶

J. New Charges and Continued Violence

58. On 13 January 2016, Kanu's legal team yet again moved for his release on bail. The new judge assigned to the case, Justice John Tsoho of the Federal High Court in Abuja, set a date of 18 January for arraignment and a hearing on the motion.¹⁸⁷ However, Justice Tsoho failed to appear in court on the scheduled date without explanation, and the case was adjourned until 20 January 2016.¹⁸⁸
59. Meanwhile, pro-Biafra protests in Aba, a city in Abia State, turned bloody as police opened fire on crowds, killing at least two on 19 January 2016:

A 20-year-old apprentice, Chidozie Okafor, was on Monday shot dead on St Micheal's Road, Aba, Abia State, as military men moved in to check a protest by members of [IPOB]. An eyewitness, who identified himself simply as Okechukwu, told the News Agency of Nigeria (NAN) that Chidozie was returning to the shop where he was learning a trade after having his lunch at a food kiosk on St Michael's road by York when tragedy struck. According to him, the military men

¹⁸⁶ See 'Falana to Buhari: Obey the courts, release Dasuki, Nnamdi Kanu immediately', *Premium Times*, 10 January 2016.

¹⁸⁷ See Ludovica Iaccino, 'Nigeria: Biafran leader Nnamdi Kanu has case assigned to new judge', *International Business Times*, 13 January 2016 ('The case of pro-Biafran leader Nnamdi Kanu has been assigned to another judge, his lawyer told IBTimes UK. Barrister Ifeanyi Ejiofo explained the case will be now presented before Hon Justice John Tsoho of the Federal High Court in Maitama, Abuja. "The case is now slated for arraignment and hearing of our pending application for his bail on 18 January 2016", he said. "The motion for his bail was today, 13 January, served on the attorney general of the federation. They are yet to file any counter to the application. I and the defence team will now be leading the case."')

¹⁸⁸ *Ibid* ('A new date has been set for the trial of pro-Biafran leader Nnamdi Kanu after the judge failed to appear in court on 18 January. It is not yet clear why Hon Justice John Tsoho was absent. The case has been adjourned to 20 January, amid speculation that another judge might be appointed for the controversial trial. Tsoho was appointed earlier in January, after the previous judge abandoned the case. The 18 January hearing was set in order to discuss Kanu's bail application put forward by his team of lawyers. However, he will now remain in jail until the new hearing.')

shot at IPOB members who made bonfires on the road, obstructing traffic and telling people to close their shops. [...] NAN reports that another victim, fondly called Taata, who was hit on the belly, died while being rushed to the Abia State University Teaching Hospital after the New Era Hospital had rejected him. Another eyewitness who spoke to NAN on condition of anonymity, said that the military men began shooting at the protesters after they had seized two guns from the military men. [...] Meanwhile, the Abia State Police Commissioner, Mr Habila Joshack, said that he was not aware of the deaths.¹⁸⁹

On the same day, additional pro-Biafran protestors were arrested in Enugu and charged with unlawful assembly.¹⁹⁰

60. On 20 January 2016, Kanu finally appeared in court before Justice Tsoho in Abuja and pleaded not guilty to a six-count indictment.¹⁹¹ A date was set for oral argument on his pending bail application, and Kanu was ordered to be

¹⁸⁹ Wale Odunsi, 'Biafra Protest: How Soldiers Killed Apprentice, Trader – Eyewitnesses', *Daily Post*, 19 January 2016; see also Emmanuel Ugwu & Senator Iroegbu, 'Three Feared Dead as Security Agents Quell Biafra Protest in Aba', *This Day Live*, 19 January 2016 ('No fewer than three persons were feared dead Monday in Aba when security agents confronted members of [IPOB] who were protesting against the continued detention of their leader, Mr Nnamdi Kanu. Eyewitnesses said that the casualties were recorded when soldiers opened fire on the protesters along Milverton Road and St Michael's Road in the commercial city in Abia State. When the smoke cleared, two lifeless bodies lay on Milverton while one was found at St Michael's, the eyewitnesses said. Though the identities of the three victims were not immediately available, it was gathered that an apprentice, Chidozie Okafor, was among those felled by bullets. Unlike the soldiers, the police were said to have used teargas in their efforts to disperse the protesters.');

Hilary Uguru, 'Nigerian Separatists Claim Police Kill 8 in Biafra Protest', *Associated Press*, 18 January 2016 ('Police shot protesters in southeastern Aba city, after protests erupted in cities in six southern states, Uchenna Madu, leader of the [MASSOB], told The Associated Press. But Abia state police spokesman Ezekiel Onyeke said no one was killed and police fired only tear gas and smoke grenades to disperse protesters after some lobbed petrol bombs at security forces. It was not possible to verify the contradictory claims. Onyeke said police arrested 26 people for possessing weapons including machetes, axes and clubs.');

Ludovica Iaccino, 'Nigeria: Nnamdi Kanu's Trial Adjourned as Judge Absent in Court While Protests Continue', *International Business Times*, 18 January 2016 ('"The protest is still ongoing as of now", a Kanu supporter told IBTimes UK on condition of anonymity. The source also alleged that demonstrators in Aba, a city in Abia State, had been surrounded by the army and two demonstrators were shot dead by police.')

¹⁹⁰ See Ikenna Asomba, 'Arrested Pro-Biafra Protesters Charged to Court in Enugu', *Vanguard*, 19 January 2016 ('The Enugu State police command, on Tuesday, stated that the pro-Biafra protesters arrested in Enugu have been charged to court for unlawful assembly. A statement by the police spokesman, Ebere Amaraizu, said the pro-Biafra protesters were assembling at the Naira Triangle area of the state, on Monday night. Amaraizu said: "This attracted attention of the officers and men of the command and following the failure of the said persons to disperse after being so requested by the police."')

¹⁹¹ See 'Biafra Activist Denies Treason Charges in Nigerian Court', *Agence France Presse*, 20 January 2016 ('The leader of a pro-Biafra group, whose arrest sparked a wave of protests by supporters in Nigeria's southeast, pleaded not guilty in court Wednesday on treason charges. Nnamdi Kanu last month refused to enter a plea when he was first charged with "treasonable felony", arguing he had no confidence in the then trial judge. But at a hearing before a new judge in the federal high court in Abuja on Wednesday, he denied a six-count indictment and was remanded in custody until a bail application on Jan. 25.');

see also John Chuks Azu, 'Biafra's Kanu, Two Others Arraigned for Treasonable Felony, Plead Not Guilty', *Daily Trust*, 20 January 2016 ('The leader of [IPOB], Nnamdi Kanu has been arraigned before a court in Abuja on terrorism charges. Kanu was arraigned on a six-count charge bordering on treasonable felony and terrorism alongside Benjamin Madubugwu and David Nwawusi. All pleaded not guilty to the charges.')

placed in the custody of the Nigerian Prison Service awaiting a decision on that motion:

Chuks Muoma (SAN), counsel to Kanu, said his client had been in DSS custody since October 2015 and said he should be sent to prison so that family members can visit him. A representative of the DSS said Kanu should be kept in their custody. However, Tsoho ruled that Kanu should be sent to the Nigeria Prison Service in Kuje, about 40 km south-west of Abuja.¹⁹²

A Nigerian human rights organization, Intersociety, immediately seconded the decision.¹⁹³ However, it remained unclear whether the DSS relinquished Kanu to the prison authorities as directed. And, as machinations unfolded in Abuja, ten additional pro-Biafran protestors were arraigned in Port Harcourt on charges of conspiracy and treason.¹⁹⁴

61. Earlier in the week, a representative of the EU's European External Action Service—responding on behalf of Federica Mogherini, the EU's High Representative for Foreign Affairs and Security Policy, to a letter from the Organization of Emerging African States¹⁹⁵ regarding the situation in Biafra—indirectly addressed the Federal Government: 'Protection of human rights and fundamental freedoms remains a priority for the EU and we encourage the authorities in every occasion to respect such rights.'¹⁹⁶ The EU also emphasized that 'questions of self-determination and changes to national borders [...] are

¹⁹² Ludovica Iaccino, 'Nigeria: Biafran Leader Nnamdi Kanu Remanded in Kuje Prison Before New Trial Begins', *International Business Times*, 20 January 2016.

¹⁹³ See 'Biafra: Human Rights Group Says Nnamdi Kanu Should Be In Prison Custody, Not In DSS Captivity', *The Whistler*, 22 January 2016 ('A human rights group, International Society for Civil Liberties and the Rule of Law, Intersociety, has said that the detained leader of [IPOB], Nnamdi [Kanu] should rather be kept in prison custody, than to remain in the captivity of the [DSS].')

¹⁹⁴ See 'Rivers Police Arraign 10 Suspected Pro-Biafra Supporters', *Premium Times*, 20 January 2016 ('The Rivers State Police Command says it has arraigned 10 suspected pro-Biafra protesters arrested between Saturday and Monday. The suspects were arraigned on Wednesday at Magistrate Courts 7 and 14 in Port Harcourt on two count charges of criminal conspiracy and treasonable felony, a statement by the Rivers State police spokesperson, Ahmad Muhammad, said. [...] The presiding magistrates ordered for the suspects to be remanded in prison custody. [...] "It would be recalled that the suspects were arrested while on their way to infiltrate Port Harcourt from neighboring states with the intent to engage in a conduct likely to undermine public peace," the statement said. "The command wishes to further re-emphasize that it will not stand idly and allow any person or group of persons to violate the laws of country by engaging in conducts that are perilous to public peace and order as well as the lives and properties of other law abiding citizens, please." The suspects were arraigned in Port Harcourt just as a court in Abuja, same day, remanded the leader of the Indigenous People of Biafra, Nnamdi Kanu.)

¹⁹⁵ See para 43, *supra*.

¹⁹⁶ Akpan Jeremiah, 'European Union Replies Biafra Over Calls For Independence', *Naij*, 19 January 2016 (quoting the reply letter of Hans Peter Schadek of the EEAS dated 18 January 2016); see also Ludovica Iaccino, 'EU on Biafra: Self-Determination to Be Addressed Respecting International Law Says Federica Mogherini', *International Business Times*, 19 January 2016.

best regulated in accordance with established international law and relative customary practice'.¹⁹⁷ The EU response echoed similar calls made previously by UK parliamentarians expressing concern over the situation in Biafra.¹⁹⁸

62. On 25 January 2016, the Abuja High Court heard oral argument on Kanu's pending bail application.¹⁹⁹ At the hearing, a member of Kanu's legal team criticized the Federal Government's handling of the case:

Muoma Udechukwu, a senior advocate of Nigeria (SAN) representing Kanu, urged the court to release the defendant, arguing that a Criminal Justice Act implemented in 2015 guarantees bail for people charged with non-capital offences, The Cable reported. 'The right to agitate is inherent in a democracy. People must not be denied of their rights to protest by way of being kept in custody,' Kanu's lawyer argued. 'If national security was a ground to throw people into detention the Criminal Justice Act would have said so.'²⁰⁰

A decision on the motion is expected on 29 January 2016.²⁰¹

K. Summary of Federal-Government Brutality

63. On 21 January 2016, Intersociety issued a lengthy press release condemning the state-sanctioned violence that has taken place in South-Eastern Nigeria between August 2015 and January 2016:

A human rights group, International Society for Civil Liberties and the rule of Law (Intersociety) has lamented the violence unleashed by security forces on Biafra protesters. In a press statement issued yesterday in Onitsha [...], Intersociety decried what it termed as murder of 50 in violent suppression of non-violent Biafran

¹⁹⁷ *Ibid.*

¹⁹⁸ See Ludovica Iaccino, 'EU on Biafra: Self-Determination to Be Addressed Respecting International Law Says Federica Mogherini', *International Business Times*, 19 January 2016 ('British MP Angela Reyner said in a statement on Twitter that she had contacted the UK Foreign and Commonwealth office expressing concern over "the situation in Biafra". Reyner's call for investigations on the ongoing situation follows MPs Tom Elliott and Danny Kinahan's motion in which they acknowledged pro-Biafran calls for independence. The motion read: "That this House acknowledges the Biafran issue could be improved with the co-operation of the Nigerian government by offering a referendum; and urges the Foreign and Commonwealth Office to use its diplomatic strength to assist in the resolution of this matter.")

¹⁹⁹ See Ludovica Iaccino, 'Nigeria: Bail ruling for Pro-Biafran leader Nnamdi Kanu set for 29 January', *International Business Times*, 25 January 2016 ('The ruling on a bail application for pro-Biafran leader Nnamdi Kanu has been set for 29 January, one of the defence lawyers told IBTimes UK. Kanu, who is facing treasonable felony charges, was brought to the federal high court Maitama in Abuja, Nigeria's capital, for a hearing on the bail. Ifeanyi Ejiofor, one of the lawyers representing the pro-Biafran leader, told IBTimes UK: "The bail application was heard today [25 January]. The ruling on the application has been adjourned to 29 January. He [Kanu] has just gone back to prison.")

²⁰⁰ *Ibid.*

²⁰¹ *Ibid.*

protesters by Nigeria's security forces between August 30, 2015 and January 18, 2016. The group said the documented statistics available at its disposal clearly indicated that 'such a massive application of state violence outside local and international norms to violently suppress the pro-Biafran non-violent protests in Nigeria within the afore-mentioned period of less than five months, had led to the gruesome murder by security forces of such a number of Nigerian citizens and Biafran citizens in particular'. The group said the murdered victims included four citizens killed in Awka and Onitsha on August 30, 2015; 13 killed in Onitsha on December 2, 2015; 12 killed in Onitsha on December 17, 2015 (eight were killed on the spot and four others died in hospital following gunshot wounds); and eight killed in Aba on January 18, 2016. The statement also alleged that scores of innocent citizens have also disappeared in the hands of Nigerian security forces particularly the Nigerian Army and the Nigeria Police Force. 'Citizens are routinely arrested by police on allegation of being "MASSOB or IPOB members" and killed secretly and buried in undisclosed shallow graves; likewise those shot and killed by soldiers and police while embarking on peaceful protests. [...] Over 120 citizens were shot and critically injured with gunshots in Delta, Rivers, Anambra, Abia, and Enugu States between 30th August 2015 and 18th January 2016. Of these, over 40 citizens were critically shot and injured in Anambra (30th August, 2nd and 17th December 2015); 30 in Abia State (18th January 2016 alone), 21 in Rivers State (30th August 2015); 10 in Delta State (30th August 2015) and 6 in Enugu State. These exclude scores of others critically shot and injured in related nonviolent protests in those States as well as Bayelsa State. [...] Between 300 and 400 citizens or more labeled "Biafran or IPOB or MASSOB members" had also been arrested, detained, tortured, or killed extra-judicially across the country since 30th of August 2015. In the Aba pro-Biafran peaceful protest of 18th January 2016 alone, 60 peaceful protesters were arrested and detained. Many are still languishing in pretrial detention; others are facing concocted heinous political crimes charges such as treason and treasonable felony.'²⁰²

This unfortunate summary of events clearly demonstrates the nature and extent of the Federal Government's approach to the pro-Biafran movement in Nigeria.

L. Individual Victim Accounts

64. As noted above,²⁰³ in addition to IPOB, this communication is being filed on behalf of 17 Nigerian citizens—each of whom is a member of IPOB and peacefully supports the cause of Biafran self-determination. These Victims were seriously injured by Federal Government forces in the attacks described above and below in Onitsha, Port Harcourt, and elsewhere. In addition to their own physical and mental suffering, the Victims have also witnessed the killing and abuse of others. The Victims' statements, which are briefly summarized below, are attached hereto as Annex A.²⁰⁴

²⁰² 'Rights Group Laments Treatment Of Pro-Biafra Protesters', *Information Nigeria*, 22 January 2016.

²⁰³ See para 1, *supra*.

²⁰⁴ *N.b.* For the reasons set out above, identifying information has been redacted for the time being. See n 3, *supra*.

The August 2015 Onitsha Demonstration

- a. Victim No 14 is an IPOB member who participated in a peaceful pro-Biafra ‘evangelism’ (i.e. awareness-raising demonstration) in Onitsha on 30 August 2015. The members of his group intended to distribute information about IPOB’s cause and were carrying pamphlets, flags, and bibles. The group included pregnant women and nursing mothers with their babies. Upon nearing the Onitsha bridgehead, they encountered a combined force of army, navy, and police who immediately opened fire with live ammunition on the unarmed demonstrators. Five IPOB members were killed instantly and more than 35 were injured. Victim No 14 himself was shot in the lap. The violence was unprovoked, and the military continue to harass and intimidate pro-Biafra supporters in Onitsha on a regular basis.
- b. Victim No 15 is an IPOB member who participated in the same ‘evangelism’ in Onitsha on 30 August 2015. As his group advanced through the streets, sharing information about their cause and Radio Biafra, they passed a number of army officers without incident. However, upon nearing the bridgehead, the group encountered a combined team of navy and police, who opened fire. Three IPOB members were killed and 15 wounded. Victim No 15 was shot in both legs.
- c. Victim No 16 gives a similar account of the 30 August 2015 incident at the Onitsha bridgehead. According to him, the peaceful demonstrators were met with unprovoked brutality when a combined team of police, army, and navy opened fire, killing three or four people and wounding nine or ten. Victim No 16 was shot in the leg.
- d. Victim No 17 is an IPOB member who also participated in the 30 August 2015 demonstration in Onitsha. According to him, the unprovoked attack—as described by the previous victims—was ordered by the governor of Anambra State, Mr Willie Obiano, after a naval officer at the bridgehead placed a call to Obiano to describe the situation. Victim No 17 was shot in the left hand; and, when he fell to the ground, a naval officer cut his head

with a large cutlass. This wound has yet to heal. Many others were killed and wounded, and some IPOB motorcycles were confiscated.

The October 2015 Awka Demonstration

- e. Victim No 2 is a petty trader from Onitsha and a member of IPOB. On her way to a peaceful pro-Kanu demonstration in Awka, the capital of Anambra State, Victim No 2 and her fellow protestors were stopped by a security agent who, upon hearing the nature of their complaints, called in a large force of Nigerian police and military personnel. Upon arrival, these forces opened fire on the demonstrators using live bullets and tear gas. Victim No 2 was shot in the leg and, luckily, rushed to the hospital. However, her ability to walk and engage in her trade has been significantly diminished.
- f. Victim No 3 is a mother of six from Onitsha and a member of IPOB. On her way to the peaceful pro-Kanu demonstration in Awka, she and others were stopped by the police and made to lie on the ground while one of the officers made a phone call. Soon after, the police opened fire and employed tear gas. Victim No 3 was shot in the foot and taken to the hospital. She knows that others were killed in the attack but is not certain as to how many.

The October 2015 Port Harcourt Demonstration

- g. Victim No 4 is a father of one from Port Harcourt in Rivers State and a member of IPOB. On 20 October 2015, he and others participated in a peaceful pro-Kanu rally in Port Harcourt. At approximately 16h00 that day, he joined the protest at an area of town called Artillery. As the protestors reached Borri Camp, they encountered a group of policemen shooting and throwing tear gas at the crowd. As he fled, Victim No 4 was hit in the eye by a bullet, fell to the ground unconscious, and was taken to the hospital. He lost his eye and, as a consequence, his job. Victim No 4 is still receiving medical treatment.

The November 2015 Port Harcourt Demonstration

- h. Victim No 5 is an IPOB member. On 3 November 2015, Victim No 5 participated in a peaceful pro-Kanu demonstration in Port Harcourt. As the demonstrators reached the Artillery section of town, the police opened fire with tear gas and both rubber and live bullets. There were many police, and their violent reactions were unprovoked; the protestors were unarmed. Victim No 5 was shot in the eye with a rubber bullet and taken to the hospital. As of today, Victim No 5 can no longer see with that eye.
- i. Victim No 6 is an IPOB member. At some point in November 2015, Victim No 6 participated in a peaceful pro-Biafran protest in Port Harcourt. (The victim cannot recall the precise day.) The crowd was large and 'armed' only with Biafran Flags. Nevertheless, the policemen and military personnel opened fire with tear gas and bullets without provocation. Witness No 6 was hit in the head by a bullet, and life for the witness has 'never been the same since then'.
- j. Victim No 7 is an IPOB member. One day in November 2015, Victim No 7 participated in a pro-Kanu demonstration in Port Harcourt; other protestors from Aba (Abia State) were present as well. As the marchers attempted to reach the Air Force Base, they were met by a large number of assembled police and military personnel who opened fire on the protestors with live ammunition. Ten of the demonstrators were gunned down, and two died instantly. Victim No 7 was shot. (In a similar protest in Onitsha, his brother was shot, arrested, and refused medical treatment.) According to Victim No 7, the police and military removed bodies of killed IPOB members from the morgue and, similarly, removed injured IPOB members from the hospital; the whereabouts of the wounded are unknown.

The December 2015 Onitsha Demonstration

- k. Victim No 8 is an IPOB member. On 17 December 2015, after hearing about the Abuja High Court's decision to order Kanu free on bail, Victim No 8 and approximately 70 others celebrated peacefully in the streets of Onitsha. At the bridgehead, the group encountered army personnel who ordered them to disperse. When the group protested that they were only celebrating, the army opened fire killing five and injuring 23. Victim No 8 was shot in the stomach and rushed to the hospital. Later that night, army personnel came to the hospital and took the wounded IPOB members to the army barracks, where they spent hours in a state of unconsciousness. Five, including Victim No 8, were eventually taken back to the hospital; while the others were detained at the barracks.

- l. Victim No 9 is an IPOB member. On 17 December 2015, he participated in the pro-Kanu celebration in the streets of Onitsha. Upon reaching the bridgehead, the army opened fire on the demonstrators without provocation. Many were killed and wounded, and corpses were dumped into the Niger River. Victim No 9 himself was shot in both legs. As a result of his wounds, he can no longer work or take care of his family.

- m. Victim No 10 is an IPOB member who took part in the pro-Kanu celebrations in Onitshu on 17 December 2015. Upon reaching the bridgehead, Victim No 10's group was met by army personnel who blocked the way and ordered them to turn back. One soldier beat the group's coordinator with a stick, even after the group had already obeyed the order begun to disperse. The army then suddenly opened fire; three members of the group were killed instantly and many more were wounded. Victim No 10 was shot in the waist. The group had been unarmed, carrying only a Biafra flag and celebrating the High Court's decision. Victim No 10 and other wounded IPOB members were taken to the hospital. Later that night, army personnel came and took them away to the barracks; only a few were later released.

- n. Victim No 11 is an IPOB member who participated in the 17 December 2015 peaceful pro-Kanu celebrations in Onitsha. Upon reaching the bridgehead, the army opened fire and he was shot in both legs. Many IPOB members were killed. Victim No 11 was rushed to the hospital, where—later that night—army personnel arrested most of the wounded IPOB members. However, Victim No 11 was able to escape from the hospital with the help of a friend.
- o. Victim No 12 is another IPOB member who took part in the same celebrations near the Onitsha bridgehead on 17 December 2015. Approximately six IPOB members were shot dead and 17—including Victim No 12, who was shot in the chest—were seriously wounded. At the hospital later that night, soldiers arrived and took the wounded IPOB members to the army barracks. Along the way, the soldiers threatened to kill them for their pro-Biafra activities. However, once at the barracks, a female soldier from the eastern part of the country chastised her Hausa colleagues and threatened to expose them. Victim No 12 and four other critically wounded individuals were taken back to the hospital, while the others were detained at the barracks.
- p. Victim No 13 is an IPOB member who gives a similar account of the events of 17 December 2015. According to him, the soldiers took his mobile phone and cash before killing four IPOB members and wounding many others. He was shot in his arm while attempting to flee. As the others, Victim No 13 recounts that the wounded were taken from the hospital to the barracks by army personnel; those in critical condition were returned to the hospital and the others detained at State CID (police) headquarters in Awka.
- q. Finally, Victim No 18 is an IPOB member from Ebonyi State who resides in Onitsha. According to him, at the Onitsha bridgehead, soldiers beat one IPOB member with a stick, shot four members dead, and left 17 others wounded. Victim No 18 was shot in the foot and taken to the hospital. Later that night, he managed to escape from his room before the soldiers

arrested the other wounded. The current whereabouts of these individuals is still unknown. As Victim No 18 tells it, the governor of Anambra State, Mr Willie Obiano, is behind the Onitsha killings.

These Victim accounts are merely representative of the many others who have suffered—directly and indirectly—as a result of the Federal Government-induced turmoil in South-Eastern Nigeria. Photographic evidence of such brutality is attached hereto as Annex B.

M. The ICC's Initial Assessment of the Situation in Nigeria

65. As early as 21 April 2011, the OTP publicly expressed its concern over—among other things—political and ethnic violence in Nigeria.²⁰⁵ It previously had been made public that the OTP was in the process of conducting a broad preliminary examination into the situation in Nigeria.²⁰⁶ Further to such examination, a report was issued on 5 August 2013.²⁰⁷ The following findings are relevant to the instant communication—in particular, those findings regarding the JTF:

The oil-rich Niger Delta region [which is historically part of Biafra] has seen violence among ethnically-based gangs and military groups and between them and federal forces, *in particular the so-called Joint Task Force*. Among the root causes of the violence in the Delta region are the struggle over control and impact of the oil production in the region and access to resources.²⁰⁸

Reportedly, *members of the JTF killed a number of civilians in the course of operations against armed groups in Niger Delta*, particularly in River and Delta States, in particular in 2008 and 2009.²⁰⁹

Based on these preliminary findings, the OTP concluded that: 'The available information currently does not provide a reasonable basis to believe that the alleged crimes committed [...] in the Niger Delta region qualify as [...] crimes

²⁰⁵ ICC, Office of the Prosecutor, 'Statement of the Prosecutor of the International Criminal Court, Luis Moreno-Ocampo in relation to Nigeria', 21 April 2011.

²⁰⁶ See Nigeria Article 5 Report, para 4 ('The preliminary examination of the situation in Nigeria was made public on 18 November 2010.')

²⁰⁷ See Nigeria Article 5 Report.

²⁰⁸ Nigeria Article 5 Report, para 7 (emphasis added); *see also ibid*, para 29.

²⁰⁹ Nigeria Article 5 Report, para 114 (emphasis added) (noting, at n 123: 'For example, on 13 September 2008, the JTF allegedly attacked three villages, Soku, Kula, and Tombia in River State, by using air and land forces. An unknown number of civilians were allegedly also killed in the attack. On 15 May 2009, the JTF allegedly attacked two villages, Oporoza and Okerenkoko, located near the city of Warri in Delta State by opening fire from helicopters. [Amnesty International] estimated that at least 100 civilians were killed as a result of the attack.')

against humanity under the jurisdiction of the ICC'.²¹⁰ However, the OTP clearly left the door open for further inquiry based on new facts: 'This conclusion may be revisited in the light of new information.'²¹¹

III. PRELIMINARY EXAMINATIONS

66. The concept of a 'preliminary examination' is found in Article 15 of the Statute.²¹² It is the procedural mechanism by which the OTP may determine whether there is a reasonable basis to proceed with an investigation, subject to authorization (at a later stage) by the ICC's Pre-Trial Chamber (the 'PTC'). One of the means of triggering a preliminary examination is the filing of a so-called 'communication' to the OTP by an individual, group, state, or organization.²¹³
67. The legal framework of a preliminary examination is governed by Article 53(1)(a)–(c) of the Statute,²¹⁴ which requires the OTP to consider: (i) jurisdiction (temporal, material, and either territorial or personal); (ii) admissibility

²¹⁰ Nigeria Article 5 Report, para 127.

²¹¹ Nigeria Article 5 Report, para 127; *see also, e.g.*, ICC, Office of the Prosecutor, 'New OTP Report on On-going Preliminary Examination of the Situation in Nigeria', 6 August 2013 ('The assessment of jurisdictional issues with respect to other [non-Boko Haram] groups in Nigeria *will continue.*') (emphasis added).

²¹² See Statute, Article 15(1) ('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.')

²¹³ See OTP Website.

²¹⁴ Article 53(1) provides as follows: '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.'

(complementarity and gravity); and (iii) the interests of justice.²¹⁵ In so doing, the OTP employs a four-phase filtering process.²¹⁶

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.²¹⁷

A reasoned response is to be issued at the conclusion of the process.²¹⁸

68. According to the OTP section of the ICC website:

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 an 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.*²¹⁹

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’.²²⁰

²¹⁵ See ICC-01/09, *Situation in the Republic of Kenya*, PTC II, ‘Decision Pursuant to Article 15 the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya’, 31 March 2010 (hereinafter, the ‘Kenya Article 15 Decision’), para 20 (‘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.’)

²¹⁶ See OTP Website (‘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.’)

²¹⁷ See OTP Website.

²¹⁸ See OTP Website (‘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.’)

²¹⁹ OTP Website (emphasis added).

²²⁰ See OTP Website.

69. As to the test applicable at this preliminary stage of the proceedings—namely: ‘a reasonable basis to believe’—this ‘is the lowest evidentiary standard provided for in the Statute’.²²¹

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.²²²

Therefore, an ICC PTC, ‘in evaluating the available information provided by the Prosecutor, [...] must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court “has been or is being committed”’.²²³

70. 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.

IV. CRIMES AGAINST HUMANITY

A. Definition and Chapeau Elements

71. According to Article 7(1) of the Statute, a crime against humanity is defined as ‘any of the [enumerated underlying] acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack [...]’.²²⁴ An ‘attack directed against any civilian population’ is further defined

²²¹ Kenya Article 15 Decision, para 27.

²²² Kenya Article 15 Decision, para 27.

²²³ Kenya Article 15 Decision, para 35.

²²⁴ Article 7(1) of the Rome Statute sets out the following underlying acts: ‘(a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to

by the Statute as ‘a course of conduct involving the multiple commission of acts referred to in [Article 7] paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’.²²⁵ As developed by the relevant jurisprudence,²²⁶ this definition encompasses five so-called chapeau (or contextual) elements: (i) an attack directed against any civilian population; (ii) a state or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus between the individual act(s) and the attack; and (v) the accused’s knowledge of the attack.

1. Attack Directed Against Any Civilian Population

72. An ‘attack’ is in no way restricted to a military attack; rather, the term refers simply to ‘a campaign or operation carried out against the civilian population’,²²⁷ either in time of peace or time of armed conflict. ‘[C]ommission of the acts referred to in Article 7(1) of the Statute constitute the attack itself and, beside the commission of the acts, no additional requirements for the existence of an attack should be proven.’²²⁸ The notion of ‘civilian population’ does not signify the entire population of the affected (targeted) state; instead, it ‘encompasses any civilian group linked by shared characteristics or common features’,²²⁹ the emphasis being on the collective nature of the crimes as opposed to the isolated targeting of individuals.²³⁰

mental or physical health.’ *N.b.* The underlying crimes relevant to the instant submission will be discussed in greater detail below.

²²⁵ Rome Statute, Article 7(2)(a).

²²⁶ See Nigeria Article 5 Report, para 35 (citing ICC-02/11-14-Corr, *Situation in the Republic of Côte d’Ivoire*, PTC III, ‘Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d’Ivoire’, 3 October 2011, paras 14, 29).

²²⁷ Kenya Article 15 Decision, para 80.

²²⁸ ICC-01/05-01/08, *Situation in the Central African Republic*, PTC II, ‘Decision Pursuant to Article 61(7)(a) and (b) of the ICC Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo’, 15 June 2009 (hereinafter, the ‘Bemba Confirmation Decision’), para 75.

²²⁹ Guenael Mettraux, ‘International Crimes and the Ad Hoc Tribunals’, 2005, p 166.

²³⁰ See IT-94-1-A, *Prosecutor v Duško Tadić*, Trial Chamber II, ‘Judgment’, 7 May 1997, para 644 (‘The requirement in Article 5 of the Statute that the prohibited acts must be directed against a civilian “population” does not mean that the entire population of a given State or territory must be victimized by these acts in order for the acts to constitute a crime against humanity. Instead the “population” element is intended to imply crimes of a collective nature and thus exclude single or isolated acts, which, although possibly constituting war crimes or crimes against national penal legislation, do not rise to the level of crimes against humanity.’)

73. Since August 2015 (and almost certainly prior to that), the Federal Government has engaged in a targeted operation against actual and perceived pro-Biafran independence advocates throughout South-Eastern Nigeria. Dozens of civilians—if not more—have been killed, wounded, arbitrarily detained, disappeared, and possibly tortured by members of the police, the JTF, and the DSS. For purposes of the instant filing, such collective violence (as described in greater detail above) clearly amounts to an attack directed against the civilian population of South-Eastern Nigeria.

2. State or Organizational Policy

74. The second chapeau element requires that the attack was conducted pursuant to or in furtherance of a state or organizational policy. Such ‘policy need not be formalized’,²³¹ and a showing of an established government program is not required. The emphasis here is planned, directed, or organized violence as opposed to violence of a spontaneous nature.²³² The required showing is an attack conducted ‘in furtherance of a common policy using public or private resources’.²³³ The existence of such a policy may be inferred from evidence of repeated perpetration of the same acts or collective mobilizations organized by the state or organization in question²³⁴ and may be deduced from evidence of, among other things, the active promotion or encouragement of the attack.²³⁵

75. By word and deed, the Federal Government has clearly articulated its goal of maintaining a unified Nigerian political entity.²³⁶ In furtherance of such aim, it has made equally clear that any and all public manifestations touching on the question of Biafran self-determination will be met with extreme measures. As the evidence above suggests, the state-sanctioned violence perpetrated to date has been anything but spontaneous. Rather, it corresponds in every respect to official

²³¹ Bemba Confirmation Decision, para 81.

²³² See Bemba Confirmation Decision, para 81.

²³³ ICC-01/04-01/07, *Situation in The Democratic Republic of Congo, Prosecutor v Katanga and Ngudjolo*, PTC I, ‘Decision on the Confirmation of Charges’, 30 September 2008 (hereinafter, ‘Katanga Confirmation Decision’), para 396.

²³⁴ ICC-01/04-01/07, *Situation in The Democratic Republic of Congo, Prosecutor v Katanga*, Trial Chamber II, ‘Judgment pursuant to article 74 of the Statute’, 7 March 2014, para 1109.

²³⁵ *Ibid*, para 1108.

²³⁶ See, e.g., para 53, *supra*.

strategic statements. Accordingly, on the evidence presented, there is reason to believe that the violence described above has been planned, directed, and organized pursuant to a Federal Government policy of suppressing Biafran self-determination efforts by any means necessary.

3. Widespread or Systematic Nature of the Attack

76. The attack against the civilian population must be either widespread or systematic. The widespread nature of an attack may result from a large number of victims or from the attack's broad geographical extent. A single attack in one area may be widespread if the number of victims is sufficiently high.²³⁷ Systematic, the disjunctive alternative, is a qualitative element. It refers to the organized nature of the attacks and the recurrence of similar criminal conduct over a sustained period.²³⁸ The widespread or systematic analysis applies only as a contextual element; it need not be undertaken with respect to each underlying crime.²³⁹
77. As set out above, dozens of civilians (if not more) have been targeted in locations throughout South-Eastern Nigeria. Moreover, the violence has been orchestrated by the police, the JTF, and the DSS over a sustained period of time beginning, at the very least, in August 2015 and continuing to this day. Notably, the various attacks have been marked by the recurrence of similar indiscriminate conduct on the part of the Nigerian security apparatus. Accordingly, on the evidence presented, there is sufficient reason to believe that the attack against the pro-Biafran civilian population of South-Eastern Nigeria has been *both* widespread and systematic in nature.

²³⁷ Katanga Confirmation Decision, para 395.

²³⁸ IT-94-1-A, *Prosecutor v Duško Tadić*, Trial Chamber II, 'Judgment', 7 May 1997, para 648; IT-96-23 & IT-96-23/1-T, *Prosecutor v Kunarac et al*, Trial Chamber, 'Judgment', 22 February 2001, para 429.

²³⁹ IT-95-14-A, *Prosecutor v Blaškić*, Appeals Chamber, 'Judgment', 29 July 2004, para 101; IT-96-23 & IT-96-23/1-A, *Prosecutor v Kunarac et al*, Appeals Chamber, 'Judgment', 12 June 2002, paras 93–96.

4. Nexus Between Individual Acts and Attack

78. At this extremely preliminary stage of the proceedings, it is unnecessary to demonstrate a nexus between the individual criminal acts and the larger attack:

The Chamber points out that the issue of whether an act was committed as part of a widespread or systematic attack needs to be analyzed on a case-by-case basis with regard to each particular act. At the current stage of the proceedings, the Chamber merely considers the situation as a whole without focusing beyond what is necessary for the purpose of the present decision on specific criminal acts.²⁴⁰

Nevertheless, in the instant case, it cannot be denied that the characteristics, nature, aims, targets, and consequences of the various individual acts described above bear a similar relationship to the characteristics of the larger attack. Accordingly, for purposes of this filing, there is sufficient reason to believe that a nexus exists between the underlying criminal acts described herein and the larger attack against the pro-Biafran civilian population of South-Eastern Nigeria.

5. Knowledge of the Attack

79. According to PTC II of the ICC, evidence of *mens rea* is not required for the purpose of opening an investigation under Article 15 of the Statute:

In light of the nature of the current stage of the proceedings, bearing in mind that there is presently no suspect before the Court, the Chamber considers that the last requirement cannot be adequately addressed at this stage, as knowledge is an aspect of the mental element under article 30(3) of the Statute. Therefore, the Chamber's analysis will be limited to the first four enumerated requirements.²⁴¹

However, for the sake of completeness, it bears noting that once a potential perpetrator is identified by the Court, it must eventually be established that he had *both* knowledge of the attack in question as well as the intention to further that attack by way of his conduct.²⁴² It is not required, however, 'that the [alleged] perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the state or organization'.²⁴³

²⁴⁰ Kenya Article 15 Decision, para 135.

²⁴¹ Kenya Article 15 Decision, para 79.

²⁴² See ICC Elements of Crimes, Introduction, para 2.

²⁴³ *Ibid.*

B. Underlying Crimes

80. The underlying crimes alleged herein must be examined ‘in light of the nature of the current stage of the proceedings, bearing in mind that there is presently no suspect before the [Court]’.²⁴⁴ Accordingly, it will not be necessary at this stage ‘to assess the *mens rea* in relation to the specific crimes’ discussed below.²⁴⁵ And the *actus reus* elements will be evaluated in accordance with the approach described above regarding preliminary examinations—that is to say: pursuant to the extremely low reason-to-believe evidentiary threshold.²⁴⁶

1. Murder – Article 7(1)(a)

81. The elements of ‘murder’ as a crime against humanity are the following: (1) the perpetrator killed one or more persons; (2) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (3) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.²⁴⁷

82. As set out above, it is well documented that at least 18 people have been killed in Onitsha by the police and/or the JTF.²⁴⁸ These unlawful killings took place in four separate incidents, namely: 22 August, 30 August, 2 December, and 17 December 2015.²⁴⁹ Moreover, an additional five individuals were reportedly killed by the police in Port Harcourt in November 2015.²⁵⁰ And at least two others have reportedly been killed recently in Abia State.²⁵¹ Each of the victims was a member of IPOB or MASSOB, and the executions took place as part of the Federal Government’s widespread and systematic attack against pro-Biafran activists and sympathizers.

²⁴⁴ Kenya Article 15 Decision, para 73.

²⁴⁵ Kenya Article 15 Decision, para 73.

²⁴⁶ See para 70, *supra*.

²⁴⁷ See ICC Elements of Crimes, p 5. *N.b.* ‘The term “killed” is interchangeable with the term “caused death”.’ *Ibid*, n 7.

²⁴⁸ See paras 29, 37, 47, *supra*.

²⁴⁹ *Ibid*.

²⁵⁰ See para 34, *supra*.

²⁵¹ See para 59, *supra*.

83. Accordingly, for purposes of this filing, there is sufficient reason to believe that the underlying crime against humanity of ‘murder’, pursuant to Article 7(1)(a) of the Statute, has taken place in South-Eastern Nigeria.

2. Unlawful Imprisonment – Article 7(1)(e)

84. The elements of ‘imprisonment or other severe deprivation of physical liberty’ as a crime against humanity are the following: (1) the perpetrator imprisoned one or more persons or otherwise severely deprived one or more persons of physical liberty; (2) the gravity of the conduct was such that it was in violation of fundamental rules of international law; (3) the perpetrator was aware of the factual circumstances that established the gravity of the conduct; (4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²⁵²
85. Regarding the second element, the dominant interpretation of ‘fundamental rules’ has so far focused on *procedure*. Essentially, ‘imprisonment’ as a crime against humanity entails a severe deprivation of liberty without due process of law.²⁵³ According to the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’):

imprisonment [...] should be understood as arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law [...]. In that respect, the Trial Chamber will have to determine the legality of imprisonment as

²⁵² See ICC Elements of Crimes, p 7.

²⁵³ On the conditions of imprisonment, ICL literature supports the view that ‘[a]nother category which may constitute arbitrary detention is when the conditions of detention themselves amount to torture or cruel, inhuman, or degrading treatment’. See Christopher K Hall, ‘Article 7 Crimes against Humanity’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (C H Beck, 2nd ed, 2008) 159, 201 [38]. Indeed, the text of the Rome Statute can be seen as supporting this approach. This would also reflect the concept of ‘arbitrariness’ in human rights law. See Human Rights Committee, General Comment No 35: Article 9 (Liberty and Security of Person), 112th sess, UN Doc CCPR/C/GC/35 (‘General Comment No 35’), 16 December 2014, para 14 (‘[D]etention may be arbitrary if the manner in which the detainees are treated does not relate to the purpose for which they are ostensibly being detained.’.)

well as the procedural safeguards pertaining to the subsequent imprisonment of the person or group of persons in question, [...].²⁵⁴

Significantly, the legality of detention will be assessed not under domestic law, but under international law.²⁵⁵ ‘In particular, the national law itself must not be arbitrary and the enforcement of this law in a given case must not take place arbitrarily.’²⁵⁶ Here international criminal law is referring to egregious violations of international human-rights law.²⁵⁷ Moreover: ‘In addition, the legal basis for the initial deprivation of liberty must apply throughout the period of imprisonment. If at any time the initial legal basis ceases to apply, the initially lawful deprivation of liberty may become unlawful at that time and be regarded as arbitrary imprisonment.’²⁵⁸

86. Nnamdi Kanu has been physically detained against his will by the DSS since approximately 17 October 2015 in an undisclosed location, presumably somewhere in Abuja. As the sequence of events set out above (and

²⁵⁴ IT-95-14/2-T, *Prosecutor v Kordić and Čerkez*, Trial Chamber, ‘Judgment’, 26 February 2001, para 302; aff’d by IT-95-14/2-A, *Kordić and Čerkez v Prosecutor*, Appeals Chamber, ‘Judgment’, 17 December 2004, para 116; see also IT-08-91-T, *Prosecutor v Stanišić and Župljanin*, Trial Chamber II, ‘Judgment’ (Volume 1 of 3), 27 March 2013, para 79. While the ICC has charged an accused with the crime of imprisonment, it has not yet developed its jurisprudence on this point. See, e.g., ICC-02/05-01/07, *Prosecutor v Harun and Abd-Al-Rahman*, PTC I, ‘Warrant of Arrest for Ahmad Harun’, 27 April 2007, Count 34, p 12.

²⁵⁵ See IT-97-25-T, *Prosecutor v Krnojelac*, Trial Chamber II, ‘Judgment’, 15 March 2002, para 114 (‘If national law is relied upon as justification, the relevant provisions must not violate international law.’); see also IT-08-91-T, *Prosecutor v Stanišić and Župljanin*, Trial Chamber II, ‘Judgment’ (Volume 1 of 3), 27 March 2013, para 79; IT-06-90-T, *Prosecutor v Gotovina et al*, Trial Chamber I, ‘Judgment’ (Volume 2 of 2), 15 April 2011, para 1816; IT-00-39-T, *Prosecutor v Krajišnik*, Trial Chamber I, ‘Judgment’, 27 September 2006, para 753.

²⁵⁶ IT-97-25-T, *Prosecutor v Krnojelac*, Trial Chamber II, ‘Judgment’, 15 March 2002, n 346.

²⁵⁷ See IT-97-25-T, *Prosecutor v Krnojelac*, Trial Chamber II, ‘Judgment’, 15 March 2002, para 113 (‘For the purpose of Article 5(e), the deprivation of an individual’s liberty is arbitrary if it is imposed without due process of law. Relevant international instruments do not adopt a common approach to the issue of when a deprivation of liberty is or becomes arbitrary. The Universal Declaration of Human Rights states that “no one shall be subjected to arbitrary arrest, detention or exile”. There are no exceptions to this prohibition, although by definition any deprivation which is not arbitrary would be permissible. The ICCPR allows a deprivation of one’s liberty only “on such grounds and in accordance with such procedure as are established by law”. The Convention on the Rights of the Child provides that the arrest, detention or imprisonment of a child shall be “in conformity with the law”. The American Convention on Human Rights provides that a person shall only be deprived of his or her physical liberty “for the reasons and under conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto”. The European Convention on Human Rights identifies an exhaustive list of cases in which the deprivation of liberty “in accordance with a procedure prescribed by law” does not constitute a violation of the Convention.’)

²⁵⁸ IT-97-25-T, *Prosecutor v Krnojelac*, Trial Chamber II, ‘Judgment’, 15 March 2002, para 114; see also IT-08-91-T, *Prosecutor v Stanišić and Župljanin*, Trial Chamber II, ‘Judgment’ (Volume 1 of 3), 27 March 2013, para 79; IT-06-90-T, *Prosecutor v Gotovina et al*, Trial Chamber I, ‘Judgment’ (Volume 2 of 2), 15 April 2011, para 1816; IT-00-39-T, *Prosecutor v Krajišnik*, Trial Chamber I, ‘Judgment’, 27 September 2006, para 753.

recapitulated below) makes abundantly clear, such detention has been in violation of fundamental rules of international law, namely Kanu's general right to due process and, more specifically, his right to provisional release on bail.

87. Shortly after the arrest, upon hearing the initial criminal charges and taking Kanu's plea of not guilty, the Chief Magistrate Court in Abuja ordered his immediate release on bail. However, the DSS continued to detain Kanu. At some point thereafter, the federal prosecutors sought and obtained—by *ex parte* motion—a 90-day detention order from the Abuja High Court pursuant to additional terrorism charges. Kanu's lawyers challenged the legality of this procedure before the same High Court on 14 December 2015, arguing—among other things—that the Federal Government had acted in bad faith and the original bail order should be enforced. Two days later, the Chief Magistrate Court in Abuja dropped the original criminal charges on the recommendation of the DSS. The next day, the Abuja High Court set aside the subsequent detention order (pursuant to the additional terrorism charges) and ordered Kanu's unconditional release on bail. The DSS again ignored the order, and Kanu remained in custody against his will. On 22 December, it was announced that the DSS had filed new charges against Kanu shortly after the High Court had issued its decision to release him.
88. As 2015 drew to a close, Nnamdi Kanu remained in DSS custody—pursuant to nothing more than that executive agency's obstinate refusal to release him. However, it was soon revealed that superior forces were at work when, in his year-end address to the Nigerian press corps, President Buhari announced that Kanu was simply too great a flight risk to be released—despite the pending High Court order to the contrary.
89. Unsurprisingly, the new year brought new charges—and a renewed bail application, a decision on which is scheduled for the filing date of this communication. Thus, it remains to be seen whether the freshly appointed federal judge, Justice John Tsoho, will follow the law or bow to the less than subtle import of Buhari's December pronouncement. And, in either case, it is

equally unclear whether the DSS will relinquish Kanu to the Nigerian prison authorities, as already directed.

90. In any event, as the facts demonstrate, the DSS's detention of Nnamdi Kanu has been *and remains* unlawful. Moreover, there is further reason to believe that an unknown number of other individuals may be imprisoned arbitrarily by the Federal Government in Onitsha, Port Harcourt, and other locations in South-Eastern Nigeria. As Amnesty International's representative in Nigeria put it, there could be 'at least two dozen Biafran activists in almost every prison in the southeast of Nigeria'.²⁵⁹ All of these detentions—most visibly and punitively Kanu's—are part of the Federal Government's widespread and systematic attack against pro-Biafran activists and sympathizers.
91. Accordingly, for purposes of this filing, there is sufficient reason to believe that the underlying crime against humanity of 'unlawful imprisonment', pursuant to Article 7(1)(e) of the Statute, has taken place in Abuja and various locations in South-Eastern Nigeria.

3. Torture – Article 7(1)(f)

92. The elements of 'torture' as a crime against humanity are the following: (1) the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons; (2) such person or persons were in the custody or under the control of the perpetrator; (3) such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions; (4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²⁶⁰

²⁵⁹ See para 31, *supra*.

²⁶⁰ See ICC Elements of Crimes, p 7. *N.b.* 'It is understood that no specific purpose need be proved for this crime.' *Ibid*, n 14.

93. Based on the available information, it appears that Nnamdi Kanu as well as an unknown number of other individuals may have been tortured while in the custody of the DSS. Members of Kanu's family claim that he has been prevented from receiving medication for a life-threatening ulcer;²⁶¹ while Amnesty International's representative in Nigeria has spoken of 'credible evidence' of torture with respect to dozens of detained pro-Biafra activists.²⁶² If true, it is inconceivable how such treatment—in any way—could have arisen from, or been inherent in or incidental to, lawful sanctions. However, it is equally inconceivable how such treatment could not have been part of the Federal Government's widespread and systematic attack against pro-Biafran activists and sympathizers.
94. Accordingly, for purposes of this filing, there is sufficient reason to believe that the underlying crime against humanity of 'torture', pursuant to Article 7(1)(f) of the Statute, has taken place in Abuja and various locations in South-Eastern Nigeria.

4. Enforced Disappearance – Article 7(1)(i)

95. The elements of 'enforced disappearance' as a crime against humanity are the following: (1) the perpetrator: (a) arrested, detained, or abducted one or more persons; or (b) refused to acknowledge the arrest, detention or abduction, or to give information on the fate or whereabouts of such person or persons; (2) (a) such arrest, detention or abduction was followed or accompanied by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (b) such refusal was preceded or accompanied by that deprivation of freedom; (3) the perpetrator was aware that: (a) such arrest, detention or abduction would be followed in the ordinary course of events by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons; or (b) such refusal was preceded or accompanied by that deprivation of freedom; (4) such arrest, detention or abduction was carried out by, or with the authorization,

²⁶¹ See para 36, *supra*.

²⁶² See para 31, *supra*.

support or acquiescence of, a State or a political organization; (5) such refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of such person or persons was carried out by, or with the authorization or support of, such State or political organization; (6) the perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time; (7) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (8) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²⁶³

96. According to IPOB, hundreds of pro-Biafran activists ‘are known to have been abducted in the middle of the night from their homes’ and remain ‘unaccounted for’.²⁶⁴ And, as described in some of the Victim accounts, the whereabouts of certain IPOB members—those who were injured by security forces in Onitsha on 17 December 2015 and later abducted from the hospital by army personnel—is currently a mystery. Little more is known about the specific circumstances of the missing. However, such is the nature of this particular crime. Despite the best efforts of family members, friends, and colleagues of those who have been abducted, the Nigerian authorities have refused to: (i) acknowledge that such deprivations of freedom have taken place or (ii) provide any information as to the fate or whereabouts of the missing individuals.
97. Accordingly, for purposes of this filing, there is sufficient reason to believe that the underlying crime against humanity of ‘enforced disappearance’, pursuant to Article 7(1)(i) of the Statute, has taken place in various locations in South-Eastern Nigeria.

²⁶³ See ICC Elements of Crimes, p 11. *N.b.* ‘Given the complex nature of this crime, it is recognized that its commission will normally involve more than one perpetrator as a part of a common criminal purpose.’ *Ibid*, n 23. ‘The word “detained” would include a perpetrator who maintained an existing detention.’ *Ibid*, n 25. ‘It is understood that under certain circumstances an arrest or detention may have been lawful.’ *Ibid*, n 26.

²⁶⁴ See para 31, *supra*.

5. Other Inhumane Acts – Article 7(1)(k)

98. The elements of ‘other inhumane acts’ as a crime against humanity are the following: (1) the perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act; (2) such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute; (3) the perpetrator was aware of the factual circumstances that established the character of the act; (4) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (5) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²⁶⁵
99. This category is conceived as a residual one for crimes that are not necessarily specified in the Statute but nevertheless are of comparable seriousness. Among other offences, this category has been used at the ICC to describe acts of brutality that fell short of murder,²⁶⁶ including ‘recurrent forms of physical violence [...] caused through gunshots or beatings’²⁶⁷ and incidents where victims ‘incurred [significant] long-term disabilities’.²⁶⁸
100. Based on the available information, there is little doubt that the many of the individuals who were spared death in the fatal incidents described above nevertheless endured ‘great suffering, or serious injury to body or to mental or physical health’. And, like those who were murdered, each of the victims of the various other forms of police and/or JTF brutality was a member of IPOB or MASSOB. Without a doubt, their injuries were incurred as part of the Federal Government’s widespread and systematic attack against pro-Biafran activists and sympathizers.

²⁶⁵ See ICC Elements of Crimes, p 12. *N.b.* ‘It is understood that “character” refers to the nature and gravity of the act.’ *Ibid*, n 30.

²⁶⁶ See Kenya Article 15 Decision, paras 166 *et seq.*

²⁶⁷ See Kenya Article 15 Decision, paras 170.

²⁶⁸ See Kenya Article 15 Decision, paras 170.

101. Accordingly, for purposes of this filing, there is sufficient reason to believe that the underlying crime against humanity of ‘other inhumane acts’, pursuant to Article 7(1)(k) of the Statute, has taken place in various locations in South-Eastern Nigeria.

6. Persecution – Article 7(1)(h)

102. The elements of ‘persecution’ as a crime against humanity are the following: (1) the perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights; (2) the perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such; (3) such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law; (4) the conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court; (5) the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and (6) the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.²⁶⁹

103. According to the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (the ‘ICTY’), persecution is defined as ‘the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5’ of the ICTY Statute.²⁷⁰ It is well established that both imprisonment²⁷¹ and enforced disappearance²⁷² are of sufficient gravity to amount to persecution when carried out on discriminatory grounds.

²⁶⁹ See ICC Elements of Crimes, p 10.

²⁷⁰ IT-95-16-T, *Prosecutor v Kupreškić et al*, ‘Judgment’, 14 January 2000, para 621. For purposes of the first element of persecution, ‘fundamental rights’ are generally understood to be those ‘found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law’. *Ibid*.

²⁷¹ See IT-95-14-A, *Prosecutor v Blaškić*, Appeals Chamber, ‘Judgment’, 29 July 2004, para 155; see also IT-08-91-T, *Prosecutor v Stanišić and Župljanin*, Trial Chamber II, ‘Judgment’ (Volume 1 of 3), 27 March 2013, para 80 (‘Imprisonment is a crime against humanity under Article 5(e) of the

104. The notion of persecution on political grounds includes the targeting of civilians on the basis of their political opposition, whether *actual or perceived*, to a particular regime or its leader.²⁷³ Victims of political persecution are not required to be members of a political party or group.²⁷⁴ Where individuals are targeted, it must be specifically because of their *actual or perceived* association with that group²⁷⁵ or, simply, their *actual or perceived* political opinions.²⁷⁶ It is the perpetrator's *subjective* identification of the group or collectivity that matters; this would include those 'defined by the perpetrator as belonging to the victim group due to their close affiliations or sympathies'.²⁷⁷

105. Ethnic groups are defined by the applicable jurisprudence as 'groups whose members share a common language or culture'²⁷⁸ and who 'belong to it

Statute. The Appeals Chamber has held that detention is of sufficient gravity as compared to the other crimes enumerated in Article 5 of the Statute and therefore may constitute persecution.'): IT-06-90-T, *Prosecutor v Gotovina et al*, Trial Chamber I, 'Judgment' (Volume 2 of 2), 15 April 2011, para 1817 ('Unlawful detention, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.'): IT-00-39-T, *Prosecutor v Krajišnik*, Trial Chamber I, 'Judgment', 27 September 2006, para 754 ('Unlawful detention, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.')

²⁷² See IT-06-90-T, *Prosecutor v Gotovina et al*, Trial Chamber I, 'Judgment' (Volume 2 of 2), 15 April 2011, paras 1838 ('When considering whether the act of disappearances is of the same gravity as the crimes listed in Article 5, the Trial Chamber notes that one other Trial Chamber has opined that it is included under "other inhumane acts" in Article 5(i) of the Statute. More importantly, however, a central element of the act of disappearances is deprivation of liberty which is also the main element of the act of unlawful detentions. As set out above in chapter 5.8.1 (e), the act of unlawful detentions, carried out on discriminatory grounds and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.') and 1839 ('Based on the above, the Chamber finds that enforced disappearances, carried out on discriminatory grounds, and for which the general elements of crimes against humanity are fulfilled, constitutes the crime of persecution.')

²⁷³ ICC-01/11, *Situation in Libyan Arab Jamahiriya*, PTC I, 'Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi', 27 June 2011, para 65.

²⁷⁴ Gerhard Werle, *Principles of International Criminal Law*, 2nd Ed (2009), para 907.

²⁷⁵ *Ibid*, paras 890, 899.

²⁷⁶ ICC-01/11, *Situation in Libyan Arab Jamahiriya*, PTC I, 'Decision on the Prosecutor's Application Pursuant to Article 58 as to Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi', 27 June 2011, para 65; *ibid*, paras 42–64 (Those who were described by the PTC as targeted persons included activists and demonstrators against the Abo Sleem massacre, writers and journalists perceived as dissidents, recipients of banned television frequencies, protestors against arrests of activists, and members of a funeral procession for murdered dissidents.)

²⁷⁷ IT-98-34-T, *Prosecutor v Naletilić and Martinović*, Trial Chamber, 'Judgment', 31 March 2003, para 636.

²⁷⁸ ICTR-96-4, *Prosecutor v Jean-Paul Akayesu*, Trial Chamber, 'Judgment', 2 September 1998, para 513.

automatically, by birth, in a continuous and often irremediable manner'.²⁷⁹ The existence and membership of a targeted ethnic group may also be determined on the basis of the perpetrator's *subjective* perception.²⁸⁰

106. Based on the foregoing analysis—with respect to the murder, unlawful imprisonment, torture, enforced disappearance, and serious physical and mental brutalization of pro-Biafran activists and sympathizers—it is apparent that such victims have been subjected to persecution by various organs of the Federal Government. Contrary to international law, the Nigerian police, JTF, DSS, and/or federal prosecutors have, in various ways, severely deprived dozens of Nigerian civilians of their fundamental rights. In every case, these victims—almost all of them members of IPOB or MASSOB—have been targeted by reason of their actual or perceived support for the notion of Biafran self-determination. Moreover, all of the victims are members of the Igbo ethnic group, the dominant people of South-Eastern Nigeria and those historically and currently linked to the state of Biafra. All of the offending conduct amounts to criminal activity under Article 7 of the Statute and was committed as part of the Federal Government's widespread and systematic attack against pro-Biafran activists and sympathizers.

107. Accordingly, for purposes of this filing, there is sufficient reason to believe that the underlying crime against humanity of 'persecution', pursuant to Article 7(1)(h) of the Statute, has taken place in Abuja and various locations in South-Eastern Nigeria.

C. General Conclusion Regarding Crimes Against Humanity

108. On the information presented—bearing in mind the nature of the instant filing, the extremely low threshold applicable to preliminary examinations, as well as the object and purpose of the OTP's mandate—there is a reasonable basis to believe that crimes against humanity have been committed against pro-Biafran activists and sympathizers in South-Eastern Nigeria.

²⁷⁹ *Ibid*, para 511.

²⁸⁰ ICTR-01-63, *Prosecutor v Simeon Nchamihigo*, Trial Chamber III, 'Judgment', 12 November 2008, paras 329–338.

V. INDIVIDUAL CRIMINAL RESPONSIBILITY

A. Acts of Commission

109. Pursuant to Article 25(3) of the Statute, ‘a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person’:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted; (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or (ii) Be made in the knowledge of the intention of the group to commit the crime; [...].²⁸¹

As noted above, for purposes of the instant submission, a detailed analysis as to the issue of *mens rea* is premature.²⁸² Accordingly, the subjective elements of the various modes of liability may be mentioned only in passing, if at all.

1. Committing Crimes Against Humanity

110. Article 25(3)(a) explicitly sets out three forms of principal liability: (a) direct perpetration, i.e. ‘individual’ commission; (b) co-perpetration, i.e. commission ‘jointly with another’); and (c) indirect perpetration, i.e. commission ‘through another person’.²⁸³ Additionally, the jurisprudence of the ICC has recognized a fourth form of principal liability under Article 25(3)(a), namely: indirect co-perpetration.²⁸⁴ These forms will be briefly addressed in turn.²⁸⁵

²⁸¹ Rome Statute, Article 25(3).

²⁸² See para 79, *supra*.

²⁸³ See ICC-01/04-01/06-803, *Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga*, PTC I, ‘Decision on the Confirmation of Charges’, 29 January 2007 (hereinafter, ‘Lubanga Confirmation Decision’), para 318 (‘[A]rticle 25(3)(a) of the Statute [...] covers the notions of direct perpetration (commission of a crime in person), co-perpetration (commission of a crime jointly with another person), and indirect perpetration (commission of a crime through another person, regardless of whether that other person is criminally responsible).’)

²⁸⁴ See Katanga Confirmation Decision, paras 490–491.

a. Direct Perpetration

111. Article 25(3)(a) of the Statute makes clear that an accused may be held directly liable for a crime if it is proven that he personally and physically carried out all objective elements of a particular offence.²⁸⁶

b. Co-Perpetration

112. In setting out for the first time the objective elements (*actus reus*) of co-perpetration as a mode of liability under Article 25(3)(a) of the Statute, ICC PTC I imported the so-called ‘control over the crime’ approach as the appropriate interpretive gloss.²⁸⁷ The two elements are: (i) ‘the existence of an agreement or common plan between two or more persons’²⁸⁸ and (ii) ‘coordinated essential contribution made by each co-perpetrator resulting in the realization of the objective elements of the crime’.²⁸⁹ With respect to the first prong: ‘The common plan must include an element of criminality, although it does not need to be specifically directed at the commission of a crime.’²⁹⁰ Such agreement ‘need not be explicit’ and ‘its existence can be inferred from the subsequent concerted action of the co-perpetrators’.²⁹¹ Regarding the second, ‘only those to whom essential tasks have been assigned—and who, consequently, have the power to frustrate the commission of the crime by not performing their tasks—can be said to have joint control over the crime’.²⁹²

²⁸⁵ *N.b.* As noted by ICC PTC II, ‘a determination on the criminal responsibility of a person within the meaning of article 25(3)(a) of the Statute concerning co-perpetrators or indirect perpetrators’—or, by extension, indirect co-perpetrators—‘should be examined in light of the concept of “control over the crime”.’ Bemba Confirmation Decision, para 348.

²⁸⁶ See, e.g., Katanga Confirmation Decision, para 488 (‘a principal is [, *inter alia*,] one who: (a) physically carries out all elements of the offence (commission of the crime as an individual)’).

²⁸⁷ See Lubanga Confirmation Decision, paras 322 *et seq.*

²⁸⁸ Lubanga Confirmation Decision, para 343.

²⁸⁹ Lubanga Confirmation Decision, para 346.

²⁹⁰ Lubanga Confirmation Decision, para 344.

²⁹¹ Lubanga Confirmation Decision, para 345.

²⁹² Lubanga Confirmation Decision, para 347.

c. Indirect Perpetration

113. In this form of liability, which is similar to co-perpetration, the accused uses another person to physically carry out the crime. More to the point, the accused *controls the will* of the direct actor.²⁹³ This makes the accused an indirect perpetrator, even if the direct perpetrator would not be criminally responsible for the crime committed.

d. Indirect Co-Perpetration

114. Indirect co-perpetration, finally, is a hybrid form of co-perpetration where the essential contribution assigned to a co-perpetrator is carried out by another person. This mode of liability encompasses all of the elements of co-perpetration *and* indirect commission, as described above, and has been neatly characterized by Ohlin:

The *Katanga and Ngudjolo* Decision represented the second application of Roxin's Control Theory to Article 25 of the Rome Statute. However, the factual scenario presented in the case was remarkably different from *Lubanga*. Whereas Lubanga was charged as a co-perpetrator for his joint commission of recruiting child soldiers, Katanga and Ngudjolo were charged with responsibility for crimes committed by their respective subordinates. The application of the Control Theory to their co-perpetrated crimes was complicated by the fact that the two defendants controlled separate rebel forces. In its Confirmation of Charges Decision, the Pre-Trial Chamber concluded that there was sufficient evidence to warrant a trial to determine whether the two rebel organizations jointly perpetrated the atrocities in question. Consequently, Katanga and Ngudjolo were viewed as co-perpetrators who formed a collective unit with a division of labor regarding the accomplishment of the task. However, since neither directly performed the criminal conduct in question, but controlled the outcome of the crime through an organized apparatus of power, the defendants were *indirect perpetrators*. The combination of these two facts—their horizontal cooperation to control the crime and their vertical control over their respective organizations—gave birth to a new flavor of the Control Theory. The Pre-Trial Chamber referred to this as Indirect Co-Perpetration. Although indirect co-perpetration is not explicitly listed in the Rome Statute, the Pre-Trial Chamber reasoned that it was a natural combination of the raw materials of co-perpetration and indirect perpetration. Add the two together and you get indirect co-perpetration.²⁹⁴

²⁹³ Katanga Confirmation Decision, para 488 ('a principal is [, *inter alia*,] one who: [...] (c) has control over the will of those who carry out the objective elements of the offence (commission of the crime through another person).')

²⁹⁴ Jens David Ohlin, 'Co-Perpetration: German Dogmatik or German Invasion?', 7 November 2013, at 546 (in *The Law and Practice of the International Criminal Court: A Critical Account of Challenges and Achievements*, Carsten Stahn ed (Oxford 2015)) (citing Katanga Confirmation Decision, paras 484, 490–491, 511, 544).

115. The objective elements (*actus reus*) of indirect co-perpetration as a mode of liability under Article 25(3)(a) of the Statute have been defined as follows:

(a) the suspect must be part of a common plan or an agreement with one or more persons; (b) the suspect and the other co-perpetrator(s) must carry out essential contributions in a coordinated manner which result in the fulfillment of the material elements of the crime; (c) the suspect must have control over the organization; (d) the organization must consist of an organized and hierarchical apparatus of power; (e) the execution of the crimes must be secured by almost automatic compliance with the orders issued by the suspect.²⁹⁵

The subjective elements (*mens rea*) of this mode of liability need not be addressed at this stage of the proceedings.²⁹⁶

2. Ordering Crimes Against Humanity

116. Most recently, with respect to ‘ordering’ the commission of crimes pursuant to Article 25(3)(b), ICC PTC I has found as follows:

The Chamber is of the view that ‘ordering’, ‘soliciting’, and ‘inducing’ in essence fall into a broader category of ‘instigating’ or ‘prompting another person to commit a crime’, in the sense that they refer to a conduct by which a person is influenced by another to commit a crime. Therefore, the Chamber will consider the elements of ‘ordering’, as previously applied by the Court, as equally applicable to ‘soliciting’ and ‘inducing’, with the exception of the requirement of a position of authority, which is particular to ‘ordering’ and is not a necessary element of ‘soliciting’ or ‘inducing’.²⁹⁷

Only three days prior, ICC PTC II had recalled the elements required for a finding of criminal responsibility based on the mode of liability of ordering:

(a) the person is in a position of authority, (b) the person instructs another person in any form to either: (i) commit a crime which in fact occurs or is attempted or (ii) perform an act or omission in the execution of which a crime is carried out, (c) the order had a direct effect on the commission or attempted commission of the crime,

²⁹⁵ ICC-01/04-02/06-309, *Situation in the Democratic Republic of the Congo*, PTC II, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda’, 9 June 2014 (hereinafter, the ‘Ntaganda Confirmation Decision’), para 104.

²⁹⁶ *N.b.* While not relevant to the instant filing, the following subjective elements (*mens rea*) must, of course, be met at a later stage of any eventual proceedings: ‘(a) the suspect must satisfy the subjective elements of the crimes namely (i) intent and knowledge within the meaning of article 30 of the Statute, unless otherwise provided in the Statute or the Elements of Crimes; (ii) and specific intent (*dolus specialis*) where required; (b) the suspect and the other co-perpetrators must be mutually aware and accept that implementing the common plan will result in the fulfillment of the material elements of the crimes; and (c) the suspect must be aware of the factual circumstances enabling him to exercise joint control over the commission of the crime through another person(s).’ Ntaganda Confirmation Decision, para 121.

²⁹⁷ ICC-02/11-01/11, *Situation in the Republic of Côte d’Ivoire, Prosecutor v Gbagbo*, PTC I, ‘Decision on the Confirmation of Charges against Laurent Gbagbo’, 12 June 2014 (hereinafter, the ‘Gbagbo Confirmation Decision’), para 243.

and (d) the person is at least aware that the crime will be committed in the ordinary course of events as a consequence of the execution or implementation of the order.²⁹⁸

According to the same chamber: ‘The person can give the order through an intermediary and need not give the order directly to the physical perpetrator.’²⁹⁹

3. Soliciting or Inducing the Commission of Crimes Against Humanity

117. While the Statute does not contain an explicit definition for the modes of liability of ‘instigation’ or ‘incitement’ (except with respect to genocide), these concepts are well-developed under international-criminal jurisprudence and arguably fall under Article 25(3)(b)’s conception of solicitation or inducement.

118. According to the ICC’s PTC II, ‘the terms “soliciting” and “inducing” within the meaning of article 25(3)(b) of the Statute [...] both characterize the situation whereby the perpetrator is prompted by another to commit the offence’.³⁰⁰

Previously, the same chamber:

recall[ed] that, in order to make a finding on [...] criminal responsibility for the mode of liability of inducing, the following objective and subjective elements must be fulfilled: (a) the person exerts influence over another person to either commit a crime which in fact occurs or is attempted or to perform an act or omission as a result of which a crime is carried out; (b) the inducement has a direct effect on the commission or attempted commission of the crime; and (c) the person is at least aware that the crimes will be committed in the ordinary course of events as a consequence of the realization of the act or omission.³⁰¹

Unlike the mode of liability of ‘ordering’, neither ‘soliciting’ nor ‘inducing’ requires the alleged perpetrator to have been in a position of authority vis-à-vis the individuals who physically carried out the underlying crimes.³⁰²

²⁹⁸ Ntaganda Confirmation Decision, para 145 (citing ICC-01/04-01/12-1-Red, *Situation in the Democratic Republic of Congo, Prosecutor v Mudacumura*, PTC II, ‘Decision on the Prosecutor’s Application under Article 58’, 13 July 2012, para 63).

²⁹⁹ ICC-01/04-01/12-1-Red, *Situation in the Democratic Republic of Congo, Prosecutor v Mudacumura*, PTC II, ‘Decision on the Prosecutor’s Application under Article 58’, 13 July 2012, para 63 (citing ICTY jurisprudence).

³⁰⁰ ICC-01/05-01/13, *Situation in the Central African Republic, Prosecutor v Bemba et al*, PTC III, ‘Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute’, 11 November 2014, para 34.

³⁰¹ Ntaganda Confirmation Decision, para 153; see also Gbagbo Confirmation Decision, para 243 (‘The Chamber is of the view that “ordering”, “soliciting”, and “inducing” in essence fall into a broader category of “instigating” or “prompting another person to commit a crime”, in the sense that they refer to a conduct by which a person is influenced by another to commit a crime.’)

³⁰² See Gbagbo Confirmation Decision, para 243 (‘[T]he requirement of a position of authority, which is particular to “ordering”[, ...] is not a necessary element of “soliciting” or “inducing”.’)

119. In confirming the charges of inducing ‘the commission and/or the attempted commission of [...] crimes’³⁰³ against Bosco Ntaganda of the Democratic Republic of Congo, ICC PTC II found that the suspect had, among other things, ‘exerted influence over [others] to commit [...] crimes, which in fact occurred and, in the case of murder, were also attempted’.³⁰⁴ The PTC’s conclusion on this point was ‘further supported by the fact that Mr Ntaganda created an environment in which crimes against [his opponents] were encouraged or officially approved’.³⁰⁵ Moreover, ‘in his capacity as a high-ranking [...] official, Mr Ntaganda: [...] openly used derogatory language against [his opponents]; and [...] failed to take all necessary and reasonable measures to prevent and/or repress [...] crimes’.³⁰⁶
120. In the Ivory-Coast Case, ICC PTC I confirmed the charges against Laurent Gbagbo under Article 25(3)(b), focusing on, among other things, the fact that: ‘Gbagbo instructed or otherwise instigated the pro-Gbagbo forces to carry out certain actions in the execution of which the crimes in the context of the four charged incidents were committed’³⁰⁷ and ‘Gbagbo’s instructions or instigation had a direct effect on the commission of the crimes’.³⁰⁸ With respect to instructing or otherwise instigating, the following factors, among others, were considered highly relevant:

(iii) by mobilizing them for his cause, Laurent Gbagbo directed the actions of the youth and militia groups in Yopougon and provided them with the purpose of their fighting, which was to retain his power by all means, including through the use of violence against civilians known or perceived to be supporters of his political opponent Alassane Ouattara; and (iv) Laurent Gbagbo, by emphasizing the goal (i.e. to stay in power) through statements and actions prior to and during the crisis without qualifying the means that were permissible to attain this goal, created a general situation amongst the forces under his and his inner circle’s control, which justified the use of violence against the civilian population.³⁰⁹

Additionally, as to the consequences of such actions, it was determined that ‘Gbagbo’s instruction or instigation had a direct effect on the commission of

³⁰³ Ntaganda Confirmation Decision, para 154.

³⁰⁴ Ntaganda Confirmation Decision, para 155.

³⁰⁵ Ntaganda Confirmation Decision, para 155.

³⁰⁶ Ntaganda Confirmation Decision, para 155.

³⁰⁷ Gbagbo Confirmation Decision, para 244.

³⁰⁸ Gbagbo Confirmation Decision, para 244; see also Ntaganda Confirmation Decision, paras 145, 153.

³⁰⁹ Gbagbo Confirmation Decision, para 246.

crimes'³¹⁰ as evidenced by, among other things, the fact that certain attacks 'occurred as a result of the mobilization and manipulation of the youth and militia to fight for maintaining Laurent Gbagbo in power'.³¹¹

121. In developing its own jurisprudence with respect to instigation (described above), the ICC has substantially relied upon the case-law of the ad-hoc tribunals,³¹² both of which have addressed the concept in detail.³¹³ The following is a brief summary of the applicable ICTY and International Criminal Tribunal for Rwanda ('ICTR') jurisprudence:

In *Blaskic*, an ICTY trial chamber defined instigating as 'prompting another to commit an offence', while the ICTR understood it to mean 'urging, encouraging or prompting' another person to commit a crime. There must be a 'causal connection between the instigation and the actus reus of the crime'; this has been held to mean that the instigation must have 'directly and substantially contributed' to the other person's commission of the substantive offence, or must at least have been a 'clear contributing factor'. However, 'but for' causation is not required, that is, the Prosecutor need not prove that the crime would not have been committed had it not been for the accused's acts.³¹⁴

There has been a certain amount of confusion in the case-law with regard to the relationship between instigation and incitement. In *Rutaganda* and, later, in *Musema*, the ICTR held that 'incitement to commit an offence, under Article 6(1), involves instigating another, directly and publicly, to commit an offence. Similarly, in the *Akayesu* trial chamber judgment it was found that 'instigation under Article 6(1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide. In its later judgment in the same case, the Appeals Chamber of the ICTR, however, found that this view was mistaken, and that there was no need for instigation generally to be direct and public in order to be punishable. Therefore, unlike direct and public incitement to commit genocide [...], instigation need not be direct and public. An omission, as well as an act, can constitute instigation, and mere presence at the time and place where a crime is being committed can amount to instigation or encouragement, particularly where the accused occupies a position of authority.'³¹⁵

Instigation as defined by the relevant ICTY and ICTR jurisprudence is not an inchoate crime; rather, it is 'punishable only where it leads to the actual

³¹⁰ Gbagbo Confirmation Decision, para 247.

³¹¹ Gbagbo Confirmation Decision, para 247.

³¹² See *Ntaganda* Confirmation Decision, para 153 (citing ICTY and ICTR jurisprudence).

³¹³ *N.b.* The statutes of those tribunals explicitly mention the concept. See ICTY Statute, Article 7(1) ('A person who planned, *instigated*, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.') (emphasis added); ICTR Statute, Article 6(1) ('A person who planned, *instigated*, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.') (emphasis added).

³¹⁴ Wibke Kristin Timmermann, 'Incitement in International Criminal Law', *International Review of the Red Cross*, Vol 88, No 864, December 2006 (citing ICTY and ICTR jurisprudence).

³¹⁵ *Ibid.*

commission of an offence intended by the instigator'.³¹⁶ This differs significantly from the Statute's approach, which embraces the notion of attempt.³¹⁷

4. Aiding and Abetting Crimes Against Humanity

122. Article 25(3)(c) of the Statute criminalizes anyone who 'for the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission'. The ICC has so far understood aiding and abetting as a form of accessory liability requiring a level of contribution less than that of a principal.³¹⁸ However, the precise contours have yet to be addressed by the Court's jurisprudence. Nevertheless, ICC PTC I has held that: 'the application of analogous modes of liability at the ad hoc tribunals suggests that a substantial contribution to the crime may be contemplated'.³¹⁹

5. Contributing in Any Other Way to the Commission of Crimes Against Humanity Accomplished Through a Group of Persons Acting with a Common Purpose

123. Finally, Article 25(3)(d) acts as a catchall mode of accessory liability designed to capture criminal conduct that does not rise to the level of what is contemplated by Articles 25(3)(a) through (c). This was first announced by PTC I in the Lubanga case:

³¹⁶ *Ibid.*

³¹⁷ See Rome Statute, Article 25(3)(b) ('Orders, solicits or induces the commission of such a crime which in fact occurs *or is attempted*') (emphasis added).

³¹⁸ See, e.g., ICC-01/04-01/06, *Situation in the Democratic Republic of the Congo, Prosecutor v Lubanga*, Trial Chamber I, 'Judgment pursuant to Article 74 of the Statute', 14 March 2012, para 997 ('Article 25(3)(c) establishes the liability of accessories—those who aid, abet or otherwise assist in the commission or attempted commission of the crime. In the view of the Majority, principal liability "objectively" requires a greater contribution than accessory liability. If accessories must have had "a substantial effect on the commission of the crime" to be held liable, then co-perpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect.') (citing ICTY and ICTR jurisprudence re 'substantial effect'); ICC-01/04-01/07, *Situation in The Democratic Republic of Congo, Prosecutor v Katanga*, Trial Chamber II, 'Judgment pursuant to article 74 of the Statute', 7 March 2014, paras 1383–85.

³¹⁹ ICC-01/04-01/10, *Situation in the Democratic Republic of the Congo, Prosecutor v Mbarushimana*, PTC I, 'Decision on the Confirmation of Charges', 16 December 2011 (hereinafter, the 'Mbarushimana Confirmation Decision'), para 279.

Hence, in the view of the Chamber, Article 25(3)(d) of the Statute provides for a residual form of accessory liability which makes it possible to criminalize those contributions to a crime which cannot be characterized as ordering, soliciting, inducing, aiding, abetting, or assisting within the meaning of Article 25(3)(b) or Article 25(3)(c) of the Statute, by reason of the state of mind in which the contributions were made.³²⁰

A 'group of persons acting with a common purpose' will be analyzed in the same manner as an 'agreement or common plan between two or more persons' under Article 25(3)(a) of the Statute.³²¹ Similarly, a 'common purpose must include an element of criminality, but does not need to be specifically directed at the commission of a crime' and the existence of an agreement 'need not be explicit [...] [but] can be inferred from the subsequent concerted action of the group of persons'.³²²

124. In keeping with its residual nature, this mode of liability applies 'irrespective of whether the person is or is not a member of the group acting with a common purpose'.³²³ And the level of contribution required is correspondingly low:

[T]he Chamber finds that the contribution to the commission of a crime under article 25(3)(d) of the Statute cannot be just any contribution and that there is a threshold of significance below which responsibility under this provision does not arise. On the other hand, given the 'residual' nature of article 25(3)(d) and its focus on group criminality, the Chamber finds that a contribution to the commission of a crime by a group acting with a common purpose be *at least significant*.³²⁴

As one commentator has put it: '[s]ubparagraph (d) establishes [...] the lowest objective threshold for participation according to Article 25 since it criminalizes "any other way" that contributes to a crime'.³²⁵ To be clear:

³²⁰ Lubanga Confirmation Decision, para 337; see also ICC-01/09-01/11, *Situation in the Republic of Kenya, Prosecutor v Ruto et al*, PTC II, 'Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute', 23 January 2012 (hereinafter, the 'Ruto Confirmation Decision'), para 354 ('[...] the provision must be understood as a residual mode of accessorial liability, which is triggered only when subparagraphs (a)–(c) are not satisfied. [...] In practice, this means that the provision is a catchall form of liability, which applies when the suspect contributes to the commission or attempted commission of the crime "in any other way".')

³²¹ See Mbarushimana Confirmation Decision, para 271 ('When discussing "a group of persons acting with a common purpose", the Chamber sees no reason to depart from the past definition of an "agreement or common plan between two or more persons" adopted by this Chamber when discussing article 25(3)(a) of the Statute. Though it appears in a discussion of co-perpetration liability, the Lubanga Confirmation Decision's concept of a "common plan" is functionally identical to the statutory requirement of article 25(3)(d) of the Statute that there be a "group of persons acting with a common purpose".')

³²² Mbarushimana Confirmation Decision, para 271.

³²³ Mbarushimana Confirmation Decision, para 275.

³²⁴ Mbarushimana Confirmation Decision, para 283 (emphasis added).

³²⁵ Ruto Confirmation Decision, para 354 (citing Ambos, Triffterer, 2nd ed, p 758).

Even assuming, *arguendo*, that the contribution under subparagraph (c), for the mode of participation of aiding and abetting, should be 'substantial', this does not mean that the required contribution under subparagraph (d) must be equally 'substantial'. If both subparagraph (c) and (d) required a 'substantial' contribution, the hierarchal structure of the different modes of participation envisaged by article 25(3) would be rendered meaningless. As a result, the contribution under subparagraph (d) is satisfied by a less than 'substantial' contribution, as far as such contribution results in the commission of the crimes charged.³²⁶

In other words, 'significant' participation is something less than 'substantial'.

125. The significance of such contribution to the committed or attempted crime will be 'determined by considering the person's relevant conduct and the context in which this conduct is performed',³²⁷ that is to say: on a case-by-case basis.

B. Acts of Omission: Command/Superior Responsibility

126. In addition to the positive modes of liability set out in Article 25 of the Statute, responsibility for the failure to act in certain circumstances is codified in Article 28:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

³²⁶ Ruto Confirmation Decision, para 354.

³²⁷ Mbarushimana Confirmation Decision, para 285.

- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

While the rule explicitly separates military from civilian command situations, ICC PTC II has usefully amalgamated the material elements in the following formulation:

(a) the suspect must be either a military commander or a person effectively acting as such; (b) the suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in articles 6 to 8 of the Statute; (c) the crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them; (d) the suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit one or more of the crimes set out in article 6 to 8 of the Statute; and (e) the suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.³²⁸

The key distinction between Articles 25 and 28 is that the latter 'establishes liability for violation of duties in relation to crimes *committed by others*'.³²⁹

127. Effective command and control (or effective authority and control) is the material ability to prevent or repress the commission of crimes or to submit the matter to the competent authorities for investigation and prosecution.³³⁰ The ICC has followed ICTY jurisprudence indicating that substantial influence alone is not sufficient to trigger liability.³³¹ Indicators of effective control include, but are not limited to: official positions and actual tasks; the power to give orders; the capacity to ensure compliance with orders; the power to promote, replace, remove, and/or discipline subordinates.³³² However, no single factor is necessarily determinative.

128. An element of causality between a superior's dereliction of duty and the underlying crimes is required in cases where a commander or superior failed to

³²⁸ Ntaganda Confirmation Decision, paras 164 (citing Bemba Confirmation Decision, para 407).

³²⁹ Gbagbo Confirmation Decision, para 262 (emphasis added); see *ibid* ('As previously observed by [PTC] II, Article 28 reflects a different form of criminal responsibility than that found in Article 25(3)(a) of the Statute in the sense that a superior may be held responsible for the prohibited conduct of his subordinates for failing to fulfill his duty to prevent or repress their unlawful conduct or submit the matter to the competent authorities.') (citing Bemba Confirmation Decision, para 405).

³³⁰ See Bemba Confirmation Decision, paras 411–419.

³³¹ See Bemba Confirmation Decision, paras 414–416.

³³² See Bemba Confirmation Decision, para 417.

prevent crimes.³³³ In such cases, the failure to act by the superior must have increased the risk of the commission of the crimes.³³⁴ No causal link between the omission of the superior and the commission of the crimes is required when responsibility is imputed on the basis of the superior's failure to repress the commission of the crimes or to submit the matter to the competent authorities.³³⁵

129. What constitute necessary and reasonable measures will depend on the material possibilities of the superior to act (either to prevent, repress, or submit)³³⁶ and will therefore depend on his effective control over his subordinates based on a case-by-case analysis of the factual situation, *in concreto*.³³⁷

³³³ See Bemba Confirmation Decision, para 423 ('The Chamber therefore considers that the chapeau of Article 28(a) of the Statute includes an element of causality between a superior's dereliction of duty and the underlying crimes.');

³³⁴ *ibid*, para 424 (However, 'the Chamber is of the view that the element of causality only relates to the commander's duty to prevent the commission of future crimes'.)

³³⁴ See Bemba Confirmation Decision, para 425 ('In other words, it would not be practical to predict exactly what would have happened if a commander had fulfilled his obligation to prevent crimes. There is no direct causal link that needs to be established between the superior's omission and the crime committed by his subordinates. Therefore, the Chamber considers that it is only necessary to prove that the commander's omission increased the risk of the commission of the crimes charged in order to hold him criminally responsible under article 28(a) of the Statute.')

³³⁵ See Bemba Confirmation Decision, para 424 ('[Articles 28(a)(ii) and 28(b)(iii)] of the Statute refers to three different duties: the duty to prevent crimes, repress crimes, or submit the matter to the competent authorities for investigation and prosecution. The Chamber considers that a failure to comply with the duties to repress or submit the matter to the competent authorities arise during or after the commission of crimes. Thus, it is illogical to conclude that a failure relating to those two duties can retroactively cause the crimes to be committed. Accordingly, the Chamber is of the view that the element of causality only relates to the commander's duty to prevent the commission of future crimes. Nonetheless, the Chamber notes that the failure of a superior to fulfill his duties during and after the crimes can have a causal impact on the commission of further crimes. As punishment is an inherent part of prevention of future crimes, a commander's past failure to punish crimes is likely to increase the risk that further crimes will be committed in the future.')

³³⁶ See Bemba Confirmation Decision, paras 435–442.

³³⁷ See Bemba Confirmation Decision, para 443 ('The Chamber considers that what constitutes "necessary and reasonable measures" must be addressed *in concreto*. A commander or military-like commander will only be responsible under Article 28(a) of the Statute for failing to take measures "within his material possibility". The Chamber's assessment of what may be materially possible will depend on the superior's degree of effective control over his forces at the time his duty arises. This suggests that what constitutes a reasonable and necessary measure will be assessed on the basis of the commander's *de jure* power as well as his *de facto* ability to take such measures.')

C. Acts and Conduct of the Possible Perpetrators

130. At this initial stage of the proceedings, it is neither legally required nor factually prudent to attempt a comprehensive or conclusive discussion as to the precise contours of the individual criminal responsibility attributable to the possible perpetrators of the crimes against humanity discussed above. Such task rightly falls to the OTP at the conclusion of any preliminary examination. However, for the purposes of this filing, it will be useful to put forward—based on the currently available evidence and the law set out in the previous sections—the modes of liability that would *arguably* characterize the acts and conduct of the various individuals who appear to bear the greatest responsibility for the crimes alleged herein.

131. The following formulations are merely suggestive—with a view toward shaping any OTP preliminary examination—and are not meant to be exhaustive or definitive in any way:

- a. **Muhammadu Buhari**, President of the Federal Republic of Nigeria and Commander-in-Chief of the Nigerian Armed Forces:
 - i. in publicly announcing his lack of regret over his involvement in the Biafran War and his willingness to ‘kill more Igbos to save the country’,³³⁸ has arguably solicited and/or induced the various crimes that took place in South-Eastern Nigeria between August 2015 and January 2016, pursuant to Article 25(3)(b) of the Statute;
 - ii. in failing to take all necessary and reasonable measures within his power to prevent or repress the various crimes committed by the army, police, and/or JTF in South-Eastern Nigeria between August 2015 and January 2016 or to submit the various matters to the competent authorities for investigation and prosecution, arguably

³³⁸ See para 27, *supra*.

bears command/superior responsibility pursuant to Article 28 of the Statute;

iii. in publicly announcing on 30 December 2015 that the Federal Government would continue to detain Nnamdi Kanu despite the 17 December 2015 unconditional High-Court release order,³³⁹ has arguably ordered, solicited, and/or induced Kanu's unlawful detention, pursuant to Article 25(3)(b) of the Statute.

b. **Lawal Musa Daura**, Director-General, State Security Service (SSS) aka Department of State Services (DSS):

i. in detaining Nnamdi Kanu against his will in the face of valid judicial orders to the contrary, has arguably committed the crime against humanity of unlawful imprisonment, pursuant to Article 25(3)(a) of the Statute;

ii. in failing to take all necessary and reasonable measures within his power to prevent or repress the commission of torture against Nnamdi Kanu while in DSS custody or to submit the matter to the competent authorities for investigation and prosecution, arguably bears command/superior responsibility pursuant to Article 28 of the Statute.

c. **Abubakar Malami**, Minister of Justice and Attorney-General of the Federation, and **Moses Idakwo**, a Federal Government prosecutor, in bringing and continuously pursuing politically-motivated charges against Nnamdi Kanu, have arguably either:

i. along with **Lawal Musa Daura**, committed—as co-perpetrators, indirect perpetrators, or indirect co-perpetrators—the crime against

³³⁹ See para 54, *supra*.

humanity of unlawful imprisonment, pursuant to Article 25(3)(a) of the Statute;

- ii. aided and abetted the same crime, pursuant to Article 25(3)(c) of the Statute; or
- iii. contributed in any other way to the commission of the same crime through a group of persons acting with a common purpose, pursuant to Article 25(3)(d) of the Statute.

d. **Lt-Gen Tukur Yusuf Buratai**, Chief of Army Staff:

- i. in publicly announcing the army's intention to 'crush' any threat to Nigeria's unity and territorial integrity,³⁴⁰ has arguably solicited and/or induced the various crimes committed by the army and/or JTF in South-Eastern Nigeria between August 2015 and January 2016, pursuant to Article 25(3)(b) of the Statute;
- ii. in failing to take all necessary and reasonable measures within his power to prevent or repress the various crimes committed by the army and/or JTF in South-Eastern Nigeria between August 2015 and January 2016 or to submit the various matters to the competent authorities for investigation and prosecution, arguably bears command/superior responsibility pursuant to Article 28 of the Statute.

e. **Colonel Sani Usman**, Nigerian Army spokesman, in publicly announcing the army's intention to utilize *military* rules of engagement 'to the fullest' in response to *civilian* demonstrations,³⁴¹ has arguably solicited and/or induced the various crimes committed by the army and/or JTF in South-Eastern Nigeria between August 2015 and January 2016, pursuant to Article 25(3)(b) of the Statute.

³⁴⁰ See para 53, *supra*.

³⁴¹ See para 36, *supra*.

- f. **Abdullahi Muhammadu**, the Commandant-General of the Nigeria Security and Civil Defence Corps,³⁴² in failing to take all necessary and reasonable measures within his power to prevent or repress the various crimes committed by the JTF in South-Eastern Nigeria between August 2015 and January 2016 or to submit the various matters to the competent authorities for investigation and prosecution, arguably bears command/superior responsibility pursuant to Article 28 of the Statute.
- g. **Solomon Ehigiator Arase**, Inspector-General of Nigeria Police:
- i. in publicly announcing, on 8 September 2015, a large-scale and systematic police operation specifically aimed at rounding up pro-Biafran protestors,³⁴³ has arguably ordered, solicited, and/or induced the various crimes committed by the police in South-Eastern Nigeria between September 2015 and January 2016, pursuant to Article 25(3)(b) of the Statute;
 - ii. in personally directing and overseeing the same operation, has arguably committed—as a co-perpetrator, indirect perpetrator, and/or indirect co-perpetrator—the various crimes committed by the police in South-Eastern Nigeria between September 2015 and January 2016, pursuant to Article 25(3)(a) of the Statute;
 - iii. in failing to take all necessary and reasonable measures within his power to prevent or repress the various crimes committed by the police in South-Eastern Nigeria between August 2015 and January 2016 or to submit the various matters to the competent authorities for investigation and prosecution, arguably bears command/superior responsibility pursuant to Article 28 of the Statute.

³⁴² *N.b.* The NSCDC is a component part of the operations of the JTF operating within the Niger Delta region. See, e.g., 'Our priority is protection of critical national infrastructure – NSCDC', *Vanguard*, 19 September 2015.

³⁴³ See para 30, *supra*.

- h. **Hosea Karma**, the Anambra State Commissioner of Police, in failing to take all necessary and reasonable measures within his power to prevent or repress the various crimes committed by the police in Onitsha between August 2015 and January 2016 or to submit the various matters to the competent authorities for investigation and prosecution, arguably bears command/superior responsibility pursuant to Article 28 of the Statute.
- i. **Musa Kimo**, the Rivers State Commissioner of Police, in failing to take all necessary and reasonable measures within his power to prevent or repress the various crimes committed by the police in Port Harcourt between August 2015 and January 2016 or to submit the various matters to the competent authorities for investigation and prosecution, arguably bears command/superior responsibility pursuant to Article 28 of the Statute.

Naturally, the various individuals named above may have given direct orders to their subordinates or collaborated with each other in any number of ways. Any OTP preliminary examination should obviously investigate, among other things, the *de jure* and *de facto* relationships between and among the named individuals (and others) as well as the existence of any agreement, common plan, and/or common purpose between two or more possible perpetrators.

132. Finally, it should be noted that—according to Article 27 of the Statute—none of the individuals named above (nor any other Nigerian official for that matter) may rely on his official capacity in order to shield himself from any criminal liability.³⁴⁴

³⁴⁴ See Rome Statute, Article 27 (Irrelevance of official capacity) ('1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence. 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.')

VI. JURISDICTION

133. 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.³⁴⁵

These requirements will be taken in turn.

A. Jurisdiction *Ratione Materiae*

134. According to Article 5 of the Statute, the ICC has subject-matter jurisdiction over the commission of crimes against humanity.³⁴⁶ As set out above, there is reason to believe that a variety of such crimes have been committed in Abuja and South-Eastern Nigeria from August 2015 to January 2016. The Court's jurisdiction *ratione materiae* is therefore triggered.

B. Jurisdiction *Ratione Temporis*

135. 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'.³⁴⁷ 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'.³⁴⁸ Nigeria deposited its instrument of ratification of the Statute on 27 September 2001.

³⁴⁵ Kenya Article 15 Decision, para 39.

³⁴⁶ 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.

³⁴⁷ Rome Statute, Article 11(1).

³⁴⁸ Rome Statute, Article 11(2) (*N.b.* Unless that state has made a declaration under Article 12(3)).

The ICC therefore has jurisdiction over crimes against humanity in Nigeria from that date onwards.

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

136. 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'.³⁴⁹ 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'³⁵⁰ or '[t]he State of which the person accused of the crime is a national'.³⁵¹ 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'.³⁵² As set out above, the crimes in question have taken place on Nigerian territory; moreover, it is alleged that all of the individuals responsible for such crimes are Nigerian nationals. Accordingly, the Court has *both* territorial and personal jurisdiction.

VII. ADMISSIBILITY

137. According to Article 17 of the Statute, the admissibility assessment includes two components, namely: complementarity and gravity.³⁵³ 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"'.³⁵⁴ 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

³⁴⁹ Rome Statute, Article 12(1).

³⁵⁰ Rome Statute, Article 12(2)(a).

³⁵¹ Rome Statute, Article 12(2)(b).

³⁵² Kenya Article 15 Decision, para 175.

³⁵³ See Article 17(1)(a)–(c) as to complementarity and Article 17(1)(d) as to gravity.

³⁵⁴ Kenya Article 15 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.*

likely to constitute the Court's future case(s)'.³⁵⁵ 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'.³⁵⁶

A. Complementarity

138. 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'.³⁵⁷ In its judgment of 25 September 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 sub-paragraphs (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.³⁵⁸

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.³⁵⁹

139. Regarding all of the crimes alleged herein, there is clearly 'a lack of national proceedings [...] with respect to the main elements which may shape the Court's potential case(s)'.³⁶⁰ As noted above, no organ of the Federal Government, nor any state-level authority, has taken any action to investigate—let alone prosecute—either the unlawful imprisonment of Nnamdi Kanu (presumably in Abuja) since October 2015 or the myriad crimes committed

³⁵⁵ Kenya Article 15 Decision, para 182.

³⁵⁶ Kenya Article 15 Decision, para 182.

³⁵⁷ Kenya Article 15 Decision, para 52.

³⁵⁸ 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.

³⁵⁹ Kenya Article 15 Decision, para 54.

³⁶⁰ Kenya Article 15 Decision, para 185.

against pro-Biafran activists in South-Eastern Nigeria between August 2015 and January 2016, despite calls by Nigerian civil-liberties groups for judicial accountability and the filing of a lawsuit by IPOB. In the face of such blatant *inaction*, the question of Nigeria's of *unwillingness or inability* to take steps simply does not arise.

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

B. Gravity

141. '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.'³⁶¹

142. 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'.³⁶² This is because 'it is not feasible that at the stage of the preliminary examination it be done with regard to a concrete "case".'³⁶³ Therefore, 'the gravity of the crimes will be assessed in the context of their modus operandi'.³⁶⁴ 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).³⁶⁵

³⁶¹ Kenya Article 15 Decision, para 57.

³⁶² Kenya Article 15 Decision, para 58.

³⁶³ Kenya Article 15 Decision, para 58.

³⁶⁴ Kenya Article 15 Decision, para 61.

³⁶⁵ Kenya Article 15 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')

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'.³⁶⁶

143. In the Kenya Case, the gravity requirement was met on the basis of 'the alleged number of deaths [...] and acts of injury, as well as the geographical location of these crimes, which appear[ed] widespread',³⁶⁷ the 'brutality [...] [of] the means used to execute the violence',³⁶⁸ and the impact on the victims.³⁶⁹ 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.³⁷⁰

144. With respect to the first prong of the contextual analysis, the facts outlined above suggest that the high-ranking individuals—including President Buhari—may indeed bear a great level of responsibility for the crimes against humanity that have been committed. Moreover, the violent nature of the murders and associated injuries, the brutal and targeted manner in which they were carried out by the authorities, and the devastating impact on the victims and their families all amount to aggravating circumstances indicating a very grave situation indeed.

VIII. THE INTERESTS OF JUSTICE

³⁶⁶ Kenya Article 15 Decision, para 62.

³⁶⁷ Kenya Article 15 Decision, para 191.

³⁶⁸ Kenya Article 15 Decision, para 193.

³⁶⁹ See Kenya Article 15 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.')

³⁷⁰ Kenya Article 15 Decision, para 198.

145. 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'.³⁷¹ 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'.³⁷² 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.³⁷³

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'.³⁷⁴

146. 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.

147. First of all, sectarian violence has continually plagued Nigeria since its inception as an independent republic and beyond its relatively recent transition to democracy. And, despite President Buhari's election promises, such endemic tribalism continues to fuel acts of brutal persecution in the economically and politically marginalized South-East. Moreover, President Buhari himself has been acting with impunity in this regard since the Biafran War and his days as military head-of-state in the mid-1980s. 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 bloody battlefield on which political and

³⁷¹ Rome Statute, Article 53(1)(c); *see also* Kenya Article 15 Decision, para 63.

³⁷² Kenya Article 15 Decision, para 63.

³⁷³ ICC-01/09, *Situation in the Republic of Kenya*, PTC II, '[OTP] Request for authorisation of an investigation pursuant to Article 15', 26 November 2009, para 60.

³⁷⁴ See OTP Website.

military leaders orchestrate and direct factional combat. Bringing those responsible for such violence to account would go a long way towards ameliorating the current situation and injecting a measure of confidence in Nigeria's highly defective political system. In this vein, the Petitioners represent the aspirations of all Nigerians who look forward to a day when their country's leaders—regardless of their party, faith, ethnicity, or geographic affiliation—can and will refrain from the hateful and sectarian bigotry that inevitably leads to death, destruction, and various forms of marginalization.³⁷⁵

148. Furthermore, it must be emphasized here that each and every victim of the various crimes described above was specifically targeted by the Federal Government for his or her actual or perceived support of Biafran self-determination. While the practical merits of such a cause are of course debatable, the right to publicly advocate and support political positions that may be disagreeable to the government of the day is protected by both Nigerian and international law. As IPOB's Ifeanyi Adibe rightly put it: 'No one is killing British people for demanding to renegotiate the terms of [their] relationship with [the] European Union or opt out of it.'³⁷⁶

149. 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

150. 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 many crimes against humanity that have been committed in Abuja and South-Eastern Nigeria between August 2015 and January 2016.

³⁷⁵ *N.b.* The lead-up to, and aftermath of, Nigeria's presidential elections of 2011 provide a clear example of how such sectarian bigotry espoused by, and capitalized on, by the nation's political leaders can result in widespread and systematic brutality. See, e.g., 'Article 15 Communication to the ICC Office of the Prosecutor Regarding 2011 Post-Election Violence in Nigeria', 2 February 2015.

³⁷⁶ See para 25, *supra*.

151. Additionally, the scope of any OTP investigation should be extended to include any additional crimes committed against the people of Biafra that postdate the submission of this communication. In this regard, the Petitioners hereby declare their intention to conduct further investigations of their own and reserve their right to submit additional information to the OTP by way of supplementary communications at any time.

152. Finally, the Petitioners request the OTP to inform them, through their lawyers, of any further steps and/or decisions to be taken in respect of the 'Nigeria Situation'. The Petitioners express their availability, through their lawyers, to assist the OTP in any further investigations, subject to reasonable conditions concerning confidentiality and security.

Respectfully submitted:



Prof. dr. Göran SLUITER

The Hague, 29 January 2016

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