Complementarity, prosecutorial discretion, and the Nigeria situation before the International Criminal Court

Dr Seun Solomon Bakare[1]

Introduction

The International Criminal Court's handling of the situation in Nigeria raises a difficult question at the centre of contemporary international criminal law: can complementarity justify the indefinite deferral of an investigation after the Prosecutor has already concluded that the statutory threshold for opening one has been met? The situation arises from the armed conflict in north-east Nigeria involving Boko Haram, its splinter faction Islamic State West Africa Province (ISWAP), and Nigerian security forces. Since 2009, the conflict has resulted in tens of thousands of deaths, widespread displacement, and allegations of war crimes and crimes against humanity committed by both non-state armed groups and state actors. This article argues that the Office of the Prosecutor's resort to a memorandum of understanding with Nigeria, following its 2020 conclusion that there was a reasonable basis to investigate alleged war crimes and crimes against humanity in north-east Nigeria, risks stretching complementarity beyond its doctrinal limits. While the Rome Statute makes domestic jurisdictions the primary fora for accountability, complementarity cannot be reduced to diplomatic engagement, symbolic prosecutions, or unreviewable prosecutorial patience. The Nigerian situation reveals a deeper institutional problem: the emergence of a non-statutory middle ground between preliminary examination and investigation. This article contends that such a development weakens procedural legality, dilutes victims' interests, and risks transforming complementarity from a doctrine of shared responsibility into one of negotiated impunity.

1. Background

In March 2026, the Deputy Prosecutor of the International Criminal Court concluded an official mission to Nigeria with the signing of a memorandum of understanding between the Office of the Prosecutor and the Government of Nigeria. According to the ICC, the mission was intended to strengthen cooperation, support national accountability efforts, and deepen engagement under the principle of complementarity. On its face, the development appeared unremarkable. The ICC has long insisted that the Rome Statute system rests on the primacy of national jurisdictions. Article 1 of the Rome Statute provides that the Court "shall be complementary to national criminal jurisdictions." There is, therefore, nothing inherently

[1] Dr. Seun Bakare, a member of the British and Nigerian Branches of ILA, is a visiting scholar at Columbia Law School, New York and a guest researcher at the Grotius Centre for International Lagal Studies, Leiden University Law School. He holds a PhD in international criminal law and is the author of the book 'Regional Complementarity in International Criminal Law: Making Sense of the Four-Tiered Justice Paradigm'. He can be reached at seun@justicebridgefoundation.org

objectionable about the Prosecutor encouraging a State Party to investigate and prosecute international crimes domestically.

The difficulty lies elsewhere. The Nigeria situation had already passed through a decade-long preliminary examination. In December 2020, the Office of the Prosecutor announced that there was a reasonable basis to believe that both Boko Haram and elements of the Nigerian security forces had committed war crimes and crimes against humanity in the context of the armed conflict in north-east Nigeria. Under Article 15(3) of the Rome Statute, "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 authorisation of an investigation, together with any supporting material collected." The language is striking. It does not say that the Prosecutor may submit such a request when diplomatic conditions are favourable. It says the Prosecutor shall do so.

Nigeria now sits in an uncertain procedural space. The preliminary examination has, in substance, reached the point at which the statutory criteria for investigation were said to have been satisfied. Yet no investigation has been opened. Nor has the matter been formally closed in a manner that would bring finality to the process and allow affected communities to understand the legal basis for non-prosecution. Instead, the OTP has chosen extended cooperation, joint assessment, and periodic review. This article argues that the resulting arrangement creates a non-statutory third category within ICC practice. It is neither preliminary examination nor investigation. It is neither closure nor judicial activation. It is complementarity as suspension.

2. The statutory architecture of complementarity

Complementarity is not a mere policy preference, it is built into the structure of the Rome Statute. Article 17(1)(a) provides that a case is inadmissible where it "is being investigated or prosecuted by a State which has jurisdiction over it," unless that State is "unwilling or unable genuinely to carry out the investigation or prosecution." The Statute therefore does not ask whether a state has performed accountability in the abstract. It asks whether there are genuine proceedings in relation to the relevant case. This distinction matters because the existence of domestic trials does not automatically displace ICC jurisdiction. The trials must concern substantially the same conduct and the same persons or categories of persons that would otherwise fall within the Court's investigative focus. Article 17(2) further provides that unwillingness may be inferred where domestic proceedings are undertaken for the purpose of shielding a person from criminal responsibility, where there has been an unjustified delay inconsistent with an intent to bring the person concerned to justice, or where proceedings are not being conducted independently or impartially. These provisions make clear that complementarity is not satisfied by movement alone. It is satisfied by genuine accountability.

Some of the best scholarship on complementarity has long warned against confusing the doctrine with deference. William Burke-White's account of proactive complementarity emphasised the potential for the ICC to catalyse domestic proceedings rather than simply replace national courts. Carsten Stahn distinguished between complementarity as a rule of admissibility and complementarity as a broader policy of cooperation. Darryl Robinson, writing on the conceptual complexity of complementarity, showed that the doctrine is often asked to perform too many functions at once: jurisdictional allocation, legitimacy management, institutional restraint, and political reassurance. These insights remain useful for Nigeria. They help us see that the present problem is not the OTP's interest in domestic accountability. The problem is whether policy complementarity is being used to suspend legal complementarity.

3. Nigeria and the problem of selective domestic accountability

The Nigeria situation presents precisely the kind of case for which complementarity was designed, but also the kind of case in which it can be most easily misused. The conflict in north-east Nigeria has generated allegations of grave crimes by insurgent groups and by state forces. The Nigerian authorities have conducted mass trials of persons alleged to be associated with Boko Haram. Yet the central complementarity question is not whether Nigeria has prosecuted some suspects. It is whether Nigeria has genuinely investigated and prosecuted those most responsible for the full range of alleged crimes, including crimes attributed to state actors.

The distinction between low-level prosecutions and responsibility-bearing prosecutions is essential to international criminal law. The ICC is not designed to prosecute every suspect. It is concerned with those who bear the greatest responsibility for the most serious crimes of concern to the international community. Where a state prosecutes only foot soldiers, detainees, or marginal participants while leaving senior commanders and state agents untouched, complementarity cannot be presumed. Indeed, such proceedings may produce the appearance of accountability while leaving intact the structures of impunity that made the crimes possible.

This is where Nigeria becomes doctrinally significant. The OTP's 2020 assessment recognised that domestic proceedings had not sufficiently addressed allegations against members of the Nigerian security forces. The subsequent turn to a memorandum of understanding must therefore be evaluated against that background. If the same factual and legal concerns remain, then the MoU cannot by itself cure the admissibility problem. A cooperation agreement may support complementarity, but it cannot substitute for genuine proceedings. Nor can diplomatic engagement erase the statutory consequences of a finding that the Article 15 threshold has been met.

4. Article 15 and the danger of procedural improvisation

Article 15 exists to regulate proprio motu action by the Prosecutor. It permits the Prosecutor to initiate investigations on the basis of information received, but it also requires judicial authorisation before an investigation may proceed. The provision therefore balances prosecutorial initiative with judicial supervision. That balance is central to the legitimacy of the Court - it prevents both paralysis and unilateralism. The Nigeria situation unsettles this balance. Once the Prosecutor concluded that there was a reasonable basis to proceed, Article 15(3) appeared to require an application to the Pre-Trial Chamber. Such an application would not automatically open the investigation. The judges would still assess the request and supporting material. The crucial point is that the statutory process would move from prosecutorial assessment into judicial oversight. By not making such a request, while also not closing the matter, the OTP has preserved control over the situation in a way that avoids judicial scrutiny.

This is a procedural concern as international criminal law is built on procedure because its legitimacy is fragile. The Court investigates sovereign states, military institutions, non-state armed groups, and individuals accused of the gravest crimes. It must therefore be able to show that its decisions are grounded in law rather than institutional convenience. A practice that allows the Prosecutor to conclude that the threshold for investigation has been met and then defer judicial authorisation for years creates a serious accountability gap. It places victims, civil society, and affected communities in a position where they cannot easily challenge inaction because no formal decision has been taken.

5. Positive complementarity or negotiated impunity?

The OTP may argue that the MoU reflects positive complementarity. In principle, positive complementarity is valuable. The ICC cannot investigate and prosecute every situation. It must encourage domestic institutions to do the work that the Rome Statute primarily assigns to them. The Court's 2013 Policy Paper on Preliminary Examinations recognises the importance of encouraging genuine national proceedings. More broadly, ICC practice has often relied on cooperation, technical engagement, and dialogue with national authorities. Yet positive complementarity has limits. It cannot override the Statute. It cannot convert a mandatory procedural step into an optional diplomatic choice. It cannot treat a state's promise of future proceedings as equivalent to genuine present action. If positive complementarity becomes a reason to avoid Article 15, then it risks becoming a doctrine of prosecutorial convenience.

Kevin Jon Heller's warning about the "shadow side" of complementarity remains relevant here. Complementarity can strengthen national justice, but it can also distort domestic criminal process when states act strategically to avoid ICC scrutiny. A government may prosecute low-level suspects, conduct mass trials, create investigative panels, or sign cooperation agreements in order to show movement while avoiding the politically sensitive prosecution of those most responsible. In such circumstances, the ICC must look beyond formal activity. It must ask whether domestic proceedings are credible, independent, and directed at the real architecture of responsibility.

6. Victims, delay, and the moral economy of international criminal law

The Nigeria situation is not only a problem of institutional design. It is a problem of victims' expectations. International criminal law has always made a difficult promise: that where states fail to confront mass atrocity, the international legal order will not simply look away. The promise is often imperfectly fulfilled. But without it, the moral claim of the ICC becomes thin. For victims in north-east Nigeria, the delay is not abstract. More than fifteen years have passed since the conflict began to produce allegations of atrocity crimes at scale. Communities have experienced killings, displacement, unlawful detention, torture, sexual violence, enforced disappearance, and the destruction of civilian life. Many affected persons have already waited through domestic inaction, security collapse, political denial, and international preliminary examination. To be told now that the matter remains under cooperative assessment is to be asked to wait again, without a clear legal timetable.

Delay can itself become a form of injustice. Article 17(2)(b) recognises that an "unjustified delay" inconsistent with an intent to bring the person concerned to justice may indicate unwillingness. Although that provision speaks to national proceedings, the principle has broader relevance. A justice system that cannot explain its own delay risks losing moral authority. This is especially true where the delay follows a formal finding that the threshold for investigation has been satisfied.

7. Regional complementarity and the African accountability question

The Nigeria situation also speaks to a larger African debate. The ICC's relationship with African states has long been marked by ambivalence. On one hand, many African states were central to the creation of the Rome Statute system and remain parties to it. On the other hand, criticisms of selectivity, unequal enforcement, and geopolitical imbalance have shaped African responses to the Court for more than a decade. A serious answer to this crisis cannot be to abandon international criminal law. Nor can it be to treat The Hague as the only meaningful site of accountability. The future of atrocity accountability must be multi-layered. Domestic courts, regional mechanisms, hybrid tribunals, and international institutions must operate within a broader ecology of justice. This is the central insight of regional complementarity: accountability should not be monopolised by global institutions, but distributed across legal orders in a way that strengthens proximity, legitimacy, and effectiveness.

Yet regional complementarity is not a polite name for withdrawal. It is not a justification for impunity dressed in the language of sovereignty. Its purpose is to expand accountability, not dilute it. If domestic and regional systems are to assume greater responsibility, they must demonstrate willingness and capacity to confront crimes committed by both insurgents and state forces. They must also show that seniority, rank, and institutional affiliation do not place perpetrators beyond the reach of law. Nigeria is therefore a test case. If the MoU produces credible investigations into those most responsible on all sides of the conflict, it may become an example of complementarity working under difficult conditions. If it produces only further delay, selective trials, and opaque review, it will become evidence of complementarity's decay.

8. Not a conclusion

The ICC's Nigeria approach reveals a troubling fault line in the Rome Statute system. Complementarity is essential to the legitimacy of the Court, but it is also vulnerable to misuse. Properly understood, it allocates responsibility between national and international jurisdictions while preserving the possibility of international intervention where domestic justice fails. Misunderstood, it becomes a language through which states manage accountability without submitting to it. The memorandum of understanding between the OTP and Nigeria may yet lead to meaningful domestic proceedings. That possibility should not be dismissed. But the MoU cannot answer the legal question created by the OTP's 2020 finding. If the threshold for investigation was met, and if Article 15(3) requires the Prosecutor to submit a request to the Pre-Trial Chamber, then prolonged diplomatic engagement cannot replace statutory procedure.

The ICC should therefore clarify the legal basis of its current posture. It should publish clear benchmarks for assessing Nigeria's domestic proceedings, identify the categories of persons and conduct under review, set measurable timelines, and explain how victims and affected communities will be informed. If Nigeria demonstrates genuine willingness and ability to prosecute those most responsible, complementarity will have served its purpose. If it does not, the Prosecutor should proceed under Article 15. The stakes are larger than Nigeria. If sustained engagement, partial cooperation, and selective domestic proceedings become sufficient to defer ICC action indefinitely, complementarity may cease to function as a doctrine of shared responsibility. It may become a doctrine of negotiated impunity. That would be a loss not only for Nigerian victims, but for the coherence of international criminal law itself.