Domestic Redress Mechanisms for Serious Crimes, the International Criminal Court and a Nation's Cry for Help

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Abstract

This paper examines the lacuna created by a nation's unwillingness or inability to prosecute its own crimes and the International Criminal Court's perceived reluctance to intervene when domestic justice fails. Using the case of Nigeria, it addresses the misconception that the International Criminal Court (ICC) is the expected messiah who can bring reprieve and respite to the victims of serious crimes of international concern. The study clarifies the principle of complementarity in the Nigerian context, and argues that the gap created by the failure of domestic redress mechanisms, and ICC's inaction can only be filled by urgent local action by the requisite political and legal actors. The paper concludes that strengthening Nigeria's domestic justice system is crucial to minimizing the need for the ICC's intervention and ensuring credible justice for victims.
Keywords: Complementarity, Sovereignty, ICC, Domestic Justice, Nigeria, Prosecution

1. Introduction

The modern era of international criminal justice began in the aftermath of World War II with the establishment of the Nuremberg and Tokyo Tribunals.[1] These ad-hoc courts, created by the victorious Allied powers, were groundbreaking in their prosecution of high-ranking Nazi and Japanese officials for crimes that included crimes against peace, war crimes, and a newly defined category, crimes against humanity. Critics such as Radhabinod Pal,[2] and George KC Roberts, have severally described these tribunals as a victor's justice.[3] Nonetheless, these tribunals set a crucial precedent and sent a signal that state officials could not hide behind the shield of national sovereignty to commit atrocities.

For nearly half a century, the Cold War largely stalled the development of this justice system.[4] This delay has been attributed to intense rivalry between the United States and the Soviet Union. They both held veto power on the UN Security Council, with which

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[1] Charter of the International Military Tribunal (annexed to the London Agreement), 82 UNTS 279, 8 August 1945. This legal instrument established the Nuremberg Tribunal and defined the crimes it was to prosecute, including crimes against humanity.

[2] Jaak Uibu, 'The Dissenting Opinions of Justice Radhabinod Pal at the Tokyo War Crimes Tribunal' (Commentary, International Centre for Defence and Security 20 February 2020) [accessed 26 October 2025].

[3] Robert F Drinan, 'The Nuremberg and Tokyo Trials: Victor's Justice?' (1987) 12 Fordham Int'l LJ 1, 6–8 (noting Justice Pal's famous dissent in Tokyo which "indicts the Tribunal as a tool of the victorious Allies").

[4] Claire Klobucista, 'The Role of the International Criminal Court.' (Council on Foreign Relations 28 March, 2022) < https://www.cfr.org/backgrounder/role-international-criminal-court> Accessed 26 October, 2025

they prevented all attempts to define the Crime of Aggression or establish a permanent international criminal court.[5] These two permanent members of the UN Security Council were concerned about the potential weaponisation of the ICC, if created, by their adversaries to prosecute their own leaders or allies, hence the delay.[6] However, in the 1990s, mass atrocities in the former Yugoslavia and Rwanda reignited the international community's resolve. In response, the UN Security Council established two more temporary, or ad-hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 [7] and the International Criminal Tribunal for Rwanda (ICTR) in 1994.[8] These tribunals were significant as they were created by the international community to prosecute crimes occurring within sovereign states, a departure from the notion of absolute state sovereignty in the face of widespread human rights violations.

The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the UN in May 1993 in direct response to the horrific mass atrocities taking place in the Balkans during the 1990s.[9] As the first war crimes court created by the UN since the Nuremberg and Tokyo tribunals, its primary purpose was to prosecute those individuals most responsible for crimes such as murder, torture, and rape, thereby deterring future crimes and delivering justice to the thousands of victims. The ICTY's creation was a critical step in a new era of international justice, aimed at holding high-ranking officials accountable for their actions and signaling to them that their senior position could no longer shield them from prosecution.[10]

By April 1994, approximately 800,000 Tutsi and moderate Hutu had been systematically slaughtered over 100 days, in Rwanda.[11] The Rwandan state collapsed under the weight of the violence. Due to a protracted inability to prosecute those responsible for the mass atrocities, the international community decided to step in by establishing the International Criminal Tribunal for Rwanda (ICTR) in 1994, to prosecute those most responsible for the genocide.[12]

But these tribunals, despite their recorded successes, were limited in terms of their temporary nature and limited jurisdiction to specific conflicts as can be deduced even from their names; hence the need for a permanent and more universal court. As a result,

[5] William A. Schabas, An Introduction to the International Criminal Court (5th edn, Cambridge University Press 2017) 5–6; Cassese, A, International Criminal Law (3rd edn, Oxford University Press 2013) 378

[6] Philippe Sands, East West Street: On the Origins of Genocide and Crimes Against Humanity (Weidenfeld & Nicolson 2016) 438–440.

[7] UN SC Res 827 (1993) UN Doc S/RES/827 (1993). This resolution established the International Criminal Tribunal for the former Yugoslavia (ICTY).

[8] UN SC Res 955 (1994) UN Doc S/RES/955 (1994). This resolution established the International Criminal Tribunal for Rwanda (ICTR).

[9] ICTY,'About the ICTY' <https://www.icty.org/en/about> accessed 18 September 2025.

[10] Ibid.

[11] BBC News, 'Rwanda genocide: 100 days of slaughter' (BBC News, 4 April 2019) https://www.bbc.com/news/world-africa-26875506 accessed 17 September 2025.

[12] UN SC Res 955 (1994) UN Doc S/RES/955 (1994), 'Statute of the International Criminal Tribunal for Rwanda' (annexed to the Resolution).

the Rome Statute was adopted in 1998, and it created the International Criminal Court (ICC) in 2002.[13]

2. The ICC

The ICC is the first permanent, treaty-based international criminal court with jurisdiction over the most serious crimes of international concern: genocide, war crimes, crimes against humanity, and the crime of aggression.[14] Unlike its predecessors, the ICC's jurisdiction is not tied to a specific conflict but is triggered by the actions of member states or a referral from the UN Security Council. Its primary mission is to end impunity for those who commit the most serious international crimes. Its creation marked a new chapter in the pursuit of global justice. The ICC sits at The Hague, Netherlands.[15] The Court's role is to complement national justice systems, not replace them. Therefore, it only acts when a country is either unwilling or unable to genuinely investigate and prosecute these crimes itself.[16]

3. State Sovereignty

State sovereignty refers to the exclusive control a state has over its internal affairs and its citizens. It has been described as "supreme legitimate authority within a territory".[17] Sovereignty can also be understood as the full and indivisible power of a state within its territory. This principle of international law, protects states from external interference.[18] However, in the wake of genocides and widespread atrocities, the international community developed legal frameworks like the Rome Statute of the International Criminal Court (ICC) to prosecute individual offenders for the most serious crimes of international concern.

4. The Principle of Complementarity

The International Criminal Court (ICC) relies heavily on the Principle of Complementarity. This is provided for in the Preamble and Article 17 of the Rome Statute.[19] In ordinary language, complementarity denotes a differing but congruous relationship whereby an idea or object is separate and distinct from the other, but serves to enhance, improve upon and perfect that other. From its root, the word 'complementarity' describes the quality or state of things that complete or make up for each other's deficiencies. It comes from the Latin word *complere*, which means 'to fill

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[13] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

[14] Rome Statute 1998, Article 1.

[15] Rome Statute 1998, Article 3.

[16] International Criminal Court, 'The ICC at a Glance' (Factsheet, July 2019) https://www.icc-cpi.int/sites/default/files/Publications/ICCAtAGlanceENG.pdf accessed 22 September 2025.

[17] Daniel Philpott, "Sovereignty: An Introduction and Brief History", [1995] Journal of International Affairs, 48/2, Transcending National Boundaries, 353, 357

[18] N Makovetska and others, 'Global challenges to state sovereignty in the 21st century' (2024) 3 Salud, Ciencia y Tecnología - Serie de Conferencias 661 <doi: 10.56294/sctconf2024.661>.

[19] W.A Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010).

up' or 'complete', and refers to a mutually completing relationship where things are different but form a complete and harmonious combination.[20]

Complementarity institutes a legal system under which the Court and domestic jurisdictions reinforce and enhance each other in their mutual efforts to institutionalize accountability for grave crimes.[21] By the wording of Article 17, the primary responsibility for prosecuting international crimes rests with individual states. The ICC only has jurisdiction in exceptional circumstances, to complement and supplement national jurisdictions rather than replacing them.[22] As such, the ICC is not a replacement for national legal systems; rather, it is a court of last resort.[23] This deferential approach is an acknowledgment of national sovereignty; it ensures that the primary responsibility for justice remains with the state.[24] The ICC can thus, only exercise its jurisdiction when a state is either unwilling or genuinely unable to investigate or prosecute the relevant crimes.[25] By putting the onus on domestic systems first, the ICC serves as a global judicial safety net and avoids being an overreaching judicial body.[26]

5. The 'Unwilling or Unable' Test and Its Criteria

The core of the complementarity principle lies in the 'unwilling or unable' test, which determines a case's admissibility before the ICC. The criteria for this test are detailed in Article 17 of the Rome Statute which states that:

"17(1). Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

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[20] M. Adigun, 'The Principle of Complementarity: A Reflection on Its Meaning, Origin and Types in International Criminal Law' (2021) 29 Afr J Intl & Comp L 82.

[21] Carsten Stahn, 'Complementarity: A Tale of Two Notions' (2008) 19 Criminal Law Forum 87.

[22] Enrique C. Rojo, 'The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From "No Peace without Justice" to "No Peace with Victor's Justice"?' (December 2005) 18 Leiden Journal of International Law, 04, 829, at 832-833

[23] Parliamentarians for Global Action (PGA), 'Complementarity - Rome Statute of the International Criminal Court' (16 August 2020) https://www.pgaction.org/ilhr/rome-statute/complementarity.html accessed 18 September 2025.

[24] Nataliia Makovetska and others, 'Global challenges to state sovereignty in the 21st century' (2024) 3 Salud, Ciencia y Tecnología - Serie de Conferencias 661 https://doi.org/10.56294/sctconf2024.661 accessed 21 September 2025.

[25] Nouwen, S. M. H.,'The Rome Statute: Complementarity in its Legal Context' in Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan (Cambridge University Press 2013) 34–110.

[26] Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (Oxford University Press 2008).

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;
(d) The case is not of sufficient gravity to justify further action by the Court."

From the foregoing, a case is only admissible if the state with jurisdiction is found to be either:

5.1 Unwilling: The Rome Statute outlines specific conditions to determine unwillingness, such as proceedings undertaken to shield the accused from responsibility, unjustified delays, or a lack of independence or impartiality on the part of the prosecuting authority.[27] In the first instance, this refers to situations where a state's domestic proceedings are not genuine and are used to shield an individual from responsibility.[28] This could involve trying the individual for minor offenses instead of the grave international crimes they are accused of, or holding sham trials designed to lead to an acquittal. Another manifestation of a state's unwillingness to prosecute as set out in the Rome Statute is an unjustified delay in the proceedings which in the circumstance, is inconsistent with an intent to bring the person concerned to justice.[29] This occurs when the state deliberately prolongs the legal process to avoid a final judgment, and to buy enough time for international pressure to subside. A third manifestation is lack of independence or impartiality which occurs when proceedings are not, or are not being conducted independently or impartially. This could happen when the judiciary is compromised by political influence or corruption, or when the process is fundamentally unfair, making a just outcome impossible.

5.2 Unable: This refers to situations where a state's judicial system has collapsed or is dysfunctional.[30] This could be due to internal conflict, a failed state, or other systemic issues that prevent it from carrying out a proper investigation or prosecution.[31] In these instances, the ICC becomes a necessary recourse, acting as a response to victims' cry for help.[32] The determination of inability is generally less controversial than unwillingness, as it is based on objective, verifiable conditions of a state's infrastructure and capacity.[33] This criterion focuses on the functional capacity of the state's judicial system, not its intent. The Rome Statute

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[27] W.A Schabas, The International Criminal Court: A Commentary on the Rome Statute (Oxford University Press 2010).
[28] Ezéchiel Amani Cirimwami, 'States of Justice Symposium: What If We Took the 'Unwilling or Unable' Seriously?' (19 August 2020) Opinio Juris https://opiniojuris.org/2020/08/19/states-of-justice-symposium-what-if-we-took-the-unwilling-or-unable-seriously/ accessed 18 September 2025.
[29] Article 17 (2) (b), Rome Statute of the International Criminal Court
[30] Stahn, C. (2008). Complementarity: A Triptych of Challenges for the International Criminal Court. Journal of International Criminal Justice, 6(5), 975–998.
[31] Jann K. Kleffner, Complementarity in the Rome Statute and National Criminal Jurisdictions (Oxford University Press 2008).
[32] Ezéchiel Amani Cirimwami, 'States of Justice Symposium: What If We Took the 'Unwilling or Unable' Seriously?' (19 August 2020) Opinio Juris https://opiniojuris.org/2020/08/19/states-of-justice-symposium-what-if-we-took-the-unwilling-or-unable-seriously/ accessed 18 September 2025.
[33] Sarah M. H. Nouwen, 'The Rome Statute: Complementarity in its Legal Context' in 'Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan' (Cambridge University Press 2013) 34–110.

specifies that inability must be due to a total or substantial collapse or unavailability of the national judicial system.[34] Inability could manifest in form of state collapse. This would mean that the state's government or judicial infrastructure has completely disintegrated due to internal conflict, civil war, or other systemic breakdown. Another example is a dysfunctional judiciary. This could mean a lack of resources, the inability to obtain necessary evidence or testimony due to insecurity, or a complete absence of a functioning police force or prosecuting authority to carry out investigations.[35] Another manifestation of inability is inability to secure the accused. The state may be unable to secure the person concerned, either because they are in hiding, have fled, or the state does not have the capacity to arrest them.

Complementarity, while respecting a state's primary role, still represents a conditional surrender of sovereignty, which can trigger external intervention from the ICC.[36] This may therefore create a situation where national governments choose to prioritize political stability or reconciliation over accountability.[37] Despite this challenge, the ICC plays a vital role as a court of last resort. An investigation can be initiated through three distinct pathways, as outlined in Article 13 of the Rome Statute. A State that is a party to the Rome Statute may refer a situation which discloses the commission of a crime under the Statute, to the prosecutor.[38] The UN Security Council (UNSC) may refer such situation to the prosecutor,[39] or the Prosecutor may open an investigation *Proprio Motu* i.e on his own initiative.[40] The ICC is both a corrective as well as a deterring measure against impunity for the gravest offenses.[41] And by the principle of complementarity, it strikes a delicate but vital balance between non-interference and the imperative to deliver justice for victims of genocide, aggression, war crimes, and crimes against humanity.[42] The ICC's role is to act as a safety net or a complementary body when a state's justice system fails. The principle encourages states to strengthen their own legal systems to effectively prosecute these crimes, as this would prevent ICC intervention. The ICC's jurisdiction is secondary, not primary, to that of national courts. This design

[34] Article 17 (3), Rome Statute of the

[35] Ezéchiel Amani Cirimwami, 'States of Justice Symposium: What If We Took the 'Unwilling or Unable' Seriously?' (19 August 2020) *Opinio Juris* https://opiniojuris.org/2020/08/19/states-of-justice-symposium-what-if-we-took-the-unwilling-or-unable-seriously/ accessed 18 September 2025.

[36] Nataliia Makovetska and others, 'Global challenges to state sovereignty in the 21st century' (2024) 3 Salud, Ciencia y Tecnología - Serie de Conferencias 661 https://doi.org/10.56294/sctconf2024.661 accessed 21 September 2025.

[37] Stahn, C. (2008). Complementarity: A Triptych of Challenges for the International Criminal Court. Journal of International Criminal Justice, 6(5), 975–998.

[38] Article 13 (a) & 14, Rome Statute of the International Criminal Court.

[39] Article 13 (b), Rome Statute of the International Criminal Court.

[40] Article 13 (c) & 15, Rome Statute of the International Criminal Court.

[41] Parliamentarians for Global Action (PGA), 'Complementarity - Rome Statute of the International Criminal Court' (16 August 2020) https://www.pgaction.org/ilhr/rome-statute/complementarity.html accessed 18 September 2025.

[42] Stahn, C. (2008). Complementarity: A Triptych of Challenges for the International Criminal Court. Journal of International Criminal Justice, 6(5), 975–998.

was a compromise to balance the need for international justice with respect for state sovereignty.[43]

6. Grave Crimes of International Concern in Nigeria

Boko Haram, which translates in Hausa into "*western education is a sin*" was founded by Mohammed Yusuf in 2002[44] in Nigeria's Yobe and Borno states and is headquartered in Maiduguri.[45] The Islamic sect's core ideology revolves around rejecting Western influence and the secular state, seeking the universal implementation of pure Sharia law to remedy perceived moral corruption among federal, state, political, and religious elites. Despite the fact that Sharia law is already in operation in 12 Northern states, the group believes that politicians have subverted its integrity for personal gain.[46] Boko Haram targets churches, individual Christians, Muslim critics, government buildings, police stations, schools, banks, and those engaging in activities deemed un-Islamic. The group's violent confrontation with the Nigerian security services resulted in the extrajudicial killing of Mohammed Yusuf in 2009, propelling the group's strategy towards extreme violence under the leadership of Abubakar Shekau, Yusuf's successor.[47] This led to a mass arrest of suspects by the Nigerian government in 2009. Yet, the organization has continued to recruit members from economically and politically marginalized Northerners.[48]

Nigeria experienced repeated Christmas-time church attacks by the Boko Haram between 2010 and 2012, and a call for Christians to leave northern Nigeria. The group's reign of terror has spanned over a decade. A few other instances are the 2014 Gamboru Ngala attack, where hundreds of residents were killed,[49] the 2015 Baga Massacre, where the group killed an estimated 2,000 civilians in Baga, burning homes and destroying public infrastructure;[50] and the 2016 Dalori Massacre, where more than 50 citizens were killed;[51] A study found that the group carried out 238 suicide bombing

[43] Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford University Press 2008).
[44] Alexander Thurston, Boko Haram: The History of an African Jihadist Movement, Princeton University Press, 2018, p. 16.
[45] United States Commission on International Religious Freedom, 'Did You Know...Boko Haram in Nigeria' (website, undated) https://www.uscirf.gov/publications/did-you-knowboko-haram-nigeria accessed 27 September 2025.
[46] Ibid.
[47] Jason Warner, Ryan O'Farrell, Héni Nsaibia and Ryan Cummings, *The Islamic State in Africa: The Emergence, Evolution, and Future of the Next Jihadist Battlefront*, Hurst & Company, London, 2018, p. 46.
[48] United States Commission on International Religious Freedom, 'Did You Know...Boko Haram in Nigeria' (website, undated) https://www.uscirf.gov/publications/did-you-knowboko-haram-nigeria accessed 27 September 2025.
[49] "Hundreds killed in Boko Haram raid on Unguarded Nigerian town", *The Guardian*, 8 May 2014.
[50] Monica Mark, "Boko Haram's 'Deadliest Massacre': 2,000 Feared Dead in Nigeria", *The Guardian*, 10 January 2015
[51] "At Least 50 Killed in Boko Haram Attack in Northeastern Nigeria", VOA *News*, 31 January 2016.

attacks with 434 bombers targeting 247 locations between 2011 and 2017.[52] Boko Haram destroys schools, hospitals and government buildings as an affront to the Nigerian state. They have killed over 2,295 teachers and destroyed 1,400 schools in Northeastern Nigeria.[53] Moreover, more than 3.9 million people have been displaced in Nigeria as a result of the protracted Boko Haram insurgency and about 2.1 million of this population are internally displaced within the country.[54]

7. Nigeria's Domestic Prosecution Scene

There is a connection between Nigeria's security woes and the documented inability of the Nigerian criminal justice actors to meet the contemporary demands of addressing serious crimes thus, festering basic law and order concerns into a security crisis.[55] The shortcomings of the Nigerian criminal justice system have negatively impacted the ability of the Nigerian state to hold human rights violators in the protracted conflict accountable. The legal and institutional framework for addressing crimes committed by Boko Haram has been largely inefficient. For instance, Nigerian security agents from 2009 started arresting suspects en masse across Northern Nigeria but trials were not commenced until nine years later, invariably resulting in prolonged and unlawful detention, a contradiction of the principle of presumption of innocence and the constitutional provisions for arrest and detention. [56] Criminal trials of these arrested defendants only began in 2017 and it is unclear how many more suspects are still languishing in detention.[57] The fairness of the trial process is another cause for concern. The Nigerian authorities adopted a mass trial system alien to its domestic criminal justice system, speedily conducted, and involving only a limited number of judicial officers, without adequate legal representation for defendants. Four rounds of trial were conducted for Boko Haram suspects between 2017 and 2024. In the first round, held in October 2017, 575 defendants were tried in secret at the Wawa Military Cantonment in Kainji, Niger.[58] The second round, in February 2018, involved an unknown number of defendants and was partially open to a limited number of observers from non-governmental organizations and select media.[59] The third round, conducted in July 2018, tried over 200 defendants.[60] The fourth round occurred at Wawa in July 2024,

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[52] Jason Warner and Hilary Matfess, Exploding Stereotypes: The Unexpected Operational and Demographic Characteristics of Boko Haram's Suicide Bombers, Combating Terrorism Center at West Point, 2017, p. 4.

[53] UNICEF, 'More than half of all schools remain closed in Borno State, epicentre of the Boko Haram crisis in northeast Nigeria' (Press Release, 29 September 2017) https://www.unicef.org/press-releases/more-half-all-schools-remain-closed-borno-state-epicentre-boko-haram-crisis accessed 30 September 2025.

[54] United Nations High Commissioner for Refugees, "Nigeria Emergency", 2021.

[55] Tosin T. Osasona, "Time to Reform Nigeria's Criminal Justice System", in *Journal of Law and Criminal Justice*, 2015, vol. 3, no. 2, p. 73.

[56] S35, Constitution of the Federal Republic of Nigeria, 1999

[57] Human Rights Watch, "Nigeria: Flawed Trials of Boko Haram Suspects", 17 September, 2018.

[58] Ibid.

[59] Ibid

[60] Ibid.

involving 300 defendants.[61] With the large number of individuals involved, these proceedings could not have genuinely served the end of justice but appear to be mere charades designed to dispense swiftly with thousands of inmates held in military custody; to give off an appearance of state control of the situation, douse tension among the populace and subside international outcry.

A review of the mass trials shows serious problems in the justice system that affect the fairness of the process. The short time given for the trial phases was not enough to properly investigate the large number of suspects involved. This problem was made worse by the large number of case files and issues that started during the arrest and detention stages. Most of the cases were based on weak evidence, relying mainly on confessional statements instead of strong, independent proof. This heavy use of confessions raises important concerns about fair trial rights and whether the system respects the presumption of innocence.[62]

8. The ICC and Nigeria

Nigeria became a State Party to the Rome Statute when it signed the statute on 1st June, 2000 and ratified it on 27 September, 2001.[63] This grants the ICC jurisdiction over crimes committed in Nigeria since that date, and obligates Nigeria to cooperate fully with the Court's investigations and prosecutions. But despite ratifying the statute, Nigeria has failed to successfully domesticate it, making it largely unenforceable in the country.[64] As such, Nigeria has no legal wherewithal, in terms of written law, to effectively prosecute any of the four crimes delineated in the Rome Statute.

The ICC opened a preliminary examination into the situation in Nigeria in November 2010, after receiving several communications in accordance with article 15, on the conflict.[65] The office of the prosecutor for about a decade looked into crimes committed both by the Boko Haram, and the Nigerian Security Forces (NSF). Whilst Boko Haram continued to commit acts of violence across the Northeast,[66] the Nigerian government's counter-insurgency tactics such as excessive use of force and prolonged unlawful detention of hundreds of suspected members without charge, greatly exacerbated the

[61] Adam Abu-Bashal, "300 Members of Boko Haram on Trial in Nigeria", AA News, 25 July 2024; Camillus Eboh, "Nigeria Courts Convict 125 Boko Haram Islamist Insurgents in Mass Trial", Reuters, 27 July 2024.
[62] Tosin T Osasona, Holding Boko Haram and Security Services Accountable in Nigeria and the Lake Chad Basin (Policy Brief Series No 171, 7 May 2025) https://share.google/p7afeNJgQjHO08CC4 accessed [Accessed 30 September, 2025].
[63] Parliamentarians for Global Action, 'Nigeria and the Rome Statute' https://www.pgaction.org/ilhr/rome-statute/nigeria.html accessed 20 September 2025.
[64] Ibid.
[65] International Criminal Court (ICC), 'Preliminary Examination: Nigeria' (18 November 2010) https://www.icc-cpi.int/nigeria accessed 25 September 2025
[66] Human Rights Watch, 'Nigeria: Boko Haram Widens Terror Campaign' (23 January 2012) https://www.hrw.org/news/2012/01/23/nigeria-boko-haram-widens-terror-campaign accessed 25 September 2025.

conflict.[67] The Office of The Prosecutor also noted other potential crimes, including those in the Niger-Delta and the Middle Belt states.[68] The Prosecutor determined there was a reasonable basis to believe that War Crimes and Crimes Against Humanity had been committed by both Boko Haram and the NSF.[69] These included murder, persecution, abduction, imprisonment, attacks on educational buildings, and the recruitment and use of child soldiers on the part of Boko Haram; as well as murder, extrajudicial executions, mass arbitrary arrests, torture, sexual violence, and detainee deaths in military custody on the part of the NSF.[70]
On 11 December 2020, the Prosecutor, Fatou Bensouda announced the conclusion of the preliminary examination, having determined that all legal criteria were met for a formal investigation.[71]According to the Prosecutor, War Crimes and Crimes against Humanity had been committed by both Boko Haram and the Nigerian armed forces, and Nigerian government had neglected its duty to ensure accountability for these actions.[72] She specifically concluded that Nigeria's national investigations and prosecutions were limited in scope and depth, finding that proceedings against both Boko Haram and the NSF either did not cover substantially the same alleged conduct or were against low-level perpetrators, thus failing the admissibility test under the principle of complementarity.[73]

Following the 2020 conclusion, the situation moved into a limbo phase, where a formal investigation was warranted but not formally requested by the OTP.[74] The current Prosecutor, Karim A.A. Khan KC, has engaged with Nigerian authorities, emphasizing their primary responsibility and giving a chance to the principle of complementarity to allow Nigeria to genuinely address the impunity gap.[75]

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[67] Reuters, 'Nigeria's Boko Haram kills dozens in northeast' (2 December 2012) https://www.reuters.com/article/us-nigeria-violence/nigerias-boko-haram-kills-dozens-in-northeast-idUSBRE8B10BT20121202 accessed 25 September 2025.
[68] Coalition for the International Criminal Court, 'Nigeria' https://www.coalitionfortheicc.org/country/nigeria accessed 20 September 2025.
[69]Ibid
[70] Nouwen S M H, 'The Rome Statute: Complementarity in its Legal Context' in Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan (Cambridge University Press 2013) 34–110
[71] Ibid
[72] ICC, "Statement of the Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Nigeria", Press Release, 11 December 2020 (https://www.legal-tools.org/doc/qgeosj/).
[73] Coalition for the International Criminal Court, 'Nigeria' https://www.coalitionfortheicc.org/country/nigeria accessed 20 September 2025.
[74] Amnesty International, 'Nigeria: ICC must not dash the hope of survivors of atrocities by the military' (28 March 2024) https://www.amnesty.org/en/latest/news/2024/03/nigeria-icc-must-not-dash-the-hope-of-survivors-of-atrocities-by-the-military/ accessed 20 September 2025.
[75] International Criminal Court, 'Nigeria' (ICC Website) https://www.icc-cpi.int/nigeria accessed 20 September 2025.

The delay in formally opening an investigation, despite the 2020 findings, has drawn strong criticism from victims and civil society groups like Amnesty International, who have accused the ICC of slow abandonment of victims and failing its legal duty. Legal filings have been submitted to the ICC's Pre-Trial Chamber, arguing that the Prosecutor must act in conformity with the Rome Statute and request authorization to proceed.[76] The ICC Pre-Trial Chamber, however, has indicated a lack of power to compel the Prosecutor's decision on Article 15(3) obligations. The situation remains under active observation, with the ICC stressing its commitment to move forward with an investigation if genuine national efforts to prosecute those most responsible fail to materialize.[77]

Post 2020, the ICC acknowledged the alleged crimes committed during the #EndSARS protests and began to examine the information received. #EndSARS started as a call for the disbandment of Nigeria's Special Anti-Robbery Squad (SARS), a unit of the Nigerian Police Force that was notorious for large scale human rights violations.[78] The #EndSARS protests, which peaked in October 2020, and the subsequent response by Nigerian security forces, including the alleged killings of civilians by Nigerian military and police, at the Lekki Toll Gate on 20 October 2020, fell within the jurisdiction of the ICC. Information and communications concerning the alleged human rights violations committed during the #EndSARS protests were formally received by the office of the Prosecutor.[79] The widespread and systematic nature of the alleged use of excessive force by security operatives, including reports of killings, torture, and arbitrary detentions of protesters,[80] raised the possibility that such conduct could amount to Crimes Against Humanity under the Rome Statute. The office of the prosecutor confirmed that it was actively analysing the information received to determine if the alleged crimes fall within the Court's jurisdiction and are of sufficient gravity and admissibility to warrant a full investigation.[81] Its conclusion remains to be seen.

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[76] Coalition for the International Criminal Court, 'Nigeria' https://www.coalitionfortheicc.org/country/nigeria accessed 20 September 2025.

[77] Khan, K.A.A., 'ICC Prosecutor, Mr Karim A.A. Khan QC, concludes first official visit to Nigeria' (22 April 2022) International Criminal Court https://www.icc-cpi.int/news/icc-prosecutor-mr-karim-aa-khan-qc-concludes-first-official-visit-nigeria accessed 25 September 2025.

[78] BBC News, 'End Swat: Nigerians reject police unit replacing hated Sars' (BBC News, 14 October 2020) https://www.bbc.co.uk/news/world-africa-54531449 accessed 30 September 2025.

[79] John Owen Nwachukwu, 'End SARS: ICC begins probe of shootings, crimes in Nigeria' (Daily Post, 4 November 2020) https://dailypost.ng/2020/11/04/end-sars-icc-begins-probe-of-shootings-crimes-in-nigeria/ accessed 30 September 2025.

[80] Amnesty International, 'Nigeria: Three years after #EndSARS at least 15 protesters languish in Lagos jail' (20 October 2023) https://www.amnesty.org/en/latest/news/2023/10/nigeria-three-years-after-endsars-at-least-15-protesters-languish-in-lagos-jail/ accessed 25 September 2025.

[81] International Criminal Court, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria' (11 December 2020) https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-nigeria accessed 25 September 2025.

Domestically, Judicial Panels of Inquiry were established in several states such as Oyo, Ogun, Rivers and more notably Lagos state to investigate cases of human rights violations committed by the disbanded SARS, and make recommendations for institutional reform and compensations for proven victims.[82] While these panels made recommendations along this line, catering to granting victims reprieve, it was less concerned about punishing offenders, a viable deterrent against future acts. The challenge for the ICC however, is to determine if these domestic efforts, including the findings and recommendations of these panels and subsequent legal actions, constitute genuine national proceedings against those most responsible for the alleged crimes.[83] Civil society groups, such as Amnesty International, continue to report on the lack of accountability and the ongoing arbitrary detention and torture of protesters several years later.[84] This lends credence to the argument that national proceedings are neither genuine nor effective.

What is more, Nigeria has made three unsuccessful attempts at domesticating the Rome Statute. First in 2001, 2006 and then 2012.[85] The bill titled 'Crimes against Humanity, Genocide and Related Offences Bill 2012,' was put before the National Assembly but has not been enacted, till date.[86]

9. Nigeria's Cry for Help

The pursuit of justice for victims of mass atrocities in Nigeria is a pressing and continuing issue, leading many to view the International Criminal Court (ICC) as a much needed messiah. For victims and their communities, the ICC presents as a beacon of hope and a platform to amplify their injuries, toward the end of redress. Consequent on the identified domestic challenges of inadequate legal framework, perfunctory investigations and insincere prosecution, there is heavy expectation that the ICC would and should step in and act. This stems from a profound and agonizing realization that the Nigerian government has failed in its primary duty to protect its citizens and hold perpetrators accountable.[87] The conflict in northeastern Nigeria involving the non-state armed group Boko Haram and the Nigerian armed forces serves as a prime example of domestic failure to prosecute mass atrocities. As a result, in December 2024, Amnesty International after years of urging the office of the Prosecutor to open an investigation in Nigeria, submitted a legal filing to the Pre-Trial Judges of the International Criminal

[82] Human Rights Watch, 'Nigeria: Officials Indicted for Abuses on Protesters' (HRW, 19 November 2021) <https://www.hrw.org/news/2021/11/19/nigeria-officials-indicted-abuses-protesters> accessed 3 October 2025.

[83] International Criminal Court, 'Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in Nigeria' (11 December 2020) https://www.icc-cpi.int/news/statement-prosecutor-fatou-bensouda-conclusion-preliminary-examination-situation-nigeria accessed 25 September 2025.

[84] Amnesty International, 'Nigeria: Three years after #EndSARS at least 15 protesters languish in Lagos jail' (20 October 2023) https://www.amnesty.org/en/latest/news/2023/10/nigeria-three-years-after-endsars-at-least-15-protesters-languish-in-lagos-jail/ accessed 25 September 2025.

[85] Benson Chinedu Olugbuo, 'Acceptance of International Criminal Justice in Nigeria: Legal Compliance, Myth or Reality?' in Evelyn A Ankumah (ed), The International Criminal Court and Africa: One Decade On (Intersentia 2016) 381.

[86] Ibid.

[87] Bello, A., Justice for the Voiceless: Human Rights in Nigeria (Oxford University Press 2019).

Court (ICC) requesting an end to the ICC Prosecutor's refusal to investigate war crimes and crimes against humanity in Nigeria.[88]

10. The 'Unwilling and Unable' Test in the Nigerian Context

Clearly, Nigeria has failed the unwilling and unable test from all indications. The failure of Nigerian authorities to genuinely investigate and prosecute these crimes portrays both political unwillingness and legal inability.

The Nigerian government's actions suggest a degree of unwillingness to prosecute the most serious crimes, particularly those allegedly committed by its own forces. According to the principle of complementarity, a state is unwilling if its proceedings are undertaken to shield the accused from criminal responsibility.[89] There has been a notable lack of prosecution of high-ranking military officials for their alleged roles in war crimes. Investigations, when they occur, are often internal military inquiries that lack independence and transparency, typically concluding with a finding of no wrongdoing. This suggests an intent to shield perpetrators from genuine accountability. Furthermore, the government has historically prioritized a military-first approach over a comprehensive justice response. This has resulted in a failure to conduct prompt and effective investigations into allegations against its forces. Beyond the issue of political will, Nigeria's justice system genuinely struggles with the capacity to handle cases of such a scale and complexity. The ICC can intervene when a state's judiciary is rendered functionally unavailable, which applies here.[90]

The failure of the government to adequately address widespread violence has created a vacuum of justice, which has been filled with the despair of victims who now see the ICC as the only credible body capable of delivering the accountability they so desperately need.[91] The victims' plea also inadvertently transfers the responsibility to the ICC under the principle of Responsibility to Protect (R2P). By this principle, the ICC's involvement will not be an affront to state sovereignty, but fulfillment of a collective international duty to protect human life and dignity.[92] The court's role,

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[88] Amnesty International, 'Nigeria: Amnesty International petitions ICC judges to end Prosecutor's delaying of justice for atrocity crimes' (Amnesty International, 2 December 2024) https://www.amnesty.org/en/latest/news/2024/12/nigeria-amnesty-international-petitions-icc-judges-to-end-prosecutors-delaying-of-justice-for-atrocity-crimes/ (accessed 3 October 2025).

[89] Parliamentarians for Global Action (PGA), 'Complementarity - Rome Statute of the International Criminal Court' (16 August 2020) https://www.pgaction.org/ilhr/rome-statute/complementarity.html accessed 18 September 2025

[90] Cirimwami E A, 'States of Justice Symposium: What If We Took the 'Unwilling or Unable' Seriously?' (19 August 2020) Opinio Juris https://opiniojuris.org/2020/08/19/states-of-justice-symposium-what-if-we-took-the-unwilling-or-unable-seriously/ accessed 18 September 2025

[91] Amadi, S., 'Nigeria and the International Criminal Court: A Victim-Centred Approach to the Responsibility to Protect' (2020) 14 *African Journal of International and Comparative Law* 301.

[92] A Adewoye, 'The International Criminal Court and the Challenge of Justice in Africa: The Nigerian Perspective' (2018) 12 Journal of International Criminal Justice 913.

therefore, is not merely to prosecute individuals but to acknowledge the victims' pain and provide them with closure.[93]

The failure of a state's domestic legal system to protect its population from mass atrocities triggers R2P doctrine. R2P is not an automatic right of intervention, but rather a principle that affirms a state's primary duty to protect its people from genocide, war crimes, ethnic cleansing, and crimes against humanity. When a state is unwilling or unable to fulfill this duty, its sovereignty is no longer absolute, and the international community has a responsibility to act. R2P framework transforms a national crisis into a matter of international concern when domestic systems break down and impunity becomes the norm.[94]

11. The Way Forward

Despite its reluctance or unwillingness to intervene as can be seen in Nigeria's instance, the ICC's role is indispensable for international justice. The very existence of the Court acts as a potential deterrent against future crimes, reinforcing the global norm against impunity for the gravest offenses.[95] The Court's work in upholding the principle of complementarity, by acting as a safeguard when domestic systems are unwilling or unable to prosecute, remains a vital contribution to global justice.[96] However, the ICC's tardiness must be seen as a call to strengthen domestic redress mechanics and proffer locally brewed solutions to grave crimes.

11.1 Institutionalizing Domestic Justice: the best place to begin is to ensure that the hitherto abandoned Crimes against Humanity, Genocide and Related Offences Bill 2012 must be swiftly and successfully passed into law in Nigeria, to give the Rome Statute full effect and criminalise the offences it criminalises, locally. Government must consequently embark on capacity building for judicial actors, namely law enforcement, lawyers and judges as well as the general public to equip them with the necessary skill and ability to facilitate the implementation of this law. Victims must be trained on how to kickstart the prosecution process by filing reports. Prosecution must be trained on evidence gathering and thorough investigation to support trial. Judges and court staff must be trained on how to effectively conduct international crime trials.

[93] E Chibueze, 'The ICC and the Nigerian Conflict: A Cry for Justice' in ON Uchendu (ed), *Accountability for Atrocities: A Nigerian Perspective* (Routledge 2021) 155.

[94] Welsh, J.M. (2002) 'From Right to Responsibility: Humanitarian Intervention and International Society' 'Global Governance' 8, pp. 503-521.

[95] Sarah M. H. Nouwen, 'The Rome Statute: Complementarity in its Legal Context' in Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan (Cambridge University Press 2013) 34–110.

[96] Parliamentarians for Global Action (PGA), 'Complementarity - Rome Statute of the International Criminal Court' (16 August 2020) https://www.pgaction.org/ilhr/rome-statute/complementarity.html accessed 18 September 2025.

11.2 Political Willingness: Nigeria must develop a political will to redress the commission of serious crimes, domestically as the ICC is no saviour. To this end, perpetrators must be brought to book by the appropriate state prosecuting authorities and government must refuse to shield them from responsibility. The need to bring offenders to book, and deter future crimes must take precedence at all times over maintaining a pretend peaceful national outlook, and fragile unsustainable political settlements.

11.3 International Support for Domestic Prosecution Mechanisms: The ICC must support the establishment of specialized national judicial and prosecutorial units dedicated to the serious international crimes with a focusing on providing financial and technical aid for the conduct of complex investigations, witness protection, comprehensive trial, and general implementation of the domestic law, once it comes into enforcement. Additionally, Nigeria must partner with state parties to the Rome Statute, who have successfully domesticated the statute, on knowledge sharing for judicial actors, as well as international cooperation on extraterritorial arrest and detention of criminal actors, who may escape from Nigeria or seek protection in other states.

11.4 Qualified Aid for Justice Reform: International organizations such as the World Bank, African Development Bank, United Nations agencies etc must create specialised or qualified assistance for rule of law sectors on the creation and implementation of domestic laws, enforcement units and redress mechanisms, as a sign of their commitment to domestically brewed transitional justice; and to deflect the over-reliance on the ICC.

12. Conclusion

In the Nigerian context, the principle of complementarity is at crossroads. On one hand, it upholds the primacy of state sovereignty and the responsibility of domestic systems to prosecute grave crimes, something that is currently weak, ineffective and nearly non-existent in Nigeria. On the other, it serves as a vital safeguard, enabling the International Criminal Court (ICC) to step in as a court of last resort when national systems are unwilling or unable to deliver justice, a duty the court has demonstrated great reluctance to fulfil. This has occasioned a socio-legal impasse, whilst the public outcry for redress subsists. The logical conclusion is that the task of addressing serious crimes such as War Crimes, Crimes against Humanity, Genocide and Aggression lies more heavily, in the hands of domestic legal systems. And the need to create and strengthen local mechanisms for redress is more crucial now than ever. The onus lies on the Nigerian government acting through its legislative arm to kick-start the process by enacting requisite legislation, whilst the executive and judiciary arms gear up, for its full implementation.