

Complementarity and Alternative Justice

A New Test for ICC Admissibility



Issue

Whether a country asking for deferral of prosecution by the International Criminal Court (ICC) can satisfy the ICC's complementarity standard when the country seeks to replace the ICC prosecution with use of "alternative justice mechanisms" (AJM), such as truth commissions, customary local procedures, lustration, reparations or amnesties.

Rule

Pursuant to Article 17 of the ICC's Rome Statute, complementarity awards primacy of jurisdiction to a state's domestic courts unless the ICC deems the state "unwilling or unable genuinely to prosecute."

Problem

The statutory language and materials interpreting Article 17 provide only general suggestions for how the ICC could determine whether alternative mechanisms render a case inadmissible under the complementarity regime.



Solution

Direct the ICC to use a concrete set of five analytic criteria to formulate an admissibility test for conducting complementarity analysis in difficult cases of municipal reliance on alternative justice mechanisms

Analytic Criteria

Circumstances Surrounding the ICC Referral and Request for Deferral

- Self-Referral v. Third-Party Referral
- Timing of the Deferral Request

State of Affairs in the Domestic Jurisdiction Seeking Deferral

- Legitimacy
- Capacity
- Stability

Alternative Justice Mechanism Itself

- Circumstances Surrounding the Body's Creation
- Degree of Judicialization
- Holistic Effect on the Transition Process

Crimes at Issue

- Relationship b/w ICC Crimes Charged and AJM-contemplated Crimes
- Gravity of the Crimes

Prosecution Target

- Fairness of the ICC in Target Selection
- Leadership Position of the Target
- Target's Potential Role in Post-Conflict Society

