Analyzing the International Criminal Court Complementarity Principle Through a Federal Courts Lens

Introduction

The signing of the Rome Statute that created the International Criminal Court (ICC) was viewed by many in the international law community as a constitutional moment not unlike the passage of the Judiciary Act of 1789.[1] In giving birth to a new type of legal institution, the Rome Statute created a void in the ability of any existing body of law to precisely convey the nature of the ICC. The Court is neither in a direct vertical nor horizontal relationship to State courts, with the result that traditional international or national legal norms do not apply.[2] The federal courts in relation to state courts initially encountered much the same problems that the ICC is encountering in relation to national courts because the federal court system provided an entirely new way of imagining the American legal structure.[3] Although the comparison is not perfect, the similarities in the situations render the doctrines of federal courts law highly relevant to a study of the manner in which the ICC can interact with States.[4] Federal courts law contains a wealth of doctrines such as exhaustion and abstention that are useful both for explaining ICC deference to State proceedings, a regime known as complementarity, and how or when the ICC can or should deviate from that initial deference.

Background

The International Criminal Court (ICC) came into existence as a result of a multilateral convention, known as the Rome Statute, that was signed on July 17, 1998. The Rome Statute was voted into effect by 120 States and the Court was born on July 1, 2002. With almost a hundred ratifications, the Court is now in its third year of existence. The Court consists of the Presidency, Chambers, in which the judges sit, the Office of the Prosecutor, which is responsible for receiving referrals, and conducting investigations and prosecutions, and the Registry, which is responsible for non-judicial aspects of the administration of the Court. In the greater context, the ICC is the first court of its kind. It is a permanent criminal court whose nearest relatives are the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda

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[1] Leila Nadya Sadat and S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 407 (2000).

[2] *See* Harold Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) (differentiating between horizontal regimes in which nation states interact on a state-to state level within treaty regimes, and vertical regimes in which international legal norms are promoted from one body and are integrated through trickle-down into each nation at a domestic level; the ICC does not require integrating legislation by State Parties, yet it does not interact on a state-to-state level, thus occupying a strange in-between space).

[3] Wilfred Ritz, REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789: EXPOSING MYTHS, CHALLENGING PREMISES, AND USING NEW EVIDENCE 5 (1990) ("The most striking fact about the new national judicial system is that it was in fact new.…it must be emphasized that the state judiciaries that existed at the end of the eighteenth century were not organized in [the current] fashion, and that part of the controversy surrounding Article III arose on this historical fact.").

[4] *See* Ernest A. Young, *Institutional Settlement in Foreign Affairs Law*, __ DUKE J. COMP. INT'L L. ___ (2005) (forthcoming) (proposing the need to apply federal courts theory to the relationship of "supranational courts" to domestic institutions).

(ICTR), both of which, however, are UN bodies that have limited geographical and temporal jurisdiction.[5]

After a heated negotiation process in which the interests of sovereign States and human rights groups and other NGOs clashed over the intended strength of the Court, the Rome Statute bestowed upon the ICC a complementarity regime that gives States the primary claim to conduct proceedings in cases which might otherwise qualify for ICC jurisdiction.[6] This idea is embodied in paragraph 10 of the Rome Statute's Preamble as the idea "that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Unlike the ICTY and ICTR charters which give those courts primacy over any national proceedings,[7] the ICC is meant to be secondary and only provide a forum when the State proceedings fail. For this purpose, the Court under Article 17 retains the ability to initiate investigations and prosecutions if, and only if, it is able to show that the State is either not taking any action or that the State is "unwilling or unable genuinely to carry out the investigation or prosecution." The idea is that, "[i]n exercising its jurisdiction, the Court will be acting as an extension of the territorial and national criminal *jurisdiction* available to States Parties; by limiting such exercise to where States are unable or unwilling, the Statute shows that the Court is not also an extension of States Parties' national criminal justice *systems*. It does not replace or supplant national jurisdictions."[8] Crucial to this regime is the consent of the States who, through their signatures, "recognize the Court's jurisdiction over all the crimes within its jurisdiction."[9] The foundation of the Court's jurisdiction is State consent and it acts only as an extension of the national systems when the States are incapable, not as an appellate court.[10]

To this end, the Court has a very specific realm in which it is designed to function. The ICC has only subject matter jurisdiction over the crimes listed and defined

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[5] *See generally*, Roy S. Lee, *Introduction*, in Roy S. Lee, ed., THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS RESULTS 1 (1999); William Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 1-25 (2004); M. Cherif Bassiouni, *Historical Survey: 1919-1998*, in M. Cherif Bassiouni and Bruce Broomhall, ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION, 13 Nouvelles Études Pénales 1 (1999). [hereinafter, *Historical Survey*]

[6] *See* Philippe Kirsch and John T. Holmes, *The Rome Conference on an International Court: The Negotiating Process*, 93 AMER. J. INT'L L. 2 (1999); Otto Triffterer, *Preliminary Remarks: The Permanent ICC – Ideal and Reality*, in Otto Triffterer, ed., COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 43 (1999); John T. Holmes, *The Principle of Complementarity*, in Lee, ed., *supra* note 5, at p.41 [hereinafter *Principle of Complementarity*]; Bruce Broomhall, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 67-78 (2003) [hereinafter INTERNATIONAL JUSTICE]. *See also generally*, William Driscoll, Joseph Zompetti, and Suzette Zompetti, eds., THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE (2004).

[7] *See* Mohammed El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 882-889 (2002); John T. Holmes, *Complementarity: National Courts* versus *the ICC*, in Antonio Cassese, Paola Gaeta, and John Jones, eds., THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 668-70 (2002). [hereinafter *National Courts* versus *the ICC*]

[8] Bruce Broomhall, *The International Criminal Court: Overview and Cooperation with States* in Bassiouni and Broomhall, eds., *supra* note 5, at 143. [hereinafter *Overview and Cooperation*]

[9] Id.. at p.64.

[10] *See* Holmes, *Principle of Complementarity*, *supra* note 6, at 49 (citing the concerns of States that the Court not function as a court of appeal).

within the statute itself – namely, genocide, crimes against humanity, and war crimes.[11] Additionally, the Court is limited to crimes committed after the enactment of the Statute,[12] and the Court's jurisdiction can only be exercised via one of three ways: referral by a State Party, referral by the Security Council, or the Prosecutor may initiate an investigation based on his *proprio motu* power.[13]

Although complementarity is typically deemed a safeguard for national sovereignty, it actually encompasses a dual capacity. From a simple viewpoint, complementarity allows the Court to defer to national judiciaries and prevents the Court from taking jurisdiction away from States.[14] The interface of ICC and national jurisdiction, however, also creates an area of expansion for ICC jurisdictional reach by allowing the Court itself to review and assess national judiciaries. The tension between the Court's twofold mandate to practice both restraint and autonomy again recalls the federal court system's need to manage state court independence while maintaining the supremacy of federal law and the Constitution.

The ICC in its incipient stages of development thus faces the challenge of delineating limitations and standards for its process of admitting cases. Just as the Supreme Court in *Marbury v. Madison* reserved to itself the ability to determine its own jurisdiction,[15] so the Rome Statute charges the ICC with the task of determining the extent of its own jurisdiction.[16] As part of its task, the Court must make determinations on admissibility requirements, a task which begins with the guidelines prescribed by the Rome Statute. Although the word complementarity is not used in the Rome Statute, the idea is embodied in several parts of the treaty. For example, the Preamble states that the ICC "shall be complementary to national criminal jurisdictions."[17] The crux of the complementarity scheme, however, lies in Articles 17 which addresses admissibility. In short form, Article 17 requires the Court to consider a case inadmissible when (a) a State is already investigating or prosecuting, (b) the State has already investigated and decided not to prosecute, (c) the accused has already been tried or (d) the case is not of sufficient gravity. A case *is* admissible, however, if the Prosecutor can prove that any of the preceding scenarios resulted from the State's "unwillingness" or "inability" to

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[11] These are listed and defined with great specificity in Art. 5-8. Crimes of aggression were tabled under Art. 123 for further discussion and possible adoption at the first Review Conference seven years after the entry into force of the Rome Statute. Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on July 17, 1998, pmbl. P10, U.N. Doc. A/CONF. 183/9 (1998) *available at* http://www.un.org/law/icc/statute/99_corr/cstatute.htm (last checked April 27, 2005). [hereinafter Rome Statute]

[12] This is under jurisdiction *ratione temporis* in Article II of the Rome Statute.

[13] Rome Statute, *supra* note 11, Art. 13-15.

[14] Complementarity is not precisely aligned with jurisdiction in that it hinges on admissibility, a type of "quasi-jurisdictional" standard for determining the ICC's caseload which lacks a counterpart in federal courts law. *See* Christopher Blakesley et al, *Association of American Law Schools Panel on the International Criminal Court*, 36 AM. CRIM. L. REV 223, 247-49 (1999). For purposes here, however, equating admissibility with a decision on jurisdiction is sufficient.

[15] 5 U.S. 137 (1803).

[16] *See* Holmes, *National Courts* versus *the ICC*, *supra* note 7, at 672 ("The ICC is arbiter of its own jurisdiction.…Article 19(1), for example, provides that the Court shall satisfy itself that it has jurisdiction in any case. Article 17(1), states that it is the Court which shall determine whether a case is inadmissible.").

[17] Rome Statute, *supra* note 11, Preamble para. 10. *See also*, Art. 1.

"genuinely" prosecute. The unwillingness factor is evaluated on the basis of whether the national proceedings were designed to shield the accused or constituted an unjustified delay inconsistent with bringing the accused to justice. Inability, meanwhile, is determined on the basis of whether "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[18]

The complexities of the ICC's complementarity scheme are best explored through a hypothetical extrapolation of the Security Council's recent referral of the Darfur situation in Sudan according to Article 13(b) of the Rome Statute.[19] Unlike the Court's current investigations in Uganda and the Democratic Republic of Congo and its most recent referrals for Côte d'Ivoire and the Central African Republic, all of which are signatories of the Rome Statute and which were referred by the States themselves under Article 13(a), Sudan is not a signatory of the Rome Statute. Prior to the Security Council referral, the ICC Prosecutor was thus not able to contemplate an investigation of the Darfur situation. Sudan has responded vehemently that the ICC has no jurisdiction over its citizens and that it will not cooperate with the ICC in any pursuant investigation.[20]

Ignoring for now the inevitable enforcement and cooperation issues which would arise with the advent of an ICC investigation of a non-cooperative State, the more pressing question raised by the Darfur situation is how the Court addresses the issue of admissibility. Because the previous referrals have come from the States themselves, amounting to a waiver of the admissibility requirement,[21] the Court has never actually addressed admissibility. The exceptions to complementarity seem theoretically simple enough – mere proof of unwillingness or inability – but when faced with Darfur, a situation in which the national government and judiciary is actually intact and unwilling to cede to ICC jurisdiction, forging ahead freely with a claimed right to review and prosecute does not seem that simple.

The first scenario for Darfur is the no-man's land state of affairs such as existed before the Sudanese government created the Darfur Special Criminal Court, a three-judge traveling court, in June 2005. Prior to that time, the Sudanese government had not opened a formal investigation into the situation in Darfur, although all parties were doubtless aware of the numerous atrocities which had been committed. The Khartoum regime, despite the international outcry over its handling of Darfur, continually made reassurances to the international community that it was properly managing the situation without actually committing to anything.[22] The Prosecutor, meanwhile, must act on the

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[18] Id., Art. 17(3).

[19] The crisis in Darfur is well-documented by groups such as Human Rights Watch, the International Committee of the Red Cross, Doctors Without Borders as well as nations around the world. The American government evaluated the killings in Darfur as rising to the level of a genocide. *See* CNN, *Powell Calls Sudan Killings Genocide*, Sept. 9, 2004, *available at* http://www.cnn.com/2004/WORLD/africa/09/09/sudan.powell/ (last checked April 27, 2005).

[20] Warren Hoge, "International War Crimes Prosecutor Gets List of 51 Sudan Suspects," *New York Times*, April 6, 2005 (Sudanese president Omar al-Bashir swore "thrice in the name of Almighty God…I shall never hand any Sudanese national to a foreign court" and vowed to prosecute war crime suspects itself).

[21] *See infra* at p.28 for discussion about referrals and waivers.

[22] *See, e.g.*, Koert Lindijer, *Analysis: Reining in the Militia*, BBC NEWS, Oct. 25, 2004, *available at* http://news.bbc.co.uk/2/hi/africa/3594520.stm (last checked April 27, 2005).

referral handed down by the Security Council.[23] Article 53 bestows the Prosecutor with discretion to dismiss the situation, listing several factors that may form the basis of dismissal, including admissibility under Article 17.[24] On a practical level, even a Security Council referral will not abolish the Prosecutor's need to evaluate the admissibility of a case either before or after an investigation begins.

According to the Court's own guidelines, in the absence of any current or past State action on the matter, the ICC faces no impediment to commencing an investigation.[25] The Court presumes that if it has an interest in beginning an investigation and a State is lodged in an "inaction" stage, admissibility is not an issue that necessitates debate because inaction equates to clear admissibility.[26] This stance on the inaction scenario is noticeably stronger than the words used in Article 17 and elsewhere in the Rome Statute. For example, Article 17(1) utilizes a double negative type of structure to state that a case is *inadmissible unless* the elements of unwilling or unable are present. The presumption underlying complementarity is deference to national prosecution unless the State shows itself to be ill-equipped. An interpretation of the Court's stance regarding complete State inaction may be that inaction is the most severe type of unwillingness which merits omission of the admissibility determination.

A slightly different scenario is envisioned under Article 17(1)(b). For a case in which the State has already conducted an investigation and decided not to prosecute, the ICC must cede and consider the case inadmissible unless the decision not to move forward was spurred by the State's unwillingness or inability.[27] Although inadmissibility is not as easily waived for this situation, the inaction of the State will still lead to an assumption of admissibility by the Court in the absence of ongoing proceedings, or else an evaluation of the State's willingness or ability which will likely spur the State into the next scenario discussed below. In either case, for practical purposes inaction and a decision to not prosecute will be approached in the same way by the Court.

Darfur in this first scenario in which it has either no history of an investigation or prosecution or no intention of commencing proceedings, thus creates very little clash between ICC and national jurisdiction since only one jurisdiction – that of the Court – is being asserted. Realistically, this stage will almost never persist unless the State, for

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[23] There is the temptation to view a Security Council referral as a clear waiver of any admissibility considerations. *See* El Zeidy, *supra* note 7, at 957 (stating "from a purely formal standpoint…the referral of a situation by the Security Council is deemed a reasonable basis for the Prosecutor to initiate an investigation, without the preventive review of the admissibility of the situation with an eye to the application of the principle of complementarity."). One view even goes as far as stating that the Prosecutor is *required* to launch an investigation after a Security Council referral and has discretion to discontinue only after the investigation has begun. *See* Schabas, *supra* note 5, at 123.

[24] In addition to admissibility, Article 53(1) specifies that the Prosecutor may consider whether there is "a reasonable basis to believe that a crime" has been committed and whether, "taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

[25] Office of the Prosecutor Informal Expert Paper, *The Principle of Complementarity in Practice*, International Criminal Court (2003), *available at* http://www.icc-cpi.int/otp/complementarity.html (last checked April 27, 2005). [hereinafter *Complementarity in Practice*]

[26] *Id*. ("the most straightforward scenario is where no State has initiated any investigation (the inaction scenario). In such a scenario, none of the alternatives of Articles 17(1)(a)-(c) are satisfied and there is no impediment to admissibility. Thus, there is no need to examine the factors of unwillingness or inability; the case is simply admissible under the clear terms of Article 17.")

[27] Sharon Williams, *Issues of Admissibility*, in Triffterer, ed., *supra* note 6, at 393.

some political reason, secretly desired the ICC intervention and proceeds to cooperate with the ICC.[28] Otherwise, the inaction stage seems inextricably tied to a negative response on the part of the State whose jurisdiction has been questioned.

The State's reaction to the ICC intention to investigate leads to the second scenario which is the current situation. The Sudanese government followed through with its statements and began its own national proceedings against the alleged perpetrators of crimes punishable under the Rome Statute. Because the Darfur referral came via the Security Council, the Court's response follows different rules than for a State Party referral or an exercise of the Prosecutor's *proprio motu* powers.[29] According to Article 19 of the Statute, Sudan is allowed to challenge the admissibility of the case to the ICC, which it presumably would do if it were conducting its own proceedings. Article 19 makes no specific requirement upon the Prosecutor to defer to the State investigation, which means this second scenario branches into two paths: 1) the Prosecutor defers to the State in much the same manner as he would under Article 18,[30] or 2) he prepares to make the case that the Sudanese government is conducting proceedings that qualify Sudan as "unwilling or unable genuinely to carry out the investigation or prosecution."[31] If the Court chooses to defer to Sudan, it can neatly follow many of the doctrines which define the basis of federal courts law. But if the Court, after taking stock of Sudan's proceedings and determining that they do not meet Rome Statute standards, decides to remove the investigation or prosecution to the ICC, it can utilize some of the exceptions to the doctrines to define its boundaries and explain its determinations.

The first option most closely achieves the goal of promoting national prosecutions and follows the path of least resistance by deferring to national proceedings. The Court, by deferring to the State, supports the presumption that the State has the primary or dominant claim to jurisdiction.[32] This tension between ICC and national jurisdiction is almost identical to a cornerstone of American federal courts law – the tension between federal and state power. Federal courts as created under Article III of the Constitution were designed to implement the powers of the national government and provide a uniform interpretation of the Constitution and federal laws.[33] The basic premise of the

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[28] *See infra*, note 165.

[29] If the situation is referred to the Court by a State Party under Article 13(a) or is initiated by the Prosecutor's use of the *proprio motu* power under Articles 13(c) and 15, then the Prosecutor must fulfill certain obligations according to Article 18, which does not, however, refer to Security Council referrals like Darfur. Under Article 18, the Prosecutor must notify all State Parties and the relevant States whose jurisdiction may overlap. If a State informs the Court within one month of the notification that it is investigating or has investigated the possible violations of the Rome Statute, the Prosecutor must defer to the State investigation unless the Pre-Trial Chamber authorizes further investigation. The Prosecutor is allowed to review the State's investigation after six months and determine if there is any issue with unwillingness or inability.

[30] *See* Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUR. J. INT'L L. 144, 159 (1999) ("although no notification is necessary in case of referral by the Security Council under Article 13(b), any state having jurisdiction over the crimes which form the object of the referral is entitled to inform the Prosecutor that it is investigating or prosecuting the case…thus obliging the Prosecutor to defer to the state's authorities.")

[31] Rome Statute, supra note 11, Art. 17(1)(a).

[32] *See* Broomhall, INTERNATIONAL JUSTICE, *supra* note 6, at 86; Schabas, *supra* note 5, at 67-68 ("The jurisdiction that the international community has accepted for its new Court is narrower than the jurisdiction that individual States are entitled to exercise with respect to the same crimes.").

[33] Erwin Chemerinsky, FEDERAL JURISDICTION 2 (2003).

federal court system – that federal courts are courts of limited jurisdiction and that state courts are courts of general jurisdiction – cedes only a parcel of jurisdiction to the federal courts,[34] a setup analogous to the way in which the ICC only maintains "concurrent" jurisdiction over a narrow segment of a State's law.[35] Federal courts over the years have had to work around the initial limitations, resulting in a body of prescriptions federal courts use to restrain themselves which may provide good theoretical underpinnings to future ICC decisions.

Exhaustion of State Remedies Prior to Federal Habeas

One such doctrine federal courts follow in deferring to state jurisdiction is exhaustion of state remedies. On a practical level, without requiring exhaustion of state remedies, federal courts would not be able to handle the volume of cases which would flood its circuits[36] and state court proceedings might face unduly delays and interference as parties invoked federal proceedings.[37] More importantly, however, the state exhaustion requirement embodies a conscious effort to defer to states as legitimate and equal seats of jurisdiction.[38] By deferring to national proceedings, the ICC can invoke this tradition of exhausting state remedies.

Federal habeas review is the most well-known residence of the exhaustion requirement. The doctrine was codified in 28 U.S. C. §2254(b), but the presumption that state remedies should be exhausted existed even before then.[39] Exhaustion seeks to preserve the delicate balance between federal and state powers in order to better protect both federal and state institutions. In part,

> Exhaustion preserves the role of the state courts in the application and enforcement of federal law. Early federal intervention in state criminal proceedings would tend to remove federal questions from the state courts, isolate those courts from constitutional issues, and thereby remove their understanding of and hospitality to federally protected interests. Second,

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[34] *Id*. at p.259-65.

[35] The status of ICC jurisdiction as "concurrent" is not necessarily unanimous. *See* Sadat and Carden, *supra* note 1, at 414 (pointing to the exercise of ICC jurisdiction only under certain exceptional circumstances). In the federalism sense, however, the relationship of the ICC to national jurisdictions is clearly analogous to concurrent jurisdiction and, as discussed below, the manner in which federal and state courts address concurrent jurisdiction is highly relevant to an analysis of any ICC-State relationships. *See* Ruth Philips, *The International Criminal Court Statute: Jurisdiction and Admissibility*, 10 CRIM. L. F. 61, 63 (1999).

[36] *See* Chemerinsky, *supra* note 33, at 649 ("Such concurrent jurisdiction is desirable because, in the vast majority of cases, it is preferable for the Court to hear cases on appeal and not serve as a trial court. The Supreme Court lacks the time and resources to function effectively as a court of original jurisdiction.").

[37] *See Younger v. Harris*, 401 U.S. 37 (1971), *Davis v. Burke*, 179 U.S. 399 (1900).

[38] *See Ex parte Royall*, 117 U.S. 241, 251 (1886) (stating "the injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the States, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts *equally bound* to guard and protect rights secured by the Constitution." (italics added)).

[39] *See United States ex rel. Kennedy v. Tyler*, 269 U.S. 13, 17 (1925) ("The due and orderly administration of justice in a state court is not to be thus interfered with save in rare cases where exceptional circumstances of peculiar urgency are shown to exist."); *Ex parte Hawk*, 321 U.S. 114, 116-18 (1944).

> exhaustion preserves orderly administration of state judicial business, preventing the interruption of state adjudication by federal habeas proceedings. It is important that petitioners reach state appellate courts, which can develop and correct errors of state and federal law and most effectively supervise and impose uniformity on trial courts.[40]

Of these reasons, the first is particularly relevant to the ICC because of the Court's small capacity and its reliance on the continued goodwill of the international community. The ICC is a court of last resort not equipped to handle more than a few selected cases at a time.[41] Additionally, the Court will fare better in gaining cooperation for a subsequent ICC proceeding if it protects the State's proceedings as much as possible.[42] The ICC equivalent of the "federally protected interests" is the interest in protecting State resolve to prosecute the crimes under the Rome Statute.[43] If made to feel like an inadequate forum, a State may not work as hard to show its own capability, thereby defeating the Court's purpose of encouraging States to bring perpetrators to justice.[44] In the case of Sudan, the Security Council referral has put the spotlight on the country and if the ICC were to defer to national proceedings, Sudan would know that its every action was being scrutinized. In order to avoid further breach of international relations or sanctions, Sudan would most likely attempt to conducts its proceedings in accordance with some minimum standard of "being conducted independently or impartially" consistent with "an intent to bring the person concerned to justice."[45]

This then integrates the second reason for the exhaustion requirement, that of letting the state "develop and correct errors of state and federal law." Under the system of complementarity, the ICC has a secondary mandate of developing State interpretations and applications of the Rome Statute. When the Court watches and reviews the proceedings of national jurisdictions in order to determine the constitution of acceptable proceedings that avoid the ICC's reach, it is in fact propounding a set of guidelines for national laws and proceedings.[46] The Court and States may engage in a system of trial

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[40] Note, *Developments in the Law: Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1094 (1970). *See also, Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973) (Justice Brennan writing, "The exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement.'…It cannot be used as a blunderbuss to shatter the attempt at litigation of constitutional claims with regard to the purposes that underlie the doctrine and that called it into existence.").

[41] *See* Holmes, *National Courts* versus *the ICC*, *supra* note 7, at 667-73.

[42] *See* Broomhall, *Overview and Cooperation*, *supra* note 8, at 47.

[43] *See* Rome Statute, *supra* note 11, Preamble para. 6 ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes").

[44] *See* Broomhall, INTERNATIONAL JUSTICE, *supra* note 7, at 86 ("Because the Court has the power to make the final decisions on the admissibility of cases before it, States that wish to avoid the adverse attention, the diplomatic entanglements, the duty to cooperate and other consequences of ICC activity have a real incentive to take action against crimes under the Statute.").

[45] Rome Statute, *supra* note 11, Art. 17(2)(c). The importance of this wording lies in its vagueness. While an ICC review of national proceedings would not call for a specific outcome, its requirements as to what would satisfy inadmissibility leave States in a position where they really have to make the best good-faith effort possible.

[46] *See* Michael Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 32-33 (2001); Bassiouni, *Historical*

and error, but States will eventually come to mold their national laws according to the ICC body of law.[47] The wonder of the exhaustion process is that it does not require the ICC to brandish its authority in order to achieve integration of Rome Statute components into the national law – the Court can stay on the sidelines while the national courts feel the burden of the Court's watchful eye exhorting the State to do its best.

Related to the development of nationals laws is one of the most fundamental issues the ICC faces within the complementarity scheme – the lack of any required implementing legislation on the part of the signatory States. The Rome Statute would have faced a wave of resistance if it had pushed through with a requirement that all State Parties implement the Statute's substantive law.[48] Although the Statute does impose an obligation on States to cooperate under Part 9, that duty does not extend to legislation incorporating the crimes.[49] The resulting gap between the Rome Statute and national laws is a potential complication for any review of national proceedings purporting to determine ability, willingness and genuineness. Utilizing national domestic laws, what can be called the "ordinary crimes approach," a State with good intentions could fulfill its role according to admissibility requirements without charging for the same crimes as the Rome Statute.[50]

For example, if the Sudanese government investigated and/or prosecuted several individuals for murder or rape (encompassed in the atrocities alleged in Darfur) according to their national laws as "ordinary crimes," the ICC could not automatically determine that the national proceedings were insufficient because they did not prosecute the defendants for genocide or crimes against humanity. Under a vertical application of the doctrine of *ne bis in idem*, a relative of the American double jeopardy doctrine, spelled out in Article 20, the Court must not prosecute a person already tried by another court for the same conduct, even if the charge was for an "ordinary crime."[51] Only on a showing

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Survey, *supra* note 5, at 2 ; Jenia Iontcheva Turner, *Nationalizing International Criminal Law*, 41 STAN. J. INT'L L. 1, 8-9 (2005).

[47] Jann Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 94 (2003) ("in order for the ICC to effectively perform its complementary function, comprehensive implementation is indispensable. To interpret the provisions on complementarity so as to give them the fullest weight and effect consistent with the ICC's functions therefore involves an obligation on States parties to establish their jurisdiction over the ICC crimes to the extent required for the purpose of national prosecution.").

[48] *Id.* at 91.

[49] *See* Iontcheva Turner, *supra* note 46, at 8.

[50] Kleffner, *supra* note 47, at 95-99. *See also* Schabas, *supra* note 5, at 88; *Complementarity in Practice*, *supra* note 25, at 8 ("It was extremely important to many States that proceedings cannot be found 'non-genuine' simply because of a comparative lack of resources or because of a lack of full compliance with all human rights standards. The issue is whether the proceedings are so inadequate that they cannot be considered 'genuine' proceedings. Of course, although the ICC is not a 'human rights court,' human rights standards may still be of relevance and utility in assessing whether the proceedings are carried out genuinely.").

[51] *See* Christine Van den Wyngaert and Tom Ongena, *Ne bis in idem Principle, Including the Issue of Amnesty*, in Cassese et al, eds., *supra* note 7, at 724-25; Leila Sadat, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 190 (2002); Schabas, *supra* note 5, at 88. *But see* Broomhall, INTERNATIONAL JUSTICE, *supra* note 6, at 91 (pointing to a situation in which a case becomes admissible when the national laws, "be they definitions of crimes, general principles, or defences – define an area of responsibility markedly narrower than that provided for in the Statute, allowing *de facto* impunity for acts punishable by the Court.").

that the State is not conducting the investigation genuinely, or that it has conducted a trial only to shield the perpetrator or not "independently or impartially in accordance with the norms of due process recognized by international law and [the trial was] conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice" can the Court exert its own jurisdiction.[52] A State which has not passed implementing legislation is not thus an automatic target of an ICC admissibility exception, but the possibility that the ICC could find the "ordinary crimes" prosecution an exception to the *ne bis in idem* doctrine may still motivate States to strive for compliance with the Rome Statute to the best of their abilities.

Final Judgment Rule

The final judgment rule is another doctrine of federal courts with a similar underpinning. While exhaustion doctrine applies to habeas proceedings and is a collateral attack on state convictions, the final judgment rule applies the same concept to the broader area of Supreme Court appellate review of state court decisions. The final judgment rule finds its statutory authority in 28 U.S.C. §1257, although the roots of Supreme Court review goes further back.[53]

The general power of the Supreme Court to review state court decisions was granted by Section 25 of the Judiciary Act of 1789. The Supreme Court, elaborating in cases like *Martin v. Hunter's* Lessee[54] and *Murdock v. City of Memphis*,[55] clarified the nature of its appellate power. Among the reasons for allowing such review, the Supreme Court pointed to the fact that "state attachments, state prejudices, state jealousies, and state interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.…[I]n controversies between…a state and its citizens…it enables the parties, under the authority of congress, to have the controversies heard, tried and determined before the national tribunals.…This is not all. A motive of another kind, perfectly compatible with the most sincere respect for state tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[56] The ICC is faced with a similar dilemma when dealing with States. Although the ICC is not an appellate court in relation to national courts, it is in many ways the creation of the will of an international community that wished to maintain some semblance of "uniformity" in the way the world combats genocide, crimes against humanity and war crimes. In that respect, the mandate

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[52] Rome Statute, *supra* note 11, Art. 20(3)(a)-(b).

[53] §1291 also promotes the final judgment rule, but in the context of appeals from federal district courts to courts of appeals. For purposes here, §1257 is more relevant because "appeals brought to the Supreme Court under section 1257 involve the transmission of cases or issues between separate judicial systems.…[it] implicates the relationship between the states and the federal government, and hence the special concerns of federalism and comity." Note, *The Finality Rule for Supreme Court Review of State Court Orders*, 91 HARV. L. REV. 1004, 1012 (1978) [hereinafter *Finality Rule*].

[54] 14 U.S. 304 (1816).

[55] 87 U.S. 590 (1875).

[56] *Martin v. Hunter's Lessee*, 14 U.S. at 347. Notice particularly the assumption that the judicial power to review encompassed controversies between "a state and its citizens" – in the realm of Rome Statute crimes, a large number of the most difficult cases will inevitably involve governments turning on their own people, such as in Serbia, Sudan, etc.

of the Court may often involve seeing through the national prejudices and jealousies to administer justice, although the ICC may not possess the power to actually do so.[57]

The very concerns that restrain the ICC from overreaching its jurisdiction into areas of State sovereignty also appeared in *Murdock*. Recognizing the vast reach appellate review would otherwise have over state court decisions, the Supreme Court found, "It cannot, therefore, be maintained that it is in any case necessary for the security of the rights claimed under the Constitution, laws, or treaties of the United States that the Supreme Court should examine and decide other questions not of a federal character."[58] This clever construction accomplishes the dual purpose of restraining the Supreme Court from overreaching in its use of appellate power by deferring to states on issues of state law, while cementing the right of the Supreme Court to review federal issues.

While the ICC does not have the luxury of distinguishing a clear set of supranational laws from national laws via which it can precisely follow the rationales underpinning *Martin* or *Murdock*, [59] it can, however, maintain a better sense of when to defer by simply recognizing the very fact that it is situated differently than the Supreme Court in *Martin* and *Murdock*. The lack of clarity surrounding the law the ICC is supposed to be upholding and the fact that the ICC is prevented from deferring on the basis of differences in law,[60] means that, even more than the Supreme Court, the ICC needs to see how States interpret the alleged conduct through their own proceedings before it makes any decisions, a goal which can be serviced by application of a final judgment rule theory.[61]

The final judgment rule is, like exhaustion doctrine in habeas cases, just another manner of qualifying federal review to protect state proceedings from needless interference.[62] Whether for reasons of judicial efficiency, or comity and federalism,[63]

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[57] *See* Iontcheva Turner, *supra* note 46, at 11-14.

[58] *Murdock v. City of Memphis*, 87 U.S. at 632-33.

[59] Unlike the history and tradition upholding both federal and state law, the very existence of international criminal law is ephemeral – it is an interstitial body of law in the space between international treaties and conventions, domestic criminal codes, transnational crime, and, now increasingly, crimes of State. *See Broomhall*, INTERNATIONAL JUSTICE, *supra* note 6, at 9-24; M. Cherif Bassiouni, INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS 15-21 (1997); Young, *supra* note 4, at p.___. The ICC cannot easily call upon the principles of "international criminal law" to justify its need to intervene. The Court's mandate envisions its role in setting an international standard for international criminal law. Iontcheva Turner, *supra* note 46, at 4. But the reality is that there is very little consensus about precisely what law the ICC is even clarifying.

[60] *See supra* note 50 for discussion on national prosecutions of "ordinary crimes" and the idea that prosecution by a State on the basis of its national laws is not in and of itself sufficient to render the case admissible for purposes of an ICC investigation.

[61] *Finality Rule*, *supra*, note 53, at 1013-14 ("By facilitating the development of alternative grounds for the disposition of cases, the rule of finality under section 1257 permits the Court to avoid unnecessary decisionmaking.").

[62] *Id*. at 1006 ("The entire case approach – with its corresponding finality rule – rests in part upon the supposition that efficiency is best served by restricting appellate interruptions of the trial process to an absolute minimum. By preserving the integrity of the trial, the rule of finality under the entire case model [as opposed to the 'individual issue' model] obviously facilitates continuity and results in a speedier disposition of the case. The finality rule also finds support in considerations other than efficiency. The interests of litigants in securing justice is served when controversies are resolved in the most expeditious fashion consistent with preserving the requirements of due process. Significantly. from the standpoint of fairness to the parties, the prohibition of interlocutory appeals prevents dilatory tactics by those litigants

federal court deference to state courts in anticipation of a final judgment is mirrored in the ICC relation to national courts. The Rome Statute attempts to limit the number of appeals and challenges to admissibility rulings, yet its need to maintain flexibility allows the Prosecutor a rolling basis on which to review admissibility decisions.[64] For example, if the ICC decided to defer to the Sudanese government because the case was inadmissible in light of ongoing investigations, the Prosecutor could after six months, if he felt there was new evidence or a change that rendered the case admissible, reopen admissibility proceedings for Darfur. If, however, the Court were to adhere to a final judgment type of doctrine by waiting until a final national judgment were rendered, the Court could preserve its legitimacy and authority better because it would avoid a series of reversals in admissibility decisions.

Abstention

Exhaustion of state remedies and the final judgment rule are just a few analogous federal courts doctrine which might be applicable to justifying ICC deference. The several abstention doctrines developed by federal courts outline different reasons why federal courts are not to interfere with state proceedings. Unlike exhaustion doctrine, a type of collateral attack which places the federal courts in a position of waiting for the final state pronouncement, abstention is applicable when a motion for an injunction of the state proceeding is filed in the federal court. In this light, exhaustion might be more similar to the Court's application of *ne bis in idem* which occurs *after* a national proceeding, while abstention is closer to the Court's role before or during an investigation or prosecution. A closer examination of the *Younger* abstention doctrine clarifies the similarities for ICC jurisdiction.

In the broad realm of state and federal concurrent jurisdiction, substantial overlap has required the development of rules of engagement for federal courts.[65] Abstention is a judicially-developed type of limitation on federal court jurisdiction, the most relevant type of which is the *Younger* abstention.[66] Also known as equitable restraint, it can be characterized as the "judicially created bar to federal court interference with ongoing state proceedings."[67] Sprouting from the Supreme Court decision in *Younger v. Harris*

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who can afford to subject their adversaries to attrition or who have an interest in delaying completion of the trial."). *See also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-78 (1975).

[63] *Id*. at 503-05 (J. Renhnquist, dissenting).

[64] Rome Statute, *supra* note 11, Art. 18(3) ("The Prosecutor's deferral to a State's investigation shall be open to review by the Prosecutor six months after the date of deferral or at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation."); Article 19(10) ("If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.").

[65] *See* Richard Fallon, Daniel Meltzer, and David Shapiro, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1144-48 (2003).

[66] The Younger abstention is not precisely in the same category as the other abstentions such as *Pullman*, *Thibodaux* or *Burford*. For purposes here, however, it will be considered a form of abstention. *See* Martin Redish, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 281 (1990).

[67] *See* Chemerinsky, *supra* note 33, at 796.

and its companion cases,[68] the doctrine of *Younger* abstention is premised on notions of equity, comity and federalism.[69] When a state court prosecution is pending, *Younger* calls for federal courts to refrain from issuing injunctions, effectively giving deference to state jurisdiction.[70] *Younger* was a necessary creation after federal courts found themselves flooded with filings seeking injunctions of state court proceedings following *Dombrowski v. Pfister*, a case in which the Supreme Court allowed for a federal court injunction of a state court proceeding.[71] Although there is debate about the notion of comity which *Younger* embraces,[72] the idea works well in the ICC system, which lacks an appellate or hierarchical structure.[73]

The overlap of ICC and national systems is precisely mirrored in the system acknowledged by *Younger* and the application of federal abstention is a very useful example for the ICC. If Darfur were to begin investigating or prosecuting in response to the Security Council referral, according to the theory of exhaustion of state remedies, the ICC should defer to Sudan's proceedings and only *after* the conclusion of those proceedings would the Court be eligible to review Darfur for admissibility. Under the *Younger* abstention doctrine, however, the Court is justified in making a determination to defer not because it *must* first defer to the national proceedings, but because it chooses to leave the ongoing proceedings in the national courts. A crucial outcome with a *Younger* abstention, however, is that the federal decision to not interfere with the state proceeding irrevocably leaves federal issues to be adjudicated in the state proceedings.[74] Although

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[68] *Samuels v. Mackell*, 401 U.S. 66 (1971); *Boyle v. Landry*, 401 U.S. 77 (1971); *Perez v. Ledesma*, 401 U.S. 82 (1971); *Dyson v. Stein*, 401 U.S. 200 (1971); *Byrne v. Karalexis*, 401 U.S. 216 (1971).

[69] 401 U.S. 37, 43-44 (1971) (Justice Black writing, "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.…This underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for lack of a better and clearer way to describe it, is referred to by many as 'Our Federalism.'").

[70] *See* Martha Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1163-65 (1974) (comparing and pointing out that, unlike the *Pullman* abstention in which the presumption is for federal jurisdiction, *Younger* presumes state jurisdiction before it examines for special circumstances).

[71] 380 U.S. 479 (1965). *See* Frank Maraist, *Federal Injunctive Relief Against State Court Proceedings: The Significance of Dombrowski*, 48 TEX. L. REV. 535, 606 (1970) (pointing out the flood of cases into federal courts).

[72] 401 U.S. at 43-44 (noting that "this underlying reason for restraining courts of equity from interfering with criminal prosecutions is reinforced by an even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."). *See also*, Fallon et al, eds., *supra* note 65, at 322-26 (citing the debate about the existence, or lack of, parity between state and federal courts).

[73] *See* Holmes, *National Courts* versus *the ICC*, *supra* note 7, at 673 (noting that "delegations were mindful that the ICC was not envisaged as an appellate body to review decisions of domestic courts.").

[74] Field, *supra* note 70, at 1164; Fallon et al, *supra* note 65, at 1227 ("In *Younger* cases…the federal court dismisses the suit, and the underlying federal claims must typically be adjudicated in the context of a state criminal case, subject only to Supreme Court review. As the Court later held in *Allen v. McCurry*, 449 U.S. 90 (1980), the state court adjudication will have full res judicata effect in subsequent federal court proceedings.").

the ICC is not bound by a strict doctrine, it should maintain an awareness that an application of a *Younger*-type justification for a deferral to State jurisdiction leaves the Court open to criticism if it later finds the State proceeding deficient in some way and delves into issues already settled in the State proceedings.[75]

Exceptions

Each doctrine mentioned so far can be utilized by the Court to support its decisions to defer to national proceedings. Their usefulness, however, is not limited to their positive application since the Court will face less challenges for deferring to States than when it attempts to confront a State with the determination that it is unwilling or unable to such an extent that the ICC can intervene. The ICC can rely on any number of justifications for why a case is not admissible[76] with the real difficulty being how to justify why a case is admissible. These federal courts doctrines are therefore most valuable to the ICC's complementarity scheme because they all include exceptions that can be utilized in prescribing boundaries for the ICC's vague standards for finding cases admissible.[77]

Although the Rome Statute was intentionally written with flexible language that would be acceptable to the greatest number of signatories,[78] the resulting mix of objective and subjective standards leaves the Court vulnerable.[79] The complementarity regime overall has an objective procedure which allows for challenges, notification, deference, and *ne bis in idem* among other provisions. Yet the criteria at the heart of the admissibility determinations in Article 17 are premised on subjective elements such as "substantial collapse"[80] of the national judicial system or "an intent to bring the person

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[75] This consideration is most relevant to a situation like Darfur in which the Security Council referral balances the scale toward an ICC proceeding (some would say an investigation is mandatory, *see* Schabas, *supra* note 5, at 123). If an ICC investigation is already proceeding, the Prosecutor would have to affirmatively justify under Article 53(2) why he wishes to halt the investigation. Otherwise, for State Party referrals or exercises of the *proprio motu* power, if the Court has deferred to a State proceeding under Article 18(2), then under 18(3) the Prosecutor may review the State proceedings after six months or "at any time when there has been a significant change of circumstances based on the State's unwillingness or inability genuinely to carry out the investigation."

[76] Rome Statute, *supra* note 11, Art. 53(1)(c). This gives the Prosecutor discretion to take into account "the gravity of the crime and the interests of the victims, [whether] there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. As Prof. Shapiro has pointed out with regard to the federal system, the grant of jurisdiction does not impose an obligation to exercise of jurisdiction at all times. *See* David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985).

[77] Keep in mind that in an application of most of these exceptions, the ICC (embodied as the ICC Prosecutor) acts in a role analogous to that of criminal defendants or civil plaintiffs in state courts seeking federal review. This role, in turn, is in many respects as a proxy for victims who are otherwise unable to seek any vindication of their rights. *See* David Donat-Cattin, *The Role of Victims in the ICC Proceedings*, in Flavia Lattanzi, ed., THE INTERNATIONAL CRIMINAL COURT: COMMENTS ON THE DRAFT STATUTE 251 (1998); Christopher Muttukumaru, *Reparation to Victims*, in Lee, ed., *supra* note 5, at p.262.

[78] *See* Sadat, *supra* note 51, at 119; Holmes, *National Courts* versus *the ICC*, *supra* note 7, at 674 (discussing high degree of States' sensitivity to proposed terms such as "ineffective," "diligently," and "good faith" that resulted in the term "genuinely" in Article 17); El Zeidy, *supra* note 7, at 900.

[79] Holmes, *Principle of Complementarity*, *supra* note 6, at 75-76 (pointing out the subjective elements in all the criteria for unwillingness as well as for the inability).

[80] Rome Statute, *supra* note 11, Art. 17(3).

concerned to justice."[81] These subjective elements imply discretionary implementation of the complementarity regime, a situation mirrored in federal courts law.

Federal courts law has similarly encountered the realization that its doctrines are not entirely rigid and that there is sometimes a need to exercise discretion to make room for circumstances justifying exceptions – the doctrines are within the jurisdictional reach of the federal courts, but the jurisdictional grant does not abolish exceptions.[82] Federal courts address the discretionary nature of their doctrines by creating concomitant doctrines of exceptions.

Exceptions to Exhaustion of State Remedies

Although exhaustion has been codified in 28 U.S. C. §2254, its roots as a judicially created doctrine reveal the types of exceptions anticipated. The Supreme Court from early on has presumed the exhaustion of state remedies but for "cases of exceptional urgency."[83] When contemplating the types of situations that qualified as cases of exceptional urgency, the Supreme Court in *U.S. ex rel. Kennedy v. Tyler* pointed to two cases involving "interferences by the state authorities with the operations of departments of the general government, and the other concerned the delicate relations of that government with a foreign nation."[84] The Supreme Court has accepted as part of the exhaustion doctrine that only rare cases of peculiar urgency justify interference in state courts,[85] but these are situations that can be analogized to ICC findings of admissibility.

According to Article 17(1) of the Rome Statute, exceptions to the presumption of inadmissibility must meet the standard of unwilling or unable to investigate or prosecute genuinely. Although standards for unwilling and unable are spelled out in 17(2)-(3), they do not clearly specify what might qualify as "shielding," "an intent to bring the person concerned to justice," and "total or substantial collapse." But looking at cases justifying exceptions to exhaustion provide may provide some useful considerations.[86] For example, *In re Neagle*,[87] *In re Loney*,[88] and *Hunter v. Wood*[89] are cases in which exceptions to the exhaustion doctrine were granted because the state proceedings were

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[81] *Id*., Art. 17(2)(b).

[82] Shapiro, *Jurisdiction and Discretion*, *supra* note 76, at 545, 574 ("Those who espouse the obligation theory of federal jurisdiction frequently overlook or understate the range of situations in which the theory simply does not accord with the facts.…[A]s experience and tradition teach, the question whether a court must exercise jurisdiction and resolve a controversy on its merits is difficult, if not impossible to answer in gross.…Moreover, questions of jurisdiction are of special concern to the courts because they intimately affect the courts' relations with each other as well as with the other branches of government. Therefore, the continued existence of measured authority to decline jurisdiction does not endanger, but rather protects, the principle of separation of powers.").

[83] 269 U.S. at 18.

[84] *Id*. at 19.

[85] *Ex parte Hawk*, 321 U.S. 114, 117-18 (1944).

[86] *See* Larry Yackle, *The Exhaustion Doctrine in Federal Habeas Corpus: An Argument for a Return to First Principles*, 44 OHIO ST. L. J. 393 (1983) (providing a look at the historic development of the exhaustion doctrine).

[87] 135 U.S. 1 (1890) (concerning a deputy marshal discharged on habeas from state custody for murdering an assailant in the performance of his duty to protect a justice of the court).

[88] 134 U.S. 372 (1890) (concerning petitioner discharged on grounds that state prosecution would impede and embarrass the administration of justice in a national tribunal).

[89] 209 U.S. 205 (1908).

seen as impairing some aspect of federal governance. Similarly, *Wildenhus' Case*[90] treats interference with federal government treaty rights. These cases are probably most analogous to any charges of shielding which the ICC may want to bring against States. Although the fact pattern in the U.S. cases may be completely opposite any situations faced by the ICC (eg. *In re Neagle* concerns a state wishing to prosecute while the federal government is looking to pardon), the underlying theory for these situations is the dominant or overriding federal interest. The ICC as charged with its mandate to "put an end to impunity…and thus to contribute to the prevention of such crimes"[91] can claim an exception if the State's behavior goes so far as to interfere with aspects of the Court's ability to attain those goals.

Another class of exceptions to exhaustion doctrine consists of cases "where the state remedy is seriously inadequate."[92] This exception is analogous to some situations in which the ICC is not able to point easily to shielding or an intent to avoid justice. In *Moore v. Dempsey*, the Court did not require exhaustion of state remedies if "the whole proceeding is a mask – that counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion, and that the State Courts failed to correct the wrongs, neither perfection in the machinery nor the possibility that the trial court and counsel saw no other way of avoiding an immediate outbreak of the mob can prevent this Court from securing to the petitioners their constitutional rights."[93] Similarly, *Mooney v. Holohan*, although it ultimately denied federal habeas on the grounds that a "corrective judicial process" was available at the state level, found that deprivation of due process via contrivances such as perjury or intimidation was unacceptable and ultimately required correction.[94]

The ICC may find itself similarly situated in that national proceedings may put on the appearance of following due process or standard procedures, yet amount to a sham in reality. The cases of *Moore*, *Mooney* and *Ex parte Hawk* give some of the reasoning that can be used in justifying admissibility for such a case. *Moore* provides an outline of a state proceeding that may be affected by public perceptions or pressures. As applied to the ICC in Darfur, imagine that the Sudanese government conducts its own proceedings and proceeds to acquit several alleged perpetrators. If the ICC were to find that the judges or jury (if applicable) were daily critiqued in the newspapers or that there were

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[90] 120 U.S. 1 (1887) (concerning a Belgian sailor who was discharged from state custody because the arrest was contrary to an international treaty).

[91] Rome Statute, *supra* note 11, Preamble para. 5.

[92] *Wade v. Mayo*, 334 U.S. 672, 692 (1948) (J. Reed, dissenting). *See Ex parte Hawk*, 321 U.S. at 118 ("But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised…a federal court should entertain his petition for habeas corpus, else he would be remediless.").

[93] 261 U.S. 86, 91 (1923).

[94] 294 U.S. 103, 112 (1935) ("We deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.…It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a state has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a state to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.").

frequent demonstrations in the streets calling for acquittal of the defendants, the Court might not be able to find that the national procedures were on their face unwilling or unable or that there was an intentional shielding or obstruction of justice. Yet the reality may be that the national proceedings are unable to protect the validity of the outcome in light of external pressures such that the proceedings are clearly unjust. The ICC might thus be able to apply the *Moore* reasoning under Article 17(3) by attributing such external interference to a "substantial collapse or unavailability" of the national judiciary.

Mooney, on the other hand, points to a federal understanding of what qualifies as due process as the standard by which the state courts must obey. In the ICC context, due process and other disembodied legal principles that are not uniformly accepted are extremely difficult to account for in any admissibility review. Because each State has its own national legal system which the ICC must respect and balance against the international community's standards of justice, the ICC will always have a difficult time pinning any admissibility exceptions on national procedural deficiencies.[95] Concerns with this unsettled aspect of the ICC's jurisdictional reach has already driven some countries to not ratify the treaty.[96] Wielding a justification like *Mooney* provides, however, may drive other countries closer to informal compliance.[97] But mostly *Mooney* will be helpful for situations that are in the middle between total compliance and complete rejection of any international standards to which the ICC subscribes (eg. torture) – where the State has exercised its jurisdiction but on "narrower grounds than contemplated by the Statute…allowing de facto impunity for acts punishable by the Court."[98] For example, the law in Sudan is a mixture of customary law, Islamic *shari'a* law and democratic law in an infant state.[99] Due process may be largely absent without minimal protections such as a defendant's right to counsel.[100] If the Sudanese government were to prosecute and acquit an alleged genocide perpetrator through its normal process utilizing Sudanese judges and courts, the ICC on review would likely find problems in the judicial process leading to an unjust result despite the procedural perfection. The ICC may have a difficult task pronouncing the subtleties of the Sudanese system to be outright corruption as opposed to part of its customary law heritage. So how does the Court tactfully avoid passing judgment on the intact judiciary of a country that does not confess to a total or even substantially collapsed judicial system? The Court cannot make admissibility decisions on the basis of outcomes in a way that effectively pushes States to litigate toward a certain end, and yet it cannot state that the intact judicial system of one nation does not administer justice in a way that is equal to the way another

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[95] This is part of a larger and very complicated discussion which includes the placement of amnesties within the purview of ICC jurisdiction. *See* Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L. J. 507 (1999). The abuse of alternative measures such as amnesty laws and proceedings in Chile and Cambodia on the one hand, contrasted with the success of proceedings such as the Truth and Reconciliation Commission in South Africa on the other, only serves to highlight the difficulty in categorically deferring or being wary of national proceedings.

[96] Iontcheva Turner, *supra* note 46, at 8, fn. 36.

[97] *See* Broomhall, INTERNATIONAL JUSTICE, *supra* note 6, at 89-90.

[98] *Id*. at 91.

[99] *See* Aharon Layish and Gabriel Warburg, THE REINSTATEMENT OF ISLAMIC LAW IN SUDAN UNDER NUMAYRI (2002); Adib Halasa, John Cooke, and Ustinia Dolgopol, THE RETURN TO DEMOCRACY IN SUDAN: REPORT OF A MISSION ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS (1986); John Wuol Makec, THE CUSTOMARY LAW OF THE DINKA PEOPLE OF SUDAN (1988).

[100] Lawyers Committee for Human Rights, SUDAN: ATTACKS ON THE JUDICIARY (1991).

nation does. Following the *Mooney* approach effectively upholds the presumption of deference to national proceedings while making it known that the national proceedings, though not inferior or lacking, may have made an error in the particular instance requiring a "corrective judicial process to remedy the wrong."[101] The advantage of the *Mooney* format is thus when a State brings a case within its normal parameters, which may be narrower grounds than the Court ultimately requires such that a patently unjust result occurs, the Court experiences no need to pronounce the national government as unable according to Article 17(3), but can say the State is unwilling if it does not provide the "corrective judicial process."

The exceptions to habeas exhaustion doctrine have been codified in 28 U.S.C. §2254(b) as well. In relevant part, §2254 reads: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(i) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant." The Supreme Court has read this to mean that an exception to exhaustion will be made "only if there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief."[102] An example of this was *Wilwording v. Swenson*, a case in which the Supreme Court allowed an exception to the exhaustion doctrine because the state court had never granted a hearing on the issues being litigated in the instant case in other similar cases – the existence of corrective proceedings was therefore meaningless.[103]

As applied to the ICC, exception (B)(i) could be made analogous to an unable claim under Article 17(2) while exception (B)(ii) would be analogous to unwilling according to Article 17(3), although *Wilwording* and *Duckworth* lead to the belief that the two categories can actually be collapsed into one if the national proceedings, though available, are so egregious that they become equivalent to an absence of further corrective proceedings. Applying the exceptions under §2254 in this way thus takes the ICC one step further towards an admissibility finding by declaring whatever national remedies exist will be insufficient to fulfill the Rome Statute's definition. In defining those standards, the ICC could look to the reasoning given in *Wilwording* – the complete absence in the state's history of ever proceeding in the way the Supreme Court considered corrective. Similarly, if the national court of Sudan claimed that it had an appeal process but had never in its history actually completed an appeal, that would provide the ICC with enough reason to find admissibility grounds in the same way the Supreme Court did in *Wilwording*. Part of this analysis is thus comparison to the State's previous practices in order to determine if the State exhibits a pattern of such behavior.[104]

Exceptions to Final Judgment Rule

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[101] *Mooney v. Holohan*, 294 U.S. at 113.
[102] *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981). *See* Chemerinsky, *supra* note 33, at 887.
[103] 404 U.S. 249 (1971).
[104] The advantage of seeking out a pattern in another application is that if the Court is able to determine that the State normally proceeds in a particular pattern, but in the instant case veers from its normal course, the Court has a stronger case against the State for unwillingness on the basis of shielding or an intent to avoid justice. *See* Holmes, *National Courts* versus *the ICC*, *supra* note 7, at 675.

As codified in 28 U.S.C. §1257, the final judgment rule provides, "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari…." Controversy over what constitutes a final judgment[105] or what it means to be the highest court in which a decision can be made[106] has rendered the final judgment rule subject to many exceptions. The most coherent treatment of the nature of exceptions to the finality rule came in *Cox Broadcasting Corp. v. Cohn*.[107] Coming after a string of cases in which exceptions for non-final cases were made,[108] *Cox* attempted to sort the types of cases justifying exceptions into four broad categories.

The four categories are generally further divided into two groups: the first two types of exceptions pertain to cases in which the federal issue survives further proceedings, and the second two classes of exceptions relate to cases in which the federal issue may be mooted but review is nonetheless justified. The first two are perceived as reasonable and practical exceptions in light of the finality rule, while the second two are seen as an expansive interpretation of the Supreme Court's power to override the final judgment rule.[109] In the ICC context, however, the exceptions are not divided in the same way because realistically, there is no clear ICC law that can be distinguished from national laws such that survival of an ICC issue is ever a real basis for intervening in a State process. The ICC is evaluating for issues of unwillingness or inability according to Article 17(2)-(3), so the relevant comparison is about how the finality exceptions can help define the State's unwillingness or inability. For the most part, though, these exceptions may be more useful for borderline cases that are more diplomatically handled under Article 17(3)'s inability standard where there is no indication of a State's blatant unwillingness through shielding or impartial proceedings, situations which would surely generate other more obvious evidence allowing admissibility.

In the first category are "those cases in which there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained. In these circumstances, because the case is for all practical purposes concluded, the judgment of the state court on the federal issue is deemed final.."[110] This class of cases might be considered relatives of the second class of exceptions under §2254(b) in which the existence of a corrective process is irrelevant because the process is, "as a practical

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[105] *See Catlin v. U.S.*, 324 U.S. 229, 233 (1945) (stating that "final" means when the judgment or decree "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.").

[106] *See, e.g.*, *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (finding the Police Court to be the highest court by virtue of a procedural limitation); *Betts v. Brady*, 316 U.S. 455 (1942).

[107] 420 U.S. 469 (1975). The verdict may be out on whether the exceptions have become so scattered or unclear as to have rendered the Cox categories archaic or to have overtaken the actual finality rule itself. *See Finality Rule*, *supra* note 53, at 1004-05 (finding "the cumulative effect of these ad hoc exceptions to the rule of finality is a rather confusing common law of appellate jurisdiction"); Redish, *supra* note 66, at 247. For purposes here, the *Cox* categories are still useful in illustrating the types of exceptions.

[108] *See Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945); *Local No. 438 Construction and General Laborers' Union v. Curry*, 371 U.S. 542 (1963); *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963).

[109] *Finality Rule*, *supra* note 53, at 1015.

[110] *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 479. *Cox* cites *Mills v. Alabama*, 384 U.S. 214 (1966) and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971) as illustrative of this category. *See also Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

matter,"[111] concluded. This typically involves a case in which there is no further defense based on state law and the state has already ruled against any defense based on a federal issue. In the federal context, these types of cases are most important when there is a constitutional right which risks being diminished by further delay. In the ICC context, however, since there are no analogous supranational rights to vindicate, this type of exception is probably most comparable to cases of procedural rulings resulting in procedural limitations.[112] For example, if the courts in Sudan had a process in which a lower judge ruled that crucial testimony of certain witnesses, without which acquittal would be guaranteed, could not be taken and this kind of ruling would be carried through all further national proceedings, the Court might look at that as a case in which, for all practical purposes, the national proceedings were final. The implication toward the State would be that, of several options available, it chose the worst one that now prevents further proceedings from being meaningful. Such a ruling would not necessarily imply an intent on the part of the government to shield or prevent justice, although it might be very likely, so this scenario might be perceived as placing the ICC in the uncomfortable position of passing judgment on the validity of a national proceeding. But by limiting the finality exception to just one issue (eg. the ruling in the particular case regarding admission of testimony) and framing it as a choice the State made although it had other options, the ICC might be able to avoid the accusation that it is passing judgment on an entire national system while still being able to contend that, on that one issue, because of "unavailability of its national judicial system, the State is unable to obtain…the necessary evidence and testimony."[113] The ICC can thus make the argument, if not under unwillingness standards, then under the unavailability standard of Article 17(3).

The second category of *Cox* exceptions involve cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings."[114] As examples of this category, the *Cox* court pointed to *Brady v. Maryland*[115] and *Radio State WOW, Inc. v. Johnson*,[116] and the recent case of *NAACP v. Claiborne Hardware Co*.[117] also fits this category. Applied to the ICC, this category is very difficult to analogize because of the inability of the ICC to recognize Rome Statute crimes as more legitimate than "ordinary crimes" in national laws – although the ICC has specified certain conduct as genocide or crimes against humanity, the same conduct can be tried by a national judiciary as an ordinary crime that may not carry the same sentencing or consequences as a Rome

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[111] *Finality Rule*, *supra* note 53, at 1015.
[112] The limitation would be some sort of restraint on the government's ability to prosecute further, not the defendant's available defenses.
[113] Rome Statute, *supra* note 11, Art. 17(3).
[114] 420 U.S. at 480.
[115] 373 U.S. 83 (1963) (Supreme Court granting review when case was remanded solely for issue of the defendant's punishment despite the defendant's challenge of the prosecutor's actions as unconstitutional because regardless of the outcome of the punishment issue, the defendant would still be entitled to an appeal based on the constitutional issue. The constitutional issue was independent of the events at the punishment proceedings.).
[116] 326 U.S. 120 (finding that the federal issue would survive the state proceedings which remanded only for determination of damages).
[117] 458 U.S. 886 (1982) (Supreme Court granting review for case in which Mississippi Court remanded case to trial court on the issue of damages because the federal law issues would not be resolved in further state court proceedings).

Statute crime. This category of exceptions basically requires a decision by the ICC that no matter what the State does, it will leave an issue unresolved which will require the ICC's intervention. Even more strongly than the first category, this type of exception requires the Court to make a judgment about the capability of the national courts to fully handle a prosecution. A hypothetical case would consist of the highest Sudanese court remanding a murder case to a lower court for further proceedings only on a perjury issue. If the ICC felt that the further State proceedings would not affect the acquittal on the murder charges, it would still have trouble justifying intervention on those grounds. The ICC would have trouble proving admissibility on a State's final judgment, much less justifying interference as an exception to the final judgment rule – intervening because the Court feels the acquittal was the wrong decision would be very difficult to defend. Although the first category of *Cox* exceptions does tend to characterize the State's further proceedings as mere formality, it leaves open the possibility that the national system is still valid but merely unable to reach the needed result in this particular instance. This second category, however, requires a more blatant characterization of the State's system as wrong or inadequate to prosecute Rome Statute types of crimes altogether, a depiction the ICC would be wise not to adopt.

Cox's third category includes "those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case."[118] Citing *California v. Stewart*[119] and *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*,[120] *Cox* allows for federal interference before a final state judgment when the federal issue will be permanently lost if the case proceeds in state courts. In the context of the ICC in Sudan, this might translate into a case in which Sudan is attempting to prosecute a defendant for genocide based on Rome Statute guidelines, but in the course of its proceedings, makes a ruling that certain evidence of mass sterilization cannot be collected. If the case for genocide proceeded in the national system on some other grounds, the ICC may never have a chance to prosecute the alleged conduct of mass sterilization and the perpetrators may never be tried for that particular conduct at all. This third category of exceptions can thus be characterized as allowing the ICC to intervene when State procedural barriers prevent proceedings on issues relevant to the ICC's realm of interest, and while ICC intervention will undoubtedly stir debate, it is likely less than if it claimed a right to intervene over an area of substantive State law.[121] The ICC in this exception creates a bubble for itself if it uses this type of exception to preserve issues relevant to the Court, and if it does so by pointing to a deficiency in the state's procedural process. This would qualify under Article 17(3) as an inability on the

[118] 420 U.S. at 481.

[119] 384 U.S. 436 (1966) (the Supreme Court citing a state court judgment as final because "acquittal of the defendant at trial would preclude, under state law, an appeal by the state.").

[120] 414 U.S. 156 (1973) (the Supreme Court finding that the issue of whether a North Dakota law was constitutional needed to be decided before the case proceeded in state courts or else the constitutional issue would never be addressed).

[121] *Finality Rule*, *supra* note 53, at 1021-22 (although "the Court will generally give effect to reasonable rules of state procedure…[b]ut since the independent and adequate state grounds doctrine as applied to state procedural law rests primarily upon considerations of comity – as opposed to a congressional statute, which underlies the doctrine as applied to state substantive law – the Court need not observe state procedural law as scrupulously as it must state substantive grounds.").

part of the State, while not imputing to the State an intentional shielding or intent to avoid justice.

The last *Cox* category of exceptions is by far the most confusing. In its distilled form, "interlocutory review is permitted (1) when 'reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action,' and (2) when failure to consider the state court decision immediately 'might seriously erode federal policy.'"[122] The *Cox* opinion cites *Curry*, *Langdeau,* and *Miami Herald Publishing Co. v. Tornillo*[123]as the cases most reflective of this category of exception. This class is very similar to the third category except that in that category, the Supreme Court intervenes because it is the only certain time at which it might be able to review the issue. The fourth category, however, includes exceptions for when review might be had later as well.[124] This characteristic tends to shift category four exceptions toward an "individual issue model" in which the Supreme Court chooses to review independent issues that it deems important to federal interests.[125] Although the ICC may find this type of exception useful, it needs to be careful that reviewing a State proceeding mostly because it serves an important ICC interest may come too close to creating an unwelcome hierarchy. While the other three categories of exceptions to finality doctrine rely on circumstances in which the ICC may step in because the State is proving unwilling or unable, this category seems to indicate situations in which the Court is even admitting that the State may still be willing or able. This exception within the federal-state system is already tenuous,[126] but applied to the ICC-State system in which the supranational-national law distinction is not very clear, this exception is probably unfeasible.

Exceptions to Abstention Doctrine

Abstention is an exercise of judicial restraint when all "jurisdictional and justiciabilty requirements are met."[127] Although there are different theories as to how or why the federal courts should issue injunctions,[128] the allowance for judicial restraint in light of state proceedings has been strongly imbued in the federal judicial system.[129] Exceptions to this presumption of deference must therefore battle an overarching systemic goal of promoting the interests of comity and federalism. Naturally, the few circumstances that can justify a breach of the deference presumption are extreme situations. Transferred into the ICC context, these are situations more relevant to a finding of unwillingness under Article 17(2), as opposed to inability under Article 17(3). Additionally, because the ICC does not have the ability to actually enjoin State proceedings, the equivalent of an injunction or declaratory relief would be determination that a case fulfills the Rome Statute's admissibility requirements. Lastly, the situations that qualify as exceptions under an abstention theory, unlike the exceptions to the final

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[122] *Id*. at 1023-24.
[123] 418 U.S. 241 (1974).
[124] *See* Chemerinsky, *supra* note 33, at 676.
[125] *Finality Rule*, *supra* note 53, at 1006-07, 1025-26.
[126] Redish, *supra* note 66, at 254-55.
[127] Chemerinsky, *supra* note 33, at 761.
[128] For example, the Anti-Injunction Act was a statutory prohibition on federal court injunctions in state proceedings, with which some critics the Younger abstention as needlessly interfering. *See* Martin Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L. J.. 71 (1984).
[129] Shapiro, *Jurisdiction and Discretion*, *supra* note 76, at pp. 545-52.

judgment rule, are not borderline instances of State mishandling which may involve merely inability without negative intent – rather, these are examples of clear State misconduct embodying a high level of intentional misconduct.

The Supreme Court in *Younger* imagined that abstention would apply in all cases except for "exceptional circumstances" in which case the federal courts could exercise their jurisdiction.[130] This reasoning closely tracks the explanation given in exhaustion doctrine, which cites "circumstances of peculiar urgency" as the only exceptions to the presumption of deference to states.[131] The emphasis on how extreme these situations need to be mirrors the presumption which the Rome Statute places on the Court – that a case is considered inadmissible unless the Court can prove one of the situations justifying an exception.

Bad faith state prosecutions constitute the first type of exception recognized by the court in *Younger*.[132] The embodiment of this exception was given by the example of *Dombrowski v. Pfister*, a case in which the state prosecutors utilized the courts for the purpose of harassing and intimidating civil rights activists as "part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass appellants and discourage them and their supporters from asserting and attempting to vindicate the constitutional rights of Negro citizens of Louisiana."[133] In distinguishing *Younger* from *Dombrowski*, the Supreme Court noted that *Dombrowski* did "sufficiently establish the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered the very restricted circumstances under which an injunction could be justified."[134] The Supreme Court further elaborated, however, that "even irreparable injury is insufficient unless it is 'both great and immediate.'"[135] Although Younger itself did not qualify for an exception as a bad faith prosecution and no case since then has qualified for such an exception, theoretically a case of bad faith prosecution resulting in great and immediate irreparable injury would qualify.

In a scenario involving the ICC, a bad faith prosecution on the part of the State would not be a case of harassment, but rather of excessive leniency for the defendant(s). The Court would not be aligned with the interests of parties who are being harassed, but rather with hypothetical petitioners (eg. victims) asking for an injunction of the national proceedings based on claims of irreparable injury. Such a showing would fulfill the Article 17(2) definition of unwillingness because it would be a prosecution brought to shield a defendant, or unjustifiably delay or conduct an impartial hearing with an intent to avoid bringing the defendant to justice.[136] The usefulness of the *Dombrowski* example is that it specifies what level of injury from the bad faith prosecution is needed to justify

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[130] 420 U.S. at 53-54.
[131] *United States ex rel. Kennedy v. Tyler*, 269 U.S. at 17.
[132] *Younger v. Harris*, 401 U.S. at 48-49.
[133] 380 U.S. 479, 482 (1965).
[134] *Younger v. Harris*, 401 U.S. at 48.
[135] *Id*. at 46.
[136] Rome Statute, supra note 11, Art. 20(3). This article on *ne bis in idem* also touches on these standards of shielding and independent or impartial proceedings. The abstention doctrine, however, is more relevant to an Article 17 analogy because abstention occurs before the state court has completed its proceedings, while *ne bis in idem* is concerned with evaluation after conviction or acquittal, a doctrine more similar to exhaustion or final judgment.

intervention since the Rome Statute itself is vague as to any methods of measurement (eg. what qualifies as shielding). In an ICC application of the rationale, the burden placed on the appellants in *Dombrowski* to prove their allegations of irreparable injury transfers to the ICC such that it must prove great and immediate irreparable injury. Of course, the injury in an ICC case is not to the defendants who are benefiting from the leniency of the national courts. The Court will have to act as a proxy for a combination of victims' interests and the interest of the international community in order to show some type of injury resulting from the State's bad faith prosecution.[137] Particularly in the case of Darfur, the Security Council referral expressed the very specific wishes of the entire international community embodied in the UN,[138] such that claiming an injury to the expressed interests of at least the international community, if not the victims of the alleged crimes, should not be difficult to fathom.

How to show an injury, however, is not readily apparent when there is a lack of a real petitioner. The Court's representation of hypothetical interests would still need to rely on proof of an irreparable injury to someone. For example, if the Sudanese prosecution were conducted in bad faith, the ICC could allege a "great and immediate" irreparable injury to 1) the claims of victims who may lose their chance to press charges against the perpetrators, 2) victims who are continuing to suffer at the hands of janjaweed militia due to a lack of good faith prosecution, and/or 3) the international community's ability to prevent Rome Statute crimes from occurring or to secure good faith trials through its referral process. The scope of the harm would need to be proven the way the appellants in *Dombrowski* "had offered to prove that their offices had been raided and all their files and records seized pursuant to search and arrest warrants that were later summarily vacated by a state judge for lack of probable cause. They also offered to prove that despite the state court order quashing the warrants and suppressing the evidence seized, the prosecutor was continuing to threaten to initiate new prosecutions of appellants under the same statutes, was holding public hearings at which photostatic copies of the illegally seized documents were being used, and was threatening to use other copies of the illegally seized documents to obtain grand jury indictments against the appellants on charges of violating the same statutes."[139] These types of allegations transferred to an ICC context might translate into repeated summary judgments dismissing consecutive claims against the defendant, continuing use of perjured testimony, ongoing threats of prosecution aimed at witnesses or victims, and other acts indicating perpetual violation of the victims' and international community's interest in a good faith prosecution. Framing the unwillingness standards in the *Dombrowski* manner, as an exception to normal abstention doctrine, enables the Court to utilize vocabulary such as irreparable injury, and add dimensions such as "great and immediate," to fill in the blanks left by Article 17(2).

Another fruitful manner of applying the *Younger* bad faith exception is by examining which cases the Supreme Court designated as falling short of the *Dombrowski*

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[137] There are various theories which designate the Court as the nexus of international interest in preventing the core crimes. *See* Sadat, *supra* note 51, at 47-75; Broomhall, INTERNATIONAL JUSTICE, *supra* note 6, at 42-43; Triffterer, *supra* note 6, at 23-32.

[138] *See* Condorelli and Villalplando, *Can the Security Council Extend the ICC's Jurisdiction?*, in Cassese, et al, eds., *supra* note 7, at 627-40.

[139] *Younger v. Harris*, 401 U.S. at 48.

level of bad faith. Since the federal courts have not granted a single bad faith exception post-*Younger*, the body of non-qualifying cases proves more relevant to defining which cases may qualify.[140] For example, in *Hicks v. Miranda*, the Supreme Court refused to find bad faith or harassment through repeated seizures of the movie "Deep Throat" because the actions were conducted according to authorizing judicial orders.[141] This hints at the idea that proof of the bad faith has to run from top to bottom, showing an intention to harass at every level. This is similar to *Juidice v. Vail*, another case in which the Supreme Court found that the lack of bad faith on the part of the judges issuing the orders nullified the allegations of bad faith that would allow for an exception.[142] The ICC might thereby want to focus, in addition to the overall nature of the prosecution, on alleging and proving bad faith on the part of the judges' or judiciary bodies' intent to enforce judicial orders "motivated by desire to harass or…conducted in bad faith."[143]

Younger's second category of exception to abstention doctrine is for statutes that "might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."[144] This class of exceptions may be almost extinct in federal courts today after *Trainor v. Hernandez*, in which the Supreme Court reversed a lower court finding that a state statute was violative of the due process clause without clarifying whether an unconstitutional statute would still justify an exception to abstention.[145] The ICC, however, need only explore whether the original reasoning behind this exception is applicable to the Court's burden of proving unwillingness. A comparable case in the Darfur scenario would be if Sudan passed a statute which declared all defendants charged with crimes prior to April 2, 2005 (the date on which the Security Council referred Darfur to the ICC) either immune or pardoned. Discussions about the nature of amnesties or pardons in relation to admissibility generally tend to recognize the admissibility of cases in which amnesty was doled out either during a proceeding or as the conclusion of a proceeding, but recognize the limitation of the Rome Statute in reaching instances of amnesties or pardons post-conviction.[146] Based on Article 17, the assumption is that amnesties granted during the course of a proceeding automatically qualifies the trial as a "sham trial."[147] The *Younger* exception rationale can bolster this presumption by

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[140] Within the federal courts, the criterion needed to grant this exception have proven to be extremely narrow. *See* Fallon et al, *supra* note 65, at 1227. The bad faith exception might be characterized as encompassing only those cases with "repeated prosecutions initiated by state officials solely for the purpose of harassment without the opportunity to raise the claims in state court because of the unavailability or bias of the state judiciary." Chemerinsky, *supra* note 33, at 832.

[141] 422 U.S. 332 (1975). Unlike *Dombrowski*, in which the continuing threats included the use of illegally seized documents, *Hicks* does not provide a showing of illegality.

[142] 430 U.S. 327 (1977).

[143] *Id*. at 326.

[144] *Younger v. Harris*, 401 U.S. at 53-54 (citing *Watson v. Buck*, 313 U.S. 387, 485-86 (1941)).

[145] 431 U.S. 434 (1977).

[146] Amnesties granted during a trial can contribute to a finding of admissibility based on unwillingness, while amnesties and pardons granted in place of a trial do not bar the ICC under the *ne bis in idem* principle since they do not qualify as judgments. *See* Van den Wyngaert and Ongena, *supra* note 51, at 726-27; Broomhall, INTERNATIONAL JUSTICE, *supra* note 6, at 100-102; Sadat, *supra* note 51, at 53-69.

[147] Van den Wyngaert and Ongena, *supra* note 51, at 726. *See also*, Broomhall, INTERNATIONAL JUSTICE, *supra* note 6, at 94-96 ("Amnesties typically remain a tribute paid, in negotiations, to the fact of present power, and their acceptability under any circumstances remains controversial").

pinpointing any specific legislation authorizing blanket amnesties or immunities and providing supplemental support for its dismissal.[148] For cases of post-conviction measures, the *Younger* exception could become useful if it was able to indicate a piece of legislation rendering a broad swath of immunity or pardons such that compared to prior patterns of legislative enactment pursuant to a judgment, the new statute indicates blatant disregard for the standards exacted in the Rome Statute. As such, this *Younger* exception provides another basis on which to compare national proceedings against their own histories, even if, in the end, the rarity of amnesties or pardons through statutory means will render this exception minimally useful.

The third *Younger* exception includes a few sub-topics encompassed in the broader category of situations in which the state lacks an adequate forum to adjudicate the issue. The reason can be bias or a finding that the state courts fail to offer an adequate remedy.[149] *Younger* does not seem to explicitly lay out the boundaries of this third exception such that the confirmation of the exception's existence consists of the subsequent cases which presume the exception, yet the inadequate state forum exception is the most substantial of the exceptions stemming from *Younger*.[150] *Gibson v. Berryhill* was one of the earliest cases to utilize this third exception.[151] In *Gibson*, the plaintiffs complained that the Alabama Board of Optometry suffered from an incurable bias that prevented it from providing them with a "fair and impartial hearing in conformity with due process of law."[152] The Supreme Court agreed that the state proceedings were biased based on the fact that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes," and possibly also because the Board may have a prejudicial notion against the plaintiffs already.[153] The federal branch's willingness to intervene, however, is circumscribed somewhat by *Kugler v. Helfant*, a case in which the state rules allowing for judicial recusal was a sufficient safeguard against system-wide bias such that it was not shown that the overall state court system could not provide an unbiased process.[154]

Transplanted into the ICC context, the *Gibson* rationale requires a showing by the Court that the national proceedings suffer from a bias (such as substantial pecuniary gain) so severe that it pervades the whole system, or that the ruling parties in the proceedings had previously engaged in behavior indicative of their predetermined disposition (such as

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[148] Exceptions such as the creation of the Truth and Reconciliation Commission in South Africa highlight the difficulty of the presumption that all amnesties lead to sham trials inconsistent with the goals of the Rome Statute. *See* Broomhall, INTERNATIONAL JUSTICE, *supra* note 6, at 101; Sadat, *supra* note 51, at 59-69.

[149] *Younger v. Harris*, 401 U.S. at 45 (citing *Fenner v. Boykin*, 271 U.S. 240, 243-44 (1926), "'[C]ases have established the doctrine that, when absolutely necessary for protection of constitutional rights, court of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate. Ordinarily, there should be no interference with such officers….The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.'").

[150] Brian Stagner, *Avoiding Abstention: The Younger Exceptions*, 29 TEX. TECH. L. REV. 137, 163-64 (1998).

[151] 411 U.S. 564 (1973)

[152] Id. at 570.

[153] Id. at 578-79.

[154] 421 U.S. 117 (1975).

an attorney who formerly defended the defendant sitting as a judge). The Court in making the case for a showing of unwillingness thus needs to focus both on showing that the national system overall does not have sufficient safeguards to guarantee an unbiased system, not just one or two unbiased judges, *and* on proving that the judges or administering bodies have substantial stakes in the outcome of the case.

The second aspect of the inadequate state forum exception is based on whether the state proceeding is able to provide a remedy. The Supreme Court addressed this in *Gerstein v. Pugh*, a case in which the federal courts, referring only briefly to *Younger*, held that "relief was not barred by the equitable restrictions on federal intervention in state prosecutions.…The injunction was not directed at the state prosecutions as such, but only at the legality of pretrial detention without a judicial hearing, an issue that could not be raised in defense of the criminal prosecution. The order to hold preliminary hearings could not prejudice the conduct of the trial on the merits."[155] This reading of the exception recalls the second class of exceptions under the final judgment rule – the survival of an important federal interest which the state has no way of adequately addressing. As in that context, the application of this rationale to an ICC situation is tricky because the lack of a state remedy is not clearly grounds for intervention. For example, Sudan has a provision allowing use of force to resist an illegal warrant for arrest.[156] If a defendant killed many people but claimed this provision as a defense and the State found the claim reasonable, the ICC may find itself unable to point to any unwillingness or inability other than the fact that the national law is different than the Rome Statute. Unless the state provisions are in some way applied with bias or in such a way as to cause great irreparable injury, the usefulness of the *Gerstein* manner of evaluation may not prove very useful for the ICC.

The lack of an adequate state remedy is, however, different from the complete absence of a state proceeding. Although this is not strictly an exception to abstention doctrine, the Supreme Court was quick to point out that *Younger* abstention principles are not applicable to a situation in which the state is not conducting proceedings. In *Steffel v. Thompson*, the Supreme Court specifically found, "When no state criminal proceeding is pending at the time the federal complaint is filed, considerations of equity, comity, and federalism on which *Younger v. Harris*, and *Samuels v. Mackell*…were based, have little vitality: federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system; nor can federal intervention, in that circumstance, be interpreted as reflecting negatively upon the state courts' ability to enforce constitutional principles."[157] Effectively stripping the federal courts of any need to justify federal action, the *Steffel* rationale applied to the ICC is similar to one of the initial complementarity propositions – that the ICC faces no obstacle in an "inaction scenario."[158] As discussed earlier, once a State decides to initiate its own proceedings, the ICC will in almost every situation need to defer to the State proceedings unless or until the Court can prove an exception to the inadmissibility presumption. *Steffel* is simply another theory to bolster the Court's initial right to intervene.

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[155] *Gerstein v. Pugh*, 420 U.S. 103, 108 fn. 9 (1975).
[156] Abdalla Hassan Salim, RIGHTS OF THE ACCUSED IN THE SUDAN 15 (1983).
[157] 415 U.S. 452, 453 (1974).
[158] *Complementarity in Practice*, *supra* note 25, at p.7.

Another tangent of exceptions to *Younger* abstention is the fact that a state may waive its right to argue for the application of abstention principles and thereby voluntarily submit to a federal forum. The Supreme Court found in *Ohio Bureau of Employment Services v. Hodory*, "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system."[159] Similarly, the majority of the ICC's jurisdiction is built on a foundation of State consent.[160] Under Article 13(a) and (c) respectively, the Court may exercise its jurisdiction if the situation is referred by a State Party (that possesses jurisdiction over the matter initially) or if the Prosecutor uses his *proprio motu* powers. Both of these scenarios require the State's acceptance of the Court's exercise of jurisdiction[161] and are therefore theoretically analogous to *voluntary* waivers of *Younger* abstention. The voluntary waiver, however, can be used not only to allow federal court proceedings, but even to urge the federal system to take over the case.[162] In drafting the Rome Statute, nobody contemplated that States would so willingly refer cases to the Court because State sovereignty interests were so high.[163] The worry now is that national courts, in referring their cases voluntarily, will actually be doing so to the detriment of the underlying principles of complementarity. The presumption of deference to State proceedings underscores the intention of the Rome Statute to create a system in which States do not shirk their duty to prosecute the core crimes.[164] The Court's continued acceptance of self-referral cases waiving complementarity, while necessary if the need for investigation and prosecution exists, may undercut the effectiveness of national regimes. The ICC must be aware of the likelihood that States may take advantage of the fact that they can waive their primary jurisdiction and proceed to a "'selective or asymmetrical self-referral' where the *de jure* government is itself party to an internal armed conflict."[165] In such a situation, the Court needs to be aware of the politics at stake and adhere to its duty to investigate entire situations, as opposed to just specific cases.[166] State waivers in favor of the ICC forum are thus both an easement of the Court's duty to abide by a *Younger*-type abstention, but it can also cause the Court difficulty in maintaining its independence and the viability of the complementarity regime.

Another interesting aspect to the issue of waivers and referrals is a referral to the ICC according to Article 13(b) by the Security Council acting under Chapter VII of the United Nations Charter. As seen in the Darfur referral, Sudan is not a State Party and is not voluntarily waiving the complementarity principle. The extent to which a state may

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[159] 431 U.S. 471, 480 (1977).

[160] Article 12(1) declares that "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." *See* Lattanzi, *supra* note 77, at 6-7.

[161] Hans-Peter Kaul, *Preconditions to the Exercise of Jurisdiction*, in Cassese et al, eds., *supra* note 7, at p.606.

[162] Stagner, *supra* note 150, at 176-77.

[163] Claus Kress, *Self-Referrals and Waivers of Complementarity: Some Considerations in Law and Policy*, 2 J. INT'L CRIM. JUST. 944, 944-45 (2004).

[164] Rome Statute, supra note 11, Preamble para. 6 ("Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.").

[165] Kress, *supra* note 163, at 946-47. *See also*, Broomhall, *Overview and Cooperation*, *supra* note 8, at 80 ("States Parties may for a variety of reasons sometimes prefer that jurisdiction is exercised by the ICC.").

[166] El Zeidy, *supra* note 7, at 914-15 (citing the intentional selection of the term "situation" as opposed to "cases" because it narrowed the Court's "independence in the exercise of its jurisdiction.").

involuntarily waive the *Younger* abstention doctrine is also an issue that plagues the federal courts. The federal courts have decided that states can actually involuntarily waive the *Younger* abstention principles and that federal courts may consider the abstention doctrine *sua sponte*.[167] In the ICC realm, these concerns are slightly different because the Court has an obligation under Article 53(1)(b) to consider admissibility issues such that considering admissibility *sua sponte* is already assumed. The issue of whether States may involuntarily waive into an ICC proceeding, however, is more of a political and practical issue than a jurisdictional issue.[168] The Rome Statute confers the ICC with jurisdiction, but investigating, prosecuting and enforcing a judgment without any cooperation from the State would be difficult, if not impossible. The Security Council referral, by virtue of it extending from the UN and with it the UN's own powers, endows the ICC only with an additional ally and resource, but it does not extend the Court's jurisdiction beyond what Article 13(b) allows.[169] Involuntary waiver in the ICC sense thus only arises in the context of a Security Council referral and results in more reliance on the UN's capabilities to coerce cooperation than in the ICC's ability to impose its jurisdiction.

Possible Future Grounds for ICC Admissibility Exceptions

There are several additional theories of federal courts doctrine that may also be relevant to the ICC structure, but which will only be touched on briefly here. The notion of independent and adequate state grounds as justification for federal deference to state decisions provides another fruitful area for comparison with ICC admissibility proceedings. The basic proposition of the independent and adequate doctrine comes from the idea that if the decision of the highest state court rests on grounds that are independent of the federal grounds and the state grounds are adequate to support the decision, then the federal court should not review even the federal issue.[170] To be independent, the state ground "must not be intertwined with or dependent upon a federal question either explicitly or implicitly."[171] To be considered adequate, "A decision based on state law…would necessarily be affirmed even if any decision on federal law were reversed."[172] These grounds for independent and adequate in an ICC context, however, might be "lost in translation" because of the difference between the national-supranational relationship and the state-federal relationship. The lack of distinct

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[167] Stagner, *supra* note 150, at 177.

[168] Sadat and Carden, *supra* note 1, at 414-15 ("Complementarity has a substantive component, a procedural component, and a component that we will call 'political,' or 'prudential' for lack of a better term.…The prudential aspect refers to the policy choices made in deciding what kinds of cases should be in the ICC, rather than national courts, which, as noted above, means that some cases that are clearly within the Court's jurisdiction (prescriptively) will not be heard by the Court."). *See also*, Kenneth Abbott, Robert Keohane, Andrew Moravcsik et al, *The Concept of Legalization*, 54 INTERNATIONAL ORGANIZATION 401 (2000) (noting the increasing tendency to make political decisions through legal institutions).

[169] Condorelli and Villalplando, *supra* note 138, at 571.

[170] *See* Chemerinsky, *supra* note 33, at 686.

[171] Thomas Baker, *The Ambiguous Independent and Adequate State Ground in Criminal Cases: Federalism Along a Mobius Strip*, 19 GA. L. REV. 799 (1985) (citing Michigan v. Long, 463 U.S. 1032 (1983) and Minnesota v. National Tea Co., 309 U.S. 551 (1940)).

[172] Richard Matasar and Gregory Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1292 fn. 2 (1986) (citing *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935)).

supranational grounds as opposed to the national grounds currently seems to imply that all national grounds are independent and adequate for whatever decision the State makes.

Eventually, however, the ICC may need to delve further into how it will cope with the gap between national proceedings on the ordinary crimes basis and proceedings utilizing the Rome Statute language. Finding the ordinary crimes proceedings to not be independent or adequate in relation to the supranational law might be just one method of distinguishing them from Rome Statute standards such that the ICC can intervene an unwilling or unable finding.[173] Solidifying such a stance will require, more or less, a presumption that States should implement legislation incorporating the core crimes into their national laws or else suffer a finding that their ordinary crime laws are inadequate or not independent of Rome Statute issues.[174]

Conclusion

The complementarity regime serves as the gatekeeper for any investigations and prosecutions the ICC may be facing. Complementarity's most interesting feature, however, is its dual role as both a guard that keeps the Court's jurisdiction from reaching beyond its mandate and as an usher that sweeps cases into the ICC's jurisdiction when States shirk their duties. The admissibility requirement based on a showing of State unwillingness or inability is the aperture through which all proceedings must pass.

The complementarity regime also highlights the difficult nature of the supranational-national relationship and focuses the Court's limitations in a way that accommodates comparison with the federal-state relationship. Through these doctrines of exhaustion, finality, and abstention, the Court is able to take a glimpse at what its future might entail. Any suggestions for what the Court might attempt to accomplish with referrals such as Darfur may stem from the comparison.

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[173] Some scholars believe admissibility based on discrepancies in legal systems to be a foregone conclusion. *See* Broomhall, *Overview and Cooperation*, *supra* note 8, at 81 ("the absence from national law of the prohibitions, defences, general principles and sentences set out in the Statute could support a finding of admissibility by the Court on the grounds of inaction at the national level.…This could be the case where national law has definitions of crimes that are too narrow, general principles of law more restrictive than those in the Statute, or defences which are overly broad. In such cases, the State would not be able to impose criminal responsibility on acts criminal under the Statute, resulting in de facto impunity. The resulting inaction could render the case admissible although, presumably, the gap between national law and the Statute would have to be a significant one before the Court would consider exercising jurisdiction, if national authorities were otherwise proceeding in good faith.") Even so, the argument that a procedural rule is not a bar to jurisdiction leaves the Court with the *ne bis in idem* bar under Article 20. It would seem that, unless the Court could show that the State had pursued the case knowing that it would, or intending to, encounter the procedural obstacle, the ICC could not prosecute the case.

[174] In the end, complementarity, in order to function, necessitates an adaptation by States of the Rome Statute standards. *See* Kleffner, *supra* note 47, at 94 ("in order for the ICC to effectively perform its complementary function, comprehensive implementation is indispensable. To interpret the provisions on complementarity so as to give them the fullest weight and effect consistent with the ICC's functions therefore involves an obligation on States parties to establish their jurisdiction over the ICC crimes to the extent required for the purpose of national prosecution.").