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Three Theories of Complementarity: Charge, Sentence, or Process?

Responding to Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53
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I. INTRODUCTION

The principle of complementarity, which governs the International Criminal Court (ICC), will inevitably require some difficult determinations about whether a national proceeding warrants deference. One may discern in the literature three major theories about what the ICC should scrutinize when it assesses a national proceeding: the nature of the *charges* laid, the severity of the *sentence* imposed, or the quality of the *process* adopted. These three approaches are not necessarily mutually exclusive; they can be combined in different ways and with different emphases to create plausible schemas.

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Kevin Jon Heller's article, *A Sentence-Based Theory of Complementarity*, makes a valuable contribution to the discussion.¹ He advances an important and convincing critique of approaches that would focus on the domestic or international nature of the charges or on the relative gravity of the charges.² He proposes to replace such approaches with one focused on the sentence.³ While Professor Heller may be successful in showing that a *sentence-based* approach is superior to a *charge-based* approach, I will argue that a sentence-based approach also raises some serious difficulties that have not been addressed. I will therefore suggest a third option, a *process-based* approach. I believe that a process-based approach is not only the best fit with the Rome Statute (the positive law); it is also the most elegant theory.⁴ Under a process-based approach, the Court can refer to charges and sentences as *indicia*, insofar as they shed light on the genuineness of the process.

While I have reservations about the more radical proposal to adopt a new approach to complementarity that focuses exclusively or even primarily on sentence severity, I believe that *A Sentence-Based Theory of Complementarity* offers two important insights. The first demonstrates the very limited role that should be accorded to "charges."⁵ The second demonstrates the potentially important role that can, in some circumstances, be accorded to "sentences."⁶ I would absorb these insights into a process-based theory.

Heller also raises concerns about the "same conduct" test adopted by the ICC.⁷ Similar concerns have been raised in other recent thoughtful scholarship,⁸ so it is valuable to inspect the concerns here. While I agree that some flexibility is needed, I hope to show that the problem is actually much narrower than is often perceived in the literature. The Rome Statute already provides solutions to the scenario where a state wishes to prosecute a person for a *different crime*. These solutions include a consultation mechanism to prioritize cases as well as the "interests of justice" test. In my view, stretching the admissibility regime to cover such scenarios is not only unnecessary but would generate incoherencies. Thus, while I partly agree with the concerns raised by Heller and others, I will argue for a much narrower solution.

¹ Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85 (2012).

² *Id.* at 88–107.

³ *Id.* at 107–30.

⁴ Rome Statute of the International Criminal Court, Jul. 17, 1998, UN Doc. A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

⁵ See generally Heller, *supra* note 1.

⁶ *Id.*

⁷ *Id.* at 107–30.

⁸ See *infra* note 53.

All references to “admissibility” in this comment concern the complementarity aspects of the Rome Statute (Article 17(1)(a)–(c)) and not the distinct issue of “gravity” (Article 17(1)(d)).

II. CHARGE-BASED APPROACHES: THE HARD MIRROR AND THE SOFT MIRROR

The first two sections of *A Sentence-Based Theory* advance an informative critique of two approaches that would focus on the charges laid at the national level. One approach is the “hard’ mirror thesis,”⁹ which is the view that prosecuting an international crime by using “ordinary” criminal offenses (e.g., murder, assault) will not satisfy the principle of complementarity.¹⁰ Heller convincingly demonstrates that the “hard’ mirror thesis” is not supported by the Rome Statute¹¹ and that it would have negative effects such as creating a disincentive and formidable barrier to implementing and ratifying the ICC Statute as well as to prosecution.¹²

The other approach is the “soft’ mirror thesis,” which acknowledges that states are not *obliged* to use ICC definitions, but argues more modestly that it is *preferable* for states to do so.¹³ Because the soft mirror thesis is more plausible, Heller’s critique is all the more eye-opening and thought-provoking. He shows that a position favoring the use of international definitions may have the undesirable effect of promoting impunity.¹⁴ Prosecution of international crimes requires experience with international legal jurisprudence as well as the investigative burden of collecting contextual evidence.¹⁵ Using international definitions will render proceedings much more

⁹ The term “mirror thesis” is adapted from Frédéric Mégret, who used the term in the context of legislative implementation of ICC obligations, to describe the view that a state should or must establish offenses matching those of the Rome Statute. Heller helpfully divides this into two variations. Frédéric Mégret, *Too Much of a Good Thing? ICC Implementation and the Uses of Complementarity*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY 363, 372 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

¹⁰ Heller, *supra* note 1, at 88.

¹¹ Indeed, whereas the ICTY and ICTR Statutes allow international prosecutions of a person who has been tried for an “ordinary” rather than “international” crime, the ICC drafters specifically considered and rejected that language and instead refer to prosecutions for “conduct also proscribed under article 6, 7 or 8.” Rome Statute, *supra* note 4, art. 20(3); John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 41, 57–58 (Roy Lee ed., 1999).

¹² Heller, *supra* note 1, at 94–96.

¹³ *Id.* at 97.

¹⁴ *Id.* at 103–07.

¹⁵ International crimes require proof of the *actus reus* as well as “contextual elements,” i.e., the surrounding context that justifies international jurisdiction. For example, in crimes against humanity, the crimes must be part of a widespread or systematic attack directed against a civilian population. Rome Statute, *supra* note 4, art. 7.

difficult and precarious and may lead to failures of investigations or prosecutions.¹⁶ This is particularly a concern and a disproportionate burden for developing countries. Heller convincingly shows that the expressive value of using international definitions is outweighed by the costs and risks of such an approach.¹⁷

Heller's critique is valuable because some scholars and advocates have advanced hard and soft versions of the mirror thesis in order to encourage wide-reaching reforms and use of international definitions, and the implications of such claims must be inspected.¹⁸ However, charge-based approaches may not be quite as ubiquitous as Heller indicates, and thus his position is not as lonely and contrarian as it may seem. Whereas Heller refers to a "nearly uniform insistence among scholars" that international definitions be used,¹⁹ I think the literature is more nuanced. From the initial commentary by John Holmes onwards, it seems a clear theme in much of the commentary that the admissibility regime does not require international charges.²⁰ For example, Heller cites the Informal Expert Paper on complementarity as an example of the soft mirror approach, but the cited passage merely says that effective implementing legislation should be encouraged, which is quite unobjectionable and says nothing at all about preferring or requiring international definitions.²¹

Several authors cited by Heller propose that states should incorporate international crimes into domestic law, not because international definitions are per se better, but because it is desirable to ensure that domestic law is at least co-extensive with ICC definitions.²² These passages do not suggest that the admissibility regime requires or favors international charges. They simply indicate that making international definitions available is a prudent way to avoid a scenario in which a crime occurs that is not covered under national law.²³ In such a scenario, the state would not be in a position to bring a national prosecution at all and thus could not resist admissibility of the case before the ICC.²⁴ That proposition, which is about options during implementation, remains accurate.²⁵

¹⁶ Heller, *supra* note 1, at 100–07.

¹⁷ *Id.* at 130–31.

¹⁸ For the arguments and for the responses, see generally *id.*; Mégret, *supra* note 9.

¹⁹ See Kevin Jon Heller, *Kevin Jon Heller Responds to Professors Darryl Robinson and Carsten Stahn*, OPINIO JURIS (Jan. 24, 2012), http://opiniojuris.org/2012/01/24/hilj_heller-response-to-robinson-and-stahn/ [hereinafter Heller Response]. See also Heller, *supra* note 1, at 87 ("traditional"), 96 (view that international charges are better is held "almost without exception"), 132 ("orthodoxy"; "almost never questioned").

²⁰ Holmes, *supra* note 11, at 57–58.

²¹ Heller, *supra* note 1, at 97.

²² See *id.* at 97–98 nn.67–77.

²³ As Heller rightly acknowledges, see *id.* at 97–98.

²⁴ Note that I am not speaking of the state being deemed to be "unable," which is a term of art in Article 17(3) of the Rome Statute. I mean that the state literally cannot do a prosecution

Another type of charge-based theory would focus not on the national or international nature of the charges, but rather on whether the charge is for a serious or minor crime. Heller convincingly shows that admissibility cannot focus entirely on the gravity of the charge.²⁶ I would again simply note that some of the works cited by Heller as examples of approaches focused on the gravity of the charge are actually amenable to a more subtle and generous reading. Rather than suggesting that the gravity of the charge is *per se determinative* (which would indeed be problematic for the reasons Heller advances), they seem to have simply been noting that in some circumstances trivial charges may be one *indicator* of a non-genuine process.²⁷ This is a more subtle position that I will explore below.

because it has no law for the crime, and hence there would be no proceeding. Thus the case would be admissible before the ICC because the proceedings requirement explicitly stated in Article 17(1)(a)–(c) would not be met. *See* Rome Statute, *supra* note 4. For those who do not know what is meant by a “proceedings requirement” in Article 17(1), this is demonstrated in detail in Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 67 (2010).

²⁵ I agree of course with the critiques by Heller and Mégret of arguments that misstate this implementation option as a duty. *See* Heller, *supra* note 1, at 88–93; Mégret, *supra* note 9, at 364–74.

Heller’s partial answer to the co-extensiveness problem is that the state can simply charge the person for a different crime, using some offense that is on the books. Heller, *supra* note 1, at 124. However, this solution is not viable if the accused is not guilty of any other offense. For example, if the person has committed only one type of crime, such as declaring that no quarter shall be given or recruiting child soldiers, *see* Rome Statute, *supra* note 4, art. 8(2)(b)(xii), art. 8(2)(b)(xxvi), and domestic law does not cover that conduct, then there is no legal possibility of proceeding against him. Thus, the proposition survives unaltered that, if a state wishes to be sure that it can exercise jurisdiction over crimes by its nationals or on its territory, it remains prudent to ensure that its criminal laws are at least as broad as the subject matter jurisdiction of the ICC.

Heller rightly warns that the adoption of international crimes legislation may create an expectation that the state will use it to deal with international crimes, rather than proceeding with domestic charges that cover the same subject matter. Heller, *supra* note 1, at 99–100. The point is sound, and thus, to avoid falling back into the problem of requiring difficult proceedings that are less likely to succeed, it must be that we cannot favor “international” charges over “ordinary” charges in an admissibility determination, even where a state has relevant legislation.

²⁶ Heller, *supra* note 1, at 111–16. In Heller’s (sentence-based) account, this is because the minor charge might still produce a serious sentence. On my (process-based) account, this is because a minor charge might still be part of a genuine process.

²⁷ *See* Heller, *supra* note 1, at 109 (citing authorities). For example, the passage Heller cites from the Informal Expert Paper lists adequacy of the charge in relation to the gravity and the evidence, but this is one in a long list of factors explicitly centered on the question of genuineness of the *process*. *See* Office of the Prosecutor, International Criminal Court, *Informal Expert Paper: The Principle of Complementarity in Practice* 14–15 (2003), available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> [hereinafter Informal Expert Paper]. Similarly, the cited

The point of the last few paragraphs is that the postulated preference for international charges is not as monolithic or widespread as it may seem. Nonetheless, charge-based theories are certainly advanced in the literature and thus Heller's careful critique is valuable. His critique of the "soft" mirror thesis is particularly insightful and important.

III. THE SENTENCE-BASED THEORY

The second, more radical step in *A Sentence-Based Theory* is to suggest a sentence-based approach as an "exclusive" test (at least where the state uses ordinary criminal charges).²⁸ On this approach, to assess the national proceeding, the Court would examine the sentence imposed and require it to be at least as stringent (with a modest margin of appreciation) as the *average* imposed by the ICC for the corresponding international crime.²⁹ Heller anticipates some of the possible objections to this approach, including *inter alia* that the ICC does not yet have any convictions and hence does not have any "average" sentences. To address such objections, he introduces various arrangements, such as incorporating ICTY and ICTR averages as well as the Rome Statute's maximum sentences.³⁰

I believe that the article advances insightful observations about the role of sentences in the admissibility determination (as I will discuss below). However, I would suggest that a sentence-based approach cannot be the exclusive or even primary test, because it would generate some significant difficulties that have not yet been addressed.

The first problem is that the sentence-based theory cannot cope with proceedings that end in acquittal. Where an accused is acquitted, there is no sentence; it is therefore

passage from Robinson simply says that selection of a charge that does not reflect the seriousness of the crime "*might contribute*" to a finding of unwillingness or inability. This does not state that the charge is determinative, nor is it a "conduct-and-gravity heuristic." It is a process-based account that looks at the charges in comparison to gravity as one of many clues to the genuineness of the process. Darryl Robinson, *The Rome Statute and Its Impact on National Law*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1849, 1864 (Antonio Cassese et al. eds., 2002). The passage cited from Benzing falls within a lengthy and subtle discussion about how the charge and how the use of "ordinary crimes" is *not* determinative, that there is no obligation to use Statute definitions, and that "ordinary" charges do not necessarily benefit the accused. Markus Benzing, *The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight against Impunity*, 7 MAX PLANCK Y.B.U.N.L. 591, 615–17 (2003). Broomhall, Kleffner, and Carter, cited by Heller, are amenable to similar reading.

²⁸ Heller, *supra* note 1, at 109. *See also id.* at 132 (determination of willingness should be made "solely" by reference to sentence).

²⁹ *Id.* at 109.

³⁰ *Id.* at 110–11.

impossible to compare the sentence to international averages. Acquittals can, of course, be a perfectly appropriate outcome. For example, an acquittal does not and should not generate ICC admissibility if the accused is innocent of the crime. Or it may be that guilt cannot be established beyond a reasonable doubt on the diligently collected and presented evidence. Alternatively, a state could legitimately grant a stay of proceedings where necessary to uphold fundamental values. The problem of being unequipped to evaluate acquittals is alone sufficient to preclude a sentence-based approach from being an exclusive test.

A second problem with a sentence approach is that one must wait until the end of the proceeding to assess the outcome. Heller offers a partial interim solution, by suggesting that the Court do its comparison with the state's average sentences to date for that crime.³¹ However, the state's historic average sentence for routine cases for a given offense is a somewhat peripheral datum that may tell us rather little about whether the particular case is being handled genuinely.³² By contrast, a process-based theory focuses on the particular proceeding and allows intervention as soon as there is sufficient evidence that the process is not genuine.

Third, several challenges arise from an insurmountable tension between (i) the crudeness of aggregate data and (ii) the problems of exceeding the nature of an admissibility hearing. In looking at average sentences, we either take into account the specific facts, or we do not. Let us assume first that we do *not* look at the specific facts. If we do not take into account the wildly different factual circumstances that can arise, aggregate data on sentences for a particular charge is too crude to be meaningful. The accused may face a serious-sounding charge but have played a very minor role, or there may be extensive mitigating circumstances.³³ Thus, a proceeding may produce a sentence dramatically below the "average" sentence without in any way being improper or warranting ICC action. General comparisons with average sentences tell us relatively little about the genuineness of a particular proceeding.

³¹ *Id.* at 110.

³² For example, a state may have a track record of truly harsh offenses for "ordinary" criminals while also having a track record of shielding state officials. This is why the analysis must be much more subtle. Sentence may play a *role* in that analysis. For example, if prosecutors faced with evidence of serious transgressions select a trivial charge with a mild maximum sentence, this may be an indicium of non-genuineness.

³³ As an example of the latter, the *Erdemovic* case, in which the accused voluntarily came forward and testified against himself and others, included an extreme situation of duress (so extreme that many jurists thought he should have been acquitted rather than convicted at all). See generally Luis E. Chiesa, *Duress, Demanding Heroism and Proportionality: The Erdemovic Case and Beyond*, 41 VAND. J. TRANSNAT'L L. 741 (2008); Valerie Epps, *The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself*, 37 NEW ENG. L. REV. 987 (2003); Aaron Fichtelberg, *Liberal Values in International Criminal Law: A Critique of Erdemovic*, 6 J. INT'L CRIM. JUST. 3 (2008).

To avoid those problems, it therefore seems we have no choice but to take the alternate route of looking at the facts of the particular case. However, once we take that route, we no longer have the reassurance of a scientific-sounding approach based on average sentences. We also immediately encounter two problems. First, to have any sense of the appropriate sentence, we would have to know what atrocities were committed, how many incidents occurred, and what aggravating factors (e.g., cruelty or leadership role) or mitigating factors (e.g., duress) were present. In other words, we would need a trial. Thus the approach would transform an admissibility hearing into a criminal trial (or re-trial or pre-trial). Second, deciding on an appropriate range for the sentence logically and inescapably necessitates a conclusion of guilt.³⁴ This generates complications with the presumption of innocence. An explicit or implicit determination of guilt would have to be made in a pre-trial proceeding, after which one could *start* the trial. Of course, a different chamber would conduct the trial, but something still seems amiss if guilt must be shown in order to establish admissibility and start the trial. It was for reasons of this sort that the Informal Expert Paper on complementarity warned that the admissibility determination had to focus on the *process*, not the *outcome*.³⁵

There are still other difficulties for the sentence theory. For example, one concern expressed about complementarity is the danger that it will lead to a homogenization of national processes.³⁶ A sentence-based approach would impose an even more severe form of homogenization. The ICC would effectively be inviting the state to conduct a trial in accordance with national laws and procedures, with a rather hefty caveat such as “by the way, if it does not result in a conviction and sentence of 15.7 years or more of imprisonment, we will do it all over again at the ICC.” Further, if the ICC seizes cases *because* the national sentence is below average, it would become difficult for the ICC judges to then issue a below-average sentence where justice required it. Another strange effect of the approach would be that, year after year, as each state has to meet or exceed the international average sentence for each offense in order to retain carriage of cases, the average sentences would continuously be driven upwards.

IV. A PROCESS-BASED APPROACH

For the foregoing reasons, I would hesitate about the more sweeping proposal to embrace the sentence-based methodology. Nonetheless, Heller advances important

³⁴ One cannot ruminate about appropriate sentences unless one is first satisfied that the accused is culpable, and indeed one would need a sense of the crimes for which he is culpable.

³⁵ Informal Expert Paper, *supra* note 27, at 14.

³⁶ Mégret, *supra* note 9, at 388–89. See also Mark A. Drumbl, *Policy Through Complementarity: The Atrocity Trial as Justice*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 9, at 197, 212.

insights about the role of charges and the role of sentences that should be absorbed into any theory of complementarity.

The admissibility determination cannot center on the *charges* (as Heller has shown); nor can it center on *sentences* (as I hope I have shown). Admissibility should center on the *process* and more specifically the genuineness of the process. I believe that this is not only most compatible with Article 17 of the Rome Statute as a matter of positive law; it is also normatively superior to alternatives. Once it is shown that a state is carrying out or has carried out its own proceedings in relation to a case,³⁷ the question is whether the state is carrying out (or has carried out) those proceedings “genuinely.”³⁸ There are two ways to show that proceedings are not genuine: the state is *unwilling* to carry out the proceedings genuinely (e.g., a lack of intent to bring the persons concerned to justice) or *unable* to carry out the proceedings genuinely (collapse or unavailability).³⁹ Thus, interpreting “genuinely” using the context of Article 17(2) and (3), we find two aspects: one about the sincerity of the effort and one requiring a very rudimentary level of capacity.⁴⁰ Process is the master theory; we can look at charges and sentences insofar as they reveal something about genuineness of the process.⁴¹

The charge laid may be an *indicator* in assessing genuineness of the process. For the reasons presented by Heller, the choice of an “international” or an “ordinary” offense (e.g., war crime of murder versus murder *simpliciter*) should likely be given zero weight. As Heller has shown, the use of international definitions may have expressive value, but we cannot require their use, and doing so may have the undesirable effect of encouraging unsuccessful proceedings.⁴²

By contrast, the decision to charge the accused with a “serious” offense versus a “minor” offense *can* be an indicator. It is not determinative, for the reasons shown by Heller: a “minor” charge might still culminate in a serious sentence and a serious process, which would address our complementarity concerns.⁴³ However, on a

³⁷ See Rome Statute, *supra* note 4, art. 17(1)(a)–(c) (first condition stated).

³⁸ *Id.* art. 17(1)(a)–(b) (the terms following “unless”). See also *id.* art. 20.

³⁹ *Id.* art. 17(1)–(3).

⁴⁰ Informal Expert Paper, *supra* note 27, at 8; John T. Holmes, *Complementarity: National Courts versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 27, at 667, 674.

⁴¹ As was mentioned above, admissibility determinations should center on process, not outcomes. One may look at outcomes and procedural developments as a factor, not because that outcome is by definition problematic but rather insofar as it is an indication that the process was not genuine. Thus, a light sentence cannot per se be a reason for admissibility. A light sentence may however, in conjunction with other factors, help to indicate a non-genuine process that does not warrant deference.

⁴² See generally Heller, *supra* note 1.

⁴³ *Id.* at 111–13.

process theory, the charge can nonetheless be a significant indicator in assessing genuineness, by suggesting whether the state is attempting to minimize and whitewash the crime by focusing on a trivial charge that ignores the gravamen of the available evidence.⁴⁴

Similarly, sentence can be an *indicator* in assessing genuineness. For example, an extremely mild sentence that is mismatched with the available evidence may be one indicator that the process had a flawed, sham character.⁴⁵ Alternatively, if the maximum available sentence is mild, this may arguably suggest the “unavailability” of the legal system for that serious international crime.⁴⁶ I would say that *lenient* sentences may be only a modest indicator, useful only in conjunction with other indicators, because lenient sentences are not *per se* evidence of non-genuineness.

Conversely, a most intriguing point advanced by Heller is that a sentence can work in the other direction in a very dramatic fashion. As Heller notes, where the sentence is stringent enough, we may not need to worry about the nature and seriousness of the charge, or the details of the proceedings, because the impunity-avoidance aim of the complementarity regime has been satisfied.⁴⁷ The person has been brought to justice. Interestingly, then, while *lenient* sentences are only a modest indicator (useful only in conjunction with other factors), *severe* sentences may be much more conclusive evidence of genuineness, ending the need for further search for evidence of non-genuineness.⁴⁸

This proposition is potentially subject to at least one caveat: a stern sentence may not foreclose the need for further analysis *if* the Court adopts an approach to

⁴⁴ The inquiry would not be outcome-oriented (e.g., “no reasonable court could reach that lenient conclusion”); instead, the ICC would use these and other clues about process to determine whether the *process* was a genuine one. If the process was not genuine, i.e., if the accused has not genuinely been placed in jeopardy of facing justice for the crimes, then the case is admissible.

⁴⁵ See, e.g., Informal Expert Paper, *supra* note 27, at 28–31 (listing indicia of unwillingness or inability to genuinely carry out proceedings).

⁴⁶ “Unavailability” of the judicial system is a term in Article 17(3) of the Rome Statute, which helps to identify “inability.” Views plausibly differ on the meaning of “unavailability.” See, e.g., Informal Expert Paper, *supra* note 27, at 15 (suggesting a broad interpretation to promote coherence with the rest of the provision).

⁴⁷ Heller, *supra* note 1, at 109–13, 124.

⁴⁸ This may at first glance seem contradictory. However, it is not contradictory once one recalls the burden of proof. Once one is within the unwilling/unable exception, the burden is to prove unwillingness or inability. A lenient sentence by itself is not sufficient to meet the burden, so one must go on to consider other indicia. Conversely, a severe sentence might be strongly persuasive that the burden is *not* met, ending the need for further search for evidence of non-genuineness.

complementarity that is concerned with draconian national processes.⁴⁹ When I have referred in this comment to a “process” approach, I am typically speaking of the inquiry into whether a process is not genuine because it is *too lenient*. However, some have argued that the ICC should be able to take a case where the national proceedings are *too repressive*, i.e., they do not provide due process.⁵⁰ Heller has addressed such arguments elsewhere,⁵¹ and he has put forward powerful arguments, rooted in the text and drafting history, that complementarity is concerned only with proceedings that are too lenient or ineffective, and not proceedings that are too stringent. I personally lean in the same direction as Heller, but ultimately my position is agnostic: it is one of those issues where arguments that are at least plausible can be made on either side, so the Court could defensibly take either interpretation.⁵² I would therefore simply note that if the ICC reaches the interpretation that excessively repressive national proceedings can trigger admissibility, then a harsh sentence will not forestall further inquiry into genuineness, and it will still be necessary to look at all factors.

V. A DEFENSE OF THE “SAME CONDUCT” TEST: WHY ADMISSIBILITY IS ABOUT “THE CASE”

Finally, Heller raises important concerns about the “same conduct” test, which is the test employed by ICC chambers to determine if a state is proceeding with the same

⁴⁹ Another caveat arises where a stern sentence is swiftly followed by an executive pardon, which can raise suspicions about the genuineness of the process from the start.

⁵⁰ See, e.g., Federica Gioia, *State Sovereignty, Jurisdiction and Modern International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. INT'L L. 1095, 1110–13 (2006); Mauro Politi, *The Establishment of the International Criminal Court at the Crossroads: Issues and Prospects After the First Session of the Preparatory Committee*, 13 NOUVELLES ÉTUDES PÉNALES 115, 143 (1997).

⁵¹ See generally Kevin Jon Heller, *The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process*, 17 CRIM. L.F. 255 (2006) [hereinafter Heller, *The Shadow Side*].

⁵² During the drafting of Article 17, most delegates were concerned with sham or ineffective proceedings and thought that the problem of overly-harsh national proceedings is one that could be taken up with a human rights body (which protects rights), not the ICC (which is about preventing impunity). Other delegates, including Mauro Politi of Italy (later a judge at the ICC) were of a different view and secured an ambiguous but potentially significant reference to “due process” in Article 17. Accordingly, it is at least arguable that Article 17 requires national proceedings that are not only effective but also fair. On this view the requirement of bringing a person “to justice” would emphasize that “justice” entails some due process. See, e.g., Gioia, *supra* note 50, at 1110–13. Heller is also somewhat ambivalent; he feels that *legally* the ICC cannot declare cases admissible because national proceedings were in violation of due process (too stringent), but that *normatively* it would be a good idea for it to be able to do so. See Heller, *The Shadow Side*, *supra* note 51, at 278.

“case.” This concern has been raised in recent thoughtful scholarship,⁵³ so it is timely and valuable to examine the question here. While I agree that an overly rigid application of the same-conduct test would be unfortunate, I will try to demonstrate that the problem is actually much narrower than is widely thought. I want to show that admissibility is quite fundamentally about *the case* and whether the case has been genuinely addressed.⁵⁴ The scenario where a state wishes to prosecute the same person for a *different case* is not an admissibility issue. Nor is it a lacuna of the Rome Statute—I will show that the scenario is addressed by other provisions of the Rome Statute, and they address it better than could Article 17.

To appreciate the significance of the same-conduct test, one must discern that Article 17 provides a two-step test for admissibility. Heller and I are on the same page in recognizing the two-step structure of Article 17. (There has been a remarkably widespread and persistent tendency in international criminal law discourse to fixate only on the “unwilling or unable” exception in Article 17 and to treat that exception as if it were the *entire test*, which has generated a lot of confusion and misplaced accusations against the Court for departing from the Rome Statute. I explore this curious phenomenon in ICC discourse elsewhere.⁵⁵) The first step of the admissibility test asks whether there are or have been national proceedings with respect to the case, i.e., “the case is being investigated or prosecuted” (Article 17(1)(a)) or “the case has been investigated . . . and the State has decided not to prosecute” (Article 17(1)(b)).⁵⁶

⁵³ See Sharon A. Williams & William A. Schabas, *Article 17*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 605, 615–16 (Otto Triffterer ed., 2d ed. 2008). See generally Nidal Nabil Jurdi, *Some Lessons on Complementarity for the International Criminal Court Review Conference*, 34 S. AFR. Y.B. INT’L L. 28 (2009); Susana Sácouto & Katherine Cleary, *The Katanga Complementarity Decisions: Sound Law but Flawed Policy*, 23 LEIDEN J. INT’L L. 363 (2003). Sácouto and Cleary express understandable concerns about compatibility with the *policy* of positive complementarity; for a partial explanation of how these are reconciled see Robinson, *supra* note 24, at 92–101 and Carsten Stahn, *Taking Complementarity Seriously: On the Sense and Sensibility of “Classical,” “Positive,” and “Negative” Complementarity*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 9, at 233, 236–48, 260–67, 276–81.

⁵⁴ As noted in the introduction, by “admissibility” I am referring only to the complementarity aspects of admissibility and not the separate issue of “gravity.” See Rome Statute, *supra* note 4, art. 17(1)(d).

⁵⁵ Robinson, *supra* note 24. The fixation on the unwilling/unable test is accompanied by a curious but persistent tendency to overlook the fifty-five words of Article 17, which explicitly and unambiguously require that there be national proceedings in relation to the case. I demonstrate that, surprisingly, many commentators overlook the words and then condemn the Court for “inventing” new requirements; this puzzling disconnect is the “mysterious mysteriousness” of complementarity.

⁵⁶ Rome Statute, *supra* note 4, art. 17(1)(a)–(b). Article 17(1)(c) addresses the third alternative, when a national trial has been completed. Some commentators treat *ne bis in idem* as part of complementarity and others treat it as separate but closely related; that difference is not of concern here. *Id.* art. 17(1)(c).

If and only if there are such proceedings, one reaches the exception and assess whether the State is unwilling or unable to *genuinely* carry out that proceeding. This means that the scope of the term “case” has a very important role in the admissibility determination. ICC jurisprudence uses the “same conduct” test as part of its determination whether a national proceeding concerns the same case.

Like many scholars in recent literature,⁵⁷ Heller expresses concern that the same-conduct test is too stringent. The concern is that the same-conduct test “privileges the ICC instead of states” because it requires national authorities to investigate the specific conduct that the ICC is investigating.⁵⁸ It is argued that the test requires governments to be “mind readers” because they have to anticipate the ICC case.⁵⁹ If the state selects a different case, then the Court would be “required to preempt national proceedings”⁶⁰ and “would be powerless to refuse to admit the case.”⁶¹ Thus, “because of the same-conduct requirement, [states] cannot charge crimes—including serious ones—that involve conduct the ICC is not investigating, even if prosecuting different conduct would be far more likely to result in a conviction.”⁶² Heller argues that there is “no justification” for a case to be admissible just because a national proceeding is based on different conduct;⁶³ the ICC case should be rendered inadmissible if a different case pursued by a state is a serious one.⁶⁴

While I agree that a margin of flexibility is necessary in identifying the “case,” the scope of the problem is considerably narrower than is generally perceived. I would like to contribute five points to the discussion surrounding the supposed lacuna where the state wishes to prosecute the same person for a different, but serious, matter.

First, Article 17 of the Rome Statute does not exhaust the principle of complementarity. Article 17 is an important but technical admissibility rule, which renders a case inadmissible before the ICC if it is genuinely addressed by a state. Article 17 is certainly a centerpiece of complementarity, and it is understandable that it is often the focus of complementarity discussion. However, insofar as “complementarity” refers to the broader interplay and division of labor between national jurisdictions and the ICC, it is woven through many other articles of the

⁵⁷ See *supra*, note 53.

⁵⁸ Heller, *supra* note 1, at 125.

⁵⁹ *Id.*

⁶⁰ *Id.* at 108.

⁶¹ *Id.* at 126.

⁶² *Id.* at 123.

⁶³ *Id.* at 114. See also *id.* at 118 (“makes little sense”); *id.* at 124 (“arbitrary limitation”).

⁶⁴ *Id.* at 113. On a sentence-based theory, this would entail that the national case culminated in a severe sentence.

Rome Statute,⁶⁵ and in many more profound respects remains to be fleshed out by policies of the Court.⁶⁶

Second, in this vein, the “different case” scenario is expressly contemplated and addressed in Part 9 of the Rome Statute, which deals with cooperation. Articles 89(4) and 94(1) provide for consultation between the state and the Court where the Court’s request (for assistance in general or for surrender specifically) would interfere with the state’s investigation or prosecution of a different case or the serving of the person’s sentence.⁶⁷ Both provisions are linked to the general consultation provision (Article 97). Heller’s article is an advance on many other works because it acknowledges Articles 89 and 94.⁶⁸ However, it does so only briefly, without fully assimilating the implications of Articles 89 and 94 for the critique of the same-conduct test or the scope of admissibility. My aim is to press a little further in exploring those implications.

Significantly, there is not a lacuna in the Rome Statute requiring repair. It is simply not true that the Court would be “powerless to refuse to admit the case”⁶⁹ or “required to pre-empt the national proceedings.”⁷⁰ The Rome Statute provides the Court with *two* distinct ways to defer its case. One, as was just mentioned, is the consultation mechanism that expressly allows the Court to defer in this exact scenario. While the policies to be employed by the Court in that mechanism remain to be determined, as I will discuss in a moment, they would undoubtedly entail deference to effective national investigations for equally or more serious atrocities. Furthermore, there is also a second mechanism, the “interests of justice” test.⁷¹ If the ICC deferred under Part 9 and the person was punished for different crimes, the ICC could decide it is no longer in the interests of justice to invest resources prosecuting an aged defendant who has already been punished for different but related crimes.⁷²

⁶⁵ See Rome Statute, *supra* note 4, arts. 1, 17–20, 89(4), 90, 93(10), 94.

⁶⁶ The most important and impressive work on this question is Carsten Stahn, *supra* note 53. See also Robinson, *supra* note 24; Informal Expert Paper, *supra* note 27.

⁶⁷ Rome Statute, *supra* note 4, art. 89(4) (“If the person sought is being proceeded against or is serving a sentence in the requested state for a crime different from that for which surrender to the Court is sought, the requested state, after making its decision to grant the request, shall consult the Court.”).

⁶⁸ Heller, *supra* note 1, at 108, 129–30.

⁶⁹ *Id.* at 126.

⁷⁰ *Id.* at 108.

⁷¹ Rome Statute, *supra* note 4, art. 53(2)(c).

⁷² *Id.* Suppose for example that the ICC wanted to prosecute the accused for crimes A, B, and C, but deferred (under Part 9) to national proceedings for crimes D, E, and F. After the accused served his sentence for crimes D, E, and F, the ICC case for crimes A, B, and C would still be admissible because the case has never been addressed. However, the ICC could decide it is no longer in the interests of justice to prosecute the person further. Or, at earlier

Third, there is no question of the ICC “requiring” states to prosecute any case, nor of “prohibiting” or “limiting” them from prosecuting other cases, nor of “nullifying” national proceedings over other cases.⁷³ The state is free to initiate any cases it wishes. The ICC has concurrent jurisdiction and exercises it subject to the rules of the Rome Statute. If the state proceeds against a case also pursued by the ICC, then the state can argue that the ICC case is inadmissible. If the state proceeds against a person sought by the ICC but for a different case, the state can invoke the consultation mechanism (and/or the interests of justice test).

Fourth, to address the “different case” scenario by rewriting Article 17 is not only unnecessary,⁷⁴ it is also *normatively undesirable*. Article 17 requires that “the case” be addressed by national proceedings. Under the existing Rome Statute regime, competing claims concerning different cases are resolved through the consultation mechanism, and thus the issue is one of *sequencing*, i.e., which jurisdiction tries its case first. If, however, we stretch the admissibility regime, we encounter a problem because a genuine proceeding renders a case *forever inadmissible*.⁷⁵ Assume that we follow the suggestion of scholars, so that case X can be rendered inadmissible because case Y is being investigated and prosecuted. Not only does Article 17 render cases inadmissible during ongoing genuine national proceedings—Article 17(1)(a),—but they also *remain* inadmissible once the state carries out the proceedings to a genuine conclusion—Articles 17(1)(b) and (c). It makes sense that the successful handling of case Y renders case Y inadmissible; it does not make sense for it to render cases X or Z inadmissible.⁷⁶ A conviction for one crime (e.g., fraud in Las Vegas) does not and should not legally insulate a person from future proceedings for a completely different crime (e.g., murder in Los Angeles).

Which brings me to my fifth point: admissibility is about the *case* not just as a matter of positive law or a happenstance of drafting but as a matter of fundamental structure. The *case* remains admissible before the ICC for a good reason: because no jurisdiction on earth has dealt with the case. There may be reasons *other than admissibility* for the Court not to deal with the case. The Court may defer to a national prosecution of a different case as a cooperation matter, or the Court may conclude it is not in the “interests of justice” to pursue further a person who has already been extensively

stages, the ICC could decide it is not in the interests of justice to press forward with a case that would disrupt effective national efforts concerning different but important crimes.

⁷³ Heller, *supra* note 1, at 108, 123, 125, 133.

⁷⁴ It is unnecessary since the Rome Statute already addresses it, as explained in the preceding paragraphs.

⁷⁵ In the same vein, see Rod Rastan, *Situation and Case: Defining the Parameters*, in 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY, *supra* note 9, at 419, 443–45.

⁷⁶ One could try to graft on additional creative “work-arounds” to ameliorate the resulting problems, but each work-around generates new incoherencies; the incoherencies arise because of the departure from the immanent structure of admissibility.

punished. The limit on how much we might pass one person around to face justice for his or her diverse crimes is the “interests of justice,” not admissibility.⁷⁷

Having laid down those parameters, I still partially agree with the concern. We simply need to clarify its boundaries. Inspired by Heller’s lead in presenting scenarios that helpfully clarify a proposition, let me suggest four scenarios. In these, the ICC and a state are each pursuing: (1) the identical case, (2) a significantly overlapping case, (3) a different case within the overall “situation,” and (4) a completely unconnected case (e.g., embezzlement).

Scenario 1 poses no problem; it meets the same-conduct test. Scenario 4 is also straightforward; for the reasons I have just advanced, it raises no admissibility issue at all. It is in scenario 2 (overlapping case) that we must argue for a “margin of appreciation” in the state’s identification of its “case.” It should not be required that the state has selected, for example, the identical offenses and incidents; a “perfect incident-specific mapping” is unlikely.⁷⁸ A significant overlap in the gravamen of the case should be enough to engage the admissibility regime.⁷⁹ Scenario 3 raises some subtleties of admissibility that I am unable to explore in the present space,⁸⁰ but it can generally be addressed by the consultation mechanism, which ideally should be applied generously to a state acting in good faith to contend with a mass crimes situation.

⁷⁷ For example, General Noriega was prosecuted in the United States, extradited to France to face prosecution for other crimes, and then extradited to Panama to face prosecution for other crimes.

⁷⁸ Rod Rastan, *What Is a ‘Case’ for the Purpose of the Rome Statute?*, 19 CRIM. L.F. 435, 439 (2008).

⁷⁹ The ICC Appeals Chamber has arguably addressed this concern as well, requiring “substantially” the same conduct. Prosecutor v. Kirimi Mathuara, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/1 OA, Judgment on Defence Appeal Challenging Admissibility of the Case, ¶ 39 (Aug. 30, 2011), available at <http://www.icc-cpi.int/NR/exeres/D57809E4-78FE-426A-9968-6A477B176BA5.htm>.

⁸⁰ As one example, scenario 3 would have a different complexion during preliminary examination, when the decision is whether to initiate an investigation of the *situation*. The Rome Statute distinguishes between the decision to initiate an investigation of a situation and the decision to prosecute specific cases within that situation. See Rome Statute, *supra* note 4, art. 53. Admissibility is about cases, but at the preliminary examination stage there are not yet defined cases, and thus the Court must consider the universe of likely cases (presumably focusing on persons most responsible for the most serious crimes). That approach is now endorsed and confirmed *inter alia* in Kirimi Mathuara, *supra* note 79, ¶ 38. I would argue that, at the situation stage, the state must be accorded a significant margin to select cases and to identify the persons most responsible for the most serious crimes, even if ICC analysts would have chosen to investigate a slightly different group of perpetrators and some different crimes or incidents.

Two counterarguments can be made against the foregoing arguments. First, in our online symposium, Kevin Heller has made some excellent counter-arguments about the limits of the consultation regime.⁸¹ The strongest of these is that, in order to invoke Article 89(4), the state must first declare its readiness to surrender the suspect. I agree with Heller that this provision sends an unfortunate signal, which seems to tilt the balance in favor of ICC proceedings.⁸² I would suggest that a state and the ICC could use the general consultation provision of Article 97 to moderate that problem. He also correctly points out that the interests of justice discretion lies largely in the hands of the Prosecutor.⁸³ This means however that the state has *two* avenues and may pursue them both: it may present arguments to the Prosecutor about the interests of justice and also request deferral from the Court under Part 9. Whatever the imperfections of the current system, to try to solve problems in Part 9 by distorting the admissibility regime would cause even greater problems, including the problem of permanent inadmissibility (as discussed above), instead of the more nimble “sequencing” solution already established in the Statute.

Second, one could argue that reliance on the consultation regime is unsatisfying because it leaves too much discretion to the Court.⁸⁴ One could argue, in the name of precision and certainty, that there should be a juridified process in which the state is entitled to bring a formal legal challenge based on its pursuit of a different but important case. This argument has merits, given the importance of clarifying the interplay between national and international jurisdictions. An ambitious option would be to amend the Rome Statute to allow challenges by states pursuing the same person for different crimes, but this is unlikely given the Rome Statute amendment formula.⁸⁵ More plausibly, the Assembly of States Parties could amend the Rules of Procedure

⁸¹ See Heller Response, *supra* note 19.

⁸² Rome Statute, *supra* note 4, art. 89(4). Heller also raises a concern about Article 94, in that it only allows postponement during investigation and prosecution but not during the serving of sentence, so the state might be obliged to surrender the person once the trial is complete. Heller Response, *supra* note 19. This concern can be addressed, however, because Article 94 only applies to requests for assistance; a request for surrender would be governed by Article 89(4), which expressly allows postponement during the serving of sentence.

⁸³ Heller Response, *supra* note 19. He is quite correct; the Statute only expressly provides for judicial review where there is a decision *not* to proceed due to the interests of justice: Article 53. This is an important point and is linked to complex questions about the optimal locus, scope, and reviewability of decisions, and whether the scope to raise “interests of justice” arguments should be expanded.

⁸⁴ See, e.g., Heller, *supra* note 1, at 130 (noting that the regime is “not the picture of clarity”).

⁸⁵ Rome Statute, *supra* note 4, art. 121. It would also require careful thought about when, why, and for how long a national proceeding of case Y should render case X inadmissible. Again, the regime already provided in Part 9 addresses the “different case” scenario most elegantly because it allows for a simple prioritization and sequencing.

and Evidence to establish guidelines for consultation and sequencing decisions.⁸⁶ Relevant factors might include the comparative seriousness of the conduct in the different cases, prospects for a genuine proceeding, the desirability of national proceedings, and so on.⁸⁷ At this early stage, however, it is not clear that we need to codify any such rule. The ICC has never rejected, nor has it ever received, a request for postponement from a state wishing to pursue a suspect for a different case. It may be preferable to let the Court develop its practice on the issue in light of experience. If problems emerge, such as the ICC proving to be too “ICC-centric,” then the Assembly of States Parties is free to act by developing a rule.

VI. CONCLUSION

In *A Sentence-Based Theory*, Kevin Heller makes an important contribution to the complementarity discussion. I have advanced two points of disagreement. First, I would not replace existing approaches with an entirely new sentence-based methodology. I would however absorb his important observations about charges and sentences into a process-based approach. Second, I think the same-conduct test is not as problematic as it seems. I do agree that it needs flexibility at the margins. The most valuable insights of his article concern (1) the very limited role that can be ascribed to “charges,” particularly the eye-opening critique of the “soft mirror” thesis, and (2) the potentially significant role that can be played by sentences, most particularly the proposition that a clearly adequate sentence may forestall the need for further inquiry.

⁸⁶ Rome Statute, *supra* note 4, art. 51. Some guidance is arguably already embedded in Article 90 (competing requests).

⁸⁷ See Robinson, *supra* note 24, at 97–99, 101; Stahn, *supra* note 53, at 236–48, 276–81.