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## One Step Forward, Two Steps Back?: Second Thoughts on a “Sentence-Based” Theory of Complementarity

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

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### I. INTRODUCTION

Kevin Heller’s essay *A Sentenced-Based Theory of Complementarity* marks a significant contribution to the growing scholarship on the International Criminal Court (ICC) and complementarity.<sup>1</sup> His proposed re-thinking of the complementarity regime is

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<sup>1</sup> See Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT’L L.J. 85 (2012).

original and helpful in highlighting existing policy dilemmas of ICC practice. A “sentence-based” heuristic is appealing in its clarity and its objective to facilitate effective repression. Nevertheless, like Darryl Robinson,<sup>2</sup> I share some hesitation regarding the central claim of this theory. In my view, the argument that the ICC should focus “exclusively on sentencing” when determining whether “ordinary” crime prosecution is admissible is neither desirable nor manageable in all cases. I will focus on three aspects: The assumptions underlying the central claim, the desirability of a new methodology, and its manageability.

## II. UNDERLYING ASSUMPTIONS

Heller’s case for a deviation from existing approaches relies on four basic premises: (i) the claim that the ICC admissibility test<sup>3</sup> creates undue pressure to charge international crimes under an international label, (ii) the alleged disadvantages of domestic prosecution of international crimes, (iii) the advantages of a “sentencing” heuristic over threat-based compliance, and (iv) the assumption that “higher” sentences might create “better” justice.<sup>4</sup> All four key assumptions merit further critical reflection.

### A. *What the ICC “Imposes,” What International Law Says, and What National Law Suggests*

Heller challenges existing theories (i.e., the “hard” and the “soft mirror” theses), based on the premise that the complementarity regime “pressures” states to prosecute international crimes under an international label.<sup>5</sup> This starting point is partly misleading. It might overstretch the role of the ICC. Complementarity provides primarily a tool for the ICC to determine its competence. It is largely based on incentives rather than a desire to “restructure national criminal justice systems in the ICC’s image.”<sup>6</sup> It organizes “shared obligations”<sup>7</sup> based on a scheme that has typically

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<sup>2</sup> See generally Darryl Robinson, *Three Theories of Complementarity: Is it About the Charge, the Sentence, or the Process?*, 53 HARV. INT’L L. J. ONLINE 165 (2012).

<sup>3</sup> For a survey, see JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS (2008); 1 THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE (Carsten Stahn & Mohamed M. El Zeidy eds., 2011); MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW (2008); Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L.F. 67 (2010).

<sup>4</sup> See Heller, *supra* note 1, at 87–88.

<sup>5</sup> See *id.* at 93 (with respect to the “hard mirror thesis”), 100 (with respect to the “soft mirror thesis”).

<sup>6</sup> *Id.* at 99.

<sup>7</sup> The Statute approaches complementarity through the lens of “responsibilities.” It defines the interaction between the ICC and States via duties, rather than rights or privileges (i.e., “primacy of jurisdiction”). Neither States nor the Court thus enjoy per se primacy of

been agreed to by choice, i.e., by ratification. Under Article 17(3) of the Rome Statute (the “Statute”), a State might be found to be partially unavailable if its domestic legal system does not contain a legal basis for prosecution of crimes within the jurisdiction of the ICC.<sup>8</sup> But the Statute does not per se oblige States to investigate and prosecute under an “international crimes” label. Nor is it directly meant to serve as a standard-setting instrument.<sup>9</sup> If an obligation to use an international crime label might exist, it might flow from pre-existing treaty obligations or customary law. Yet, even international law appears to leave States flexibility to comply with their duty to punish international crimes (e.g., war crimes, crimes against humanity) as “ordinary” crimes or sometimes even as a different “international crime.”<sup>10</sup> The general duty to penalize under treaty law or customary law does not necessarily coincide with a duty to prosecute a specific crime under the respective label.<sup>11</sup> An “ordinary” crime label might not be ideal since domestic law might not reflect all specific aspects of international crimes, capture their specific “gravity,” or provide “effective penalties” that take into account their contextual elements. But the obligation to use a specific “international crime” label results mostly from domestic provisions, such as prosecutorial duties to pursue the most “serious” charges or charges that reflect the context and characteristics of the crime most suitably. This principle is largely independent of Western or non-Western cultures.<sup>12</sup> It is thus somewhat artificial to “blame” the ICC admissibility system for introducing a pull towards an “equivalence” rule that is hard to comply with or to associate this trend with a “Western” bias. This

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jurisdiction of the other. This duty-based conception of domestic jurisdiction was strengthened by the Resolution on Complementarity, adopted at the 2010 Review Conference, which recognized the “*primary responsibility* of States to investigate and prosecute the most serious crimes of international concern,” emphasizing “the obligations of States Parties flowing from the Statute.” See Review Conference of the Assembly of States Parties to the Rome Statute, RC/Res. 1, ¶¶ 1–2 (Jun. 8, 2010), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.1-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.1-ENG.pdf) (emphasis in original).

<sup>8</sup> See Rome Statute of the International Criminal Court art. 17(3), July 17, 1998, U.N. Doc. A/CONF.183/9, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (“[T]he Court shall consider whether, due to . . . *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.”) (emphasis added).

<sup>9</sup> Complementarity creates incentives for States Parties to implement core crimes based on a cost-benefit calculation, rather than “hard” obligations. See KLEFFNER, *supra* note 3, at 321–24.

<sup>10</sup> For a study, see WARD N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS 18–21, 205 (2006). See generally Ward Ferdinandusse, *The Prosecution of Grave Breaches in National Courts*, 7 J. INT’L CRIM. JUST. 723 (2009).

<sup>11</sup> See Prosecutor v. Hadzihasanovic, Case No. IT-01-47-T, Judgment, ¶ 260 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006) (“[T]here is no rule, either in customary or in positive law, which obliges States to prosecute acts which can be characterized as war crimes solely in the basis of international humanitarian law, completely setting aside any characterizations of their national criminal law.”).

<sup>12</sup> For an analysis of alleged differences, see Heller, *supra* note 1, at 103–06.

prerogative is often of domestic origin and might be subject to less international proscription than Heller assumes.

*B. Cost-Benefit Analysis of “Ordinary” Crime Prosecution*

Heller supports his criticism of the “equivalence” principle by a generalized preference for ordinary crime prosecution.<sup>13</sup> He seeks to encourage states to prosecute international crimes as “ordinary” crimes and argues “national prosecutions of ordinary crimes are far more likely to succeed than national prosecutions of international crimes.”<sup>14</sup> This claim is based on a slippery dichotomy. To present these two options as two diametrically opposed schemes is artificial. While “international crimes” may be more difficult to investigate or prosecute, they also offer certain advantages that must be brought into the equation. An “international crime” label might offer a broader basis for jurisdiction (i.e., prosecution of extraterritorial acts), curtail the applicability of statutes of limitation, or extend the prospects for cooperation and judicial assistance. Some studies indicate that implementation of the ICC Statute has led to an increase of national prosecutions for international crimes.<sup>15</sup> Surveys on the exercise of universal jurisdiction suggest that it remains an “important tool that should be considered and used alongside other local, regional, and international remedies”—despite its obvious difficulties.<sup>16</sup> Supporters point, in particular, to the fact that an “international crime” label might draw greater attention to atrocity crimes among governments, the press, and the general public.<sup>17</sup> Moreover, in practice, domestic and international crime labels are *de facto* often interrelated in a domestic setting. Many jurisdictions rely on a mix of “international” and “ordinary crime” definitions in order to try offences, or they adjust modes of liability to capture the conduct in question.<sup>18</sup> These factors are not taken into account in Heller’s “cost-benefit” analysis. Paradoxically, in existing practice, “ordinary crime” prosecutions

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<sup>13</sup> See *id.* at 106 (arguing that “pressuring states to prosecute international crimes as international crimes is more likely to *promote* impunity than combat it”).

<sup>14</sup> *Id.* at 87.

<sup>15</sup> See generally Joseph Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*, 20 CRIM. L.F. 1 (2009).

<sup>16</sup> Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe*, 30 MICH. J. INT’L L. 927, 980 (2009). See also Cedric Ryngaert, *Applying the Rome Statute’s Complementarity Principle: Drawing Lessons from the Prosecution of Core Crimes By States Acting under the Universality Principle*, 19 CRIM. L.F. 153 (2008).

<sup>17</sup> Christopher K. Hall, *The Role of Universal Jurisdiction in the International Criminal Court Complementarity System*, in FORUM FOR INT’L CRIMINAL & HUMANITARIAN LAW, COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 201, 231 (Morten Bergsmo ed., 2010).

<sup>18</sup> See, e.g., Van Anraat, *Rechtbank “s-Gravenhage [District Court of the Hague]*, Dec. 23, 2005, LjN AU8685 (Neth.), available at <http://www.haguejusticeportal.net/index.php?id=4497>.

(e.g., war crimes) are often criticized since they result in lower sentences.<sup>19</sup> To reduce incentives for international crimes prosecution is thus partially counter-productive and disregards the existing inter-connections. The proposed generic preference for “ordinary crime” prosecution might in fact reduce the options for prosecution overall, which runs counter to Heller’s overall objective of increasing effectiveness.

### C. *Checks and Balances Versus “Sentencing” Heuristic*

Heller’s justification for the turn to a “sentencing heuristic” is that a sentence-based assessment of admissibility is better suited to address accountability gaps than a “conduct”- and “gravity”-based logic.<sup>20</sup> This argument is founded on the overall assumption that even greater flexibility for States to investigate and prosecute might create better compliance rates.<sup>21</sup> This logic is open to challenge. It is questionable whether greater freedom to use an “ordinary” crime label might encourage more investigation and prosecution. This argument seems to overstretch the reach of the law. More often than not, factors other than the choice of the “crime label” may be more determinate causes of action or inaction. This choice is heavily influenced by contextual factors, such as the nature of the conflict, internal political factors (i.e., regime change), or general attention to atrocities.

According to the drafters, complementarity was designed as an incentive-based system of checks and balances, with multiple layers of scrutiny, partly in order to promote greater transparency and monitoring.<sup>22</sup> Heller’s attempt to reduce the interpretative space offered to the ICC (e.g., through a more flexible “conduct” test and greater deference to “ordinary crime prosecution”) may effectively limit the scope of accountability. The existing architecture of the complementarity regime foresees a nuanced system of checks and balances: compliance by threat (including the ICC’s power as ultimate arbiter over disputes) and consensual burden-sharing.<sup>23</sup> In practice, Heller’s test leads to a more determinate “all-or-nothing” choice. According to the application of the “sentencing” logic, either the ICC or a domestic jurisdiction

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<sup>19</sup> See, e.g., Ferdinandusse, *supra* note 10, at 730 (referring to the need to adapt national penalties to the punishment of grave breaches of the Geneva Convention).

<sup>20</sup> The “conduct”-based heuristic determines forum allocation on the basis of identity of the domestic and the ICC “case.” The “gravity”-based logic determines preference according to the scope and severity of charges. For a criticism, see, e.g., Heller, *supra* note 1, at 109.

<sup>21</sup> *Id.* at 87, 132.

<sup>22</sup> On the role of the ICC as “final arbiter,” see John. T. Holmes, *Complementarity: National Courts Versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 672 (Antonio Cassese et al. eds., 2002). On supervision and “complementarity as management,” see KLEFFNER, *supra* note 3, at 326–28.

<sup>23</sup> See Rod Rastan, *Complementarity: Contest or Collaboration?*, in COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 83, 83 (Morten Bergsmo ed., 2010), available at [www.fichl.org/fileadmin/fichl/documents/FICHL\\_7\\_Web.pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHL_7_Web.pdf).

assumes “ownership” over the case. This leaves little space for burden-sharing or parallel action, which might sometimes be an asset from a compliance point of view. Given the limited number of atrocity trials overall, it might be premature to abandon this structure at this moment in time.

#### D. *Higher Sentence* Equals *Better Justice*

Heller’s theory operates on the assumption that a justice system based on “higher sentences” provides better and more efficient justice than a system with potentially lower sentences.<sup>24</sup> This vision reduces the rationales of the admissibility assessment to considerations of retribution and alleged effectiveness. This approach privileges “outcome” over “process.” It might sideline other systematic factors that are inherent in the system of forum allocation under the Statute, such as judicial independence, fairness, or sustainability.<sup>25</sup> Most fundamentally, Heller’s claim implies that a “higher sentence” provides “better” justice. This argument appears to go against the very rationales of sentencing, which typically preserves a great degree of flexibility in order to pay adequate tribute to individual interests.<sup>26</sup> It is ill-suited to provide an appropriate logic for forum choices in situations in which sentence and penalties may be of lesser importance in achieving justice, such as transitional justice scenarios. Heller’s test curtails flexibility in such contexts.

### III. IS A CHANGE OF METHODOLOGY DESIRABLE?

Legally, the “soft mirror” approach is not expressly required by the core provisions on “unwillingness” and “inability” under Article 17.<sup>27</sup> *A priori*, the ICC’s admissibility system might offer greater flexibility than the *11bis* deferral mechanism of the *ad hoc* tribunals and the strict scrutiny exercised by the International Criminal Tribunal for Rwanda (ICTR) in *Bagaragaza*<sup>28</sup> since the ICC does not enjoy primacy of jurisdiction.

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<sup>24</sup> See Heller, *supra* note 1, at 109–11.

<sup>25</sup> For a study of (meta-)principles underlying complementarity, see Carsten Stahn, *Taking Complementarity Seriously*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, *supra* note 3, at 233, 244–48, 274–81.

<sup>26</sup> On “influential factors” in sentencing, see, e.g., SILVIA D’ASCOLI, *SENTENCING IN INTERNATIONAL CRIMINAL LAW* 130 (2011). Such discretion is particularly important in light of the discrepancy between “minimum” and “maximum” sentences.

<sup>27</sup> Duties of implementation arise only in relation to cooperation to “procedures available under . . . national law for all of the forms of cooperation . . .” See Rome Statute, *supra* note 8, art. 88.

<sup>28</sup> See *Prosecutor v. Bagaragaza*, Case No. ICTR-05-86-AR11BIS, Decision on Rule 11*bis* Appeal, ¶¶ 16–17 (Aug. 30, 2006). The Chamber held that Article 8 of the ICTR Statute “delimits the Tribunal’s authority, allowing it only to refer cases where the state will charge and convict for those international crimes listed in its Statute.” It further noted that according to Article 9 of the Statute, “the Tribunal may still try a person who has been tried before a

In the ICC context, the symmetry argument is mostly a consequence of the interpretation of the notion of the “case”<sup>29</sup> for jurisdictional purposes under the Statute and an assurance to domestic authorities that the ICC might not conduct proceedings under the *ne bis in idem* clause under Article 20(3) (which does not contain a strict symmetry requirement itself).<sup>30</sup>

#### A. Merits of the “Same Conduct” Test

It is questionable whether this framework requires adjustment. The existing methodology has some merit. The “same conduct” test is based on a consistent application of the notion of the “case” under the admissibility regime (namely Article 17(1)(a) and (b), and Article 17(1)(c) in conjunction with Article 20(3)),<sup>31</sup> and the distinction between “same conduct” and “other conduct” in the cooperation regime (in particular Article 90).<sup>32</sup> It determines admissibility considerations primarily on the basis of a factual qualification (i.e., domestic investigation or prosecution of “conduct”).<sup>33</sup> It leaves States flexibility since it does not per se require identity in the legal qualification of the criminal conduct. Its application has further largely detached

national court for ‘acts constituting serious violations of international humanitarian law’ if the acts for which he or she was tried were ‘categorized as an ordinary crime.’”

<sup>29</sup> In *Lubanga*, the Pre-Trial Chamber of the ICC held: “[I]t is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court.” Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a Warrant of Arrest, ¶ 31 (Feb. 10, 2006). See also Prosecutor v. Ruto, Kosgey & Sang, Case No. ICC-01/09-01/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ¶ 55 (May 30, 2011).

<sup>30</sup> See Rome Statute, *supra* note 8, art. 20(3), which refers to “conduct also proscribed under article 6, 7 or 8” (emphasis added). For a discussion, see EL ZEIDY, *supra* note 3, 287–93.

<sup>31</sup> See Rome Statute, *supra* note 8, art. 20(3), 90(3). Article 19(5) contains a value judgment that conflicts be sorted as early as possible. In this light, it would be strange if a more “lenient” test was allowed prior under Article 17, and a stricter test (strict scrutiny) under the *ne bis in idem* clause. *Id.* art. 17, 19(5).

<sup>32</sup> See Rod Rastan, *Situation and Case: Defining the Parameters, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, *supra* note 3, at 421, 444–45 [hereinafter Rastan, *Situation and Case*]. The statute operates on the general assumption that disputes relating to the “same case” must be solved on the basis of admissibility determinations (e.g., to minimize a duplication of proceedings), while issues relating to a “different” case must be addressed through “consultation” and “coordination” under Articles 89(4) and 94. See also Robinson, *supra* note 2.

<sup>33</sup> The Statute distinguishes the broader notion of “conduct” (i.e., facts, circumstances) from its legal qualification, i.e., the crime-base. See Rome Statute, *supra* note 8, art. 20(1) (“conduct which formed the basis of crimes”), Art. 20(3) (“conduct also proscribed under article 6, 7 or 8.”).

the method of forum allocation under the Statute from the stigma of “failure” associated with the applicability of the “unwillingness” and “inability” criteria.

*B. Relevance of the “Sentencing Heuristic”*

Given the existing *status quo*, it might not be necessary to introduce a new “heuristic.” Due to the large number of perpetrators and crimes committed under ICC jurisdiction, conflicts over the prioritization of “ordinary” versus “international crime” prosecution are a relatively rare exception. In many existing ICC situations (Democratic Republic of Congo, Uganda, Central African Republic), states have entrusted the ICC with the mandate to investigate and prosecute.<sup>34</sup> In these circumstances, it would be largely unfeasible to force the ICC to encourage the exercise of domestic jurisdiction, based on the consideration that the domestic system might potentially impose a higher sentence. The Court cannot compel states to exercise jurisdiction, nor should it be required to suspend its own proceedings, based on the speculation that domestic authorities might act—be it under an “ordinary” or an “international” crime label.<sup>35</sup>

Potential conflicts might arise in cases of competing proceedings involving the “same conduct” and specifically in cases where domestic investigations or prosecutions cover the same “incident.” Such conflicts can be avoided through prosecutorial selection practice and an appropriate charging strategy. A “sentencing” heuristic is not strictly necessary to save ICC resources. In many instances, the same result may be achieved through other constraints (e.g. budgetary (self-) restriction) and the proper exercise of prosecutorial discretion. In circumstances where there is overlap, there is a range of different options. The Prosecutor might on his or her own motion decide not to proceed further (e.g., based on “new facts or information” under Article 53(4)).<sup>36</sup> The respective State might seek to convince the Prosecutor to “withdraw the charges.”<sup>37</sup> Moreover, the ICC may defer to domestic jurisdictions if investigations or

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<sup>34</sup> For a discussion, see generally Payam Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities*, 21 CRIM. L.F. 1 (2010); Claus Kress, *Self-Referrals and Waivers of Complementarity: Some Considerations in Law and Policy*, 2 J. INT’L. CRIM. JUST. 944 (2004); Darryl Robinson, *The Controversy Over Territorial State Referrals and Reflections on ICL Discourse*, 9 J. INT’L. CRIM. JUST. 355 (2011).

<sup>35</sup> See Prosecutor v. Katanga, Case No. ICC-01/04-01/07 OA 8, Judgment on the Appeal of Mr. Germain Katanga Against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, ¶¶ 79, 86 (Sept. 25, 2009).

<sup>36</sup> Article 53(4) enables the Prosecutor “at any time” to “reconsider a decision whether to initiate an investigation or prosecution based on new facts or information.” For a discussion, see generally Morten Bergsmo & Pieter Kruger, *Article 54*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1076 (Otto Triffterer ed., 2008).

<sup>37</sup> See Rome Statute, *supra* note 8, art. 61(9).



prosecutions are genuine.<sup>38</sup> In the first two cases, the application of the “sentencing” logic is not required. In the last case, it is doubtful whether the estimated gravity of the “sentence” should be the “exclusive criterion” to make this admissibility judgment.

### C. “Hard” Cases

Heller mentions two examples where the existing regime might produce unsatisfactory results because it might complicate “ordinary crime” prosecution. The first is the charging of an “inadequate mode of participation,”<sup>39</sup> and the second is an “overprotective” use of domestic defenses.<sup>40</sup> Both examples are less clear-cut than suggested and might not necessarily require exclusive application of the “sentencing heuristic.” Even Rule 11*bis* jurisprudence before the *ad hoc* tribunals has left domestic authorities some flexibility in relation to the adjudication of modes of liability.<sup>41</sup> Curiously, in some cases, domestic authorities (rather than international courts) have pushed to “give preference to the bounds of international liability instead of national liability.”<sup>42</sup> The second scenario might often be resolved through application of the traditional admissibility criteria under Article 17(2) (i.e., “purpose of shielding,”

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<sup>38</sup> On the “genuineness” requirement under Article 17, see Office of the Prosecutor, International Criminal Court, *Informal Expert Paper: The Principle of Complementarity in Practice 8* (2003), available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> [hereinafter Informal Expert Paper].

<sup>39</sup> Heller, *supra* note 1, at 116.

<sup>40</sup> *Id.* at 117.

<sup>41</sup> Rule 11*bis* contains general factors and conditions relating to “referrals” of cases to domestic jurisdictions. See ICTY Rules of Procedure and Evidence, IT/32/Rev. 46, Rule 11*bis*(B) (Oct. 20, 2011) (“being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out”), Rule 11*bis*(C) (“the gravity of the crimes charged and the level of responsibility of the accused”). On flexibility with respect to command responsibility, see Prosecutor v. Ademi and Norac, Case No. IT-04-78-PT, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, ¶ 46 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 14, 2005) (“On the basis of these considerations, the Referral Bench is not persuaded that it should exclude referral for the reason only that there may well be found to be a limited difference between the law applied by the Tribunal and the Croatian Court. Should this case be referred, it will be for the incumbent County Court in Croatia to determine the law applicable to each of the alleged criminal acts of the Accused.”).

<sup>42</sup> Van Anraat, *supra* note 18, ¶ 6.3. For a discussion, see Harmen G. van der Wilt, *Genocide, Complicity in Genocide and International v. Domestic Jurisdiction: Reflections on the van Anraat Case*, 4 J. INT’L CRIM. JUST. 239 (2006); Harmen van der Wilt, *Genocide v. War Crimes in the Van Anraat Appeal*, 9 J. INT’L CRIM. JUST. 557 (2008).

“intent to bring the person to justice”), or 17(3), which already allow the Court to take sentencing considerations into account.<sup>43</sup>

The most difficult scenarios are “borderline” cases that relate to context. The resolution of such cases might deserve a more nuanced consideration than “sentencing.” For instance, there might be a legitimate interest for the ICC to consider the broader context of charges if a perpetrator is charged as an isolated actor, i.e., irrespective of a link to a State or organizational policy, to an armed conflict, or the widespread or systematic commission of crimes. As noted by Rod Rastan, this finding might arguably provide a reason not to defer if such a strategy ultimately limits responsibility to low-level perpetrators and prevents proceedings at a higher echelon.<sup>44</sup>

#### D. *Alternative “Conduct” Definition?*

A more radical alternative to achieve greater leeway for the exercise of domestic jurisdiction in the context of competing proceedings would be the adoption of a broader notion of “conduct.” Such a proposal has been made in *Katanga* where the Defense proposed the application of a “comprehensive conduct test” based on a comparison of the intended gravity or factual scope of the case at the ICC and the national level.<sup>45</sup> This approach might indeed provide a greater possibility to challenge admissibility. But it also causes new problems, both legally and conceptually. To incorporate “gravity” considerations into the “conduct” requirement shifts interpretational dilemmas from Article 17(1)(d) of the Rome Statute into the definition of the “case.” It introduces “normative” concepts (i.e., a “gravity”-based comparator) into a primarily “factual” notion. Moreover, it makes the distinction between the “international” and the “domestic” case” difficult to operate since it would force the ICC to speculate about the scope of domestic proceedings over which it lacks control. This might increase disputes over the scope of exercise of jurisdiction rather than facilitate effective investigation and prosecution.

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<sup>43</sup> Rome Statute, *supra* note 8, art. 17. For some criteria relevant to determining whether a State is unwilling or unable to prosecute crimes, see Annex 4 of the Informal Expert Paper, *supra* note 38, at 28–31. Unwillingness might be shown by “inadequate sentences,” while “amnesties [and] immunities rendering [the] system ‘unavailable’” may be factors indicating inability.

<sup>44</sup> See Rastan, *Situation and Case*, *supra* note 32, at 452 n.88.

<sup>45</sup> See Prosecutor v. Katanga & Ngudjolo Chui, Case No. ICC-01/04-01/07, Motion Challenging the Admissibility of the Case by the Defence of Germain Katanga, Pursuant to Article 19(2)(a) of the Statute, ¶¶ 39–52 (Mar. 11, 2009).

*E. Other Side-Effects of the “Sentencing” Heuristic*

The “sentencing heuristic” might be a lesser evil. But even in its “moderate” form, it produces some side-effects that are not necessarily desirable. It pays little attention to the interests of defendants. It might require the Prosecutor or Judges to make a “sentencing” hypothesis even prior to the “confirmation of charges,” or the closure of the investigation.

Moreover, it would implicitly encourage a “race to the top” in terms of penalties, both at the ICC and the domestic level. Such a prioritization of “higher” penalties through ICC procedure is not necessarily in the spirit of the Statute. The Statute is neutral in this respect as confirmed by the wording of Article 80.<sup>46</sup>

The debate on admissibility in relation to Libya<sup>47</sup> illustrates some of the difficulties of Heller’s position. Taken to the extreme, Heller’s argument might be understood as an incentive for States to extend the death penalty for conduct underlying “core crimes.” This poses problems on several levels. The ICC is not a forum or appellate body mandated to remedy general human rights violations to the disadvantage of the person occurring in domestic criminal proceedings (i.e., akin to a human rights Court).<sup>48</sup> But in some cases, considerations related to the “proportionality” of the domestic penalty might have to be assessed. Judges might for instance consider the “proportionality” and modalities of domestic sentences for specific crimes, either as context or under the due process clause under Article 17(2)<sup>49</sup> or in light of Article

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<sup>46</sup> It states: “Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties in this Part.” Rome Statute, *supra* note 8, art. 80.

<sup>47</sup> See, e.g., Jens David Ohlin, *Libya & The Death Penalty: Can the ICC Complain About Too Much Punishment?*, LIEBERCODE (Nov. 28, 2011, 6:30 PM), <http://www.liebercode.org/2011/11/libya-death-penalty-can-icc-complain.html>; Carsten Stahn, R2P, *the ICC and the Libyan Arrests*, HAGUE JUSTICE PORTAL (Nov. 24, 2011), <http://www.haguejusticeportal.net/index.php?id=12998>; Carsten Stahn, *Libya, the International Criminal Court and Complementarity: A Test for ‘Shared Responsibility’*, 10 J. OF INT’L CRIM. JUST. (forthcoming 2012).

<sup>48</sup> Violation of fair trial principles is not per se a principle of case selection. Admissibility is rather tied to circumstances in which these violations reflect an intent not to bring a person to justice. See Enrique Carnero Rojo, *The Role of Fair Trial Considerations in the Complementarity Regime of the International Criminal Court: From “No Peace Without Justice” to “No Peace with Victor’s Justice”?*, 18 LEIDEN J. INT’L L. 829, 840–56 (2005). For a different view, see Federica Gioia, *Comments on Chapter 3 of Jann Kleffner, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY* 105, 112 (Jann K. Kleffner & Gerben Kor eds., 2006).

<sup>49</sup> The chapeau of Article 17(2) mandates the Court to have “regard to the principles of due process recognized by international law.” Rome Statute, *supra* note 8, art. 17(2).

21(3).<sup>50</sup> Heller's logic would ultimately force the Prosecutor or Judges to justify a forum choice and deferral to domestic jurisdiction because that domestic system recognizes capital punishment as the main sentence. This positive endorsement of the potential application of the death penalty might be difficult to reconcile with the Statute and Rule 11*bis* practice.<sup>51</sup> Ultimately, the ICC might not be prohibited from deferring a case to a State applying capital punishment if one takes the view that an admissibility assessment should not involve consideration of potential violations to the detriment of the defendant.<sup>52</sup> But even if one adopts that view, Heller's proposal is not appealing from a "policy" perspective. The problem with Heller's "sentencing heuristic" is that it places the ICC in the uncomfortable position of making that choice in the first place. By natural instinct, Court officials will be inclined to avoid entering into such determinations. This makes this test very hard to apply in practice.

Finally, Heller's theory would ultimately treat states who reject the "death" penalty less "favorably" in terms of deference than States who apply it. This inequality will be hard to defend.

#### IV. IS A CHANGE OF METHODOLOGY MANAGEABLE?

This leads to the last question treated by Heller, namely the issue as to whether this new approach would be manageable. Heller gives in-depth consideration to the question whether the "sentencing heuristic" would be manageable in light of the absence of internationally agreed sentencing standards.<sup>53</sup> The problem may not only lie in the determination of an anticipated international penalty but also in the prediction of a domestic sentence by the ICC. This determination exercise involves a great degree of uncertainty and certain risks.

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<sup>50</sup> Article 21(3) provides the applicable law of the ICC must be interpreted and applied consistently "with internationally recognized human rights." *Id.* art 21(3).

<sup>51</sup> The ICC Statute does not include the death penalty in its sentencing regime. Rule 11*bis* of the ICTR Rules of Procedure and Evidence specified specifically that a case shall only be referred back by a Trial Chamber if the accused will receive a fair trial and if "the death penalty will not be imposed or carried out." The ICTR Appeals Chamber held that a "Chamber designated under Rule 11*bis* must consider whether the State has a legal framework which criminalizes the alleged conduct of the accused and provides an adequate penalty structure." *See* Bagaragaza, *supra* note 28, ¶ 9.

<sup>52</sup> For a discussion of this issue, 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).

<sup>53</sup> *See, e.g.*, Heller, *supra* note 1, at 114.

A. *“Domestic” Sentence Assessment*

Heller’s proposal might require not only Judges, but also the Prosecutor to determine an estimated “average” sentence for respective crimes. Such a determination may be difficult at the early stages of the proceedings (i.e., at pre-trial), where investigations continue and the scope of the “case” and charges are still undefined.

Heller’s test would further require the ICC to carry out in-depth analysis of domestic law in order to determine an estimated “average” sentence. This would pose significant problems. Domestic sentencing criteria typically contain a large number of individualized discretionary elements, i.e., due to the discrepancy between minimum and maximum penalty.<sup>54</sup> To properly understand the specificities of the domestic system, ICC Judges or the Prosecutor might have to engage deeply with applicable domestic law and jurisprudence. It is questionable whether the ICC would be properly equipped to carry out such assessment. Any calculation might entail a great degree of uncertainty and risk of misinterpretation. Further complications might arise if the ICC has to address factors such as cumulative charging, plea bargaining, or applicable mitigating circumstances under domestic law. If a party (e.g., the defendant) appeals the initial admissibility decision under Article 82(1)(a),<sup>55</sup> the ICC might be involved more with the correct interpretation of national law, rather than its core business: to investigate and prosecute cases.

B. *The “Lower” Sentence Dilemma*

Finally, there is an inherent flaw in the design of the model. In some cases, the ICC might wish to give preference to proceedings at the domestic level, although such proceedings might actually lead to the imposition of a lower sentence. Such cases might in particular arise in contexts where mitigated or alternative sentences are part of a “transitional justice” strategy (e.g., Colombia).<sup>56</sup> Heller’s model might have to be adjusted in order to take into account such specificities.

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<sup>54</sup> Even in relation to murder, sentences typically vary between a specified number of years, life imprisonment, or capital punishment. The Court might have to engage with jurisprudence on different degrees of murder and comparable domestic cases, including conditions for review or reduction of sentence, in order to make an appropriate judgment.

<sup>55</sup> This appeal would not require “leave to appeal” by the Pre-Trial Chamber. *See* Rome Statute, *supra* note 8, art. 82(2).

<sup>56</sup> For a discussion of the Colombian example, see Kai Ambos, *The Colombian Peace Process (Law 975 of 2005) and the ICC’s Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, *supra* note 3, at 1071; Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 *ARIZ. J. INT’L & COMP. L.* 49 (2009).

## V. CONCLUSION

As it stands, Heller's approach is thus still more a creative "thought" experiment than a fully "manageable" model. In his reply to the online comment, Heller claims that "the sentence-based heuristic is the worst complementarity heuristic—except for all the others."<sup>57</sup> I would argue that a case-by-case assessment, which makes best use of the existing flexibility under the Statute and takes into account "sentencing" criteria as part of the admissibility criteria under Article 17, might in the end present a more nuanced and suitable approach.

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<sup>57</sup> See Kevin Heller's reply on the Opinio Juris Symposium. 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/](http://opiniojuris.org/2012/01/24/hilj_heller-response-to-robinson-and-stahn/).