

VOLUME 53, NUMBER 1, WINTER 2012

A Sentence-Based Theory of Complementarity

Kevin Jon Heller

TABLE OF CONTENTS

| | | |
|--|-----|---|
| INTRODUCTION | 202 | R |
| I. THE HARD MIRROR THESIS | 204 | R |
| A. <i>The Thesis Defined</i> | 204 | R |
| B. <i>Critique</i> | 205 | R |
| 1. <i>Text</i> | 205 | R |
| 2. <i>History</i> | 208 | R |
| C. <i>Consequences of Adopting the Hard Mirror Thesis</i> | 210 | R |
| 1. <i>Two-Tiered System of Complementarity</i> | 210 | R |
| 2. <i>Disincentives to Ratify</i> | 212 | R |
| II. THE SOFT MIRROR THESIS | 213 | R |
| A. <i>The Thesis Defined</i> | 213 | R |
| B. <i>Rationale</i> | 213 | R |
| C. <i>Critique</i> | 215 | R |
| 1. <i>Reputational Costs and Willingness Dilemmas</i> | 215 | R |
| 2. <i>Practical Costs</i> | 216 | R |
| III. A SENTENCE-BASED THEORY OF COMPLEMENTARITY | 223 | R |
| A. <i>Current Doctrine</i> | 223 | R |
| B. <i>The Sentence-Based Alternative</i> | 225 | R |
| C. <i>A Taxonomy of Ordinary Crime Prosecutions</i> | 227 | R |
| D. <i>Applying the Heuristics</i> | 228 | R |
| E. <i>The Advantages of a Sentence-Based Theory of Complementarity</i> | 230 | R |
| 1. <i>Administrability</i> | 230 | R |
| 2. <i>Promoting the Rome System of International Justice</i> ... | 234 | R |
| F. <i>Implementing the Heuristic</i> | 245 | R |
| IV. EXPRESSIVE VALUE | 246 | R |
| V. CONCLUSION | 248 | R |

A Sentence-Based Theory of Complementarity

Kevin Jon Heller*

Article 17 of the Rome Statute prohibits the International Criminal Court (“ICC”) from pre-empting a national prosecution of an act that qualifies as a war crime, crime against humanity, or act of genocide unless the State is “unwilling or unable genuinely to carry out” that prosecution itself. Scholars have long debated to what extent Article 17 permits states to prosecute international crimes as ordinary crimes. Proponents of the hard mirror thesis argue that such prosecutions never satisfy the principle of complementarity, because the mere act of prosecuting an international crime as an ordinary crime indicates that the state is unwilling or unable to genuinely prosecute. Proponents of the soft mirror thesis, by contrast, accept that prosecuting an international crime as an ordinary crime does not necessarily mean that the state is unwilling or unable to prosecute, but nevertheless insist that states should prosecute international crimes as international crimes whenever possible, because such prosecutions guard against unwillingness determinations and better promote the Rome system of justice.

This Article challenges both theses, demonstrating both that the best reading of the Rome Statute is that states are permitted to prosecute international crimes as ordinary crimes and that discouraging states from prosecuting international crimes as ordinary crimes is counterproductive, because national prosecutions of ordinary crimes are far more likely to succeed than national prosecutions of international crimes. This Article then defends an alternative theory of complementarity that focuses exclusively on sentence. It addresses how the Court should distinguish between acceptable and unacceptable national prosecutions of ordinary crimes. It argues that the traditional complementary heuristic, which limits states to prosecuting “serious” ordinary crimes that are based on the same conduct the ICC is investigating, is inadequate and should be replaced by a heuristic in which any national prosecution of an ordinary crime satisfies the principle of complementarity as long as it results in a sentence equal to, or longer than, the sentence the perpetrator would receive from the ICC. This Article also addresses the most serious objection to a sentence-based complementarity heuristic: namely, that prosecutions for ordinary crimes fail to capture the greater expressive value of international crimes. The Article concludes by discussing less radical alternatives to the sentence-based complementarity heuristic and expresses the hope that, because of increased national capacity to prosecute international crimes as international crimes, such a heuristic may eventually be unnecessary.

INTRODUCTION

One of Luis Moreno-Ocampo’s first statements as the Prosecutor of the International Criminal Court (“ICC”) was that “the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”¹ He was referring to the principle of complementarity in Article 17 of the Rome Statute, which prohibits the Court from pre-empting the national prosecution of an act that qualifies as a war

* Senior Lecturer, Melbourne Law School. My thanks to those who have given me comments on the essay, particularly Marko Milanovic, Mark Drumbl, Polina Levina, David Kaye, Frédéric Mégret, Chris Jenks, Margaret deGuzman, Immi Tallgren, Beth van Schaack, and Bianca Dillon.

1. Office of the Prosecutor, International Criminal Court, Informal Expert Paper: The Principle of Complementarity in Practice (2003), available at <http://www.icc-cpi.int/iccdocs/doc/doc654724.pdf> [hereinafter Informal Expert Paper] (quoting Luis Moreno-Ocampo, International Criminal Court, Statement Made by Mr. Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court, at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (June 16, 2003)) (internal quotation marks omitted).

crime, crime against humanity, or act of genocide unless the State is “unwilling or unable genuinely to carry out” that prosecution itself.² Article 17, however, fails to answer a critical question: *what kind* of national prosecution satisfies the principle of complementarity? Must a state prosecute an international crime *as* an international crime? Or is it permitted to charge the perpetrator with an “ordinary” domestic crime—murder, rape, theft—instead?

Scholars have long debated to what extent Article 17 permits states to prosecute international crimes as ordinary crimes. Two positions dominate the discourse, what I will call—adapting Frédéric Mégret’s phrases³—the “hard mirror thesis” and the “soft mirror thesis.” Proponents of the hard mirror thesis argue that such prosecutions never satisfy the principle of complementarity, because the mere act of prosecuting an international crime as an ordinary crime indicates that the state is unwilling or unable to genuinely prosecute. Proponents of the soft mirror thesis, by contrast, accept that prosecuting an international crime as an ordinary crime does not necessarily mean that the state is unwilling or unable to prosecute, but nevertheless insist that states *should* prosecute international crimes as international crimes whenever possible because such prosecutions guard against unwillingness determinations and better promote the Rome system of justice.

This Article challenges both theses and defends an alternative theory of complementarity that focuses exclusively on sentence. Part I critiques the hard mirror thesis, demonstrating that the best reading of the Rome Statute is that states are permitted to prosecute international crimes as ordinary crimes. It also explains why prohibiting states from doing so would have disastrous practical consequences. Part II evaluates the soft mirror thesis. It argues that discouraging states from prosecuting international crimes as ordinary crimes is counterproductive, because national prosecutions of ordinary crimes are far more likely to succeed than national prosecutions of international crimes. Part III then addresses how the Court should distinguish between acceptable and unacceptable national prosecutions of ordinary crimes. It argues that the traditional complementarity heuristic,⁴ which limits states to prosecuting “serious” ordinary crimes that are based on the same conduct the ICC is investigating, is inadequate and should be replaced by a heuristic in which *any* national prosecution of an ordinary crime satisfies the principle of complementarity as long as it results in a sentence equal to, or longer than, the sentence the perpetrator would receive from the ICC.

2. Rome Statute of the International Criminal Court art. 17, Jul. 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter Rome Statute].

3. See Frédéric Mégret, *Too Much of a Good Thing? ICC Implementation and the Uses of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY* 363, 372 (Carsten Stahn & Mohamed El Zeidy eds., 2011) (discussing the “‘mirror’ theory of implementation”).

4. A heuristic is an experience-based technique—a “rule of thumb”—for solving a particular problem. See, e.g., John M.C. Hutchinson & Gerd Gigerenzer, *Simple Heuristics and Rules of Thumb: Where Psychologists and Behavioral Biologists Might Meet*, 69 *BEHAV. PROCESSES* 97, 98 (2005).

Part IV addresses the most serious objection to a sentence-based complementarity heuristic: namely, that prosecutions for ordinary crimes fail to capture the greater expressive value of international crimes. Finally, the Conclusion discusses less radical alternatives to the sentence-based complementarity heuristic and expresses the hope that, because of increased national capacity to prosecute international crimes as international crimes, such a heuristic may eventually be unnecessary.

I. THE HARD MIRROR THESIS

A. *The Thesis Defined*

Nothing in the Rome Statute expressly obligates states to incorporate the Statute's substantive provisions—the crimes, modes of participation, and defenses—into their domestic law.⁵ A number of ICC stakeholders nevertheless insist that, as a matter of law, prosecuting an international crime as an ordinary crime cannot satisfy the principle of complementarity. That position—what I am calling the hard mirror thesis (“HMT”)—is particularly common among scholars. Sedman, for example, argues that “complementarity is not satisfied” by “prosecuting for an ordinary crime,” because the ICC was created to punish “the most serious crimes of concern to the international community.”⁶ Similarly, Philippe says that it is “an obvious requirement” of complementarity that “the definition of international crimes in domestic legislation . . . be in line with their definition at the international level.”⁷ The HMT has also been embraced by human rights organizations and at least one member state. Amnesty International claims that a state that fails to enact “national legislation which provides that these crimes under international law are also crimes under national law” risks “being

5. Carsten Stahn, *Complementarity: A Tale of Two Notions*, 19 CRIM. L.F. 87, 92 (2008); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 91 (2003) [hereinafter Kleffner, *Impact*].

6. Dawn Sedman, *Should the Prosecution of Ordinary Crimes in Domestic Jurisdictions Satisfy the Complementarity Principle?*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 259, 266 (Carsten Stahn & Larissa van den Herik eds., 2010).

7. Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 INT'L REV. RED CROSS 375, 390 (2006); see also Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 224–25 (2002–2003) (arguing that states “must also ensure that all ICC crimes are incorporated into national legislation” because “the crime of murder found in national law is not the same as a crime against humanity—since it lacks the requirement of intent—or other acts that constitute a crime against humanity”); ALEXANDER ZAHAR & GÖRAN SLUITER, *INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION* 489 (2008) (arguing that, because “the crimes set out in the Statute . . . must be implemented in domestic law as international crimes,” prosecuting such crimes as ordinary crimes “will in all likelihood result in an inability determination”); Matt Halling, *Push the Envelope—Watch It Bend: Removing the Policy Requirement and Extending Crimes Against Humanity*, 23 LEIDEN J. INT'L L. 827, 839 (2010) (“Complementarity requires that states prosecute crimes as they are spelled out in the Rome Statute; the prosecutions have to be for ‘crimes against humanity,’ not the murders, rapes, and so on that underlie the charge of crimes against humanity.”).

considered unable and unwilling genuinely to investigate and prosecute crimes within the Court's jurisdiction."⁸ And Spain has taken the position that, "if a State Party wishes successfully to invoke the principle of complementarity . . . then it has to ensure that its law includes [international] crimes and that its courts have jurisdiction to deal over them."⁹

B. Critique

Despite these claims, very little in the text or history of the Rome Statute supports the HMT. The most important provisions are Article 17, which specifies the requirements of complementarity, and Article 20, concerning *ne bis in idem*,¹⁰ which Article 17 incorporates by reference.¹¹

1. Text

Article 17 provides that a case being investigated or prosecuted by a state is inadmissible¹² unless the state is "unwilling or unable genuinely to carry out the investigation or prosecution."¹³ It also prohibits prosecuting a person who "has already been tried for conduct which is the subject of the complaint,"¹⁴ unless that person can be re-tried under Article 20(3) because the national prosecution was conducted—to quote the latter article—"for the purpose of shielding the person concerned from criminal responsibility."¹⁵

a. Unwillingness

Although there is no question that *certain kinds* of national prosecutions¹⁶ of ordinary crimes can manifest an unwillingness to prosecute—an issue discussed in Part III—only the most formalist interpretation of Article 17 indi-

8. Amnesty International, *The International Criminal Court: Checklist for Effective Implementation*, AMNESTY INT'L 2 (2000), available at <http://www.amnesty.org/en/library/asset/IO/40/01/1/2000/en/4c316ba9-df5e-11dd-aaaa-7d9091d4638f/ior400112000en.html>.

9. Kleffner, *Impact*, *supra* note 5, at 89 (quoting Eur. Consult. Ass., *Spain Progress Report on Ratification and Implementation of the Rome Statute*, 53d Sess., Consult/ICC 28 (Aug. 3, 2001)) (internal quotation marks omitted).

10. Latin for "not twice for the same." The *ne bis in idem* principle is effectively equivalent to the common law principle of double jeopardy.

11. Rome Statute, *supra* note 2 ("Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where . . . [t]he person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3.")

12. A case is "inadmissible" if it cannot be prosecuted by the ICC because a national prosecution satisfies the complementarity requirements of Article 17. A case is "admissible" if it can be prosecuted by the ICC because the national prosecution does not satisfy those requirements.

13. Rome Statute, *supra* note 2.

14. *Id.*

15. Rome Statute, *supra* note 2, art. 20. That purpose indicates unwillingness to genuinely prosecute the defendant, although subparagraph (c) of Article 17 does not use the "unwillingness" language of subparagraphs (a) and (b). *See* Rome Statute, *supra* note 2.

16. For sake of readability, I will refer to the national investigations and prosecutions simply as "prosecutions." Where there is a difference between the two, it will be noted in the text.

R

R

R

R

R

cates that a state should *automatically* be considered “unwilling” to prosecute simply because it chooses to charge an international crime as an ordinary crime. A national prosecution of an ordinary crime does not represent an “unjustified delay” in the proceedings, assuming that the state is pursuing the prosecution in a timely manner, nor does it necessarily manifest a lack of independence or impartiality.¹⁷ The real question is whether charging the perpetrator with an ordinary crime instead of an international crime indicates that the prosecution is being conducted “for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”¹⁸ It is possible, of course, to read the provision as equating any national decision to charge an ordinary crime with the intent to shield a perpetrator from “crimes within the jurisdiction of the court”—namely, from international crimes. The more natural reading, however, emphasizes the first part of the provision, “for the purpose of shielding the person from criminal responsibility,” which would be satisfied by a state charging a perpetrator with a serious ordinary crime like murder or rape. Indeed, it would undermine Article 17(2)(a)’s intent requirement to automatically equate the intent to charge a perpetrator with a serious ordinary crime with the intent to shield the perpetrator from criminal responsibility for an international crime. As discussed in Part II, a state could have many reasons for charging an international crime as an ordinary crime that have nothing to do with the prohibited intent.¹⁹

b. Inability

The textual case against the HMT is even clearer with regard to the inability to prosecute. There are two major problems with including the decision to charge an international crime as an ordinary crime within the category of “inability.” To begin with, Article 17(3) limits inability to situations in which the state is unable “to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”²⁰ The first two situations obviously do not apply, and it would be counterintuitive to equate a fully functioning national prosecution of a serious crime

17. Julio Bacio Terracino, *National Implementation of ICC Crimes: Impact on National Jurisdictions and the ICC*, 5 J. INT’L CRIM. JUST. 421, 433 (2007).

18. Rome Statute, *supra* note 2.

19. Such a scenario is, of course, not inconceivable. For example, a state might prefer to have one of its nationals convicted of one count of murder instead of genocide, a crime that is particularly stigmatizing in the eyes of the international community. It nevertheless seems unlikely that a state faced with such a choice would genuinely prosecute the perpetrator at all; as Mégret has pointed out, it is counterintuitive to imagine that a state “would conduct ‘mock’ proceedings for the purposes of holding off ICC jurisdiction. If a state is unwilling, it will generally be unwilling all the way.” Mégret, *supra* note 3, at 376. Regardless, as long as such a “mock” proceeding resulted in a prison sentence that satisfied the sentence-based complementarity heuristic, the arguments developed in this essay would still counsel that the ICC defer to the national prosecution. The contrary argument—that a murder conviction would not reflect the expressive value of genocide—is addressed in Part IV.

20. Rome Statute, *supra* note 2.

R

R

R

with a state being “unable to carry out its proceedings,”²¹ particularly in light of the *ejusdem generis* canon of construction.²² In addition, Article 17(3) requires all three situations to be “due to”—to result from—“a total or substantial collapse or unavailability of its national judicial system.”²³ It is equally counterintuitive to equate the failure to charge an international crime as an international crime with such “a total or substantial collapse,” even if the state’s decision was necessitated by the absence of legislation implementing the substantive provisions of the Rome Statute.²⁴

c. Ne Bis in Idem

The text of Article 20(3) provides further evidence against the HMT. The “upward”²⁵ *ne bis in idem* provision does not simply prohibit the Court from retrying a perpetrator whom a state has prosecuted for an international crime; it prohibits retrial whenever a state has prosecuted the perpetrator for “conduct also proscribed under article 6, 7, or 8” (emphasis added).²⁶ Article 20(3) thus seems specifically designed to permit a state to prosecute conduct that constitutes an international crime as an ordinary crime instead. Had the drafters of the provision wanted to require states to prosecute international crimes *as* international crimes, they would have prohibited the Court from retrying a perpetrator only if he had been prosecuted for “a crime referred to in article 5”²⁷—the language they used in Article 20(2),²⁸ the “downward” *ne bis in idem* provision.²⁹ That interpretation of the “conduct also proscribed” language is supported by the difference between Article 20(3)³⁰ and the equivalent *ne bis in idem* provisions in the statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International

21. Terracino, *supra* note 17, at 436.

22. The *ejusdem generis* canon—which translates from Latin as “of the same kind”—holds that when a list of examples is not exclusive, additional examples must be similar to the enumerated ones. GABRIEL HALLEVY, *A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW* 156 (2010).

23. Rome Statute, *supra* note 2.

24. See 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, 617 (2003) (arguing that “[c]ases where a state is declared unable because its national legislation differs from the substantive provisions of the Rome Statute should . . . be limited to situations where it . . . does not penalise a conduct proscribed under the Statute at all”). *But cf.* Kleffner, *Impact*, *supra* note 5, at 89 (arguing that “inability may result from the absence or inadequacies of substantive legislation”).

25. The expression refers to the fact that, in such situations, the *ne bis in idem* bar flows “upward” from the state to the ICC.

26. Rome Statute, art. 20(3)(a) (“No person who has been tried by another court for conduct also proscribed under article 6, 7, or 8 shall be tried by the Court with respect to the same conduct unless the proceedings in the other court . . . were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court.”). Articles 6, 7, and 8 concern genocide, crimes against humanity, and war crimes, respectively.

27. See WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 70 (2001).

28. Rome Statute, *supra* note 2, art. 20 (“No person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court.”).

29. The expression refers to the fact that, in such situations, the *ne bis in idem* bar flows “downward” from the ICC to the state.

30. Rome Statute, *supra* note 2, art. 20(3).

R

R

R

R

R

Criminal Tribunal for Rwanda (ICTR), both of which explicitly permit the tribunals to retry a perpetrator, who has been prosecuted nationally for an ordinary crime instead of for an international crime.³¹

2. History

The drafting history of Articles 17 and 20 supports the conclusion that the HMT is inconsistent with the Rome Statute. “Unwillingness” and “inability” were designed to address more dramatic failures of a national judicial system, and the drafters deliberately removed language from the *ne bis in idem* provision that would have permitted the ICC to retry a defendant convicted of an ordinary crime in a domestic court.

a. Unwillingness

Nothing in the *travaux préparatoires*³² indicates that the drafters of Article 17 considered the very act of prosecuting an international crime as an ordinary crime to constitute “unwillingness.” On the contrary, reflecting the desire of states to create an international court that would pre-empt national prosecutions only in the most exceptional circumstances,³³ the drafters of Article 17(2)(a) included the “unwillingness” criterion primarily “to preclude the possibility of sham trials aimed at shielding perpetrators” from being convicted at all.³⁴

b. Inability

There is also no indication in the drafting history that the drafters considered a national judicial system “unable” to prosecute if it did not—or even could not—prosecute an international crime as an international crime. As the “total or substantial collapse” language of Article 17(3) indicates,³⁵ the exception was designed to ensure that the Court could take control of prosecutions in states that lacked the basic material resources to conduct an effective prosecution,³⁶ the examples mentioned most often being Rwanda,

31. U.N. Secretary-General, *Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for the Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia*, art. 10, U.N. Doc. S/25704 (May 3, 1993); U.N. S.C. Res. 955, art. 9, U.N. SCOR, 49th Year, U.N. Doc. S/RES/955 (Nov. 8, 1994).

32. French for “preparatory works.”

33. John T. Holmes, *Complementarity: National Courts versus the ICC*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 667, 675 (Antonio Cassese et al. eds., 2002) [hereinafter *Complementarity*] (“the underlying premise of the complementarity regime was to ensure that the Court did not interfere with national investigations or prosecutions except in the most obvious cases.”).

34. John T. Holmes, *The Principle of Complementarity*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS 41, 50 (Roy S. Lee ed., 1999) [hereinafter *Principle*].

35. Rome Statute, *supra* note 2, art. 17(3).

36. See Sharon A. Williams & William A. Schabas, *Article 17 Issues of Admissibility*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES 605, 623 (Otto Triffterer ed., 2d. ed. 2008).

whose national judicial system had been destroyed by the 1994 genocide,³⁷ and Somalia.³⁸ The “unable to otherwise carry out its proceedings” criterion was similarly intended to cover situations in which a state that could obtain the accused and the necessary evidence nevertheless lacked sufficient personnel to conduct a genuine proceeding.³⁹

c. Ne Bis in Idem

The drafting history of Article 20(3) provides the most compelling evidence against the HMT. Both the 1993 Draft Statute and the 1994 Draft Statute followed the statutes of the ICTY and ICTR by permitting the Court to re-try a perpetrator who had been prosecuted nationally for an ordinary crime instead of for an international one.⁴⁰ The Preparatory Committee removed the relevant provision, however, because states rejected the distinction between international and ordinary crimes:

During the negotiations, the discussion surrounding the concept of “ordinary crime” revealed the difficulties inherent in trying to include this notion. Delegations diverged greatly on how to define this concept and, as a result, on whether it should be included at all. An attempt at a different approach provided for the Court to take into account the “international character and the grave nature of the crime.” The problem with these approaches for many delegations was that they ran counter to the underlying basis of the principle of *ne bis in idem*. If an accused committed some reprehensible conduct, what did it matter if that person was tried, convicted and punished pursuant to a national crime as opposed to the crimes listed in the Statute? Arguments were made on the deterrent and retributive effects of adjudicating crimes as international but these points did not sway the majority. As a result, the concept of “ordinary crime” was not included.⁴¹

The most important amendment to the *ne bis in idem* provision was then adopted during the Rome Conference, when the “with respect to the same conduct” language was added to the chapeaux of Article 20(3).⁴² That change was designed to make clear that although states were free to prosecute international crimes as ordinary crimes, the ICC would only be prohibited from retrying the perpetrator for the conduct underlying the ordinary

37. See Holmes, *Complementarity*, *supra* note 33, at 677 (noting that the Rwanda situation was invoked by a number of the delegations involved in drafting the “inability” provision).

38. See Williams & Schabas, *supra* note 36, at 623.

39. See Holmes, *Complementarity*, *supra* note 33, at 678.

40. JANN K. KLEFFNER, COMPLEMENTARITY IN THE ROME STATUTE AND NATIONAL CRIMINAL JURISDICTIONS 72, 75 (2008) [hereinafter Kleffner, COMPLEMENTARITY].

41. Holmes, *Principle*, *supra* note 34, at 57–58.

42. *Id.* at 59.

R

R

R

R

crime; it remained free to bring international charges that were based on different conduct.⁴³

C. Consequences of Adopting the Hard Mirror Thesis

Early judicial practice indicates that the ICC is unlikely to accept the HMT. According to Article 17, a state can challenge the admissibility of a case only if it is “being investigated or prosecuted” at the time of the challenge—the “activity” requirement.⁴⁴ The Appeals Chamber has recently held that, to qualify as activity, the national proceeding underlying an admissibility challenge must “cover the same individual and substantially the same conduct as alleged in the proceedings before the Court.”⁴⁵ That “same conduct” test is incompatible with the HMT; if the Appeals Chamber believed that any national prosecution for an ordinary crime automatically qualified as inactivity, it would have required the prosecution to encompass the same person *and* the same crime.

That said, the Appeals Chamber has yet to specifically disavow the HMT. It is thus critically important to recognize that requiring states to prosecute international crimes as international crimes would have disastrous practical consequences for the Court.

1. Two-Tiered System of Complementarity

To begin with, the HMT would create precisely the kind of two-tiered system of complementarity that Louise Arbour predicted more than a decade ago—a system in which non-Western states find it much more difficult to satisfy complementarity than their Western counterparts.⁴⁶ Western states that join the ICC normally have no trouble incorporating the substantive provisions of the Rome Statute into their domestic law. Of the twenty-seven NATO states that have ratified the Rome Statute, for example, twenty-two have enacted incorporation legislation and three others⁴⁷ are in the process of doing so. Only Hungary⁴⁸ and Italy⁴⁹ have unsuccessfully attempted to incorporate. By contrast, a significant number of non-Western states who are

43. *Id.*

44. Rome Statute, *supra* note 2, art. 17(1)(a).

45. Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali, Case No. ICC-01/09-02/11 OA, Judgment on Defence Appeal Challenging Admissibility of Case, ¶ 39 (Aug. 30, 2011), available at <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf>.

46. Williams & Schabas, *supra* note 36, at 624 (noting that, during the drafting of Article 17, Arbour claimed that the Court would never find a rich country unable to genuinely prosecute a crime).

47. Czechoslovakia, France, and Lithuania. See COALITION FOR THE INTERNATIONAL CRIMINAL COURT, CHART ON THE STATUS OF RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE AND THE AGREEMENT ON PRIVILEGES AND IMMUNITIES 11–21 (2010), available at [http://www.coalitionfortheicc.org/documents/Global_Ratificationimplementation_chartApr2010_\(3\).pdf](http://www.coalitionfortheicc.org/documents/Global_Ratificationimplementation_chartApr2010_(3).pdf).

48. *Id.* at 14 (noting that Parliament rejected a draft package of amendments submitted by the Ministry of Justice).

49. *Id.* at 15 (noting that a draft of incorporation legislation has been languishing in Parliament since 2003).

R

R

members of the ICC have tried without success to enact incorporation legislation. In many of those states, the internal political situation is too divided or too unstable to permit the government to enact incorporation legislation. That is the situation in at least six states in the Global South: the Dominican Republic,⁵⁰ Honduras,⁵¹ Gabon,⁵² Guinea,⁵³ Madagascar,⁵⁴ and Zambia.⁵⁵ In Gabon, for example, the political stalemate created by President Omar Bongo's death derailed a 2008 implementation bill.⁵⁶ Similarly, the Coalition for the International Criminal Court (CICC) reports that the "current complex political situation" in Honduras has prevented the legislature from enacting a new criminal code that includes international crimes.⁵⁷

Even in states that are (relatively) politically unified, the need to attend to more pressing issues may divert the government's attention from incorporation. The CICC puts Bolivia,⁵⁸ Guyana,⁵⁹ and Peru⁶⁰ in that category, and Tanzania also belongs on the list. Although Tanzania was one of the earliest advocates of the ICC, ratifying the Rome Statute in 2002, it has not passed implementing legislation primarily because "laws to deal with terrorist offences . . . are seen by officials as far more urgent and relevant to Kenya than the ICC Bill."⁶¹

Finally, a number of states have not incorporated the Rome Statute simply because they lack the technical capacity to do so. Botswana, for example, has yet to incorporate even though it ratified the Rome Statute in 2000. The primary reason, according to Lee Stone, is that "Botswana is party to numerous instruments, and is facing enormous capacity challenges with respect to implementation of all of these instruments . . . [and] resources and expertise in the Attorney General's Chambers are insufficient."⁶² Similarly, the other reason Tanzania has failed to incorporate is that, "whilst the political will seems to exist, matters remain fairly stuck for want of specialised personnel"

50. *Id.* at 4–5.

51. *Id.* at 6.

52. *Id.* at 30.

53. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, CHART ON THE STATUS OF RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE AND THE AGREEMENT ON PRIVILEGES AND IMMUNITIES 31 (2010), available at [http://www.coalitionfortheicc.org/documents/Global_Ratification_implementation_chartApr2010_\(3\).pdf](http://www.coalitionfortheicc.org/documents/Global_Ratification_implementation_chartApr2010_(3).pdf).

54. *Id.* at 31–32.

55. *Id.* at 35.

56. See *id.* at 30.

57. See *id.* at 6.

58. *Id.* at 3.

59. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, CHART ON THE STATUS OF RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE AND THE AGREEMENT ON PRIVILEGES AND IMMUNITIES 5–6 (2010), available at [http://www.coalitionfortheicc.org/documents/Global_Ratification_implementation_chartApr2010_\(3\).pdf](http://www.coalitionfortheicc.org/documents/Global_Ratification_implementation_chartApr2010_(3).pdf).

60. *Id.* at 7.

61. Jolyon Ford, *Kenya*, in UNABLE OR UNWILLING? CASE STUDIES ON DOMESTIC IMPLEMENTATION OF THE ICC STATUTE IN SELECTED AFRICAN COUNTRIES 57, 68 (Max du Plessis & Jolyon Ford eds., 2008).

62. Lee Stone, *Botswana*, in UNABLE OR UNWILLING? CASE STUDIES ON DOMESTIC IMPLEMENTATION OF THE ICC STATUTE IN SELECTED AFRICAN COUNTRIES, *supra* note 61, at 24.

in the government—particularly in the Ministry of Justice and Attorney General's Office—who are capable of the necessary drafting.⁶³

This analysis is not exhaustive, nor is it meant to be. The point is simply that, were the ICC to accept the HMT, Western states would find it far easier to satisfy complementarity than non-Western ones. To be sure, the failure of some non-Western states to incorporate the Rome Statute may reflect an unwillingness to genuinely prosecute international crimes. As the discussion above indicates, however, in most situations that failure does not reflect a lack of commitment to the ICC.

2. *Disincentives to Ratify*

The HMT would also harm the ICC by providing non-member states with a powerful disincentive to ratify the Rome Statute. As Mégret has noted, the perceived ability of a non-member state to prevent its nationals from being prosecuted by the ICC is a critical determinant of its willingness to ratify: a state that is confident it will be able to invoke the principle of complementarity will be far more likely to ratify than one that is not.⁶⁴ It is thus difficult to imagine any non-member state joining the ICC that was not certain (for any of the reasons discussed above) that it would be able to implement the Rome Statute, because its failure to do so would automatically result in it being deemed “unwilling” to prosecute. Even worse, the HMT would discourage states from ratifying that have the political will and technical capacity to incorporate the Rome Statute, but nevertheless prefer to charge international crimes as ordinary crimes. The United States, for example, has an official policy of charging soldiers with serious ordinary crimes under the Uniform Code of Military Justice (UCMJ) instead of with war crimes.⁶⁵ In some situations, that policy might reflect an “unwillingness” to prosecute. But it is difficult to argue that *the policy itself* represents unwillingness given that a conviction under the UCMJ may result in the death penalty, a sentence more severe than the maximum sentence under the Rome Statute.⁶⁶

63. Ford, *supra* note 61, at 85, 88.

64. Frédéric Mégret, *Why Would States Want to Join the ICC? A Theoretical Exploration Based on the Legal Nature of Complementarity*, in COMPLEMENTARY VIEWS ON COMPLEMENTARITY 1, 20–22 (Jann Kleffner & Gerben Kor eds., 2006) [hereinafter Mégret, *Why Join*].

65. Manual for Courts-Martial United States, r. 307(c)(2) (2008) (“Ordinarily persons subject to the code should be charged with a specific violation of the code rather than a violation of the law of war.”).

66. Compare 10 U.S.C. § 918, art. 118 (Uniform Code of Military Justice permitting the death penalty for the crime of murder), with Rome Statute, *supra* note 2, art. 77(1)(b) (permitting “life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.”).

II. THE SOFT MIRROR THESIS

A. *The Thesis Defined*

Most scholars accept that the principle of complementarity permits a state to prosecute international crimes as ordinary crimes, as long as the state is not conducting sham trials designed to shield perpetrators from criminal responsibility. Almost without exception, however, they insist that states *should* incorporate the substantive provisions of the Rome Statute, because it is *better* for states to prosecute international crimes as international crimes than as ordinary ones. After criticizing the HMT, Kleffner says that, “[b]e that as it may, the most coherent solution to the aforementioned problem [of impunity] would be to criminalize the acts within the jurisdiction of the ICC as genocide, crimes against humanity and war crimes.”⁶⁷ Bergsmo argues that “[h]aving legislation in place is the first step in putting an end to impunity for atrocities and constitutes a means of materialising the application of complementarity.”⁶⁸ And the committee that wrote the well-known Informal Expert Paper (IEP) on complementarity insists that, “[c]onsistent with its mandate to help ensure that serious international crimes do not go unpunished, it should be a high priority for the Office of the Prosecutor to actively remind States of their responsibility to adopt and implement effective legislation”⁶⁹

As the IEP’s reference to the role of the Prosecutor indicates, the very notion of positive complementarity rests on the assumption that states should avoid prosecuting international crimes as ordinary crimes. The Bureau of the Assembly of States Parties defines positive complementarity as “all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute.”⁷⁰ Similarly, in his seminal essay on the topic, Burke-White suggests that “[u]nder such a policy, the ICC would cooperate with national governments and use political leverage to encourage states to undertake their own prosecutions of international crimes.”⁷¹

B. *Rationale*

The popularity of the soft mirror thesis (SMT) raises an intriguing question: *why* is a national prosecution for an international crime better than a national prosecution for an ordinary crime? Scholars have offered two pri-

67. Kleffner, *Impact*, *supra* note 5, at 98.

68. Morten Bergsmo et al., *Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools*, 2 GOETTINGEN J. INT’L L. 791, 801 (2010).

69. Informal Expert Paper, *supra* note 1, at 5.

70. Bergsmo et al., *supra* note 68, at 798 (quoting International Criminal Court, ICC Review Conference, Appendix ¶ 16, ICC-ASP/8/Res. 9, at 16 (Mar. 25 2010)).

71. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT’L L. J. 53, 54 (2008).

R

R

R

mary rationales. Some take a narrowly pragmatic view, arguing that incorporating the Rome Statute into domestic law is necessary to avoid “impunity gaps”: situations in which effective prosecution is impossible, because a state’s national criminal law fails to include an ordinary equivalent to an international crime,⁷² contains an inadequate range of modes of participation,⁷³ or makes available overly broad defenses.⁷⁴ Others offer a more conceptual argument, claiming that the greater expressive value of a conviction for an international crime justifies encouraging states not to prosecute ordinary crimes even if the practical consequences of the two prosecutions would be the same. Doherty and McCormack argue, for example, that “domestic penal provisions fail to capture what makes the international crimes truly heinous and distinguishes them from domestic ‘equivalents,’” because “what gives the acts listed their dubious status as international crimes is the additional element—the context or ‘situationing’ for crimes against humanity and the mental element for genocide.”⁷⁵ A recent expert panel organized by the ICC took the same position, concluding that “prosecuting core crimes as murder or rape, rather than their international equivalents, is not desirable since ordinary crimes do not represent the scope, scale and gravity of the conduct.”⁷⁶ Even more dramatically, Terracino argues that national prosecutions of ordinary crimes “undermine the fundamental idea on which the international criminal justice system is founded,” because “although prosecuting for ordinary crimes fulfills the objective of ending impunity, it must not be forgotten that the acts in question are the most serious crimes of concern to the international community as a whole.”⁷⁷

72. See, e.g., Bruce Broomhall, *The International Criminal Court: A Checklist for National Implementation*, 13 *quarter NOUVELLES ETUDES PENALES* 113, 149–51 (1999) [hereinafter *Checklist*] (“[I]f national penal law does not encompass all the acts listed as crimes against humanity—forced pregnancy, persecution, enforced disappearance—with the consequence that charges could not be brought for such acts, a case involving one of these acts could conceivably be admissible before the ICC” (author’s translation)); Kleffner, *Impact*, *supra* note 5, at 96–97 (arguing that when it is difficult “to find a ‘matching’ ordinary crime for certain ICC crimes . . . the ordinary-crimes approach may increase the likelihood of cases being admissible because of the inaction by national authorities.”).

R

73. See, e.g., 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) [hereinafter Robinson, *Rome Statute*] (“If a State wants to be sure of meeting the complementarity test, then it would be prudent to review the grounds of responsibility in the Rome Statute, and to ensure that the national law is at least as broad.”); Informal Expert Paper, *supra* note 1, at 30 (describing “[a]dequacy of . . . modes of liability vis-à-vis the gravity and evidence” as an indicium of willingness).

R

74. See, e.g., Robinson, *Rome Statute*, *supra* note 73, at 1865 (“If the defences available under national law are dramatically broader than those available under the Rome Statute, then it is conceivable that a State could find itself unable to secure a conviction of a person who would clearly be liable under the Rome Statute.”).

R

75. Katherine L. Doherty & Timothy L.H. McCormack, “Complementarity” as a Catalyst for Comprehensive Domestic Penal Legislation, 5 *U.C. DAVIS J. INT’L L. & POL’Y* 147, 166–67 (1999).

76. Bergsmo et al., *supra* note 68, at 801.

R

77. Terracino, *supra* note 17, at 439. For additional examples of the conceptual argument, see Kleffner, *Impact*, *supra* note 5, at 98 (arguing that states should fully incorporate the Rome Statute because “[a]n important consideration on the conceptual level . . . is that it more adequately reflects the very nature of international core crimes”); see also Mégret, *supra* note 3, at 384 (describing the prosecution of ordinary crimes as “the one case where this author would find merit in the contention that insufficient implemen-

R

R

R

R

C. Critique

Both rationales for the SMT are plausible, and each is addressed below. It is critically important to recognize, however, that pressuring states to incorporate the Rome Statute and prosecute international crimes as international crimes—what Mégret usefully calls the “command-and-control, top-down view” of complementarity, highlighting the SMT’s desire to restructure national criminal justice systems in the ICC’s image⁷⁸—is actually far more likely to *undermine* national efforts to combat impunity than most scholars recognize.

1. Reputational Costs and Willingness Dilemmas

Unlike the hard mirror thesis, the soft mirror thesis does not directly penalize member states that fail to incorporate the Rome Statute by automatically deeming them unwilling to prosecute. The SMT does, however, impose at least some reputational costs on states that fail to incorporate, branding them as bad international citizens that are not living up to their obligations—“soft” though they may be—to the Court.⁷⁹ After all, Terracino is speaking for many in the ICC community when he claims that prosecuting an international crime as an ordinary crime “undermine[s] the fundamental idea on which the international criminal justice system is founded.” That may be true—but it is counterproductive to make no distinction between states that charge ordinary crimes because they are hostile to the ICC and states that are committed to the ICC but, for unrelated reasons, are unable to incorporate the Rome Statute. As Concannon says, “[a]n analysis of the impunity problem that ignores the complexity of a poor country’s needs and simply classifies the government as one not interested in justice is unlikely to yield results.”⁸⁰

The SMT’s pressure on states to charge international crimes as international crimes whenever possible also creates an expectation that states that are committed to the ICC will eventually incorporate the Rome Statute and avoid relying on ordinary crimes. Given that expectation, states that fail to incorporate and continue to charge ordinary crimes cannot help but appear more “unwilling” to genuinely prosecute than their more compliant counterparts, even if there is no reason to fault their investigation and prosecution of ordinary crimes. Although the extent of that bias is, of course,

tation could lead to a real unavailability,” because “[i]n most cases except perhaps isolated war crimes, judging individuals for ‘ordinary’ domestic crimes will be the equivalent of denying a crucial contextual and systemic aspect to their acts, which will almost inevitably reveal an at least partial unwillingness to try them for what they did.”

78. Mégret, *supra* note 3, at 387.

79. See Mégret, *Why Join*, *supra* note 64, at 34.

80. Brian Concannon, Jr., *Beyond Complementarity: The International Criminal Court and National Prosecutions, a View from Haiti*, 32 COLUM. HUM. RTS. L. REV. 201, 215 (2000).

impossible to determine, it is certainly not zero—and the greater the bias, the smaller the practical distance between the SMT and the HMT.

The SMT creates a worse willingness dilemma for states that *do* incorporate the Rome Statute. Once international crimes are part of a state's domestic law, there is an even greater expectation that the state will avoid charging international crimes as ordinary ones, and an even greater assumption that charging ordinary crimes represents an unwillingness to prosecute. A state that incorporates the Rome Statute yet does not take advantage of its substantive provisions is thus particularly likely to be considered unwilling to genuinely prosecute. Put more simply, given the international consensus that prosecuting ordinary crimes exhibits a lack of commitment to the ICC and to international criminal law in general, the state that *can* charge international crimes *must* charge them.⁸¹

2. Practical Costs

Most importantly, pressuring states to prosecute international crimes as international crimes significantly increases the likelihood that national prosecutions will fail.⁸² International crimes are far more difficult to investigate and prove than ordinary crimes, requiring better-trained personnel and significantly more financial resources.⁸³ Prosecutions of ordinary crimes are thus much more likely to result in a conviction.

a. Legal Requirements

To begin with, international crimes are far more legally complicated than ordinary crimes. Unlike ordinary crimes, international crimes possess a “double-layered” structure⁸⁴ that requires proof of *both* the underlying criminal act—the specific war crime, crime against humanity, or act of genocide—and a particular contextual element. War crimes require proof of an armed conflict, whether international or non-international.⁸⁵ Crimes against humanity require proof of a “widespread or systematic attack . . . [and] a State or organizational policy to commit such attack.”⁸⁶ Genocide requires proof not only of the specific intent to destroy a racial, ethnic, national, or religious group, but also that “[t]he conduct took place in the context of a manifest pattern of similar conduct directed against that group or was con-

81. See Michael A. Newton, *The Quest for Constructive Complementarity*, in STAHN & EL ZEIDY, *supra* note 3, at 304, 320, 328–29.

82. This criticism also applies, of course, to the hard mirror thesis. Because the HMT's primary weakness is its absence of support in the text and history of the Rome Statute, however, I discuss a states' lack of capacity to prosecute international crimes as international crimes here.

83. See generally OPEN SOCIETY JUSTICE INITIATIVE, PROMOTING COMPLEMENTARITY IN PRACTICE—LESSONS FROM THREE ICC SITUATION COUNTRIES 2 (2010) [hereinafter OSJI].

84. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 54 (2d ed. 2008).

85. See, e.g., Rome Statute, *supra* note 2, art. 8(2)(b) (listing war crimes in international armed conflict).

86. *Id.*, art. 7(1), (2)(a).

duct that could itself effect such destruction.”⁸⁷ International tribunals have developed a vast jurisprudence concerning the contextual elements; without a sound understanding of that jurisprudence, a national prosecutor cannot hope to prove them.

Proving the underlying criminal act itself is also often more difficult for international crimes. Many such acts are simply ordinary crimes—murder as a crime against humanity, rape as a war crime. But numerous others are unique to international criminal law, requiring specialized knowledge to prosecute: deportation,⁸⁸ forced pregnancy,⁸⁹ and enforced disappearance⁹⁰ as crimes against humanity; denying quarter,⁹¹ perfidy,⁹² and using human shields⁹³ as war crimes; forcible transfer of children⁹⁴ as genocide. War crimes are particularly complicated, requiring prosecutors to understand vast swaths of international humanitarian law, most notably the distinction between combatants and civilians, the difference between military objectives and civilian objects, and the concept of military necessity. Similarly, many other international crimes require knowledge of related areas of international law. The crimes against humanity of imprisonment and persecution, for example, cannot be applied without at least some understanding of international human-rights law, because both specifically incorporate that law by reference.⁹⁵

The Rome Statute also includes a number of modes of participation that are either unique to international criminal law or reflect a specific legal tradition, complicating their use by national prosecutors. Perpetration-by-

87. See, e.g., International Criminal Court, Elements of Crimes, art. 6(a)(4), U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002) [hereinafter Elements of Crimes].

88. See Rome Statute, *supra* note 2, art. 7(2)(d) (defining deportation as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law”).

89. See *id.*, art. 7(2)(f) (defining forced pregnancy as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law”).

90. See *id.*, art. 7(2)(i) (defining enforced disappearance as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time”).

91. Elements of Crimes, *supra* note 87, art. 8(2)(b)(xii) (defining the denial of quarter as ordering or declaring that “there shall be no survivors” of an attack).

92. See *id.*, art. 8(2)(b)(xi) (defining perfidy as causing death or serious injury after the perpetrator “invited the confidence or belief of one or more persons that they were entitled to, or were obliged to accord, protection under rules of international law applicable in armed conflict”).

93. See *id.*, art. 8(2)(b)(xxiii) (defining the use of human shields as taking advantage “of the location of one or more civilians or other persons protected under the international law of armed conflict” in order “to shield a military objective from attack or shield, favour or impede military operations”).

94. See Rome Statute, *supra* note 2, art. 6(e).

95. See Elements of Crimes, *supra* note 87, art. 7(1)(e)(2) (requiring the imprisonment to be “in violation of fundamental rules of international law”); Rome Statute, *supra* note 3, art. 7(2)(g) (defining persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”).

R

R

R

R

means, which is at the heart of the ICC's case against Bashir,⁹⁶ is an example of the latter: although most legal systems criminalize a situation in which a person uses an "innocent agent"⁹⁷ to commit a crime,⁹⁸ the Rome Statute's version of perpetration-by-means, which focuses on the perpetrator's control over a hierarchical organization, is based specifically on German criminal law.⁹⁹ Command responsibility is an example of the former¹⁰⁰—and is often extremely difficult to prove. As Bergsmo and Wiley have pointed out, "a finding of criminal command responsibility normally rests upon several legal requirements of increasing complexity, including the requirement that it be proved that the commander in question was aware or should have known that forces under his or her command were committing, or were about to commit, conduct contrary to international criminal law."¹⁰¹

b. Investigation

In addition to being more difficult to prove than ordinary crimes, international crimes are also far more difficult to investigate. Once again, the contextual elements are the primary culprits. Proving a crime against humanity not only requires investigators to tie the perpetrator to the underlying act, it also requires them to develop evidence (1) that the victim was a civilian and not a combatant; (2) that the underlying act was part of a widespread or systematic attack on civilians; (3) that the widespread or systematic attack involved a course of conduct involving multiple crimes against humanity; (4) that the multiple crimes against humanity were committed pursuant to a state or organizational policy; and (5) that the perpetrator knew of the widespread or systematic attack.¹⁰² Proving genocide requires evidence that the underlying act did, in fact, take place in the context of a manifest pattern of similar conduct.¹⁰³ Proving a war crime in an internal armed conflict requires evidence that the hostilities were sufficiently intense and protracted, and involved a rebel group with a sufficient degree of internal organization,

96. See Prosecutor v. Omar Hassam Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest, ¶¶ 209–23 (Mar. 4, 2009).

97. An individual who cannot be convicted of the crime, whether because of age, incapacity, duress, or the like. See Florian Jessberger & Julia Geneuss, *On the Application of a Theory of Indirect Perpetration in Al Bashir: German Doctrine at the Hague?*, 6 J. INT'L CRIM. JUST. 853, 857 (2008).

98. See *id.* at 854.

99. See, e.g., Kevin Jon Heller, *The Rome Statute of the International Criminal Court*, in THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 593, 607 (Kevin Jon Heller & Markus D. Dubber eds., 2011).

100. See, e.g., ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 320 (2007).

101. Morton Bergsmo & William H. Wiley, *Human Rights Professionals and the Criminal Investigation and Prosecution of Core International Crimes*, in MANUAL ON HUMAN RIGHTS MONITORING: AN INTRODUCTION FOR HUMAN RIGHTS FIELD OFFICERS 1, 7 (Siri Skåre et al. eds., 2008).

102. See, e.g., GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 296–97 (2005).

103. See, e.g., Elements of Crimes, *supra* note 87, art. 6(a)(4) (requiring the genocidal conduct to have taken place "in the context of a manifest pattern of similar conduct directed against that group").

to trigger the application of international humanitarian law.¹⁰⁴ In each case, as the ICTR Prosecutor has noted, investigators not only have to “learn the elements of the crimes they are investigating,” they also have to investigate “multiple locations, not just single massacre sites.”¹⁰⁵ Focusing exclusively on developing evidence of the underlying crime is far easier—and far less time- and resource-intensive.¹⁰⁶

That is not all. The specialized nature of certain specific international crimes and modes of participation complicates the investigative stage of a prosecution no less than it complicates the prosecution itself. War crimes involving attacks on civilian objects, for example, require evidence that the object attacked did not qualify as a military objective—no small task, particularly concerning so-called “dual-use” infrastructure whose status depends on how it is being used at the time of the attack.¹⁰⁷ Similarly, to prove command responsibility, investigators not only have to document the subordinates’ crimes, they must also find evidence sufficient to establish both the commander’s effective control over those subordinates and the existence of information that satisfies the mode of participation’s mental element. That can be difficult, particularly for civilian superiors whose effective control often exists only *de facto* and who are criminally responsible only if they “knew, or consciously disregarded information that clearly indicated” their subordinates were committing crimes.¹⁰⁸

c. Consequences

There is no question that some states are able to effectively prosecute international crimes despite their legal complexity. Many of the most successful prosecutions of international crimes committed during World War II, for example, took place in national courts in Israel, France, Australia, Canada, the United States, and Germany.¹⁰⁹ That said, even in Western states, it is likely that prosecutions of ordinary crimes will succeed more often than prosecutions of international crimes. Even the best-trained and best-resourced national investigators and prosecutors will be more familiar with, and more skilled at applying, national criminal law than international criminal law. Moreover, whether a prosecution is successful depends not only on the quality of the evidence and advocacy, but also on the quality of the judges who determine the law that the finder of fact (sometimes the judges themselves, sometimes a jury) applies to the evidence. National

104. See, e.g., Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT’L REV. RED CROSS 95, 102–08 (2009) (discussing requirements).

105. Hassan B. Jallow, *Challenges of Investigating and Prosecuting International Crimes*, in FROM HUMAN RIGHTS TO INTERNATIONAL CRIMINAL LAW 437, 451 (Emmanuel Decaux et al. eds., 2007).

106. Bergsmo & Wiley, *supra* note 101, at 10.

107. See, e.g., Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions*, 35 CORNELL INT’L L.J. 559, 562 (2001–2002).

108. Rome Statute, *supra* note 2, art. 28(b)(i).

109. See, e.g., WERLE, *supra* note 102, at 108–10.

R

R

R

judges are rarely expert in international criminal law, and even well-trained ones often make mistakes concerning its content. In *R v. Finta*, for example, the Supreme Court of Canada wrongly held—despite ample WWII-era jurisprudence to the contrary¹¹⁰—that proof of discriminatory intent was an essential element of all crimes against humanity, not simply the persecution crime against humanity.¹¹¹ Similarly, more than one federal court in the United States has wrongly concluded that the *mens rea* of aiding-and-abetting under customary international law is intent, not knowledge, ignoring more than 50 years of jurisprudence supporting the latter standard.¹¹²

In terms of combating impunity, then, even Western states will normally be better off prosecuting international crimes as ordinary crimes instead of as international ones. That advantage is even greater for non-Western states—states that lack the personnel and resources necessary to adequately investigate and prosecute international crimes as international crimes. The Open Society Justice Initiative (OSJI) has pointed out that “the capacity and will to carry out effective prosecutions of Rome Statute crimes require as a foundation the basic outlines of competent courts, independent judges, a professional bar and functioning judicial infrastructure.”¹¹³ Unfortunately, one or more of those requirements are lacking in far too many non-Western states, making it difficult for them to prosecute *ordinary* crimes successfully, much less international ones. Consider the situation in the following states, the first four of which are members of the ICC:

Democratic Republic of Congo (DRC): At present, international crimes can only be prosecuted by military tribunals in the DRC.¹¹⁴ Although incorporation legislation is pending that would transfer jurisdiction over international crimes to civilian courts, OSJI field research indicates that the DRC:

lacks capacity in every area needed to conduct proper investigations and prosecutions and hold fair trials. Police are, on the whole, ill-prepared and ill-equipped to provide security, undertake investigations or make arrests in support of domestic war crimes proceedings. A severe shortage of legal professionals to serve in the DRC legal system exists, including prosecuting and trial magistrates along with defense lawyers—and systematic

110. See, e.g., KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 242–49 (2011).

111. See *id.*; Katrina Gustafson, *R v. Finta*, in *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE* 673, 675 (Antonio Cassese ed., 2009). It took the Supreme Court another decade to correct itself.

112. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). These courts have addressed ICL in the context of Alien Tort Claims Act litigation, but not in criminal cases. The aiding-and-abetting standard would also apply, however, in a criminal case involving an international crime.

113. OSJI, *supra* note 83, at 1; see also Marieke Wierda, International Center for Transitional Justice, *Stocktaking: Complementarity* 4 (May 2010) (noting that “[s]ome domestic legal systems may be willing to try Rome Statute crimes but may simply lack experience in trying such complex crimes”).

114. OSJI, *supra* note 83, at 5.

training in international criminal law is lacking. Capacity for court management was described as being “close to zero”—officials still use paper and pencils to track the proceedings, and little international assistance has been directed towards the area of court management. No legal basis currently exists in the DRC for the protection of victims and witnesses.¹¹⁵

Uganda: In May 2008, Uganda created an International Crimes Division (“ICD”) within the Uganda High Court; its primary goal is to satisfy the principle of complementarity regarding the prosecution of Joseph Kony and the other surviving LRA members against whom arrest warrants have been issued.¹¹⁶ Nevertheless, similar to the DRC, “[t]he Ugandan legal community generally lacks international criminal law knowledge, though some trainings for both prosecutors and defense have been conducted”—only two judges, for example, have received training in international criminal law—and “there is no standardized education or training requirement for judiciary support staff.”¹¹⁷ Those problems are evident in the ICD’s first trial, involving a mid-level LRA commander, Thomas Kwoyelo. In addition to a variety of ordinary crimes, Kwoyelo is charged with war crimes under Uganda’s Geneva Conventions Act of 1964, even though that Act does not apply to non-international armed conflicts such as the one in Uganda.¹¹⁸

Serbia: Domestic courts in Serbia, including a Special Court for War Crimes in the Belgrade District Court that was created in 2003, have often prosecuted international crimes as international crimes. Those prosecutions, however, “are not approaching the punishment of extraordinary criminals in a predictable or structured manner,” acquitting multiple defendants and generally sentencing convicted defendants to lenient sentences vis-à-vis the ICTY.¹¹⁹ That inconsistency, according to one scholar, reflects the fact that judges in Serbia are “simply overstrained by the prospect of punishing offenders of the gravest crimes committed during a state of widespread anomie. They [are] just not sure how to handle the cases, although most of

115. *Id.* (Emphasis removed).

116. See Sabine Klein, *Uganda and the International Criminal Court Review Conference—Some Observations of the Conference’s Impact in the “Situation Country” Uganda*, 2 GOETTINGEN J. INT’L L. 669, 676 (2010). The ICD was originally named the War Crimes Division, but Uganda has since renamed it. See, e.g., Simon Jennings, *Ugandan War Crimes Trial Hangs in Balance*, INST. FOR WAR & PEACE REPORTING (Aug. 25, 2011), available at <http://iwpr.net/report-news/ugandan-war-crimes-trial-hangs-balance> (referring to “the national court’s International Crimes Division, ICD”).

117. OSJI, *supra* note 83, at 5. In addition, the Uganda Police Force, which has primary responsibility for criminal investigations, is deeply corrupt and “constrained by limited resources, including low pay and lack of vehicles, equipment, and training.” U.S. DEPARTMENT OF STATE, 2010 HUMAN RIGHTS REPORT: UGANDA 11 (2010), available at <http://www.state.gov/documents/organization/160149.pdf>.

118. See Human Rights Watch, *Uganda: Q&A on the Trial of Thomas Kwoyelo*, HUMAN RIGHTS WATCH (July 7, 2011), available at <http://www.hrw.org/en/news/2011/07/07/uganda-qa-trial-thomas-kwoyelo>.

119. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 106 (2007).

them were very experienced concerning 'regular' murder, rape, and other violent crimes."¹²⁰

Tanzania: As Jolyon Ford has noted, given that the ICTR is hosted by Tanzania, "one would expect the judiciary and legal profession and academia in Tanzania to be fairly fluent in issues of international criminal law, or at least for a core of practical expertise to have built up for example among defence lawyers."¹²¹ In fact, that is not the case: because of a lack of "cross-fertilisation" between the two, few Tanzanian lawyers have the necessary training and expertise to deal with international criminal law issues.¹²²

Haiti: Haiti is a prototypical example of a non-ICC state that would be ill-served by pressure to prosecute international crimes as international crimes. Although there is considerable political will in Haiti to prosecute international crimes,¹²³ the necessary legal capacity simply does not exist.¹²⁴ According to Concannon, "the judiciary has little experience with human rights cases or complex litigation. Consequently, the judiciary has little precedent on issues likely to arise in human rights cases, such as the legal responsibilities of subordinates and superior officers, accomplice or accessory liability, and definitions of terms like war crimes and crimes against humanity."¹²⁵ Efforts at reform, moreover, are "usually frustrated by an intransigent judicial system, a lack of resources, training, and experience, and a paucity of role models."¹²⁶

Positive complementarity is, of course, designed to remedy precisely these kinds of systemic defects. Such complementarity, however, is more aspirational than real, given that the ICC has essentially outsourced responsibility for upgrading national legal systems to states and NGOs. The Bureau of the Assembly of State Parties ("ASP"), for example, has made it clear that positive complementarity must be conducted "without involving the Court in capacity building, financial support and technical assistance," instead "leaving these actions and activities for States, to assist each other on a voluntary basis."¹²⁷ States have engaged in positive complementarity,¹²⁸ and they should be commended for doing so. But it is unlikely that positive complementarity will ever upgrade even one national legal system (much less many) to the point that it could prosecute an international crime as effectively as it could prosecute an ordinary one.

For all of these reasons, pressuring states to prosecute international crimes as international crimes is more likely to *promote* impunity than combat it. In

120. *Id.* (quoting Ernesto Kiza).

121. Ford, *supra* note 61, at 85.

122. *Id.*

123. Concannon, *supra* note 80, at 205.

124. *Id.* at 233.

125. *Id.*

126. *Id.* at 212.

127. Quoted in Bergsmo et al., *supra* note 68, at 798.

128. *See, e.g.,* Burke-White, *supra* note 71, at 95.

R

R

R

R

Western states, the complexity of international criminal law will reduce the likelihood that a prosecution will result in a conviction. In non-Western states, the *best-case* scenario is that prosecuting an international crime as an international crime will make obtaining a conviction extremely difficult; the worst-case scenario—and the much more likely one—is that the prosecution will be doomed from the beginning.¹²⁹ Even worse, in such states, a failed prosecution of an international crime is likely to deter the government from pursuing *any* kind of accountability for perpetrators in the future; as Concannon notes, pointing to Haiti as an example, “[f]or a transitional government trying to consolidate democracy, especially one having mixed success, prominent human rights trials pose significant political, social, and security risks. If the trial is not successful, the government loses credibility and confidence in the justice system is further eroded, thus creating another flash point for criticism.”¹³⁰

III. A SENTENCE-BASED THEORY OF COMPLEMENTARITY

The significant practical disadvantages of the hard and soft mirror theses indicate that, from the standpoint of promoting ratification of the Rome Statute and combating impunity, states should be encouraged to prosecute international crimes as ordinary crimes whenever possible. That does not mean, however, that *any* national prosecution of an ordinary crime should satisfy the principle of complementarity; the “vigilance” aspect of the principle¹³¹ must continue to have bite. It is thus critically important for the Court to adopt a complementarity heuristic that is capable of reliably distinguishing between adequate and inadequate national prosecutions of ordinary crimes.

A. Current Doctrine

As noted in Part I, although the ICC itself has not yet taken a definitive position on the relationship between complementarity and ordinary crimes, the Appeals Chamber has held that, at a minimum, a national prosecution must “cover the same person and substantially the same conduct as alleged in the proceedings before the Court.”¹³² That is a significant limitation,

129. This presumes, of course, that the state in question provides the defendant with a fair trial. I have previously criticized the fact that Article 17 does not empower the Court to retry a defendant whose trial did not satisfy international standards of due process. 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. FORUM 255, 280 (2006).

130. Concannon, *supra* note 80, at 235.

131. Informal Expert Paper, *supra* note 1, at 4; see also Stahn, *Two Notions*, *supra* note 5, at 94 (discussing the “vertical” dimension of complementarity, which is “based on the role of the Court as a Court of last resort and the idea of compliance through threat”).

132. See Prosecutor v. Muthaura, *supra* note 45, ¶ 39; see also Prosecutor v. Ahman Harun & Ali Kushayb, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of

given “the universe of criminality” that typically characterizes situations of mass atrocity.¹³³ Consider, for example, the Pre-Trial Chamber’s (“PTC”) complementarity analysis in *Lubanga*.¹³⁴ When the Office of the Prosecutor sought an arrest warrant for Thomas Lubanga Dyilo on the ground that he was responsible for war crimes involving the enlistment and use of child soldiers, he was already facing far more serious charges in the DRC involving murder, illegal detention, and torture.¹³⁵ The PTC was nevertheless required to pre-empt the national proceedings, because “the warrants of arrest issued by the competent DRC authorities” made no reference to Lubanga’s “alleged criminal responsibility for the alleged UPC/FPLC policy/practice of enlisting into the FPLC, conscripting into the FPLC, and using to participate actively in hostilities children under the age of fifteen between July 2002 and December 2003.”¹³⁶ Or consider a hypothetical situation in which the Office of the Prosecutor charges a high-ranking military officer with the war crime of murder, alleging that he ordered his soldiers to massacre civilians in a village associated with a rebel group. The narrow scope of the conduct underlying that charge would not only prohibit the state from charging the officer with *any* ordinary crime that took place outside of the village—including murder—it would even prohibit the state from charging the officer with any crime other than murder¹³⁷ that was committed *within* the village, such as rape or theft.

It is not surprising that the Appeals Chamber has endorsed the same-conduct requirement. The “same conduct” language was specifically added to the chapeaux of Article 20(3) during the Rome Conference to make clear that a national prosecution of a crime—international or ordinary—did not prohibit ICC retrial for charges based on different conduct.¹³⁸ Moreover, two other Articles in the Rome Statute also indicate that the complementarity requirements in Article 17 are limited to national prosecutions involving the same conduct as the ICC prosecution. Article 89 specifically addresses situations in which the ICC requests surrender of a suspect who “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.”¹³⁹ In such situations, the conflict is resolved not by applying Article 17, but through

the Statute ¶ 24 (Apr. 27, 2007); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58 ¶ 37 (Feb. 10, 2006).

133. Rod Rastan, *What is a “Case” for the Purpose of the Rome Statute?*, 19 CRIM. L. FORUM 435, 439 (2008).

134. Prosecutor v. Dyilo, Case No. ICC-01/04-01/06, Decision on the Prosecutor’s Application for a Warrant of Arrest (Feb. 10, 2006),

135. *Id.* ¶ 33. Those acts were charged as international crimes, not as ordinary ones, but the international/ordinary distinction is irrelevant for purposes of the “same conduct” requirement.

136. *Id.* ¶ 38.

137. Or perhaps one of murder’s lesser-included offenses, such as aggravated assault.

138. See *supra* text accompanying notes 42–43.

139. Rome Statute, *supra* note 2, art. 89(4).

consultation between the ICC and the state.¹⁴⁰ Similarly, Article 94 provides that “[i]f the immediate execution of a request [for surrender] would interfere with an ongoing investigation or prosecution of a case different from that to which the request relates, the requested State may postpone the execution of the request for a period of time agreed upon with the Court.”¹⁴¹

The same-conduct test determines whether a state is “inactive” with regard to an ICC prosecution; it says nothing about whether a state satisfies Article 17(1)’s willingness requirement.¹⁴² Scholars have thus encouraged the Court to supplement the same-conduct test by adopting a view of unwillingness that limits states to charging defendants with “serious” ordinary crimes. Broomhall argues that a national prosecution should be deemed inadmissible only if “the conduct is treated with an appropriate amount of gravity.”¹⁴³ Benzing agrees, noting that if “the charge chosen by national authorities does not reflect and adequately capture the severity of the perpetrator’s conduct . . . this may be seen as conflicting with an intent to bring the perpetrator to justice.”¹⁴⁴ And Carter argues that “if the national prosecution was for a minor crime, such as assault, in a context in which the conduct should be charged as genocide, then the sham trial exception should apply.”¹⁴⁵ Genocide as assault is a particularly common example of unwillingness,¹⁴⁶ as is prosecuting the war crime of pillage as theft.¹⁴⁷

B. The Sentence-Based Alternative

Scholars who want to limit states to charging serious ordinary crimes do not deny that sentence should play a role in complementarity analysis. On the contrary, most accept that an inadequate sentence can also justify the ICC pre-empting a national prosecution of an ordinary crime.¹⁴⁸ No scholar to date, however, has suggested that a lengthy sentence can compensate for an ordinary crime that is not sufficiently serious. Moreover, only Sharon

140. *Id.*

141. *Id.* art. 94(1).

142. See, e.g., Rastan, *supra* note 133, at 438; Darryl Robinson, *The Mysterious Mysteriousness of Complementarity*, 21 CRIM. L. F. 67, 85 (2010) [hereinafter Robinson, *Mysterious*].

143. Broomhall, *Checklist*, *supra* note 72, at 149.

144. Benzing, *supra* note 24, at 616.

145. Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of *Nebis in Idem**, 8 SANTA CLARA J. INT’L L. 165, 194 (2010); see also Informal Expert Paper, *supra* note 1, at 30 (describing “[a]dequacy of charge . . . vis-à-vis the gravity and evidence” as an indicium of willingness); Robinson, *Rome Statute*, *supra* note 73, at 1861 (arguing that if the “stigma attached to a certain national offence does] not reflect the grave seriousness of the crime in international law, then this might contribute to a finding of unwillingness or inability to genuinely prosecute”).

146. Carter, *supra* note 145, at 194; see also INTERNATIONAL CENTRE FOR CRIMINAL LAW REFORM AND CRIMINAL JUSTICE POLICY, INTERNATIONAL CRIMINAL COURT: MANUAL FOR THE RATIFICATION AND IMPLEMENTATION OF THE ROME STATUTE 66 (3d ed. 2008) [hereinafter RATIFICATION MANUAL].

147. See, e.g., Kleffner, *Impact*, *supra* note 5, at 97; RATIFICATION MANUAL, *supra* note 146, at 84.

148. They are divided, however, over whether an inadequate sentence represents unwillingness or inability. Broomhall and the Informal Expert Paper are in the former category. See Broomhall, *Checklist*, *supra* note 72, at 153; Informal Expert Paper, *supra* note 1, at 31. Benzing and Kleffner are in the latter. See Benzing, *supra* note 24, at 617; Kleffner, *Impact*, *supra* note 5, at 97.

R

R

R

R

R

R

R

R

R

Williams and Bill Schabas have questioned whether the same-conduct requirement is consistent with the goals of complementarity.¹⁴⁹

This Article argues, by contrast, that the Court should focus *exclusively* on sentence when determining whether a national prosecution of an ordinary crime is admissible. As long as a national prosecution results in a sentence no less severe than the defendant would receive in the ICC prosecution, the case should be inadmissible regardless of the gravity of the crime or whether it is based on the same conduct.

The complementarity heuristic would work as follows. Pursuant to Article 17, a state can challenge the admissibility of a case in two different situations: (1) when it is currently investigating or prosecuting the case itself;¹⁵⁰ or (2) when it has already prosecuted the perpetrator and either convicted or acquitted him.¹⁵¹ If a state challenged admissibility pre-conviction, the Court would compare the average sentence for the international crime charged by the ICC with the average sentence for the ordinary crime being investigated or prosecuted by the state. As long as the national average was equal to or greater than the ICC average, the case would be inadmissible. The Court could then revisit the admissibility challenge after the national prosecution concluded, retrying the defendant under Article 20(3) if the defendant was acquitted after a sham trial or received an inadequate sentence.

The comparison would be even more straightforward if a state challenged admissibility post-conviction. In that situation, the Court would simply compare the actual sentence the defendant received for the ordinary crime with the average sentence for the international crime charged by the ICC. As long as the actual sentence was equal to or greater than the ICC maximum—or perhaps slightly below it, permitting states a certain “margin of appreciation”¹⁵²—the case would be inadmissible.¹⁵³

This heuristic is, of course, open to an important objection: because the ICC has yet to complete a trial, it is impossible to know what the “average” sentence will be for the international crimes within its jurisdiction. That problem should decrease over time, as the Court develops its sentencing

149. Williams & Schabas, *supra* note 36, at 617. Rastan has also raised the issue, but he did not take a firm position on it. See Rastan, *supra* note 133, at 440.

150. Rome Statute, *supra* note 2, art. 17(1)(a).

151. *Id.*, art. 17(1)(c).

152. Both Broomhall and Kleffner have suggested that states should be entitled to such a margin when the Court judges the adequacy of a sentence for an ordinary crime. See BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 92–93 (2003); KLEFFNER, COMPLEMENTARITY, *supra* note 40, at 137.

153. A situation could arise in which a convicted defendant who received an adequate sentence served an inadequate amount of time in prison because of pardon or parole. In such a situation—which affects any complementarity heuristic—Article 20(3)(a) would permit the Court to retry the defendant, assuming that the circumstances of his release reflected an intention to “shield[] the person concerned from criminal responsibility.” See, e.g., MOHAMED M. EL ZEIDY, THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE 297–98 (2008).

jurisprudence. In the interim, two solutions are possible. To begin with, when faced with an admissibility challenge, the Court could determine the applicable statutory maximum for the international crime—thirty years if the crime was neither extremely grave nor the defendant particularly heinous,¹⁵⁴ life otherwise¹⁵⁵—and use that as its baseline for comparison. Alternatively, the Court could apply the average sentence for the international crime at the ICTY and ICTR,¹⁵⁶ which have sentenced more than 100 defendants for a variety of international crimes.¹⁵⁷

C. A Taxonomy of Ordinary Crime Prosecutions

To understand why a sentence-based heuristic is superior to a heuristic based on conduct and gravity, it is helpful to create a taxonomy of scenarios in which a state charges a defendant with an ordinary crime instead of an international crime. Three factors are particularly relevant: (1) whether the ordinary crime and the international crime are based on the same conduct or different conduct; (2) whether the ordinary crime is serious or minor; and (3) whether the ordinary crime carries a severe or light sentence. Those factors generate the following taxonomy:

| Scenario | Conduct | Crime | Sentence |
|----------|-----------|---------|----------|
| 1 | Same | Serious | Severe |
| 2 | Same | Serious | Lenient |
| 3 | Same | Minor | Severe |
| 4 | Same | Minor | Lenient |
| 5 | Different | Serious | Severe |
| 6 | Different | Serious | Lenient |
| 7 | Different | Minor | Severe |
| 8 | Different | Minor | Lenient |

154. Rome Statute, *supra* note 2, art. 77(1)(a).

155. *Id.*, art. 77(1)(b).

156. The ICC, of course, is not bound by the sentencing jurisprudence of the *ad hoc* tribunals. Moreover, as discussed below, there is reason to believe that the ICTY and (to a lesser extent) the ICTR have imposed sentences that are relatively lenient relative to the gravity of convicted defendants' crimes. See *infra* text accompanying notes 185–194. Those sentences nevertheless remain the primary source of data concerning "appropriate" international sentences.

157. The ICC would need to use the average sentence for a particular crime, because individual sentences are affected by the presence of aggravating and mitigating factors that differ between defendants. See, e.g., Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 688–89 (2007) (discussing the impact of those factors in the context of ICTY sentences).

R

R

Although a degree of subjectivity inheres in all three factors, it is not difficult to identify a prototypical example of each scenario. Scenarios 1–4 involve ordinary crimes that are based on the same conduct as the international crime charged by the ICC:

Scenario 1: a defendant charged with murder as a crime against humanity is convicted of ordinary murder and sentenced to death.

Scenario 2: a defendant charged with the crime against humanity of rape is convicted of ordinary rape and sentenced to five years in prison.

Scenario 3: a defendant charged with the crime against humanity of murder is convicted of assault and sentenced to thirty years in prison.

Scenario 4: a defendant charged with the crime against humanity of rape is convicted of indecent assault and sentenced to three years in prison.

Scenarios 5–8, by contrast, involve situations in which a state ignores the conduct underlying the ICC prosecution and prosecutes the defendant for an unrelated ordinary crime.

Scenario 5: a defendant charged with the crime against humanity of rape is convicted of murder and sentenced to death.

Scenario 6: a defendant charged with the crime against humanity of murder is convicted of ordinary rape and sentenced to five years in prison.

Scenario 7: a defendant charged with the crime against humanity of rape is convicted of theft and sentenced to thirty years in prison.

Scenario 8: a defendant charged with the crime against humanity of murder is convicted of theft and sentenced to three years in prison.

D. Applying the Heuristics

We can now apply the heuristics to the scenarios in the taxonomy. Scenarios 1–4 each satisfy the “same conduct” requirement, so the most important factor under the traditional heuristic would be gravity. Scenario 1 would clearly be inadmissible, because murder is the most serious ordinary crime. Scenario 2 is not as clear-cut as Scenario 1, but would likely be admissible: although rape is a serious ordinary crime, a five-year sentence seems manifestly inadequate relative to the crime against humanity of rape, and even scholars who emphasize gravity agree that an inadequate sentence

can manifest a state's unwillingness to genuinely prosecute.¹⁵⁸ Scenario 4, by contrast, would almost certainly be admissible, given that a conviction for assault does not reflect the gravity of rape.

The most difficult "same conduct" situation is Scenario 3, where a defendant charged by the ICC with the crime against humanity of murder is convicted of assault and given a thirty-year sentence. Here the gravity and sentence factors point in different directions: an assault conviction does not reflect the gravity of murder, but thirty years in prison is far longer than the defendant would likely receive if he were convicted by the ICC of murder as a crime against humanity—the average sentence for that crime at the ICTR is twelve to twenty years,¹⁵⁹ and the ICTR is generally far more punitive than the ICTY.¹⁶⁰ Most scholars would nevertheless deem Scenario 3 admissible, given their consistent emphasis on gravity and the fact that no scholar who emphasizes gravity has ever suggested that a lengthy sentence can offset the choice of an inadequate ordinary crime.

Because the Appeals Chamber has adopted the same-conduct requirement, Scenarios 5–8 would each be admissible on the ground that the state was "inactive" in relation to the ICC proceeding. In the absence of the same-conduct requirement, the analysis would be similar to the analysis of Scenarios 1–4. Scenario 5 would be inadmissible, because murder is at least as serious as rape. Scenario 6 would likely be admissible even though rape is a serious crime because of the manifestly inadequate sentence. Scenario 7 would likely be admissible because the severe sentence does not compensate for the difference in gravity between the international and ordinary crime. Finally, Scenario 8 would clearly be inadmissible because murder is a far more serious crime than theft.

The traditional complementarity heuristic, in short, leads to a very ICC-centric approach to the prosecution of ordinary crimes. Indeed, given the same-conduct requirement, the traditional heuristic would deem only one of the eight scenarios inadmissible: Scenario 1. A sentence-based complementarity heuristic, by contrast, leads to a much more state-centric approach to the prosecution of ordinary crimes. It would deem four scenarios inadmissible, because each involves an adequate sentence vis-à-vis the ICC proceeding. Scenarios 1 and 5 would be inadmissible because the death penalty is more severe than the most severe sentence (life) that the ICC can impose. Scenario 3 would be inadmissible, despite involving the "minor" crime of assault, because a thirty-year sentence is well above the average sentence for the crime against humanity of murder. Scenario 7 would be inadmissible, despite involving the "minor" crime of theft, because a thirty-year sentence

158. See, e.g., Broomhall, *Checklist*, *supra* note 72, at 153; Informal Expert Paper, *supra* note 1, at 31; Benzing, *supra* note 24, at 617; Kleffner, *Impact*, *supra* note 5, at 97.

159. See *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence (15 May 2003), ¶ 564.

160. DRUMBL, *supra* note 119, at 56.

is far longer than the defendant would likely receive if he was convicted by the ICC of rape as a crime against humanity—the average sentence for that crime at the ICTR is twelve to fifteen years.¹⁶¹

E. *The Advantages of a Sentence-Based Theory of Complementarity*

The differences between the traditional conduct-and-gravity heuristic and the sentence-based heuristic thus center on Scenarios 3, 5, and 7. All three are admissible under the former but not the latter: Scenario 3 because the ordinary crime is not considered grave enough; Scenario 5 because the underlying conduct is different; Scenario 7 because of both factors. In all three scenarios, however, a successful ICC prosecution for the international crime would result in a sentence that is no more severe than the national prosecution for the ordinary crime. What justifies that seeming waste of the ICC's limited resources?

This Article's answer is straightforward: nothing. There is *no* justification for the ICC to admit a national prosecution of an ordinary crime that results in an adequate sentence simply because the ordinary crime does not capture the gravity of the international crime charged by the ICC or is based on a different conduct. On the contrary, adopting a complementarity heuristic that focuses exclusively on sentence would not only be more administrable than the current approach, but would also better promote the goals of what Burke-White has called the "Rome System of Justice"—the "tiered system of prosecutorial authority" created by the Rome Statute's relationship between the ICC and national criminal-justice systems.¹⁶²

1. *Administrability*

The administrability issue focuses on Scenarios 3 and 7, in which admissibility is predicated on a state's choice of an *inadequate* ordinary crime. The problem with a gravity-centered complementarity heuristic is that it fails to answer a critical question: how should the Court determine whether an ordinary crime is so minor that the Court should infer that the state is attempting to "shield the person concerned from criminal responsibility"? International tribunals have struggled to determine the relative gravity of *categories* of international crimes;¹⁶³ they have not even attempted to rank specific international crimes. Is there any reason to believe that it is possible to reliably compare the gravity of international crimes and ordinary crimes?

161. Prosecutor v. Semanza, *supra* note 159, at ¶ 564.

162. Burke-White, *supra* note 71, at 57.

163. In *Erdemović*, for example, Judges McDonald and Vohrah argued that crimes against humanity were more serious than war crimes, see Prosecutor v. Erdemović, IT-96-22-Tbis, Joint Separate Opinion of Judges McDonald and Vohrah, ¶ 24 (7 Oct. 1997), while Judge Li took precisely the opposite position, see Prosecutor v. Erdemović, IT-96-22-Tbis, Separate and Dissenting Opinion of Judge Li, ¶ 22 (7 Oct. 1997). See Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 467–70 (2001) (discussing debates at the ICTY).

The drafters of Article 20 did not believe such comparisons were possible; as noted earlier, that is precisely why they eliminated the ICTY and ICTR's "ordinary crimes" exception to the *ne bis in idem* bar.¹⁶⁴

The drafters' skepticism is warranted. By definition, there will be *some* gravity deficit in a national prosecution for an ordinary crime, because the element of collective perpetration or collective victimization that distinguishes international crimes from ordinary ones will necessarily be lacking.¹⁶⁵ That inherent deficit cannot itself make the case admissible, unless we accept the hard mirror thesis. So when does a gravity deficit become an unacceptable gravity deficit? Some situations may be obvious, such as Carter's example of where genocide is charged as assault¹⁶⁶ or—to use a non-hypothetical example—the Sudanese government's decision to charge two intelligence officers suspected of involvement in a mass killing with looting instead of murder.¹⁶⁷ However, those situations will be the exception, not the rule. What about the more difficult ones? If the ICC charges an international crime involving intentional murder, does a state's decision to charge any lesser included offense—reckless murder, manslaughter, assault with intent to cause grievous bodily harm—automatically make the case admissible? If not, where should the line be drawn? Or consider Kleffner's example of pillage being charged as theft.¹⁶⁸ Because he rejects the hard mirror thesis, he accepts that a state does not have to charge pillage as pillage to satisfy complementarity. So what does a state have to charge? Must it charge multiple counts of theft? How many counts are equivalent to pillage—two, ten, fifty?

A sentence-based heuristic, by contrast, avoids these problems. It determines whether a national prosecution of an ordinary crime is adequate by comparing two factors that can be empirically determined: on the international side, the ICC sentence maximums and/or the average sentence imposed by international tribunals; on the national side, average sentences and/or the actual sentence imposed in the case in question. The need to make difficult and inherently subjective assessments of the gravity of the ordinary crime disappears; as long as the sentence for the ordinary crime is equal to the sentence for the international crime, the nature of the ordinary crime is irrelevant.

Some proponents of the gravity approach, including Kleffner, recognize that it is difficult to compare the gravity of international and ordinary

164. Holmes, *Complementarity*, *supra* note 33, at 57.

165. See Danner, *supra* note 163, at 470 ("The *mens rea* element of the chapeau provisions of each of the three categories of crimes within the Tribunals' jurisdiction . . . provides a proxy for accounting for secondary harms because it incorporates notions of collective perpetration and collective victimization absent from the enumerated acts.")

166. See *supra* text accompanying note 146.

167. See Human Rights Watch, Briefing Paper, *Lack of Conviction: The Special Criminal Court on the Events in Darfur* 13–14 (June 2006).

168. See *supra* text accompanying note 147.

R

R

R

R

crimes. His explanation of what demonstrates that an international crime is more serious than an ordinary crime, however, is revealing: “[t]he latter crime will normally entail a far lower maximum sentence than for crimes considered to be the most severe.”¹⁶⁹ However, if that is the case—if the primary concern with “minor” ordinary crimes is that they are not punished severely enough in comparison to an ICC prosecution—what is the justification for admitting a national prosecution involving a minor crime that *does* result in an adequate sentence?

A sentence-based heuristic also helps address two other situations in which a gravity-based approach has difficulty determining whether a national prosecution of an ordinary crime should be admissible. The first is where a state charges a serious ordinary crime, but attempts to connect the defendant to that crime through an inadequate mode of participation. Broomhall, for example, claims that “were national law to provide a markedly narrower scope of responsibility” than the Rome Statute, “the ICC could, in appropriate circumstances, admit the case.”¹⁷⁰ Two scenarios are possible here. To begin with, the state might charge a mode of participation that is narrower than the Rome Statute equivalent. Broomhall cites a national definition of command responsibility that makes it more difficult to convict a military superior¹⁷¹—for example, by requiring the superior to have knowledge of his subordinates’ crimes.¹⁷² The other scenario includes situations in which a mode of participation arguably understates the perpetrator’s culpability, such as a prosecution in a state that treats command responsibility as a form of dereliction of duty (such as Canada)¹⁷³ instead of as a mode of participation,¹⁷⁴ or a national prosecution that charges the defendant as an aider-and-abettor (accessorial liability) instead of as a co-perpetrator or perpetrator-by-means (principal liability).

The problem with a gravity-based heuristic is that it does not help us determine *when* such deviations from the Rome Statute should render a national prosecution admissible. At best, it supports a categorical rule that any deviation is unacceptable. But that result is overbroad, as the three scenarios indicate. It is problematic if a narrow definition of command responsibility

169. Kleffner, *Impact*, *supra* note 5, at 97.

170. BROOMHALL, *supra* note 152, at 92; *see also* Robinson, *Rome Statute*, *supra* note 73, at 1864 (“If a State wants to be sure of meeting the complementarity test, then it would be prudent to review the grounds of responsibility in the Rome Statute, and to ensure that the national law is at least as broad.”); Informal Expert Paper, *supra* note 1, at 30 (describing “[a]dequacy of . . . modes of liability vis-à-vis the gravity and evidence” as an indicium of willingness).

171. BROOMHALL, *supra* note 152, at 92.

172. The Rome Statute provides that negligence satisfies the *mens rea* of command responsibility for military superiors. *See* Rome Statute, art. 28(a)(i) (“That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes.”).

173. CRYER ET AL., *supra* note 100, at 238.

174. *See, e.g.*, Rome Statute, *supra* note 2, art. 28(a) (holding a military superior responsible “for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control”).

R
R

R

R

R
R

results in an acquittal (and if it does, retrial by the ICC is the obvious solution). But why should the ICC be concerned about the narrowness of the definition if the defendant is convicted and receives an adequate sentence? Similarly, why should the ICC be concerned whether a state like Canada treats command responsibility as a form of dereliction of duty if it punishes such derelictions just as severely as the Court punishes commanders convicted of their subordinates' crimes? Or that a state charges a defendant as an accessory instead of as a principal if the punishment is the same?¹⁷⁵

The other difficult situation is where a state "overprotects" a defendant charged with an ordinary crime by providing defenses that are considerably broader than the grounds for excluding criminal responsibility in the Rome Statute. A number of scholars agree with Benzing that, like the failure to charge an equally serious crime, such overprotection "may be seen as conflicting with an intent to bring the perpetrator to justice."¹⁷⁶ It remains to be seen, for example, how the ICC will treat civil-law states that treat unavoidable mistakes of law as exculpatory and treat avoidable mistakes of fact as reducing the perpetrator's culpability;¹⁷⁷ that approach is considerably more expansive than Article 32 of the Rome Statute, which only recognizes mistakes that negate the perpetrator's *mens rea*.¹⁷⁸ Another difficult situation involves states that consider mistake of law to be a mitigating factor, such as Japan;¹⁷⁹ it is unclear whether the ICC will take a similar approach.¹⁸⁰

As with narrower modes of participation, a gravity-based complementarity heuristic cannot tell us when the Court should consider a national prosecution involving an "overprotective" defense admissible; the only possibility is a categorical rule that national and international defenses must be equivalent.¹⁸¹ Such a rule, however, is not only inconsistent with Article 31 of the Rome Statute—which specifically permits the Court to apply defenses

175. A study of sentencing practice in twenty-two states found that most states do not require lesser sentences for accessories. Thirteen of the twenty-two states (sixty percent) permitted accessories and principals to be punished equally, and a number of the others—such as Chile and Spain—punished accessories nearly as severely as principals. See ULRICH SIEBER, *I THE PUNISHMENT OF SERIOUS CRIMES: A COMPARATIVE ANALYSIS OF SENTENCING LAW AND PRACTICE* 81 (2004).

176. Benzing, *supra* note 24, at 616; cf. Robinson, *Rome Statute*, *supra* note 73, at 1865 ("If the defences available under national law are dramatically broader than those available under the Rome Statute, then it is conceivable that a State could find itself unable to secure a conviction of a person who would clearly be liable under the Rome Statute.")

177. See, e.g., Thomas Weigend, *Germany*, in HELLER & DUBBER, *supra* note 99, at 272 (discussing the German approach to mistake).

178. See Rome Statute, *supra* note 2, art. 32 (recognizing a mistake only when it "negates the mental element required . . . by a crime").

179. See John O. Haley, *Japan*, in HELLER & DUBBER, *supra* note 99, at 405.

180. Rule 145(2)(a) of the Rules of Evidence and Procedure entitles the Court to take into account mitigating factors such as "circumstances falling short of constituting grounds for exclusion of criminal responsibility." Rules of Evidence and Procedure, ICC-ASP/1/3 (3 Sept. 2002). Article 32's insistence on limiting mistakes of law to those that negate *mens rea* makes it unlikely, however, that the Court will recognize other mistakes as mitigating.

181. See Kleffner, *Impact*, *supra* note 5, at 103 (noting, with regard to defenses, that "States can reasonably be expected to bring their laws into conformity with the decisions of the ICC in order to avoid cases being declared admissible in future.")

R

R

R

R

R

that are not specifically enumerated in the Statute¹⁸²—but is also overbroad. As long as the national prosecution results in an adequate sentence, it should not matter whether an overprotective defense led to reduced culpability or was treated at sentencing as a mitigating factor.

2. *Promoting the Rome System of International Justice*

Even if a gravity-based heuristic was administrable, it would still be an open question whether deeming Scenarios 3 and 7 admissible promotes the goals of complementarity. Moreover, although the Appeals Chamber’s “same-conduct” requirement is clearly consistent with the text of the Rome Statute, neither the Court nor scholars have ever explained why the ICC should spend its limited resources prosecuting a defendant who is either facing a prison sentence equivalent to what the Court would impose or who has already received such a sentence—the situations in Scenarios 5 and 7.

In fact, it makes little sense for the Court to exclude Scenarios 3, 5, and 7 from the category of inadmissible cases. On the contrary, deeming such scenarios inadmissible on the ground that they involve adequate sentences would have a number of important practical benefits for the Rome system of international justice.

a. *Minimizing the ICC’s Burden*

The most important benefit of adopting a sentence-based complementarity heuristic is that, because it provides states with greater flexibility to prosecute international crimes as ordinary crimes than the conduct-and-gravity heuristic, it would significantly decrease the number of national prosecutions that the Court would have to either pre-empt (prior to conviction) or re-try (after conviction), thereby conserving the ICC’s limited resources. The Office of the Prosecutor has estimated that, at most, it can prepare four to six cases for prosecution over a three-year period.¹⁸³ The Court thus has to be exceptionally careful to avoid admitting cases in which the state is not, in fact, attempting to shield the perpetrator from criminal responsibility. Even a small number of errors could quite literally be catastrophic for the Court.

The primary objection to a sentence-based heuristic seems to be the concern that, to recall Kleffner, ordinary crimes “will normally entail a far lower maximum sentence” than international crimes.¹⁸⁴ That is an empirical claim, and testing it would require a study far more comprehensive than any scholar has conducted to date. The data that are available, however, indicate that in fact the opposite is true: we should be far more concerned about *international* sentences being excessively lenient. The sentencing practice of the ICTY, for example, is anything but harsh. As of 2007, eighty-four per-

182. See Rome Statute, art. 31(3).

183. Office of the Prosecutor, *Report on Prosecutorial Strategy*, 7 (14 Sept. 2006).

184. Kleffner, *Impact*, *supra* note 5, at 97.

cent of the defendants convicted at the ICTY had been sentenced to less than twenty years in prison, with thirty-five percent receiving less than ten years.¹⁸⁵ Other studies have found that the average final sentence at the ICTY is 14.3 years,¹⁸⁶ with average sentences of 15.7 and 10.9 years for crimes against humanity and war crimes, respectively.¹⁸⁷ Some individual sentences also seem remarkably lenient, such as Dražen Erdemović's five-year sentence for personally executing seventy Bosnian civilians—a horrific war crime¹⁸⁸—and Miroslav Kvočka's seven-year sentence for co-perpetrating the war crimes of murder and torture and the crime against humanity of persecution.¹⁸⁹

Nor is the ICTY's record anomalous. The ICTR is more punitive than the ICTY—which is not surprising, given the scale of the genocide in Rwanda—yet the sentences still seem, as one scholar put it, “incongruously lenient.”¹⁹⁰ As of 2007, little more than one third of the defendants convicted by the ICTR had been sentenced to life imprisonment,¹⁹¹ even though nearly all of the convictions were for genocide or crimes against humanity.¹⁹² Indeed, an almost equal number of defendants had been sentenced to less than twenty years; eleven percent had been sentenced to less than ten years.¹⁹³ The average sentence for the crimes against humanity of rape, torture, and murder were twelve to fifteen, five to twelve, and twelve to twenty years, respectively.¹⁹⁴

The Special Panels for Serious Crimes in East Timor (SPSC), which could prosecute both international crimes and ordinary crimes such as murder and rape, were even more lenient.¹⁹⁵ The SPSC's enabling statute prohibited judges from sentencing defendants to life imprisonment, and the average sentence for defendants convicted of international crimes was a paltry 9.9 years.¹⁹⁶ That average sentence was only 3.6 years longer than the average

185. Harmon & Gaynor, *supra* note 157, at 684.

186. DRUMBL, *supra* note 119, at 56.

187. James Meernik & Kimi King, *The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis*, 16 LEIDEN J. INT'L L. 717, 735 (2003).

188. See Erdemović Case Information Sheet, available at www.icty.org/case/erdemovic/.

189. See Kvočka Case Information Sheet, available at www.icty.org/case/kvocka/.

190. Robert Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 69 (2007). Joseph Serugendo received a six-year sentence after pleading guilty to direct and public incitement to genocide and persecution as a crime against humanity. See *Prosecutor v. Joseph Serugendo*, Case No. ICTR-2005-84-I, Judgment and Sentence, 12 June 2006, at 19. Elizaphan Ntakirutimana received a ten-year sentence after being convicted for aiding and abetting genocide. See *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-17-A, Appeals Judgment, 13 Dec. 2004, ¶ 579.

191. Harmon & Gaynor, *supra* note 157, at 685.

192. DRUMBL, *supra* note 119, at 56.

193. Harmon & Gaynor, *supra* note 157, at 685.

194. *Prosecutor v. Semanza*, *supra* note 159, at 36.

195. See, e.g., *Prosecutor v. de Deus*, Case No. 2a-2004, Judgment, 12 Apr. 2005, at 15 (imposing a two-year sentence for murder as a crime against humanity); *Prosecutor v. Aghostinho Cab*, Case No. 4-2003, Judgment, 16 Nov. 2004, ¶ 25 (imposing a four-year sentence for murder as a crime against humanity and the crime against humanity of other inhumane acts).

196. DRUMBL, *supra* note 119, at 58.

R
R

R
R
R
R

R

sentence for defendants convicted of ordinary crimes: 6.3 years.¹⁹⁷ The additional gravity of the international crimes thus made almost no difference in practice.

By contrast, there is evidence that states impose quite significant sentences when they prosecute international crimes as ordinary crimes. In a ground-breaking 2003 study commissioned by the ICTY,¹⁹⁸ Ulrich Sieber examined how twenty-two non-Balkan states¹⁹⁹ would punish a variety of scenarios involving crimes against humanity if they charged the underlying conduct as an ordinary crime. Three scenarios tested the crimes against humanity of rape, torture, and murder—the crimes for which we have average sentence ranges at the ICTR, the more punitive of the two *ad hoc* tribunals. Here is a table of the maximum national sentences for each crime against humanity when prosecuted as an equivalent²⁰⁰ ordinary crime:

197. *Id.*

198. See SIEBER, *supra* note 175.

199. Argentina, Austria, Belgium, Brazil, Canada, Chile, China, England, Finland, France, Germany, Greece, Italy, Ivory Coast, Mexico, Poland, Russia, South Africa, Spain, Sweden, Turkey, and the United States.

200. States would not always charge the same ordinary crimes. Torture, for example, would be charged as “moral mistreatment” in Poland, and as “abuse of authority with the use of violence” in Russia. See ULRICH SIEBER, II THE PUNISHMENT OF SERIOUS CRIMES: A COMPARATIVE ANALYSIS OF SENTENCING LAW AND PRACTICE 9 (2004). The specific crime, however, is less important than the maximum punishment that crime could entail. Indeed, the point of the sentence-based complementarity heuristic is to de-emphasize the nature of the charged crime in favor of an emphasis on sentence.

| Country | Rape ²⁰¹ | Torture ²⁰² | Murder ²⁰³ |
|---------------|---------------------|------------------------|-----------------------|
| Argentina | 25 years | 25 years | Life |
| Austria | Life | 5 years | Life |
| Belgium | 22 years | 5 years | 30 years |
| Brazil | 20 years | 8 years | 30 years |
| Canada | Life | 14 years | Life |
| Chile | Life | 15 years | Life |
| China | Death | 3 years | Death |
| England | Life | Life | Life |
| Finland | 10 years | 10 years | Life |
| France | Life | 15 years | Life |
| Germany | 15 years | 5 years | Life |
| Greece | 20 years | 20 years | Life |
| Italy | 12 years | 5.4 years | Life |
| Cote D'Ivoire | 20 years | Life | Life |
| Mexico | 14 years | 13.5 years | 50 years |
| Poland | 10 years | 10 years | Life |
| Russia | 14 years | 18 years | Death |
| South Africa | Life | Unknown | Life |
| Spain | 19 years | 6 years | 25 years |
| Sweden | 10 years | 10 years | Life |
| Turkey | 18 years | 12 years | Life |
| United States | 9 years | 20 years | Death |

As the table indicates, national courts are almost always able to punish ordinary equivalents of international crimes just as harshly as international tribunals punish the international crimes themselves. Only five of the twenty-two maximum sentences for rape equivalents are beneath the ICTR's average sentence range for the crime against humanity of rape: England, Finland, Poland, Sweden, and the United States. Only one of the twenty-two maximum sentences for torture equivalents are beneath the ICTR's average sentence range for the crime against humanity of torture: China. And none of the twenty-two maximum sentences for murder are beneath the ICTR's average sentence range for the crime against humanity of murder.

201. SIEBER, *supra* note 175, at 109.

202. *Id.* at 105.

203. *Id.* at 94.

To be sure, the table does not indicate what sentence convicted defendants would actually receive in the twenty-two states. Studies of the ICTY and ICTR indicate, however, that national sentences for ordinary crimes are rarely more lenient than international sentences for international crimes. As of 2007, for example, the sentence breakdown at the ICTR was as follows: thirty-seven percent life imprisonment; thirty-three percent twenty years or more; nineteen percent ten to twenty years; eleven percent less than ten years.²⁰⁴ That breakdown is not dramatically different than the breakdown of sentences imposed as of 2006 by Rwanda's genocide courts, which prosecuted ordinary crimes: fifteen percent death; thirty percent life imprisonment; fifty-five percent a term of years, with an average sentence of 15.25 years.²⁰⁵ A comparison of ICTY sentences to sentences imposed by courts in the former Yugoslavia leads to similar results.²⁰⁶

Although these actual-sentence statistics are informative, it is important to note that they are only indirectly relevant to whether the sentence-based heuristic provides a workable alternative to the traditional conduct and gravity heuristic. The sentence-based heuristic would be problematic only if states were *unable* to impose adequate sentences for ordinary crimes. As long as their sentencing regimes are adequate, there is no reason why the ICC could not adopt a complementarity heuristic that required them to impose sentences for ordinary crimes no less severe than their (relatively lenient) international counterparts. National prosecutors could easily determine the minimum sentence necessary to avoid an admissibility finding and adjust their charging decisions accordingly.

There is, finally, another important aspect of the national/international sentence comparison that favors giving states maximum flexibility to prosecute ordinary crimes. A proponent of the soft mirror thesis would likely argue that although national sentences for ordinary crimes are normally not more lenient than international sentences for international crimes, they are normally more lenient than national sentences for *international* crimes—in which case states would be better off prosecuting international crimes *as* international crimes even under a sentence-based heuristic. The first response to that objection has already been discussed: even if they punish international crimes more severely, almost all states (particularly those in the Global South) are far more likely to successfully prosecute ordinary crimes than international ones. The second response, more important in this context, is that it is incorrect to assume that all states punish international crimes more severely than ordinary ones. In general, only *Western* states do. In Sieber's study, for example, the only states that had significantly longer statutory *minima* and *maxima* for torture as a crime against humanity than

204. Harmon & Gaynor, *supra* note 157, at 685. Twenty-six percent of the sentences are under appeal.

205. DRUMBL, *supra* note 119, at 77.

206. See Meernik & King, *supra* note 187, at 727.

for ordinary torture were Belgium, Canada, and Germany.²⁰⁷ In fact, a number of non-Western states actually punish international crimes *less* severely than ordinary ones. In both Bosnia and Croatia, for example, not only is the minimum sentence for international crimes at least ten years lower than the minimum punishment for serious ordinary crimes,²⁰⁸ but also judges “do not consistently sentence more severely for wrongdoing committed as war crimes than committed ordinarily.”²⁰⁹ Those statistics cannot necessarily be generalized; there may well be non-Western states that punish international crimes more severely than ordinary crimes.²¹⁰ Nevertheless, the data that exist provide yet another reason to be cautious of pressuring non-Western states to avoid prosecuting ordinary crimes.

b. Encouraging National Prosecutions

As discussed in Part II, the primary justification for rejecting the soft mirror thesis is that states, particularly non-Western ones, will normally find it easier to successfully prosecute ordinary crimes than international crimes. Similar considerations counsel in favor of providing states with as much latitude as possible to select charges against a defendant who is subject to prosecution by the ICC: the more flexibility national prosecutors have, the more likely they are to select ordinary crimes that they can successfully prosecute.

Viewed in that light, a sentence-based complementarity heuristic is superior to a heuristic based on conduct and gravity. Under the former heuristic, national prosecutors can charge a defendant with any ordinary crime that is likely to result in an adequate sentence, even if that crime is “minor” relative to the international crime the ICC is investigating or is based on different conduct. Under the latter heuristic, by contrast, national prosecutors have their discretion constrained in two important ways: (1) because of the gravity requirement, they are limited to charging “serious” ordinary crimes, even if those crimes are more difficult to prove and are not punished significantly more severely than more “minor” crimes; and (2) because of the same-conduct requirement, they 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.

c. Avoiding Impunity Gaps

The sentence-based heuristic also addresses the problem of “impunity gaps” much better than the conduct-and-gravity heuristic. Proponents of the soft mirror thesis are right to be concerned with situations in which

207. See SIEBER, *supra* note 175, at 105.

208. DRUMBL, *supra* note 119, at 102.

209. *Id.* at 69.

210. In Sieber’s study, for example, the Ivory Coast had longer minimum and maximum sentences for murder and rape as crimes against humanity than for ordinary murder and rape. See SIEBER, *supra* note 175, at 94, 108.

deficiencies in national criminal law—the absence of an ordinary equivalent to an international crime, inadequate modes of participation, or overly broad defenses—may prevent a state from effectively prosecuting an individual who has committed an international crime.²¹¹ Such gaps are unavoidable, however, unless the Court adopts the hard mirror thesis and *requires* states to fully incorporate the Rome Statute. In the absence of such a requirement—which would be ill-advised, for all the reasons discussed in Part II—it seems prudent for the Court to adopt a complementarity heuristic that at least *minimizes* the likelihood that impunity gaps will require it to pre-empt a national prosecution of an ordinary crime. The conduct-and-gravity heuristic is inconsistent with that goal, because it limits the kinds of ordinary crimes that a state can charge in lieu of the international crime and prevents a state from responding to an impunity gap by prosecuting different conduct that might be easier to prove. The sentence-based heuristic, by contrast, permits a state to respond to an impunity gap by charging any crime and prosecuting any conduct that will result in a conviction and adequate sentence.

Consider, for example, a particularly common impunity gap: a situation in which the absence of command responsibility prevents a state from prosecuting a powerful military or civilian superior for failing to prevent his subordinates from committing serious crimes.²¹² That gap will always be fatal to a national prosecution under the conduct-and-gravity heuristic, because the state will not have the option of prosecuting the superior for an ordinary crime based on different conduct. Under the sentence-based heuristic, in contrast, the state would not be so limited: it would have the option of compensating for its failure to criminalize command responsibility by relying on a different mode of participation to convict the superior of a different ordinary crime. If such an alternative prosecution was possible and would result in an adequate sentence, the Court would defer to the national prosecution. If not—and it may well be the case that, for certain military and civilian superiors, it will indeed be command responsibility or nothing—the Court would prosecute the superior itself. Either way, the Court would intervene only when it was absolutely necessary, efficiently allocating its scarce resources.

d. Avoiding Primacy

The arbitrary limitations imposed on states by the same-conduct requirement indicate another advantage of the sentence-based complementarity heuristic: it is far more consistent with the idea that the ICC should defer to

211. See *supra* text accompanying notes 202–204.

212. Sudanese criminal law is an example. A number of NGOs have singled out the absence of command responsibility as one of the primary reasons that a Sudanese challenge to the arrest warrants against Haroun, Kushayb, or Bashir would fail. See, e.g., Human Rights Watch, *Lack of Conviction, supra* note 167, at 16.

national prosecutions whenever possible.²¹³ Throughout the drafting of the Rome Statute, states consistently emphasized that—in the words of the Informal Expert Paper—“[t]he standard for assessing ‘genuineness’ should reflect appropriate deference to national systems as well as the fact that the ICC is not an international court of appeal”²¹⁴ The sentence-based heuristic reflects the drafters’ desire to protect state sovereignty, because it gives national prosecutors complete discretion to select the conduct and ordinary crime they believe will be the easiest to prove, subject only to the requirement that the selected crime carry an appropriate sentence. The same-conduct requirement, by contrast, privileges the ICC instead of states, because it limits national prosecutors to charging ordinary crimes that involve the specific conduct that the ICC is investigating, even if those crimes will be more difficult to prosecute.²¹⁵ Indeed, given that a diligent state will often begin investigating conduct amounting to an international crime *before* the ICC begins its investigation, the same-conduct requirement expects states to be mind-readers: if they do not accurately anticipate the precise conduct that will draw the ICC’s attention—no small task, given the “universe of criminality in atrocity-crime situations”²¹⁶—they will be deemed “inactive” with regard to the international proceedings and the Court will admit the case.²¹⁷

In fact, the same-conduct requirement opens up an even more disturbing possibility—one that indicates that, in practice, the requirement effectively transforms complementarity into primacy. Because of the same-conduct requirement, the ICC will always have final say over whether a case remains at the national level; a Prosecutor that wants to ensure that a particular defendant is prosecuted by the ICC can simply nullify an existing national investigation or prosecution by selecting different conduct to investigate. Such a scenario is unlikely, but it is far from unimaginable. An ambitious Prosecutor, for example, could decide to maximize his post-ICC prospects by prosecuting an infamous, recently deposed head of state within the Court’s jurisdiction even though adequate national proceedings had already been initiated. Although the Prosecutor would find it very difficult to disrupt those proceedings under a sentence-based complementarity heuristic, a heuristic based on the same-conduct requirement would pose no such problem. As long as the Prosecutor sought an arrest warrant for conduct different than

213. See, e.g., Holmes, *Complementarity*, *supra* note 33, at 675; cf. KLEFFNER, COMPLEMENTARITY, *supra* note 40, at 96 (noting that, in developing complementarity, “States were much more concerned about safeguarding their sovereign prerogative to punish these perpetrators than they were in the context of ad hoc international criminal tribunals.”).

214. Informal Expert Paper, *supra* note 1, at 16.

215. Cf. Robinson, *Mysterious*, *supra* note 142, at 101 (noting that “[t]he more narrowly ‘case’ is defined, the harder it becomes for a State to show that it is acting in relation to that same ‘case’, and the easier for the ICC to assert admissibility.”).

216. Rastan, *supra* note 133, at 439.

217. That is, of course, precisely what happened in the *Lubanga* case. See *supra* text accompanying notes 134–136.

R
RR
R

R

R

the conduct involved in the national proceeding, the Court would be powerless to refuse to admit the case.²¹⁸

e. Avoiding Two-Tiered Complementarity

As discussed above, because they have fewer investigative resources and less-sophisticated judicial and prosecutorial personnel, non-Western states will normally find it far more difficult than Western states to prosecute international crimes. Those limitations counsel in favor of adopting a complementarity heuristic that provides states with as much flexibility as possible concerning the prosecution of ordinary crimes: the more restrictive the heuristic, the greater the likelihood that non-Western states—unlike Western ones—will be deemed unwilling to prosecute. The traditional conduct-and-gravity heuristic is thus far more likely to discriminate against non-Western states than the sentence-based heuristic: whereas the former narrows the range of ordinary crimes that non-Western states can prosecute and requires them to investigate the same conduct as the ICC (even if investigating different conduct would be more fruitful), the latter allows them to investigate any conduct and prosecute any crime that will result in an adequate sentence.

f. Promoting Ratification

For similar reasons, a sentence-based complementarity heuristic provides non-member states with a greater incentive to join the ICC than the traditional heuristic. As noted earlier, the willingness of a non-member state to ratify the Rome Statute depends, in large part, on its perceived ability to prevent its nationals from being prosecuted by the ICC. The sentence-based heuristic provides states with maximum flexibility to prosecute their nationals for ordinary crimes without being found unwilling to prosecute; it thus maximizes the incentive to ratify. The traditional heuristic, by contrast, undermines that incentive by limiting both the conduct a state can investigate and the kinds of crimes a state can charge. Indeed, the same-conduct requirement is particularly problematic from a ratification standpoint: as noted above, the requirement redistributes authority to determine how an

218. Interestingly, the defense made a similar argument in *Katanga and Chui*, arguing that “the ‘same conduct’ test as developed and applied by the ICC Pre-Trial Chamber is the wrong test. It amounts to primacy The ICC Prosecutor could, in many instances, be in a position to put an end to serious investigations and prosecution at the national level, and for what reason? There would be no functional reason as it would merely substitute bona fide national proceedings for investigations which are just as selective—in some cases, even more selective.” See *Prosecutor v. Germain Katanga & Mathieu 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 (11 Mar. 2009) ¶ 39. Because the Trial Chamber did not find it necessary to decide whether the Pre-Trial Chamber’s “same conduct” test was appropriate, it did not address the Defense’s argument. *Prosecutor v. Germain Katanga & Mathieu Ngudjolo Chui*, Case No. ICC-01/04-01/07, Reasons for the Oral Decision on the Motion Challenging the Admissibility of the Case (Article 19 of the Statute), (16 June 2009) ¶ 95.

international crime will be investigated and prosecuted from states to the ICC, effectively transforming complementarity into primacy.

The sentence-based heuristic would also blunt one of the United States' primary criticisms of the principle of complementarity: that "the ICC has the final word on what counts as a 'genuine' investigation based on its judgment whether the domestic proceedings are 'inconsistent with an intent to bring the person concerned to justice.'"²¹⁹ Focusing complementarity exclusively on sentencing would not reallocate the "final word" to states, but it would free the Court from making difficult and inherently subjective judgments concerning the gravity of crimes, modes of participation, and defenses. States could thus join the ICC knowing that although the Court itself would ultimately determine whether a national prosecution was admissible, it would do so through a relatively mechanical comparison of national sentences to international norms.

g. Promoting the Rationales of Punishment

All of these practical benefits would be meaningless, of course, if a sentence-based heuristic was inconsistent with either of the ICC's primary rationales for punishment: retribution and deterrence.²²⁰ In practice, however, such a heuristic would promote both rationales *better* than the traditional conduct-and-gravity heuristic.

i.) Retribution

As Mark Drumbl has pointed out, because "sentence constitutes the central—and, basically, only—measurement device that liberal legalist institutions practically avail themselves of when it comes to operationalizing punishment in extant sentencing frameworks," the "length of a prison term is . . . a meter for retributive value."²²¹ By definition, therefore, the sentence-based heuristic is no less retributive than the conduct-and-gravity heuristic: the sentence-based heuristic only expands the category of inadmissible national prosecutions to include prosecutions that result in a sentence no less severe than the equivalent ICC sentence—namely, Scenarios 3, 5, and 7.

In fact, because the sentence-based heuristic makes it easier for states to prosecute international crimes as ordinary crimes than the conduct-and-gravity heuristic, its retributive value is likely to be considerably greater. In many cases, national sentences for ordinary crimes are *more* severe than international sentences for international crimes. Consider, for example, murder. The average sentence for murder as a crime against humanity at the ICTR, the most punitive *ad hoc* tribunal, is twelve to twenty years. By contrast, the

219. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 95 (2003) (quoting Rome Statute Article 17(2)b)).

220. See Rome Statute, *supra* note 2, Preamble, ¶ 4 (retribution), ¶ 5 (deterrence).

221. DRUMBL, *supra* note 119, at 155.

ICTY Trial Chamber concluded in *Nikolić* that “in most countries, a single act of murder attracts life imprisonment or the death penalty, as either an optional or mandatory sanction.”²²² Sieber’s study supports that conclusion: of the twenty-two states in the study, twelve (fifty-five percent) required a *minimum* twenty-year sentence for murder as an ordinary crime, with ten of those states requiring life.²²³ From a retributive standpoint, therefore, a national conviction for murder as an ordinary crime will often be more desirable than an international conviction for murder as an international crime.

ii.) *Deterrence*

The deterrent value of a criminal-justice system—international or national—is a function of three factors: the likelihood that a perpetrator will be prosecuted; the likelihood that a prosecuted perpetrator will be convicted; and the severity of the sentence that a convicted perpetrator will receive.²²⁴ All three factors indicate that the deterrent value of a sentence-based heuristic will be greater than the deterrent value of the conduct-and-gravity heuristic. First, the likelihood that a perpetrator will be prosecuted is intimately connected to the number of prosecutions that states are capable of pursuing. Because prosecutions of international crimes are so legally complicated and resource-intensive, prosecutions for ordinary crimes will normally take far less time and cost far less to complete.²²⁵ States that prosecute international crimes as ordinary crimes can thus be expected, *ceteris paribus*, to prosecute more defendants than states that prosecute international crimes as international crimes. Second, national prosecutions are far more likely to result in conviction when prosecutors are not artificially limited in terms of the conduct they can investigate and the ordinary crimes they can charge. Third, national sentences for ordinary crimes are normally longer than international sentences for international crimes.

The ICTY’s failed four-year prosecution of Milosević for war crimes, crimes against humanity, and genocide serves as a stark reminder of why, from a deterrence perspective, the ICC should encourage states to prosecute international crimes as ordinary crimes whenever possible. Although often forgotten, Serbia had already indicted Milosević for abuse of power and corruption when the ICTY demanded his extradition to the tribunal.²²⁶ Had Serbia been permitted to try Milosević itself on the less-complicated ordi-

222. Prosecutor v. Dragan Nikolić, Sentencing Judgment, Case No. IT-94-2-S, ¶ 172 (18 Dec. 2003).

223. Argentina, Canada, England, Finland, Germany, Greece, South Africa, Turkey, the United States, Belgium (20 years) and Italy (21 years) imposed a term of years instead. SIEBER, *supra* note 175, at 94.

224. See, e.g., RICHARD H. SPEIER ET AL., NONPROLIFERATION SANCTIONS 55 (2001).

225. Cf. NANCY AMOURY COMBS, GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH 41 (2007) (noting that “[d]omestic prosecutions can reduce trial time by charging domestic crimes, such as murder, in lieu of international crimes”).

226. See YVES BEIGBEDER, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES 82 (2005).

nary crimes, the trial would not have taken more than four years to complete, making it very likely that he would have lived to see a verdict. A resulting conviction would have had considerable deterrent value—certainly greater than the non-existent deterrent value of the ICTY’s failure to convict Milosević of “serious” international crimes.²²⁷

F. Implementing the Heuristic

Nothing in the Rome Statute would prevent the Court from applying a sentence-based complementarity heuristic instead of a heuristic based on gravity. Article 17(2)(a) simply prohibits States from conducting prosecutions that are designed to shield perpetrators from criminal responsibility; it does not explain what kinds of prosecutions exhibit that prohibited intent, much less equate willingness with the prosecution of serious ordinary crimes. The Court thus remains free to adopt an understanding of willingness that focuses on sentence instead.

The “same conduct” requirement, by contrast, poses a more formidable challenge. The Court cannot simply ignore the requirement when applying Article 17, because it has a strong foundation in the text and history of Article 20(3)’s upward *ne bis in idem* provision (which Article 17(1)(c) incorporates by reference), and is supported by the two articles in the Rome Statute that concern the obligation of states to surrender suspects to the Court. The first is Article 89(4), which provides that “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 with the Court.”²²⁸ The second is Article 94(1), which provides, in relevant part, that “[i]f the immediate execution of a request would interfere with an ongoing investigation or prosecution of *a case different from that to which the request relates*, the requested State may postpone the execution of the request for a period of time agreed upon with the Court.”²²⁹

The best way to eliminate the same-conduct requirement, therefore, would be to amend those three Articles to make clear that a sufficiently punitive national prosecution of an ordinary crime is inadmissible even if it involves different conduct than the ICC prosecution.

Needless to say, the Assembly of State Parties is unlikely to make the necessary changes anytime soon. The Rome Statute is very difficult to amend: two-thirds of States Parties must approve an amendment, and an approved amendment does not enter into force until seven-eighths ratify

227. To be sure, it is an open question whether Serbia was genuinely committed to prosecuting Milosević. In a similar situation, however, the ICC would always be able to take control of the case on the ground that the state in question was unwilling to genuinely carry out the prosecution itself.

228. Rome Statute, *supra* note 2, art. 89(4) (emphasis added).

229. *Id.*, art. 94(1) (emphasis added).

it.²³⁰ The more practical solution, therefore, would be for the Court to rely on the same articles in the Rome Statute that make clear Article 17's presumption of inadmissibility does not apply to prosecutions—for international or for ordinary crimes—that are based on different conduct than the ICC prosecution. Although Articles 89(4) and 94(1) are not the picture of clarity,²³¹ neither expressly *requires* the Court to pre-empt a national investigation, prosecution, or sentence that involves a different crime. Indeed, most scholars believe—to quote Kaul and Kress—that although “the requested state may not refuse the execution of the request . . . execution may be postponed for a period of time as agreed upon with the Court.”²³² The Court could thus decide, as a matter of policy, to apply the sentence-based heuristic to national prosecutions and sentences falling under Articles 89(4) and 94(1), permitting states whose national prosecutions and sentences satisfy the heuristic to “delay” surrendering the perpetrator until *after* he served the duration of his national sentence.

Applying the sentence-based heuristic, in short, would require the Court to proceed along two parallel tracks. If a national prosecution involved the same conduct as the ICC prosecution, thus triggering Article 17's complementarity provisions, the Court would apply the heuristic as the best method for determining whether a state is genuinely willing to prosecute. If the national prosecution involved different conduct, thus falling within the ambit of Articles 89(4) and 94(1), the Court would apply the heuristic as a matter of surrender policy. Such a bifurcated approach to complementarity would be less than ideal, but it would be better than continuing to apply a gravity-and-conduct heuristic that undermines instead of promotes the fight against impunity.

IV. EXPRESSIVE VALUE

As the previous Parts have demonstrated, there are persuasive and pragmatic reasons not only to encourage states to prosecute international crimes as ordinary crimes, but also to adopt a sentence-based complementarity heuristic that provides states with as much flexibility as possible concerning the conduct they investigate and the ordinary crimes they charge. It is now important to address the primary cost of that approach: expressive value. There is no question that the complementarity heuristic defended in this Article reduces the expressive value of national prosecutions in two impor-

230. See *id.*, art. 121(3), (4).

231. See, e.g., Report of the Commonwealth Expert Group on Implementing Legislation for the Rome Statute of the International Criminal Court, ¶ 93 (2004) (“The Rome Statute does not resolve what happens if a person sought by the Court is serving a sentence domestically or being prosecuted.”); Hans-Peter Kaul & Claus Kress, *Jurisdiction and Cooperation in the Statute of the International Criminal Court: Principles and Compromises*, 2 Y.B. INT'L HUM. L. 143, 166 (1999) (noting the “constructive ambiguity” in the two articles).

232. Kaul & Kress, *supra* note 231, at 166.

tant ways. First, it is clear that prosecuting international crimes has greater expressive value than prosecuting ordinary crimes. In that respect, proponents of the soft mirror thesis are correct when they argue that “prosecuting core crimes as murder or rape, rather than their international equivalents, is not desirable since ordinary crimes do not represent the scope, scale and gravity of the conduct.”²³³ Second, the sentence-based heuristic may reduce the expressive value of a national prosecution still further, by permitting states to prosecute “minor” ordinary crimes (assault, theft) instead of serious ones (murder, rape).

These are real costs, and they should not be minimized. The question is whether they outweigh the benefits of a sentence-based complementarity heuristic. I do not believe that they do. Most obviously, a national prosecution of an international crime only has expressive value if it results in a conviction; an acquittal not only has no positive expressive value, it actually has *negative* expressive value in reinforcing the perception that the national legal system is unable to bring perpetrators of international crimes to justice.²³⁴ As discussed above, only Western states can consistently and effectively prosecute international crimes as international crimes. On balance, then, the reduced expressive value of national prosecutions of ordinary crimes will almost certainly be offset by their much higher success rate.

It is also important to emphasize that a successful national prosecution of an international crime as an ordinary crime, even a “minor” one, has its own expressive value, because it demonstrates that international crimes are not so “extraordinary” that they cannot be handled by a traumatized state’s normal criminal-justice system.²³⁵ As Lawrence Douglas has pointed out, “[i]f one of the purposes of the perpetrator trial is to reintroduce norms of legality into a radically lawless space, the very dryness of the proceeding can be construed as a triumph of legal sobriety over lawless chaos.”²³⁶ Prosecuting an international crime as an ordinary crime, in other words, is a powerful method of demonstrating Arendt’s “banality of evil,”²³⁷ because it insists that the perpetrator, despite the magnitude of his crimes—which too many perpetrators bent on martyrdom wear as a badge of pride²³⁸—is really nothing more than a common criminal.

233. Bergsmo et al., *supra* note 68, at 801.

234. See, e.g., Lawrence Douglas, *History and Memory in the Courtroom: Reflections on Perpetrator Trials*, in HERBERT R. REGINBOGIN & CRISTOPH J. SAFFERLING (EDS.), *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, 102 (2006) (“A prosecutorial failure cannot help but be seen as a didactic failure, as well.”); Concannon, *supra* note 80, at 235 (“If the trial is not successful, the government loses credibility and confidence in the justice system is further eroded, thus creating another flash point for criticism.”).

235. See DRUMBL, *supra* note 119, at 3–6.

236. Douglas, *supra* note 234, at 96–97.

237. See generally HANNAH ARENDT: EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963).

238. See Douglas, *supra* note 234, at 102–03.

R

R

R

R

R

These considerations do not undercut the need to reinforce the seriousness and unacceptability of international crimes. A number of scholars have argued, for example, that the ICC should privilege expressive considerations when determining which situations to investigate and which cases to prosecute.²³⁹ The point is that the limits of most national legal systems counsel against elevating expressive considerations over the more pragmatic concern of obtaining convictions. Given those limits, the ideal theory of complementarity is one in which the ICC assumes primary responsibility for the symbolic condemnation of international crimes, while states assume primary responsibility—necessary because of the Court’s limited resources—for convicting as many perpetrators who have committed international crimes as possible. Such a division of labor between the ICC and states will not only maximize the expressive value of international criminal justice, but will also fight impunity far more effectively than an ICC-centric theory of complementarity that is based on conduct and gravity.

V. CONCLUSION

Frédéric Mégret has predicted that complementarity “will be used to occasionally implement a liberal orthodoxy about what international criminal law should be, caricaturing the reality of complementarity.”²⁴⁰ The hard and soft mirror theses illustrate his point: both are based on the assumption—almost never questioned—that the goals of the ICC will be best served if states are either required (the HMT) or pressured (the SMT) to prosecute international crimes as ordinary crimes. This Article has challenged that orthodoxy, arguing not only that national prosecutions of international crimes are likely to fail, but also that adopting a complementarity heuristic that provides states with maximum flexibility to prosecute international crimes as ordinary crimes will level the complementarity playing-field between Western and non-Western states and increase the willingness of non-member states to ratify the Rome Statute. The Article has thus defended a heuristic that determines whether a state is genuinely willing to prosecute solely by reference to sentence. Such an approach is not based on the Appeals Chamber’s counterproductive ‘same conduct’ requirement, and does not require the Court to make difficult and contestable judgments concerning the relative gravity of ordinary crimes.

As acknowledged in Part IV, there is no question that expressive value is lost when a state prosecutes an international crime as an ordinary crime. In

239. See Heller, *Situational Gravity Under the Rome Statute*, in STAHN AND VAN DEN HERIK, *supra* note 6, at 233–37; Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT’L L. (forthcoming 2012) (arguing that “the ICC should select crimes and defendants for prosecution according to their ability to maximize its expressive impact”); *cf.* Sloane, *supra* note 190, at 44 (arguing that “[i]nternational criminal tribunals can contribute most effectively to world public order as self-consciously expressive penal institutions”).

240. Mégret, *Implementation*, *supra* note 3, at 386.

R

R

R

my view, the practical benefits of a *pure* sentence-based complementarity heuristic far outweigh its symbolic costs. It is nevertheless important to emphasize that it is possible to imagine less-radical heuristics that would still focus on sentence, but would not eliminate the conduct and gravity requirements entirely. For example, a state could be permitted to charge any kind of ordinary crime that would result in an adequate sentence as long as the relevant conduct took place in the same situation the ICC was investigating. Such a heuristic would be considerably more flexible than the gravity-and-conduct heuristic, but would still limit states to prosecuting conduct related to the international crimes that initially drew the Court's attention. Alternatively, a state could be permitted to prosecute any criminal conduct by the defendant, even conduct that did not take place in the situation the Court was investigating, as long as it prosecuted crimes involving the defendant's *official* conduct. That heuristic would provide states with significant flexibility, but would ensure that defendants were only held accountable for public crimes—such as the abuse of power and corruption charges against Milosević—and not for crimes of a purely private nature. Both complementarity heuristics are inferior to the heuristic defended in this Article. But both would be clearly superior to the current conduct-and-gravity heuristic.

Finally, it is important to emphasize that the sentence-based complementarity heuristic is not intended to be a permanent solution to the problems facing national criminal-justice systems. In an ideal world, states would always prosecute international crimes *as* international crimes, maximizing the expressive value of their prosecutions. The problem is that, at present, states simply lack the legal and material resources to make such prosecutions possible. Perhaps the day will come when states have developed such capacity regarding international criminal law that nothing will be lost by encouraging—or even requiring—them to prosecute international crimes as international crimes. Or perhaps at some point the ICC will be so well-staffed and so well-funded that it will be able to assume responsibility for prosecuting every international crime that states cannot successfully prosecute themselves. Either development would be cause for celebration. In the meantime, however, the hard and soft mirror theses will remain luxuries that neither the ICC nor states can afford.

