"What Is an International Crime?": What Kind of Question It Is and How We Should Answer It"

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I am grateful to the editors of *HILJ* for the invitation to participate in this online Symposium on Kevin Jon Heller's superb piece on how to conceptualize international crimes. Determining whether a specific conduct constitutes an international crime is a particularly sensitive and important legal issue. In Argentina, for instance, it is the distance that separates crimes perpetrated during the 1970s which may be prosecuted today, from those which may not, on grounds of statutes of limitations.[2] Similarly, this notion arguably accounts for why Belgian courts can try and punish two Rwandan nuns for participating in a genocide perpetrated in Rwanda, against Rwandan victims, whereas they lack the power to adjudicate the murder of an Italian national in London.[3] Again, the Inter-American Court of Human rights took this notion centrally into consideration when deciding the invalidity of amnesties dictated by domestic authorities in Peru and Uruguay.[4] Heller presents an ambitious account of international crimes, challenging the mainstream views available in the literature. His account is persuasive, thoroughly researched, and tightly argued. And yet, I disagree with its central thesis. In this response, I shall explain the basis of my disagreement – which has to do not only with the answer he provides, but essentially with how to understand and answer this important conceptual question.

Heller addresses the question of what is an international crime by focusing on what is distinctive about them, i.e., what separates them from ordinary, domestic offenses, and from transnational crimes. Their underlying conceptual feature, he suggests, is that they constitute "an act which international law deems universally criminal"[5] – in line with the Belgian example above. Yet this proposition can be accounted for in two different ways. The "direct criminalization thesis" (hereinafter, DCT) claims that international crimes must

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[2] *See* Corte Suprema de Justicia de la Nación [CSJN] [National Supremem Court of Justice], 24/08/2004, "Arancibia Clavel," Fallos (2004-327-3312) (Arg.); Corte Suprema de Justicia de la Nación [CSJN] [National Supremem Court of Justice], 14/06/2005, "Simón, Julio Héctor y otros s/ privación ilegítima de la libertad," Fallos (2005-328-2056), 14 June 2005 (Arg.).

[3] *See*, eg, Helen Stacy, "Criminalizing Culture", in Larry May and Zachary Hoskings, INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 79 (2010).

[4] *See* Barrios Altos v. Peru, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 75 paras. 41–44 (Mar. 14, 2001); *see also* Gelman v. Uruguay, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221 paras. 225–29 (Feb. 24, 2011).

[5] Kevin J. Heller, *What Is an International Crime? (A Revisionist History),* 58 HARV. INT'L L.J. (forthcoming 2017) (manuscript at 1) (on file with author).

be understood as directly criminalized under international law (regardless of whether states criminalize them under their domestic laws).[6] By contrast, the "national criminalization thesis" (hereinafter, NCT) understands international crimes as those which international law obligates every state to criminalize and prosecute under their own domestic law.[7] The mainstream in international law, with rare exceptions, supports the DCT. Heller advocates, by contrast, the NCT.[8]

Interestingly, Heller does not suggest that the DCT is wrong or incoherent.[9] He claims that the problem with the DCT is that it can only be subscribed if one is committed to a natural law view, according to which, the basic principles of international law are derived "not from any deliberate human choice or decision, but from principles of justice which [have] a universal and eternal validity and which [can] be discovered by pure reason."[10] By contrast, the NCT is the only view compatible with a commitment to legal positivism, understood as a thesis by which international legal rules are derived "inductively, on the basis of what states do and say."[11]

This way of framing the discussion seems unconvincing. For one, it is hardly clear that a natural law position would take such a dismissive stance on laws as social facts, ie, to legal sources, as Heller seems to assume. No contemporary natural law theorist claims that a moral rule or principle belongs to the law or determines its content only in virtue of its merits.[12] Dworkin, for example, argues that a moral principle belongs to the law if and only if it is part of the set of principles that morally best justifies the legal practice.[13] By the same token, Heller seems to identify positivism generally with an extreme variant of exclusive legal positivism.[14] Yet, a number of (inclusive) positivists, such as Hart, Walchow, and Coleman have acknowledged that law can, and often does incorporate morality.[15] This would be the case, for instance, when the rule of recognition or other legally valid norm picks out the moral merits as relevant to their legal validity.[16] Thus, even if we buy the rest of Heller's argument, it is rather dubious that the DCT would be incompatible with any plausible variety of positivism (as well as plausible varieties of

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[6] *Id.* (manuscript at 11).
[7] *Id.* (manuscript at 3).
[8] *Id.* (manuscript at 4).
[9] *See id.* (manuscript at 3).
[10] *Id*. (citing PETER MALANZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 15 (7th ed. 1997)).
[11] *Id.* (manuscript at 3).
[12] *E.g.*, RONALD DWORKIN, LAW'S EMPIRE 264–65 (1986).
[13] *Id.* For an equivalent, more recent view, *see* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288 (2014).
[14] *See* Heller, *supra* note 4 (manuscript at 3).
[15] *See, e.g*, WILFRID J. WALCHOW, INCLUSIVE LEGAL POSITIVISM 80 (1994).
[16] *See id.*

natural law theory).[17] I find this aspect of Heller's approach least compelling.[18] By contrast, I believe the most persuasive reconstruction of his claim is simply that the NCT is the only view which is supported by international law, jurisprudential positions aside. And yet I also have doubts that this is the case.

On the one hand, I am not convinced that existing international law supports the NCT as strongly as Heller argues. In particular, I doubt that the NCT can convincingly account for international crimes warranting universal jurisdiction, which he acknowledges is their defining feature. His argument on this point rests on three interrelated propositions. First, he argues that international crimes are subject to universal jurisdiction because "it is precisely a state's failure to prosecute an international crime committed on its territory that justifies other states disregarding traditional limits on extraterritorial jurisdiction."[19]

Nevertheless, the fact that a state fails to prosecute a particular type of crime would hardly suffice to conclude, under international law, that other states have jurisdiction over it. This further implication is allegedly based on a second proposition, namely that "failing to prosecute an international crime [i]s a violation of an *erga omnes* obligation – an obligation owed 'towards the international community as a whole'".[20] However, even if we grant the existence of such obligation, this implication hardly follows. The fact that state A has an *erga omnes* obligation to criminalize and prosecute individuals who commit an international crime on its territory does not, per se, entail that if it were to violate this obligation other states would acquire the right to exercise that jurisdiction themselves. As a matter of the law on State responsibility – which specifically regulates the legal consequences of failing to comply with any international law obligation – this would hardly be the case. A state violating a primary rule of international law would incur in the obligation to cease in its breach and make full reparations.[21] Yet, this hardly means – at least not without further argument – that other states would automatically acquire the legal power to adjudicate the matter themselves. Heller cites no state practice in support of his view, but merely the opinion of a publicist, something which he does not list among the relevant sources of international law.[22]

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[17] In fact, Roger O'Keefe reaches the exact opposite conclusion through an approach that may be called even more radically positivistic then Heller's. *See*, ROGER O'KEEFE, INTERNATIONAL CRIMINAL LAW (2015), at para 2.20.

[18] Heller himself considers it sufficiently relevant to note that *philosophical* defenses of universal jurisdiction support his conceptual claim, thereby weakening his extreme positivist stance. *See supra* note 4 (manuscript at 55). At the same time, he does not endorse (at least not explicitly) any form of normative positivism. On this theoretical position, *see, e.g*, Jeremy Waldron, "Normative (or Ethical) Positivism, HART'S POSTCRIPT 411 (Jules Coleman, 2001).

[19] *See supra* note 4(manuscript at 51).

[20] *Id.* (manuscript at 56).

[21] *See, e.g*, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 31–36 (Ian Brownlie & James Crawford eds., 8th ed. 2012).

[22] Heller, *supra* note 4 (manuscript at 56).

Heller goes on to suggest, as a third, final claim that the basis of this specific jurisdictional implication rests on the fact that the obligation to criminalize this type of act is a peremptory norm of international law.[23] By contrast, I believe there is hardly sufficient evidence that the legal rule which obliges states to criminalize and prosecute international crimes has *jus cogens* status (unlike the rules prohibiting most of those acts). As Heller explicitly recognizes, the existence and function of international criminal rules is precisely a consequence of states *not* prosecuting international crimes perpetrated on their territory.[24] More importantly, a significant number of countries lack appropriate legislation criminalizing the core international crimes – for instance, slightly less than half of UN member states[25] have domestically criminalized crimes against humanity.[26] It is hard to see how we may argue that there is a peremptory norm of international law with which such a large proportion of states fail to comply with. And yet, even if we grant the existence of such a rule for the sake of argument, it is unclear from the standard implications associated with *jus cogens* norms that a violation of said rule would authorize other states to unilaterally intervene to remedy such violation.[27]

Thus, I am not persuaded that the NCT can convincingly account for the main implication of considering a particular conduct an international crime, namely, that it is subject to universal criminal jurisdiction. Admittedly, Heller could argue, as Schwarzenberger did before him, that the NCT is still conceptually more attuned to existing international law even if it implies that there are currently no international crimes strictly conceived.[28] But he explicitly rejects this conclusion, at least vis-à-vis crimes against humanity, war crimes, and genocide.[29]

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[23] *See id.* (manuscript at 57).
[24] *Id.* (manuscript at 51).
[25] In a recent survey, Amnesty International reported that only 47.7 per cent of UN member states have included at least one crime against humanity, 61.1 per cent have included genocide, and 70.5 per cent of UN member states have provided for at least one war crime under their domestic legislation. AMNESTY INT'L, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD – 2012 UPDATE 12 (2012).
[26] By contrast, the customary norm authorizing the exercise of universal jurisdiction over international crimes has not been legally justified on the basis of *erga omnes* obligations or *jus cogens* norms. For one of the more authoritative views, *see* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. Rep. 3, para. 56 (Feb. 14).
[27] *See* ILC Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (Appended to GA Res. 56/83, 12 December 2001), art. 41. Arguably, the positive duty for states to "cooperate to bring to an end through lawful means any serious breach" (art. 41(1)) would hardly seem to grant individual states the power to interfere with a state which fails to criminalize or prosecute this type of behavior by exercising jurisdiction themselves over the alleged offender. Furthermore, Crawford writes that the provisions in article 41 are "probably as much progressive development as codification … [;] if there is an element of customary international law here, it is the element of collective non-recognition" (*supra* note 20, 598). *See further*,Vienna Convention on the Law of Treaties art. 53., *opened for signature* May 23, 1969, 1155 UNTS 331.
[28] *See* George Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURR. LEGAL PROBS. 263, at 293 (1950). Heller cites Schwarzenberger as a forerunner of the NCT, *supra* note 4

On the other hand, I disagree with Heller that the DCT has no plausible foundation in international law. To see this, it may help us to identify the actual difference between the DCT and the NCT, given that both are ultimately instantiations of the underlying claim that international crimes are acts "which international law deems universally criminal".[30] One central difference would be as follows. Let us assume that international law only contains, as per the NCT, a norm that requires states to criminalize murder as part of a widespread or systematic attack against a civilian population under their own domestic law, irrespectively of where they have been perpetrated. Suppose further that State S has not fulfilled this duty, and suddenly Paul, a perpetrator of such crime against humanity, is apprehended on its territory. Under Heller's NCT, S would simply lack the right (a normative power) to prosecute Paul for crimes against humanity.

This implication not only seems normatively unattractive; it is descriptively incorrect as to actual state practice and *opinio juris*. Colombian courts, for instance, have prosecuted individuals for crimes against humanity on the basis of the international prohibitions contained in customary international law, as codified under the Rome Statute, even though they lacked a domestic provision criminalizing these type of conduct as a matter of domestic Colombian law.[31] Similarly, Argentine courts have characterized crimes perpetrated under the 1970s Chilean and Argentine military dictatorships (as well as by Franco's regime in Spain) as crimes against humanity on the basis of the international criminal prohibition of these crimes.[32] In the latter case, they have exercised their jurisdiction on grounds of a provision, originated in its 1853/60 Constitution, conferring jurisdiction of its domestic courts on "crimes against the law of nations".[33] These decisions not only support the DCT, they are clearly incompatible with the NCT.

Furthermore, *opinio juris* explicitly confirms the legality of this approach. For one, the International Criminal Court or the Inter-American Court of Human Rights have hardly criticized these decisions.[34] Similarly, the District Court of Jerusalem in *Eichmann* famously argued that the "abhorrent crimes defined in this Law are not crimes under Israel law alone [;][t]hese crimes, which struck at the whole of mankind and shocked the

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(manuscript at 42), yet he fails to acknowledge that Schwarzenberger claimed that such framework did not provide for international crimes *stricto sensu*.

[29] Schwarzenberger, *Id*.

[30] *Supra* note 4 (manuscript at 1).

[31] *See*, *e.g.*, Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala de Casación Penal, diciembre 3, 2009, Decisión 32672, Salvador Arana Sus Gaceta Judicial [G.J.] (No. 18, p. 23, 25) (Colom.).

[32] *Supra* note 1. *See also*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *opened for signature* Nov. 26, 1968, 754 U.N.T.S. 73; European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, *opened for signature* Jan. 25, 1974; [1974] E.T.S. 82; Inter-American Convention on Forced Disappearance of Persons, art. VII, Mar. 28, 1996, [1996] O.A.S.T.S. 68.

[33] *See* Art. 118, CONSTITUCIÓN NACIONAL [Const. Nac.] (Arg.).

[34] *See, e.g.*, Office of the Prosecutor of the ICC, Report on Preliminary Examination Activities, paras. 150, 153 (2015), https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf/. For the IACtHR, *see e.g.*, *supra* note 3.

conscience of nations, are grave offenses against the law of nations itself (*delicta juris gentium*)" [35], and concluded that states were stepping in only as a substitute for a tribunal genuinely representing the international community as a whole.[36] In fact, under the NCT, Israel would have been disabled from trying *Eichmann* under the principle of legality, insofar the domestic law under which his acts were considered criminal had not been enacted (in fact, the State had not been founded) at the time of his conduct.[37] Finally, in *Yunis,*[38] a US District Court argued: "The Universal principle recognizes that certain offenses are so heinous and widely condemned that 'any state if it captures the offender may prosecute and punish that person on behalf of the world community regardless of the nationality of the offender or victim or where the crime was committed.'"[39]

In sum, I am not persuaded that international law itself clearly supports the NCT vis-à-vis the DCT. Yet my disagreement with Heller seems to cut deeper, and most likely has to do with the way we should answer the question of what an international crime is. I believe *concepts* such as that of an international crime are better defined doctrinally, not settled by reference to the law itself, be it a domestic law, treaty or custom.[40] This is precisely the way in which scholars have approached the parallel question of what constitutes a crime under domestic law or, for that matter, a transnational crime.[41] Similarly, the better way to address the question of what is an international crime is to see how this concept is used in international law, most significantly by adjudicative bodies. Once we acknowledge this aspect of the inquiry at hand that we are able to fully grasp why the DCT enjoys such preeminence among contemporary international lawyers.

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[35] DC (Jer) 40/61 Attorney-General v. Adolf Eichmann, para. 12 (1961) (Isr.).
[36] *Id.*
[37] *See, e.g*, International Covenant on Civil and Political Rights art. 15, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171.
[38] *United States v. Yunis*, 681 F. Supp 896 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).
[39] *Id.* at 900.
[40] On this, vis-à-vis the concept of universal jurisdiction, *see* Roger O'Keefe, *Universal Jurisdiction. Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 744 (2004).
[41] For a recent example, *see* VICTOR TADROS, WRONGS AND CRIMES 13–15 (2017). For transnational crimes, *see* Neil Boister, *Transnational Criminal Law?*, 14 EUR J. INT'L. L. 953, 953 (2003).