

“What Is an International Crime?”: A Response to Kevin Jon Heller

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Kevin Jon Heller distinguishes a “direct criminalization thesis” (DCT), which he acknowledges to constitute the generally accepted approach to define an international crime,² from a “national criminalization thesis” (NCT), which he argues to be the better approach to characterize an international crime from a positivist point of view. The “direct criminalization thesis” is built on the premise that “certain acts are universally criminal because they are directly criminalized by international law itself, regardless of whether states criminalize them”.³ The “national criminalization thesis” is conceptualized as an antithesis, in that it “rejects the idea that international law bypasses domestic law by directly criminalizing particular acts”. Accordingly, “certain acts are universally criminal because international law obliges every state in the world to criminalize and prosecute them”.⁴

Heller rejects the DCT primarily due to insufficient positivist evidence of its element of direct criminalization independent of domestic law.⁵

It does not come as a surprise that suppression conventions offer little evidence of direct criminalization. Their very purpose is criminalization under national law in order to prevent and punish certain conduct. In order to reach these objectives, it is irrelevant whether the treaty definition does or does not reflect a corresponding crime under international law.

There is however convincing evidence of direct criminalization in the major human rights documents. Article 11 para. 2 of the Universal Declaration of Human Rights (UDHR) and the non-derogable Article 15 para. 1 of the International Covenant on Civil and Political Rights (ICCPR) contain an almost identical protection of the principle of legality. They provide that “No one shall be held guilty of any penal offence ... which did not constitute a penal offence, under national or international law, at the time when it was committed.”⁶ This clause guarantees a subjective right against retroactive criminal law in that an act or omission must have been criminalized either under national law or under international law. It also

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² The term “international crime” in this context is understood in a narrow sense, for crimes that this commentator will refer to as “crimes under international law”, see e.g. Otto Triffterer, *General Report, Part I: Efforts to Recognize and Codify International Crimes*, 60 *REVUE INTERNATIONALE DE DROIT PÉNAL* 31, 39, 47 (1989); Claus Kress, *International Criminal Law*, para. 14, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2009), available at <http://opil.ouplaw.com/home/epil> (last visited Nov.1, 2017).

³ Kevin Jon Heller, *What Is an International Crime? (A Revisionist History)*, 58 *HARVARD INTERNATIONAL LAW JOURNAL* 1, 2 (2017), available at <http://dx.doi.org/10.2139/ssrn.2836889> (last visited Nov.1, 2017).

⁴ *Ibid.* 3.

⁵ For the three conceptually distinct but interlinked aspects of the definition of a crime under international law: 1. That the norm in question forms part of international law; 2. That the international norm entails individual responsibility; and 3. That the criminalization is independent from its incorporation in domestic law, see e.g. Gerhard Werle, *PRINCIPLES OF INTERNATIONAL CRIMINAL LAW* 29 (2009).

⁶ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art.11(2) (Dec.10, 1948).

ensures that a person does not escape punishment for a crime under international law by pleading that the conduct in question was not criminalized nationally.⁷

This passage was not controversial during the drafting process. More heated discussions surrounded the so-called Nuremberg clause, which was eventually not adopted for the UDHR, but found its way into the ICCPR. Article 15 para. 2 ICCPR provides that “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.” As an exception to the protection of the right against retroactive criminal law, this language covers crimes that at the time of their commission may not (yet) have fully crystallized as customary norms.⁸ According to the travaux, Article 15 para. 2 aims at eliminating any doubt regarding the legality of the Nuremberg trials,⁹ and eludes to the principles of international law recognized by the Nuremberg Charter¹⁰.

The UDHR and the ICCPR thus contain a clear recognition of direct criminalization, independent of whether or not the crime is recognized under national criminal law. With 169 states parties, the ICCPR is widely ratified and also claimed to have customary status.¹¹ Comparable provisions to the ICCPR can be found in Article 7 of the European Convention of Human Rights.¹² Article 9 of the American Convention on Human Rights and Article 7 para. 2 of the African Charter of Human and Peoples’ Rights do not contain an explicit reference to direct criminalization, but can be interpreted accordingly.¹³

If criminalization is either a matter of international law or of national law, direct criminality independent of national law must be confirmed by practice, whenever an international or national court lawfully enforces crimes that at the time of their commission were not criminalized under national law. Without engaging in a detailed analysis, it is submitted that national laws incorporating crimes under international law rarely existed in periods preceding the establishment of international tribunals. At the time of World War II, this may be partly true for war crimes, but it certainly applies for crimes against peace and crimes against humanity. For the period falling within the temporal jurisdiction of the ICTY and the ICTR, national incorporation of war crimes and genocide may have increased but crimes against humanity were still exceptional in national criminal codes.

The DCT underlies the creation of international criminal courts and tribunals starting with Nuremberg and prevails substantive (at times admittedly valid) critique regarding the

⁷ Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS – CCPR COMMENTARY, 360-1 (2nd ed. 2005). See also the introduction of its proposal by France, UN Doc. A/2929, Ch. VI, § 94: printed in Marc J. Bossuyt, GUIDE TO THE “TRAVAUX PRÉPARATOIRES” OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 324 (1987).

⁸ Johannes Morsink, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS ORIGINS, DRAFTING, AND INTENT, UNIVERSITY OF PENNSYLVANIA PRESS 54 *et seq.* (1999).

⁹ A/4625, §16, printed in Bossuyt, *supra* note 4, 331-2.

¹⁰ G.A. Res. 95/1, Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal (Dec.11, 1946).

¹¹ See *e.g.* Louis Henkin, INTERNATIONAL LAW: POLITICS AND VALUES and Functions, 216 *Recueil des Cours* 21, 234 (1989) regarding patterns of gross violations; more specifically, Kenneth S. Gallant, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 352 *et seq.* (2008).

¹² For many see William A. Schabas, THE EUROPEAN CONVENTION ON HUMAN RIGHTS. A COMMENTARY 343 *et seq.* (2015).

¹³ See *e.g.* the proposal of Argentina to exchange the term “under national or international law” of Art. 15 ICCPR with the arguably more flexible term “under applicable law”, which was eventually used in Art. 9 of the American Convention on Human Rights, A/4625, § 14, printed in Bossuyt, *supra* note 4, 325.

actual criminalization at the time the conduct took place. Independent of whether the Nuremberg Charter reflected international customary law or created new international law, it convincingly claimed to work on the basis of direct criminalization under international law. The concept was acknowledged by States and equally applied by subsequent international criminal tribunals.

On national level, it may be true that, apart from cases of treaty obligation, legislators seldom disclose underlying motives for the incorporation of crimes. However, a DCT is revealed when national legislation establishes criminal accountability for past events. A precondition for such retrospective legislation not to violate the international protection against retroactive criminal law would be that the crimes in question were criminalized directly under international law at the time the conduct took place. Respective state practice can be found in legislation and court proceedings in numerous countries in the aftermath of World War II.¹⁴ Other examples of retrospective legislation of crimes against peace, crimes against humanity and genocide include, for instance, Bangladesh, Canada, Estonia, Indonesia, Iraq, Israel, Bosnia and Herzegovina, Lithuania, Rwanda, and Senegal.¹⁵

A major difference between Heller's DCT and the NCT concerns the source of criminalization. The NCT rejects the idea of direct criminalization under international law. It is built on the idea of indirect (mediated) criminalization. That means that once an obligation to criminalize nationally is implemented, the source of criminalization is national law.¹⁶ Despite its apparently clear terminology, the nature of the NCT remains doubtful. It does not seem overly occupied with national implementing legislation, which is but one aspect under consideration. In terms of numbers, 140 states are accounted for to have domestically criminalized (one or more) war crimes in the context of an international armed conflict, 100 states for (one or more) war crimes in the context of a non-international armed conflict, 119 states for genocide, 90 states for crimes against humanity. But are these numbers sufficient to claim universal criminalization on the basis of national laws? If the source of criminalization is national law, would it not be expected that (virtually) all states criminalize the conduct in question? If the argument on the other hand concentrates on factors such as widespread implementation, including states that are not under a treaty obligation to implement, does this not constitute an international law argument? And if criminalization is assumed despite universal national criminalization by all states, would not international law standards again bypass national law?

The NCT claims the existence of an obligation under international law to domestically criminalize certain conduct. This international duty distinguishes international crimes in accordance with the NCT from other universally criminalized acts, i.e. murder. Such a duty may well have developed under international customary law and Heller provides persuasive evidence for it. One might even argue the existence of a *jus cogens* obligation to criminalize certain conduct domestically. However, all this does not make the NCT more convincing than the DCT from a positivist point of view. First, as Heller acknowledges, a *jus cogens* argument could also be made in the context of the DCT. This could relate to the status of direct criminality or to a related duty to prevent and punish. Second, under a strictly

¹⁴ For examples *see e.g.* the listed national proceedings in United Nations War Crimes Commission, THE HISTORY OF THE UNITED NATIONS' WAR CRIMES COMMISSION 536 *et seq.* (1948); David M. Crowe, WAR CRIMES, GENOCIDE, AND JUSTICE: A GLOBAL HISTORY 243 *et seq.* (2014).

¹⁵ For examples *see e.g.* M. Cherif Bassiouni, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 660 *et seq.* (2011); ICRC, *Practice Relating to Rule 101. The Principle of Legality*, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule101 (last visited Nov.1, 2017).

¹⁶ Anne Peters, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 125 *et seq.* (2016).

positivist view, it may be argued that the *jus cogens* argument does not necessarily overcome the persistent objector problem of customary law. In order to establish a norm of *jus cogens*, it is not sufficient to show its quasi-universal acceptance, the norm must also be recognized as having peremptory character.¹⁷ A state that is a persistent objector to the formation of customary law will most likely refrain from recognizing the same norm as *jus cogens*.¹⁸ The doctrinal situation of DCT and NCT is thus not so different. Third, even if the existence of a general obligation to criminalize nationally is accepted, the NCT does not satisfactorily answer the question how such a duty to criminalize domestically translates into actual criminalization. As Heller states eloquently with regard to the DCT: The wide ratification of a suppression convention may justify an argument of a customary duty to criminalize but such an international duty to criminalize does not necessarily evolve into a direct criminalization. However, it should be added that without the required national criminalization, neither does it evolve into a crime in accordance with a NCT. Therefore, if the NCT rejects the idea that international law bypasses domestic law, the question of states that do not nationally criminalize a specific conduct remains unanswered. If they are bound on the basis of customary law or *jus cogens*, international law bypasses national law under the NCT in the same way as under the DCT. The legal consequence of a breach of an international obligation (to criminalize) however, even of a *jus cogens* obligation, would be state responsibility, not automatic criminalization.

One last weakness of the NCT is its *ex post* perspective. It cannot serve as a model to explain the formation of crimes under international law in the Nuremberg era or even in the era of the *ad hoc* international tribunals. An evaluation of a general international obligation to criminalize certain conduct at those times would look very different from one that takes into account developments until today. The same is true with regard to a survey of relevant national laws. From a policy perspective, the double requirement of an international obligation to criminalize as well as a quasi-universal ratification, would additionally burden any future developments of international criminal law.

In summary, this commentator's reaction to Heller's "revisionist" approach is threefold. First, Heller succeeds in making a strong claim for the existence of an international legal obligation to criminalize certain conduct. This obligation, it may be added, might allow a careful expansion towards an obligation to prevent and punish. This aspect of the NCT constitutes a useful complement to the concept of crimes under international law. Second, Heller's thoughtful analysis sheds fresh light on certain basic doctrinal aspects of international criminal law that are often too easily taken for granted. It is certainly true that even seventy years after Nuremberg, international criminal law scholars have not yet eliminated all inconsistencies that pervade their field, due to its partly spontaneous and selective evolution in response to massive ruptures of the international legal order. But third, and most importantly, Heller's critique remains unconvincing. The fact that the DCT constitutes the generally accepted approach is no accident, but it accurately reflects the way international criminal law has evolved since 1945; with the concept of direct criminalization as a fundamental pillar of an emerging system of international criminal law and justice.

¹⁷ Vienna Convention on the Law of Treaties, Art.53, Jan. 27, 1980, 1155 U.N.T.S. 331.

¹⁸ See e.g. Kirsten Schmalenbach, *Article 53* in Oliver Dörr & Kirsten Schmalenbach, VIENNA CONVENTION ON THE LAW OF TREATIES. A COMMENTARY 897, 920, 922 (2012).