

What Is an International Crime? (A Revisionist History) A Reply to My Critics

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I am profoundly grateful to Mia Swart, Astrid Reisinger Coracini, and Alejandro Chehtman for their thoughtful responses to my Article, “What Is an International Crime? (A Revisionist History).” I am also indebted to the editors of the *Harvard International Law Journal* for giving us the (virtual) space to continue a discussion that we all agree is both important and overdue. In what follows, I will address Swart, Reisinger, and Chehtman’s most important criticisms, noting overlap between them when necessary.

Mia Swart

There is much that Swart and I agree on. I share her belief that international criminal tribunals have often failed to respect the principle of legality “[i]n straining to find custom.”¹ I completely agree that custom identification is “open to subjectivity and therefore political mingling.”² And I would be the last person³ to argue against her insistence that the Rome Statute is riddled “with vague and indeterminate concepts such as ‘gravity’ and the ‘interests of justice’.”⁴

I also accept Swart’s contention that “a purely positivistic approach as the basis for international criminalization is not convincing since it fails to explain or accommodate the various natural law influences in international criminal law.”⁵ I do not claim in the Article that international criminal law (ICL) has developed free from naturalist influences. On the contrary, I believe ICL owes an incalculable debt to naturalism – with its embrace of direct criminalization perhaps the most striking example. My point is simply that the *ideology* of ICL has always been radically positivist, with judges routinely claiming to be doing positivism even when it is extraordinarily clear they are not.

That judges always claim to be positivists does not mean, of course, that positivism provides a sufficient basis for international criminalization. The responses to my Article do not convince me that the direct-criminalization thesis (DCT) has a stronger positivist foundation than the national-criminalization thesis (NCT). But that does not mean – as I point out in the Article’s conclusion⁶ – that I believe positivism provides an adequate foundation for the NCT in all its particulars. My argument is more modest: namely, that the NCT has a much stronger positivist foundation than the DCT. So if we want to be positivists, I think we are much better off accepting the NCT.

¹ Swart Response, 4.

² *Id.* at 3.

³ See generally Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, in *FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* (Carsten Stahn & Larissa van den Herik eds., 2010).

⁴ Swart Response, 3.

⁵ *Id.* at 2.

⁶ Article, 66–67.

We do not, however, *have* to be positivists. Perhaps we should simply admit ICL is an inherently naturalist area of law and get on with it. That seems to be Swart's position. I find naturalism troubling, for the reasons I discuss in my Article. But if a positivist ICL is genuinely impossible, as I fear it might be, Swart's naturalist understanding of international criminalization has much to recommend it.

Two final points on Swart. To begin with, I want to clarify the importance I assign to domestic criminalization of the core international crimes. Swart says that although I emphasize the NCT's dependence on domestic criminalization, "the small amount of countries that have criminalized the core international crimes points to the fact that the status of 'international crime' cannot depend on the extent to which domestic states have criminalized the core crimes."⁷ I do not disagree. As I note in the Article,⁸ domestic criminalization does support the NCT, particularly when the state in question is not party to a treaty that requires criminalization. The key issue, however, is whether all states are *obligated* to domestically criminalize, not whether they all in fact do. Such a universal obligation can be established, I believe, through the concatenation of domestic criminalization, law-making treaties, and UNGA Resolutions. Hence my detailed discussion of whether we can find a *jus cogens* obligation to criminalize each core international crime.⁹

I also want to call attention to a statement Swart makes about naturalism and the universality of international crimes:

The indeterminacy of naturalism, which Heller refers to as key weakness of the DCT approach, has not deterred generations of scholars from finding the basis for international criminalization in the idea that international law itself calls upon all states to prosecute international crimes.... What is important about naturalism is its relationship with the claims about the universality of the law.¹⁰

Swart seems to suggest here that naturalism might support the NCT, not the DCT. After all, the key assumption of the DCT is that the international crimes would be criminal even if every state in the world considered them legal and made no effort whatsoever to prosecute them. It is the NCT that insists the foundation of international criminalization lies in international law "call[ing] upon all states to prosecute international crimes." I would still prefer, of course, to base that universal obligation on traditional positivism. But I am more than happy to welcome naturalist fellow travelers.

Astrid Reisinger Coracini

Reisinger offers an explicitly positivist critique of my article, arguing that I understate state practice in favor of the idea of direct criminalization. She begins by citing the

⁷ Swart Response, 3.

⁸ Article, 45.

⁹ *Id.* at 46–50.

¹⁰ Swart Response, 2.

UDHR and ICCPR's common insistence that "[n]o 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." In Reisinger's view, that language indicates that the UDHR and ICCPR each "contain a clear recognition of direct criminalization, independent of whether or not the crime is recognized under national criminal law."¹¹

I agree with Reisinger that Art. 11(2) of the UDHR and Art. 15(1) of the ICCPR reflect custom. But I disagree that those provisions support direct criminalization. Reisinger's basic idea seems to be that "international law" in Art. 11(2) and Art. 15(1) must refer to acts directly criminalized by international law because, by definition, the provisions come into play only when a national criminal law is applied to acts that took place before the national law was enacted. That is not, however, the only interpretation of the provisions. It is equally possible that the pre-existing international law that permits the retroactive application of a national law is a suppression convention that affirms the criminality of a particular act under international law and requires its domestic criminalization. Indeed, the very scholar that Reisinger cites – Manfred Nowak – specifically claims that the pre-existing international law referred to by Art. 11(2) and Art. 15(1) includes *both* customary and conventional international law: "A person may be held guilty of an act or omission that was not punishable by the applicable national law at the time the offence was committed so long as this was punishable *under international treaty law* or customary international law in force at the time the offence was committed."¹² If that is the case, neither provision is incompatible with the NCT.

The same response applies to Reisinger's assertion that Art. 15(2) of the ICCPR supports the DCT. On its face, the provision – "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" – is limited to customary international law, thereby potentially embracing direct criminalization. Nowak points out, however, that "[t]he legal significance of Art. 15(2) is rather dubious in light of the reference to international law in Art. 15(1), which applies equally to international treaty law and customary international law."¹³ Nowak's position is sound, because there seems to be no reason why Art. 15(1) and Art. 15(2) would refer to different sources of international law.

It is also worth noting that acts can be criminal under customary international law without being directly criminalized by international law itself. As the Article notes, there is no reason why the customary criminality of a particular act cannot be established by a suppression convention, particularly where the widespread ratification of such a convention is accompanied by significant non-party practice.¹⁴ So even if Art. 15(2) is limited to customary international law, it does not necessarily support the DCT.

¹¹ Reisinger Response, 1–2.

¹² MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS – CCPR COMMENTARY, Article 15, marginal 6 (2005) (emphasis mine).

¹³ *Id.* at marginal 24.

¹⁴ *See* Article, 60.

To be sure, Reisinger is no doubt correct when she says that the *travaux* of Art. 15(2) indicate that the provision “aims at eliminating any doubt regarding the legality of the Nuremberg trials and eludes [sic] to the principles of international law recognized by the Nuremberg Charter.”¹⁵ I disagree, though, that those principles include “the direct criminalization of crimes against peace, war crimes, and crimes against humanity (with genocide).”¹⁶ As I explain at length in the Article, UNGA Res. 95(I) was written to reflect states’ inability to agree over the customary status of the Nuremberg Principles¹⁷ – and that disagreement only worsened over time.¹⁸ If states could not agree about direct criminalization when specifically addressing the Nuremberg Principles, it beggars belief to imagine that they adopted Art. 15(2) of the ICCPR specifically to endorse direct criminalization – especially as the drafting of the various documents was essentially contemporaneous.

No retroactivity issue arises, therefore, when a state applies a criminal law to an act that took place before the law was adopted but after the act in question became criminal under conventional international law. Which means that, contrary to Reisinger’s assertion, it is not necessarily the case that “a DCT is revealed when national legislation is retrospect.”¹⁹ Such legislation is valid as long as the act took place after a suppression convention deemed it criminal under international law. National legislation *can*, of course, support direct criminalization – I cite South Africa’s approach to international crimes as an example.²⁰ But we cannot simply infer that support from the retrospective nature of the legislation.

In addition to arguing that I understate support for the DCT, Reisinger also argues that I overstate support for the NCT. In particular, she is skeptical that the domestic criminalization of war crimes, crimes against humanity, and genocide is “sufficient to claim universal criminalization on the basis of national laws.”²¹ Chehtman make a similar point.²² I don’t disagree – which is why I don’t rely solely on domestic criminalization to argue that there is a *jus cogens* obligation to criminalize the international crimes (other than aggression). On the contrary, I cite three other sources of state practice, as well: widely-ratified law-making treaties, unanimous and near-unanimous UNGA Resolutions, and universal jurisdiction provisions that are based on subsidiarity and/or double criminality.²³ It may well be that the totality of the evidence I present is still insufficient to justify the NCT. Again, I specifically acknowledge that possibility in the Article’s conclusion. But nothing in Reisinger’s response shakes my belief that the NCT has a much stronger positivist foundation than the DCT. If that means the NCT “cannot serve as a model to justify the formation of crimes under international law in the Nuremberg era or even in the era of

¹⁵ Reisinger Response, 2.

¹⁶ *Id.*

¹⁷ Article, 27–29.

¹⁸ *Id.* at 30–31.

¹⁹ Reisinger Response, 3.

²⁰ Article, 39.

²¹ Reisinger Response, 4.

²² Chehtman Response, 3–4.

²³ *See* Article at 45.

the ad hoc international tribunals” – as Reisinger claims²⁴ – so be it. As noted above, contemporary ICL may simply be an irremediably naturalist area of law.

Alejandro Chehtman

Like Reisinger, Chehtman claims that I both overstate the positivist foundations of the NCT and understate the positivist foundations of the DCT.²⁵ He begins, however, by questioning my account of naturalism, which emphasizes – quoting Michael Akehurst – that the method derives basic principles of international law “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.” In Chehtman’s view, “[t]his way of framing the discussion seems unconvincing,” because “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.”²⁶

I plead guilty to possibly oversimplifying naturalism. I would simply point out two things: that there is a dearth of overtly naturalist scholarship in ICL; and that judges at the international criminal tribunals have always insisted that their judgments remain true to positivism, which has made ICL jurisprudence largely devoid of the kind of naturalist analysis Chehtman thinks is possible. Perhaps it is possible to mount a naturalist defense of direct criminalization that does not simply substitute the analyst’s political and legal preferences for the actual practice of states. I’m skeptical, but I would be happy to be convinced otherwise.

Now let me turn to Chehtman’s claim that my positivist argument is too generous to the NCT and too uncharitable to the DCT. I have already responded to the claim – which he shares with Reisinger – that national legislation is insufficient to establish a *jus cogens* obligation to criminalize the core international crimes other than aggression. On a related note, I want to emphasize that I do not claim in the Article “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).”²⁷ There is no such general rule; there are simply specific *jus cogens* obligations to criminalize certain specific acts. Only if such an obligation exists can an act legitimately be called an international crime.

Cehtman’s more basic criticism is that I am wrong to explain universal jurisdiction as a consequence of a state’s failure to live up to an international obligation to criminalize a particular act. That explanation is critical to my argument, because I view universal jurisdiction as the necessary and sufficient condition of an act qualifying as an international crime – a stark difference between the NCT and the DCT, the latter of which views universal jurisdiction as a *consequence* of international criminalization. Here is what Chehtman says:

²⁴ Reisinger Response, 5.

²⁵ Chehtman Response, 2.

²⁶ *Id.*

²⁷ *Id.* at 3.

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. 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.²⁸

Chehtman’s characterization of the evidence I cite in support of my explanation of universal jurisdiction is somewhat misleading. To begin with, I don’t rely solely on “the opinion of a publicist”: I cite the Harvard Research Project’s Draft Convention on Jurisdiction; two WW II-era international judgments, *Hostage* and *Einsatzgruppen*; one modern national judgment, *Zimbabwe Torture Docket*; and six legal theorists – including Chehtman himself.²⁹ All condition the exercise of universal jurisdiction on a state’s failure to criminalize and prosecute a particular act. It is true that I cite fewer sources when I discuss the role *erga omnes* obligations play in universal jurisdiction. But that is simply because I am speculating about what international law mechanism can explain why so many states condition their willingness to exercise universal jurisdiction on the territorial state’s failure to criminalize and/or prosecute a particular act. Moreover, even in my *erga omnes* discussion I rely on more than just one publicist – I cite six scholars, the UNHCR, Germany’s Federal Constitutional Court, the ECtHR, and the ICTY.³⁰ All emphasize the connection between universal jurisdiction and *erga omnes* obligations.

More importantly, though, I cite considerable state practice in support of my explanation of universal jurisdiction. I will not repeat that discussion here, other than to reiterate that 59 states see universal jurisdiction as a consequence of the territorial state’s failure to criminalize and/or prosecute a particular act. 28 of those states require the act to actually be criminal in the territorial state, while the other 31 are also willing to exercise universal jurisdiction when the territorial state is unable to prosecute the act because it has failed to incorporate the relevant international crime into its penal code.³¹

I could be wrong, of course, that this state practice supports the NCT. Perhaps states view universal jurisdiction as subsidiary to territorial jurisdiction only as a matter of policy: they *could* prosecute the act in question even when the territorial state is doing

²⁸ *Id.*

²⁹ *See* Article, 53–55.

³⁰ *Id.* at 56–58.

³¹ *Id.* at 52.

so – because that act is directly criminalized by international law – but simply choose not to. That view, however, is difficult to reconcile with the fact that the 59 states have formally incorporated subsidiarity into their national legislation. Such incorporation seems to indicate that they view subsidiarity as legally required by international law, not simply as a matter of choice.

Chehtman also believes that I understate the state practice that supports the DCT. Here, for example, is what he says about Colombia and Argentina:

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. 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. 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”. These decisions not only support the DCT, they are clearly incompatible with the NCT.³²

Chehtman is far more knowledgeable than I about Colombian and Argentinian law, so I will assume that “international prohibitions contained in customary international law” and “crimes against the law of nations” include only acts that are directly criminalized by international law. I would like to see evidence, however, that neither state prosecutes acts prohibited by a suppression convention on a similar basis. As discussed above, customary international law can deem acts criminal without directly criminalizing them. Moreover, it is interesting to note that Colombia views universal jurisdiction as a subsidiary form of jurisdiction and only exercises universal jurisdiction on the basis of treaties that require it. Those limitations are difficult to reconcile with the idea that Colombia accepts direct criminalization: if international law directly criminalizes acts that qualify as international crimes and direct criminalization carries with it universal jurisdiction, why would Colombia not exercise universal jurisdiction over crimes against humanity?³³

In the end, though, I don’t think Chehtman is particularly interested in arguing that, from a positivist perspective, the DCT provides a better explanation of international criminalization than the NCT. On the contrary, here is how he thinks we should determine which acts qualify as international crimes:

³² Chehtman Response, 4–5.

³³ See AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD – 2012 UPDATE 12 (2012). A similar problem undermines Chehtman’s invocation of the *Yunis* case, decided by a federal district court in the United States. Chehtman Response, 5. The U.S. is one of the many states that refuses to exercise universal jurisdiction in the absence of a treaty requirement. See Article, 69.

[T]he 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 enquiry at hand that we are able to fully grasp why the DCT enjoys such preeminence among contemporary international lawyers.³⁴

This explanation bears little resemblance to any form of positivism, because it completely disconnects the substance of ICL from state practice. But it also bears little resemblance to any form of naturalism, because instead of deriving international crimes deductively, on the basis of principles of justice, it simply outsources international criminalization to judges. International crimes are what judges say they are, regardless of state practice and principles of justice. Such a radical view may be edifying for the judges themselves, but I dare say it will hardly satisfy anyone else.

³⁴ Chehtman Response, 5.