The Legal Foundation for Criminalizing International Crimes: A Response to Kevin Jon Heller

Mia Swart[1]

International criminal lawyers, and the international law community more broadly, routinely refer to "international crimes" without analyzing what this rather controversial term means. The foundation for such criminalization is rarely considered. For a term that carries such heavy legal and symbolic weight, this is unfortunate, even careless. The term is often loosely used with the same unthinking regularity as terms such as "mass atrocities," "universal condemnation," and so forth. Kevin Jon Heller offers welcome and much-needed scrutiny of the term "international crimes" in his article "What is an international crime?" in which he asks, essentially, what it is that makes an international crime an international crime.

Heller agrees with the argument that what makes an international crime distinctive is the fact that it involves an act that international law deems universally criminal. He asks how exactly an international crime becomes universally criminal under international law and formulates two possible answers: the Direct Criminalization Thesis (DCT), which holds that certain acts are universally criminal because they are directly criminalized by international law itself, and the National Criminalization Thesis (NCT), which rejects the idea that international law bypasses domestic law by directly criminalizing particular acts. The NCT holds that acts qualify as international crimes because international law obligates every state in the world to criminalize and prosecute these particular crimes.

Heller writes that the choice between the two theories depends on whether we adopt a naturalist or positivistic approach to international law. Heller essentially argues that the only acceptable and legally justifiable basis for the criminalization of international crimes is to support the NCT, which he describes as a positivistic approach. He describes the DCT as akin to the naturalist position. One of the key differences is that under DCT, acts can be criminalized even in the absence of state consent.

This response will evaluate Heller's argument. It will be argued that although the positivistic approach is more palatable to international lawyers of civil law sensibility and fits better with the demand that law should satisfy certain objective expectations such as the principle of legality, 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.

In juxtaposing the positivistic and the naturalist approaches, Heller invariably invokes the Hart-Fuller debate of the 1950s which was similarly rooted in the question of how the criminal law should approach crimes of a universal nature in the absence of domestic criminalization of these crimes.[2] Fuller argued that law embodied an inner morality of its own.[3] 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. But even positivists allow for a measure of natural law thinking. H.L.A Hart famously argued that people are more likely to comply with law if one does not assume

[1] Research Director, Human Sciences Research Council; Visiting Professor, University of the Witwatersrand.
[2] *See generally* H.L.A Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 325 (1958); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 325 (1958).
[3] *See* LON L. FULLER, THE MORALITY OF LAW (1964)

that nothing called law can be morally wicked or unjust.[4] What is important about naturalism is its relationship with the claims about the universality of the law. The roots of this idea can be found in the work of Aristotle, who wrote of the natural as having "the same validity everywhere alike, independent of its seeming so or not"[5] and that "natural justice stays the same from society to society."[6]

Heller takes a particularly skeptical view of naturalism as the basis for DCT. He cites Cryer, who believes that natural law, because if its vagueness and indeterminacy, violates the principles of legality.[7] Heller rejects natural law as forming a basis for criminalization via the NCT, partly because he (rightfully) argues that natural law is obscure. But naturalism is no more obscure than concepts within international law itself—most prominently the concept of customary international law[8] and, many would argue, the principle of *ius cogens*.[9] The ICC Statute is further riddled with vague and indeterminate concepts such as "gravity" and the "interests of justice."

In line with his support for NCT, Heller strongly supports international customary law as the basis for criminalization.[10] But employing customary international law as the foundation for NCT injects more uncertainty than certainty into this debate, since custom as source of lawmaking is equally controversial and open to subjectivity (and therefore to political mingling). I share Michael Reisman's skeptical view of custom as a key lawmaking device. Reisman highlights the politics inherent in the exercise of finding custom: "The critical factor in the establishment of custom is the relative power imbalances . . . and the intensity of the interest they have in securing certain outcomes."[11]

Heller makes much out of state consent, but the small amount of countries that have criminalized 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. This is especially true of the crime of aggression, which has been criminalized in very few states. If the operationalization of the crime of aggression depended on the extent to which it was criminalized domestically, it would be a dead duck.

From the earliest days of international criminal law's revival in the 1990s (through the establishment of the International Criminal Tribunal for the former Yugoslavia and the subsequent establishment of the Rwanda Tribunal), the *ad hoc* international Tribunals struggled to justify their findings through custom. In the context of the ICTY, the judges' overreliance on *opinio juris* (as a means of compensating for the thin state practice) has been severely criticized by scholars such as Mettraux.[12] In the context of the ICTY this was particularly problematic, since the ICTY had to base its subject matter jurisdiction in

---

[4] *See* Benjamin C. Zipursky, *Practical Positivism Versus Practical Perfectionism: The Hart-Fuller Debate at Fifty*, 83 N.Y.U. L. REV. 1170 (2008).
[5] ARISTOTLE, NICOMACHEAN ETHICS 1134b20
[6] Larry May, *International Criminal Law and the Inner Morality of Law*, VIMEO (Sept. 25, 2009), http://digitalcommons.osgoode.yorku.ca/legal-philosophy/23/.
[7] Robert Cryer, *The Doctrinal Foundations of International Criminalization*, in INTERNATIONAL CRIMINAL LAW: SOURCES, SUBJECT AND CONTENT 127 (M. Cherif Bassiouni ed., 2008).
[8] *See generally* Michael Reisman, *The Cult of Custom in the Late Twentieth Century*, 17 CAL. W. INT'L L.J. 133 (1987).
[9] See Andrea Bianchi, *Human Rights and the Magic of Ius Cogens*, 19 EUR. J. INT'L L. 491, 496 *European Journal of International Law* (2008).
[10] Heller however argues that custom is not the only source the ICTY can refer to. In his view the Tribunal is free to use other sources if it does not violate the *nullum crimen* principle. *See* Heller, *Two Thoughts on Manuel Ventura's Critique of Specific Direction*, OPINIO JURIS (Ja 2014)
[11] Reisman, *supra* note 7.
[12] GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 13 (2006).

customary international law.[13] In straining to find custom, many have argued that the Tribunals violated the principle of legality.[14] Custom is furthermore anything but apolitical. As Cassese has acknowledged, states participate in custom not for the primary purpose of laying down international rules but to safeguard some economic or political interest.[15]

Should positivism become the yardstick, it is doubtful that even the crime of torture (probably the most widely domesticized crime) will satisfy the custom requirement. In spite of the near-universal domestication of the crime of torture, very few states actually prosecute torture.

Heller further raises the acutely important question of what *kinds* of acts qualify as international crimes. The seeming randomness of this categorization raises the question of the selectivity and possible arbitrariness of international criminal law. The identification of international crimes is one aspect of the selectivity of international criminal tribunals—a question that has been widely commented on.

The initiative taken by the drafters of the Malabo Protocol to establish a regional criminal court that would adjudicate international crimes is relevant here. The yet-to-be-operationalized African Court of Justice and Human Rights (colloquially referred to as the African Criminal Court) will have subject matter jurisdiction that extends beyond the current quartet of core international crimes—this Court (should it receive the required number of ratifications)[16] will also entertain jurisdiction over crimes such as terrorism, human trafficking, and piracy. This proposed extension of the category of international crime strengthens the need for a cogent explanation for the nature of international crimes and the basis for its criminalization.

Few would disagree with the proposition that we should strive for an international criminal system in which domestic states take the lead in criminalizing and prosecuting. For the moment, the reason why international crimes cannot be founded in the position or practice of states is that states, overwhelmingly, have not implemented their obligations under the ICC Statute, Conventions such as UNCAT, or relevant customary international law. Even countries that claim to support the domestic criminalization of international crimes have not provided for the criminalization of crimes such as torture in their domestic legislation. South Africa, until recently a leading supporter of the ICC on the African continent, only criminalized torture in 2014.[17] As I have attempted to demonstrate, positivism in international criminal law relies on concepts that cannot make a significantly stronger claim to certainty and empiricism than natural law. I argue that positivism and naturalism are not mutually exclusive and can exist side by side.

The language and philosophy of naturalism is irretrievably lodged in international criminal law, as Heller himself illustrates by citing strings of scholars, courts, and pronouncements of states that have used the vague language of naturalist universalism that clearly holds irresistible appeal. In a widely diverse and pluralistic international setting, adopting the positivistic approach might seem like the prudent and more neutral, apolitical option, but until international crimes are domestically criminalized on a much wider scale, we have to make room for naturalism with all its claims (or pretensions) to morality, normativity, and universality. One simply cannot take the naturalism out of international criminal law or out of the reasons we believe international crimes are international crimes. At most, one can,

---

[13] *See* Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 48th Sess., ¶ 34, U.N. Doc. S/25704 (1993).

[14] *See* MACHTELD BOOT, NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2002).

[15] ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 119 (2003).

[16] Article 7, Protocol on the Statute of the African Court of Justice and Human Rights, 2008.

[17] Prevention and Combating and Torture of Persons Act (13 of 2013).

as Heller has done, scrutinize these assumptions about an issue foundational to our discipline with much more vigor and rigor.