

Philosophy at Washington University in St. Louis, has written a masterful and thoughtful book which aims to remedy that gap: in a clear and accessible manner, the book covers several conceptual issues in international criminal law. The present review will, however, only concentrate on the question that is the thread running through the entire work; namely, why is it permissible for some acts to be tried internationally?

As a preliminary matter, May seeks to establish the source of law that provides for international criminal responsibility. He concentrates on *jus cogens* norms, which he views as being 'of such transparent bindingness that no individual can fail to understand that he or she is bound by them' (at 64). These norms must therefore be 'the principal basis for the justification of international prosecutions for genocide and crimes against humanity' (at 25). By the same token, May refutes 'the main alternative view in international law – namely that customary norms can ground international criminal law' (*ibid.*). This distrust for customary law has to do with May's position that *jus cogens* cannot derive from consensually-based custom. But even if one accepts this view, it does not necessarily mean that *jus cogens* and custom are alternatives for grounding international criminal law. Although the criminalization itself may have its source in *jus cogens*, customary international law may serve to specify the elements of each crime.

The book's main argumentative thrust, however, is concerned with the substantive question as to why certain crimes could, and should, be internationally prosecuted. According to May, an international prosecution is warranted when the offence meets the requirements of what he calls the 'security principle' and the 'international harm principle'. The starting point is that sovereignty, and the leeway it provides for a state in its internal actions, must be set aside to allow for international criminal trials when the state is either unable or unwilling to protect individuals from harm, or worse still, is the one attacking its subjects' physical security or subsistence.

Larry May. ***Crimes against Humanity: A Normative Account.***  
Cambridge: Cambridge University Press, 2005. Pp. 326. £17.99/£40.00. ISBN 0-521-84079-1; ISBN 0-521-60051-0.

Few books have tried to bridge the gap between international criminal law and philosophy. Larry May, a lawyer and Professor of

This argument – inspired by Grotius and Hobbes, and forming the essence of the security principle – is rather compelling. If serious violations of human rights are increasingly suggested as grounds for an outright military intervention in a sovereign state, prosecuting those responsible for such violations abroad would surely be acceptable *a fortiori*.

But May possibly misplaces the emphasis of his argument. In his opinion, international criminal tribunals ‘offer a challenge to the sovereignty of States, which had previously had *exclusive jurisdiction* over the putative criminal conduct of *their individual members*’ (at 21, emphases added). The idea of exclusive jurisdiction is, however, ill-founded as international law generally does not recognize the exclusive jurisdiction of a state over its nationals (e.g., a person travelling to a foreign country clearly also becomes subject to the latter’s jurisdiction). The crux of the matter, I would argue, is elsewhere and lies in the fact that, through judging the state’s agents in the exercise of their duties, an international criminal tribunal may be regarded as judging, albeit indirectly, the state itself.<sup>1</sup> Given that a state cannot be submitted to adjudicatory procedures against its will, stripping state officials of their immunities offers more of a challenge to sovereignty than the general idea of prosecuting individuals internationally.

Another interesting problem is that of the forum: Why should the failure of a state to protect its subjects legitimize the intervention primarily by an international body, and perhaps not by another state? May goes so far as to suggest that domestic prosecutions of international crimes should really be seen as ‘stand-in trials for trials of international tribunals’ (at 79). One of May’s arguments is that crimes against humanity ‘are not normally recognized as crimes by the criminal statutes that govern domestic tribunals’ (at 79). This, however, is a circumstantial, not a principled

argument, and it is becoming increasingly less true (crimes against humanity are today widely recognized in domestic statutes). More convincingly, May relies ‘on the plausible assumption that State sovereignty is more jeopardized when another sovereign State “crosses its borders” than when an international body does so’ (at 69).<sup>2</sup> This is indeed a reasonable premise but states exercising universal jurisdiction will claim to be exercising jurisdiction on behalf of the international community so that the suspicion of interference is partly minimized. As the Supreme Court of Israel famously held, for example, while affirming the conviction of Adolf Eichmann, in trying him, Israel was acting ‘in the capacity of a guardian of international law and an agent for its enforcement’.<sup>3</sup> Moreover, May seems to neglect the fact that the International Criminal Court (ICC) is generally accepted as complementing domestic legal systems, which would presumably include domestic trials conducted on the basis of universal jurisdiction.<sup>4</sup>

The security principle, taken on its own, might suggest that an isolated incident of violating a person’s human rights warrants scrutiny by an international criminal tribunal. May argues against this possibility, on the grounds that ‘international criminal prosecutions risk loss of liberty to the defendants, a loss that is of such potential importance that it should not be risked unless there is also harm to the international community’ (at 70). Yet such a risk is in no way characteristic of international trials, but rather of all trials of serious crimes. Compared to proceeding before domestic courts, international trials constitute no greater ‘threat’ to the defendant. Sometimes, in fact, the contrary is true: persons tried by the International Criminal Tribunal for Rwanda (ICTR) face, at the most, a stiff prison

<sup>1</sup> See along these lines, e.g., Morris, ‘High Crimes and Misconceptions: The ICC and Non-party States’, 64 *Law and Contemporary Problems* (2001) 13, esp. at 16–26.

<sup>2</sup> ‘Crossing borders’ is used here in a more figurative than literal sense (see note 4, at 259, and note 18, at 267).

<sup>3</sup> *Attorney-General of Israel v. Eichmann*, Supreme Court of Israel, 29 May 1962, 36 ILR (1968) 277, at 304.

<sup>4</sup> See Art. 17, Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 90.

sentence, whereas persons convicted for similar crimes by Rwandan courts might get the death penalty. There are, however, other grounds that warrant cautious employment of international trials – judicial economy, for one, springs to mind. International trials are extremely complicated, for linguistic, logistical and other reasons, which add to the length of the trial, thereby casting doubt on the fundamental right of the accused to a trial within a reasonable time.

At any rate, international trials based solely on the security principle would clog up any conceivable international criminal justice system. Therefore, if for no other reason, an additional justificatory principle is essential. According to May, what is necessary is a 'serious harm to the international community', which 'normally . . . will require a showing of harm to the victims that is based on non-individualized characteristics of the individual, such as the individual's group membership, or is perpetrated by, or involves, a State or other collective entity' (at 83, emphasis in original). In other words, this international harm principle requires that the crime be 'group-based', whether on the side of the victim or the perpetrator.

As regards the victim, May argues that when 'an individual person is treated according to group-characteristics that are out of that person's control, there is a straightforward assault on that person's humanity' (at 85). Therefore, the key component of the harm principle is that a person be treated 'in a way that is individuality-denying' (at 86). This clearly makes sense as regards genocide which, by definition, is directed against a particular group, dehumanizing the individual victim. However, it is not immediately clear that group-characteristics are relevant to crimes against humanity. This matter is dealt with – in what is probably the most fascinating part of the book – when May examines 'how an attack by one individual on another individual could be seen as also an attack on a whole population, and ultimately an attack on humanity itself' (at 121). The problem of individual responsibility is indeed a formidable

one: 'an individual act of murder, torture, or rape that is being prosecuted as a crime against humanity cannot itself have either systematicity or widespreadness', which are the defining criteria of crimes against humanity (at 123). Partly to satisfy his theory of the group-characteristics of victims, May suggests that a discriminatory intent is required on the part of the perpetrator, i.e. an 'intent to harm an individual because of that individual's group membership' (at 125). While sharing May's worries that a mere *knowledge* of a systematic or widespread attack might not be sufficient to tie an individual's actions to that attack, it is difficult to accept that such acts are necessarily directed against an identifiable group.

Discriminatory intent is certainly required for the crime against humanity of persecution as this involves the deprivation of fundamental rights 'by reason of the identity of the group or collectivity'.<sup>5</sup> However, in the case of other crimes against humanity, such an intent is not necessary.<sup>6</sup> Even though the ICTR Statute requires that crimes against humanity be committed 'on national, political, ethnic, racial, or religious grounds',<sup>7</sup> this should not be seen as part of the definition of the crime, but rather as a restriction on that particular tribunal's jurisdiction.<sup>8</sup>

A similar problem arises from the discussion of the group-characteristics of the perpetrator. According to May, when a state is 'assaulting a person, either through an official representative of the State . . . or because of some State-sponsored plan' then 'there is an opening for prosecution by an international tribunal' (at 88). In line with this, the Rome Statute requires that crimes against humanity be committed 'pursuant to or in furtherance

<sup>5</sup> See Art. 7(2)(g), Rome Statute.

<sup>6</sup> See *Prosecutor v. Tadić*, Case No. IT-94-1, ICTY Appeals Chamber, 15 July 1999, especially at paras 273–305. See also May's own discussion of this case at 132–138.

<sup>7</sup> Art. 3, Statute of the International Criminal Tribunal for Rwanda, annexed to SC Res. 955, 8 November 1994.

<sup>8</sup> See, e.g., G. Werle, *Principles of International Criminal Law* (2005) 219.

of a State or organizational policy'.<sup>9</sup> However, such a policy is not an element of the crime: the International Criminal Tribunal for the Former Yugoslavia (ICTY) has found it not to be necessary to prove the existence of such a plan or policy, although doing so may help to establish the widespreadness or, especially, systematicity of the attack.<sup>10</sup>

Thus the inclusion of the plan or policy requirement in the Rome Statute and the discriminatory intent criterion in the ICTR Statute go to show that it may be prudent to place additional limitations on competence of international tribunals.<sup>11</sup> But the same considerations should not necessarily be extended to the very notion of crimes against humanity and thus to trials before domestic courts. May's arguments might thus be extremely relevant as to international trials, but not immediately to the concept of crimes against humanity, although that is what the title of the book seems to hint at.

May also tries to extend the group-based criterion to other international crimes that violate *jus cogens* norms (at 87). This admittedly works very well in the case of genocide, as was noted above. It applies equally well to apartheid, which involves inhuman acts committed with a view to systematically oppressing a racial group,<sup>12</sup> and to torture, as a separate international crime, which involves the participation of someone in public authority (thus being group-based on the side of the perpetrator).<sup>13</sup> However, reading that '[s]lavery

is the mistreatment of a people, including the denial of a people's right to self-determination' (at 87) makes one wonder. While history may support such an understanding of slavery in layman's terms, modern international law does not; slavery being most commonly defined as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'.<sup>14</sup> Thus, neither the victim nor the perpetrator needs to belong to an identifiable group. Furthermore, May's theory suggests that terrorism cannot be an international crime *stricto sensu* because it is not perpetrated against an identifiable group (but most often a completely random group of individuals) and possibly by a single terrorist. Yet there can be no question that terrorism in its randomness is precisely 'individuality-denying' and at the same time harms the international community as a whole.

This brief review cannot do justice to such an expansive book, which provides valuable insights into several important issues in international criminal law. It must be said, however, that May has achieved the goal that he set for himself, namely to inspire people who work in the fields of international criminal law and philosophy 'to think harder than they have about the momentous changes in international criminal law that are occurring' (at 257).

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<sup>9</sup> Art. 7(2)(a), Rome Statute.

<sup>10</sup> *Prosecutor v. Kumarac et al.*, Case No. IT-96-23 & 23/1, ICTY Appeals Chamber, 12 June 2002, para. 98, and further references contained therein.

<sup>11</sup> See also Werle, *supra* note 8, at 226–230.

<sup>12</sup> See Art. 2, International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243.

<sup>13</sup> See Art. 1(1), Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.

<sup>14</sup> See Art. 1(1), Slavery Convention, 25 September 1926, 60 LNTS 253 (emphasis added).