

Crimes Against Humanity: A Normative Account

by Larry May, Cambridge University Press, 2004, 310. pp

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Larry May has written a book on crimes against humanity that provides careful analysis of the core issues for anyone – whether lawyer, moral or political philosopher, or plain citizen – interested in this subject. The book is divided into four parts. In the first two, May explores the philosophical underpinnings of the concept of crimes against humanity, arguing for his own preferred version of it, and he examines some of the most relevant norms of international law. The third and fourth parts are then concerned with matters of (roughly) application: here he discusses, amongst other topics, difficulties in prosecuting individuals putatively responsible for crimes against humanity (including genocide), the idea of the international rule of law, and what there is to be said for amnesty and reconciliation programmes. Although there is much of interest in these later sections of the book, my review will focus on the argument of its first two parts: that is, on the philosophical case the author lays out and the normative principles central to it. His approach to thinking about crimes against humanity is, so I shall contend, at once instructive and flawed.

Widely used though the expression now is, ‘crimes against humanity’ is a term of art. The idea which it has come to stand for emerged within international law only during the twentieth century, its meaning is not transparent, and it has no ‘natural’ boundaries. This is not to say that the concept of crimes against humanity is not a useful or important one. On the contrary, it is vital. But its development in law and the critical discussion of it amongst legal theorists and others – which also counts as part of that process of development, since the law generally develops in dynamic interaction with informed legal and philosophical opinion about it – amount to an exercise in constructive elucidation. From the very beginning the concept of crimes against humanity has had to find (or, rather, be supplied with) a content that could be coherently justified and defended.

To illustrate the point we may go back to the Nuremberg Trials. These mark the official entry of the offence of crimes against humanity into the instruments of

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international law, albeit after a long prehistory within the traditions of moral, political and legal thought, and of the 'law of nations' itself. One of the crucial norms taken to have been established by the Nuremberg Trials was that there are constraints upon what governments may permissibly do to people under their jurisdiction. As this thought was articulated by Sir Hartley Shawcross, the Chief Prosecutor for the United Kingdom at Nuremberg:

[I]nternational law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind... [T]he right of humanitarian intervention by war is not a novelty in international law – can intervention by judicial process then be illegal?

Yet, as is also well known to anyone who has studied the subject, this principle was initially qualified (and many would say compromised) by the link that the Nuremberg Charter set up between the new offence and the context of war. The illogic in so circumscribing crimes against humanity was already clear to critics at the time: if there are limits on the sovereign authority of any state vis-à-vis those within its jurisdiction, such limits have no intrinsic connection with a condition of war between nations. Atrocities against individuals or groups may be more likely in wartime, but they are also perfectly possible outside it. Apart from an exaggerated respect for the principle of state sovereignty, there is no compelling reason why the more grievous assaults against people by governments or other political organizations should not be treated as criminal where their context is civil conflict or political repression rather than a war between states. Larry May for his own part (p. 119) notes the fact that in the evolution of international law, the 'war nexus' set up by the initial definition of crimes against humanity at Nuremberg has progressively fallen away.

In a world of more transparent simplicity and perfect justice there might be a clean fit between the state of the law and its presumed moral basis. Such is not, however, our world – in which nearly everything is messier, and the relationship of law to morality and justice more complicated. Given how the offence of crimes against humanity emerged into international law (over time, haphazardly, subject to political imperatives and political constraints, and within an area of law of controversial status in any case), discrepancies between the legal state of affairs and any consistent set of justifying norms are as likely here as anywhere.

In these circumstances the best one can do, and the task of legal and political philosophy, is to aim for a conception of crimes against humanity that, building on the principles at its foundation, makes sense in its own terms and is internally coherent. Where there appear to be discrepancies between such an ideal theoretical conception and the actual state of international law, one is then called upon to look for the adjustments that may be necessary. It could be that what a particular discrepancy between theoretical conception and the state of international law reveals is a shortcoming in the latter, so vindicating the former in its function as critical normative idea. Or it could be, alternatively, that there are empirical complexities accounting for why the ideal theory cannot map neatly on to the law as it is, but in accommodating which pragmatic rather than fundamental adjustments to the theory will suffice. Or it might be, finally, that the lack of fit between ideal conception and legal reality indicates a basic fault in the conception, requiring it to be abandoned or at least seriously revised.

There is, however, a certain danger to be noted here, a danger of what I will call 'definitional realism': I mean by this a temptation to treat current legal realities as themselves so regulative of what the ideal conception must match, to track the state of the relevant body of law so closely in trying to devise a viable concept of crimes against humanity, that this concept risks losing its critical function. Not only that, but if there are normative weaknesses within the prevailing framework of law, the danger is then also one of supplying justifications for them that are correspondingly weak.

In my view Larry May's book is open to criticism on this count. It is not that his argument cleaves to the actual state of the law in every point. It does not. (See, for example, what he says in chapter 7 about 'discriminatory intent'.) But in a crucial and damaging way it does, and his conception of crimes against humanity is thereby pressed towards defending assumptions that are morally and philosophically arbitrary. How this comes about is instructive, all the same; for it is the product of a tension that has been at the heart of the thinking about crimes against humanity since the inception of the offence.

I have already quoted the words of Sir Hartley Shawcross at Nuremberg about the 'limit to the omnipotence of the state' and the reason for this: namely, 'that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind.' This principle, pervasive in the international

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humanitarian law literature, finds early and repeated expression in May's Crimes Against Humanity. There are violations of the rights of human beings that are so severe, so harmful, and so outrageous, that the normal – and necessary – claims of state sovereignty cannot justify them. May writes, for example (p. 6), of crimes against humanity being:

crimes committed by individuals against other individuals that are so egregious as to harm all of humanity and hence to call for international prosecution.

I set aside (and will return to) the idea of such crimes harming 'all of humanity.' For the time being I want merely to note that the act-type of a crime against humanity is characterized by May in terms of its severity as a violation of individual human rights. The severity is germane. Not just any infraction of rights will fit the bill. May is clear and insistent about this from the outset. Thus, he writes (p. 12):

I will defend a moral minimalist position in international law where the limit of toleration [that is, toleration of 'societal differences... in setting moral standards and making and enforcing laws' - NG] and sovereignty is reached when the security of a State's subjects is jeopardized.

Or again, he presents his moral minimalism so (p. 25):

This view holds that there is a basic minimum of individual rights that States must protect if their subjects are to owe the State obedience to law.

Now, what should be regarded as making up the moral minimum will inevitably be the subject of debate and of possible disagreement at the boundary. Still, there is likely to be a substantial measure of agreement on what makes up its core. May himself specifies the general nature of this core in holding (p. 68) that when a state 'deprives its subjects of physical security or subsistence, or is unable or unwilling to protect its subjects from harms to security or subsistence,' it loses its right to prevent international bodies from crossing its borders for remedial purposes, and such bodies may then be justified in doing that. According to him, the same basic human rights which justify state sovereignty as an institutional necessity in providing people with the elementary protections and provisions of life, also explain the limits to state sovereignty. He says (p. 34):

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Rights that are grounded in the moral minimum are crucial for explaining both the authority of sovereigns and the limitation on sovereignty that occurs when sovereigns cannot, or choose not to, protect basic human rights. This points to the need for international criminal law as *a source of protection for those individuals who are either attacked by their States, or whose States fail to protect them from other individuals or groups.* [My italics.]

All of this is, so far, clear. Elsewhere I have myself argued that crimes against humanity may be defined as offences against the human status or condition that lie beyond a certain threshold of seriousness. The idea of an offence against the human status or condition – expressed by the French Chief Prosecutor at Nuremberg, M. François de Menthon – can be taken as another way of articulating the notion of an assault upon a person’s most basic human rights (and, behind these, interests); and the idea of a threshold of seriousness or moral gravity can be taken as embodying something similar to May’s requirement of moral minimalism. May calls the principle I have just briefly summarized here the security principle.

The problem, however, is that he does not see this principle as sufficient to his conception of crimes against humanity, proposing a second one to complement it. There can be no objection to that in itself, of course. There is nothing wrong with deploying complementary principles. The problem arises because May’s second principle actually subverts part of what the first principle was supposed to defend. He calls his second principle the international harm principle, and what it says in a nutshell is that for an offence to qualify as a crime against humanity it must constitute a harm to all of humanity or (as he mostly seems to mean by this) to the international community. He writes (p. 82):

[W]hat sets paradigmatic international crimes apart from domestic crimes is that, in some sense, humanity is harmed when these crimes are perpetrated.

Again (p. 100):

International prosecutions are conducted... in order to signify the importance or magnitude of the offences for all of humanity.

Then, here (p. 70) he explains why the first of his two principles, the security principle, is not alone sufficient to justify prosecuting individuals:

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This is because 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 a harm to the international community.

Once more (p. 80):

To offset the possible injustice done to defendants by incarceration there must be a correspondingly important injustice to the international community...

Now, there are two interesting issues in this that I will merely register without trying to resolve, since, whatever is the best way of resolving them, they are tangential to the matter I want to pursue. First, if by harming humanity May means harming all of humankind, it is not clear that most of the acts thought of as crimes against humanity do in fact do that. I believe there is a possible meaning, in this context, for a harm that is to 'all of humanity' – namely, terrorizing human beings in their generality – but whether the torture of people in, say, Zimbabwe fits this meaning by harming the population of, say, Sweden, is at least debatable. Second, one can conceive of cases of crimes against humanity under existing international law that, confined within a particular territory, would not harm the international community – except in so far as any violation of law might be said to harm its relevant community just by undermining respect for the law. But because of the very breadth of it, this consideration does not provide us with a criterion for distinguishing those acts which should be brought within the purview of international humanitarian law as prosecutable and punishable (those acts in other words which should be made crimes against humanity) from those acts which should not.

Leave these issues behind, however. The problem May's second principle creates for his first principle may be stated succinctly thus: if an act is only to count as a prosecutable crime against humanity when it harms all of humanity, or harms the international community, then it will not be true to speak of crimes-against-humanity law – in the way that May has – as 'a source of protection for those individuals who are either attacked by their States, or whose States fail to protect them from other individuals or groups.' Sometimes yes, but sometimes no – depending on whether humanity or the international community can also be shown to have been harmed. We will see shortly that this is indeed May's meaning, when I come to what he regards as establishing that wider, more global harm. But I dwell for a moment on the clash between his two principles here, since the problem it highlights is both central to what follows and endemic within the literature and body of law

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under discussion. If a violation of individual human rights has to rise to the level of harming the international community, or all of humankind, before it comes within the compass of the law on crimes against humanity, then (to go back to the words of Sir Hartley Shawcross) 'the individual human being, the ultimate unit of all law' will, under that law, often be 'disentitled to the protection of mankind' when his or her most important rights are violated, and however 'egregious' (May's generic description) the 'crimes committed by individuals against other individuals' are. It will then not be true that, in May's words (p. 75):

... there are rights that people have by virtue of being human, and... certain of these rights cannot be waived.

Or, if it remains true in some loose sense, it will not be effective as part of the law on crimes against humanity.

If we now ask what is the reason why May permits the apparent (human rights) content of his security principle to be compromised and undermined by the international harm principle, this may appear at first, as intimated above in passages from his book I have already quoted to establish other points, to be a concern for the interests of defendants in crimes-against-humanity trials. He writes, for example, of the need to distinguish between human rights that are relevant to international criminal law and those that are not, and goes on (p. 71):

Failure to make this distinction means that people will be tried, and will risk serious deprivation of their liberty rights, even though their acts, did not cause a corresponding deprivation of liberty rights, or their moral equivalent, for their victims.

One can, however, respect this constraint within the scope of the security principle taken on its own – trying people in international tribunals for, say, enslavement, murder, torture, severe deprivation of physical liberty, and not for interfering with someone's right to a paid annual holiday (May's example.) Being himself aware of the point, May makes it clear in other passages that the concern for the interests of defendants entails a more demanding requirement than mere gravity of the harm to the victim. He says (p. 82):

[S]ince significant harm is risked to the defendant in a criminal trial such trials should only be conducted when the defendant is accused of causing

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similarly serious harm to others. And not all serious harm to individuals [italics mine] should be prosecuted as a violation of international law. We should be very reluctant to countenance international tribunals prosecuting individualized crimes rather than those concerning groups of people and protected classes of people.

Perhaps we should and perhaps we should not. I will come back to this. But we can now see, in any case, that May's international harm principle is not there to protect the interests of defendants against deprivation of their liberty for insufficiently grave rights violations; and it is altogether unclear clear why the interests of defendants should need the very high protective threshold they do, of (for short) a harm of global scope. It is not clear why the possibility of an injustice to defendants has to be matched by 'a correspondingly important injustice to the international community', rather than just a correspondingly important injustice to the victims. Unless some good reason can be given for this, the stipulation appears merely arbitrary. And even were there to be a good reason for it, it has knocked a serious hole in the security principle, as the last-quoted passage plainly shows.

Before I get to what I believe to be the background – the effective – reason for this undermining of the security principle by the international harm principle, I want to highlight another argument of May's in formulating the international harm principle that I find philosophically unconvincing and morally arbitrary. It relates to the distinction we have just seen him make between 'individualized crimes' and 'those concerning groups of people and protected classes of people.' This is central to the meaning of the international harm principle in that, for May, it is only the 'group-based' nature of an offence that makes it an offence against humanity, under the meaning of 'humankind' or of 'the international community.' Hence (p. 117):

For an act to be so heinous as to be called a "crime against humanity," that crime must be directed not merely against individuals but against social groups and, in a sense, the whole of humanity.

Note the 'in a sense.' Here it is again (pp. 85-6):

Humanity is a victim when the intentions of individual perpetrators or the harms of individual victims are based on group characteristics rather than on individual characteristics. Humanity is implicated, and in a sense victimized, when the sufferer merely stands in for larger segments of the population who

are not treated according to individual differences among fellow humans, but only according to group characteristics.

This group-based aspect of the international harm principle May connects to ‘the idea that international crimes are those that are widespread or systematic’ (p. 80), and there is no question that in doing so he faithfully mirrors an important component of the law on crimes against humanity as it has developed. From the Nuremberg Charter to the Rome Statute of the International Criminal Court crimes against humanity have been codified as acts committed or directed ‘against any civilian population,’ rather than just acts against individuals. But there are different ways of trying to integrate this legal fact into a justificatory theoretical conception.

If we ask why it is that humanity (or the international community) is implicated only when the crime is directed against social groups, ask what the precise sense is of May’s ‘in a sense,’ we will find a logical consequence opposite to the one he wants to derive. For this is what he tells us (p. 85):

If 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. It is as if the individuality of the person were being ignored, and the person were being treated as a mere representative of a group that the person has not chosen to join.

There is no difficulty in seeing what is being said here. To be targeted for some form of grave assault simply on the basis of your group identity is to be attacked in your very humanity since everyone has some such identity willy-nilly, merely in virtue of being human. To be murdered or tortured because you are black, or a Jew, or a Muslim, is to be attacked in one of your quintessentially human qualities, and so in your ‘human status.’ But is it not equally obvious that a person can be attacked in his or her humanity by way of other human characteristics than group membership or identity? Someone who is seized even for something they have done (like, say, reading a ‘prohibited’ work), or who is seized indeed randomly, for no fathomable reason connected to them at all, and who is then subjected to prolonged and brutal torture from which – assuming they survive it – they will probably never fully recover, is also assaulted in their humanity. That the assault is not predicated on an identity they share with an ethnic or other sub-group of humankind is not to the point here. The assault implicates something they

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share with the entirety of the human species, a vulnerability to extreme pain and to having their lives wrecked by being subjected to it. This – though not only this – amongst crimes against humanity is about as egregious as egregious gets, and to withhold from it the description ‘assault on that person’s humanity’ because the person in question, in being tortured, is not ‘being treated as a mere representative of a group’, would be a piece of the purest arbitrariness. She or he is being treated (albeit by being mistreated) as a member of the largest human group there is, humankind: being robbed, either temporarily or permanently, of their connection to everything human – the ability to think, to hope, to enjoy, to love, to choose, and to ever be at ease again – by the exploitation of a universal human vulnerability.

The arbitrariness of his group-characteristics requirement is brought out by what strikes me as one of the strangest aspects of May’s argument. Insisting as he does that for humanity (or the international community) to be seen as the victim of a putatively criminal harm ‘the crime must be directed not merely against individuals but against social groups’, May at the same time lets go of that requirement. How can he do so? This is how. He lets go of the requirement by allowing it to be one of two alternative conditions for elevating an egregious human rights violation (according to the security principle) to the rank of an international crime (by the international harm principle). May writes (p. 83):

To determine if harm to humanity has occurred there will have to be one of two (and ideally both) of the following conditions met: either the individual is harmed because of that person’s group membership or other non-individualized characteristic; or the harm occurs due to the involvement of a group such as the State.

It is true that the two conditions are stated by May as being ideally joint conditions; but this is just to say that he allows them also as separate conditions ‘non-ideally’, and therefore the first of them is dispensable. The link between an attack which is on humanity and an attack on people in virtue of their group characteristics is thereby broken, suggesting that it is not necessary when all is said and done. And this is indeed right. If at the core of the concept of crimes against humanity lies the idea of a set of human rights which are inviolable, which even states are constrained to respect and protect and which international law must take responsibility for where states prove themselves delinquent, then it is not pertinent whether or

not the victims are individuals or groups, or individuals targeted because of their group-based characteristics or for other unrelated reasons. What matters is only whether they are human beings whose most fundamental rights (as per May's security principle) have been violated. But if that's right, it's right, and so May's own advocacy to the contrary fails.

I come, finally, to what I earlier referred to as the background – the effective – reason for May's willingness to compromise and, as I contend, subvert the security principle with the international harm principle. This is a desire to build into the philosophical notion of crimes against humanity some difference between a crime under ordinary municipal law and a crime under international law. As he writes (p. 107):

If international crimes are not cast in group-based terms it will be very difficult to draw a distinction between international and domestic crime.

And (p. 84):

There are obvious pragmatic reasons why States would be uncomfortable thinking about international crimes in this [individualized] way, since then State sovereignty about internal criminal matters might be threatened.

May makes the same point also as a political argument, speaking (p. 107) of the need to weaken opposition to the ICC from 'those who fear usurpation of domestic tribunals, and hence of State sovereignty.' As he says again in the same place, however, '[t]his is a pragmatic point', and it is puzzling why he doesn't leave it as just that, a pragmatic point, but tries rather to find a philosophical underpinning for it. It might, of course, just happen to be that there is some deep philosophical distinction mapping neatly on to the practical distinction between domestic and international crimes that May is concerned to preserve. But that there is such a practical distinction does not itself assure this. There are reasons to be doubtful of it, not only by inference from the strains and stresses in his argument, but also of a general kind.

One of the primary responsibilities of just states, after all, is the defence of the very rights, the security and subsistence rights, whose violation sends us looking for another source of protection, and – one of the most fundamental assumptions of the law on crimes against humanity – locates it in a prima facie responsibility of the

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community of nations. You only have to scan the list of recognized crimes against humanity to see how many of them are, in their elementary description as act-types, ordinary municipal crimes as well. Thus, from the Rome Statute: murder, torture, rape, enforced prostitution, enslavement, severe deprivation of physical liberty, enforced disappearance of persons, and so on.

True, as the law stands, for crimes against humanity there is also a threshold of scale. This is contained in the words ‘any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population.’ I can think of at least two reasons for having that threshold. First, there is a presumption that individualized or small-scale versions of these crimes do not generally need the intervention of the international community because they fall within the province of domestic law and would usually be dealt with under it. Second, even where they are not, as things stand the international community and its recognized courts could not realistically handle every case of individualized or small-scale (even if egregious) rights violation across the planet.

However, the practical need for a threshold of scale does not in itself establish that we also need a philosophical distinction marking some fundamental difference in kind between grave assaults that violate people’s humanity via their group characteristics and grave assaults that (supposedly) do not violate their humanity because unrelated to those. Picture an individualized crime as follows (not part of any widespread or systematic attack against a civilian population): a policeman kidnaps someone off the street and over several days in some remote place tortures him or her to death; or else this is done to three or four people but not for reasons of the group identity of any one of them; or they are subjected to appalling sexual violence and/or physical mutilation; and so forth. Notwithstanding the ex hypothesi small scale of these incidents and their unrelatedness to any shared racial, ethnic, religious or political identity as motive, it makes no philosophical sense to treat them as not assaulting the humanity of the victims, where persecutory or discriminatory crimes (in the identity-related sense) do that. They are shocking crimes, even if not as shocking as larger-scale ones, and whatever practical reasons there may be, as things institutionally stand, for not prosecuting them as international crimes, there is nothing to be said for denying the outrage they represent to the code of universal human rights which May signs up to, embodying it in his security principle, and to the humanitarian conscience at large. If for pragmatic reasons crimes falling short of a scale-threshold cannot today be prosecuted internationally, these reasons have

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nothing to do with the intrinsic nature of the acts themselves or with some supposed lesser violation of the integrity of the human person that those acts represent.

It will bear repeating that if individualized and relatively small scale, but nonetheless horrific, assaults on human beings cannot, for pragmatic reasons, be prosecuted under current crimes-against-humanity law, then the central ambition that the idea of crimes against humanity is so commonly said (including by Larry May) to have announced – the ambition, that is, of offering protection for individuals under attack by their own states, or under attack with the complicity or owing to the negligence of those states – is not adequately embodied in crimes-against-humanity law, and is in a way betrayed by it. Better to preserve the normative idea as a critical tool for reforming and improving that law than to seek to reflect the legal practicalities within the idea, so rendering it a rather more conservative one.

For imagine, now, a more lawful world than our present world: one in which the great majority of states were rights-respecting rather than rights-violating states, and in which there was all but universal recognition amongst them for the international court or courts with the responsibility for dealing with offences under the laws on crimes against humanity. Because respect for human rights by states was a much more widespread phenomenon and state delinquencies were more rare, the need for intervention by international courts might be less than at present. And for egregious offences of relatively small scale, domestic systems of law should for the most part suffice. In these circumstances, the international courts could act as courts of higher authority, and courts of appeal, even for smaller-scale cases in which a putative offence had not been properly dealt with at the level of the domestic law of some particular state. For such a utopian world we would need to know which are the most egregious offences, the ones we assign to the ethically minimum core, those offences breaching a recognized security principle. We would not need an extra international harm principle – except in so far as the global community in this lawful world might have declared by its system of law that violating the fundamental rights of any of its inhabitants would be taken ipso facto as a harm against itself. Even for the world as it is, we need no more than a minimum code of universal rights, the infraction of any of which is always a crime against humanity. The scale of the infraction may be part of an operational threshold. But that scale does not inscribe itself as any sort of metaphysical or other presence in the individual assaults against persons of which mass human crimes are always made up.

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In the conclusion to *Crimes Against Humanity* Larry May urges (pp. 256-7) the need for good philosophical work in the area of international criminal law. His own book contributes to that important enterprise by its effort – sustained in richer and more abundant detail than this review of it has conveyed – to adumbrate a philosophical conception apt to the present law on crimes against humanity. In its general structure, I have argued here, the conception he puts forward is indeed apt. But the ‘fit’ it achieves with contemporary legal realities comes at the cost of arguments and distinctions that are open to serious question.

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