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**International Jurisdiction: An Analysis of Larry May's Theory on Crimes Against
Humanity**

May's Understanding of International Harm (Crimes Against Humanity)

May claims that “some crimes so clearly harm the international community that they must be proscribed in all societies.”¹ In other words, some criminal acts are so atrocious that they hurt not just the people in one community, or even an entire nation, but rather everyone in our international “community” known as humanity. Because of this, these sorts of crimes must be considered illegal universally. These universally held norms regarding crimes are what May refers to as *jus cogens* norms. These norms provide a foundation for international law. Moreover, they cannot arise from states consenting that they are, in fact, norms. This would cause a problem in states being bound by the universal norms. If states so chose, they could simply announce that they do not consent to a given “universal norm,” and consequently are no longer bound by it.

recognition” of this fact.³ Because May is focused on minimum moral content of universal norms, not all human rights that are violated will constitute an international crime. Instead, only human rights that defend the physical security (and therefore both the maxims of self-preservation and self-defense) of the individual can justify an international criminal court having jurisdiction and stepping in to prosecute a criminal when he has violated these rights.⁴ Additionally, May believes that states, as long as they are providing their citizens with this physical security, are sovereign. No other state or international body has the right to step in to that state to provide this security for that state’s citizens *unless* that state is not providing this security itself.⁵ By keeping the content of universal norms minimal, limited to self-preservation and self-defense, an international body would be able to deal with a *universal* right that has been violated, while also not overstepping its boundaries by claiming jurisdiction rather than a state, if the state did not perform its duty of upholding such a right for its citizens.

For May, “*jus cogens* norms must be applied with reference to differences in context and circumstance.”⁶ The context that gives international jurisdiction for *jus cogens* norms, is crime that can be perceived as an international harm, which May explains in his international harm principle. Since states are sovereign entities, there needs to be a compelling reason for why an

May presents two criteria for what makes a crime one that is a harm to humanity: firstly, that the person that is harmed by the crime is done so because of the person's membership in a particular group or the person's ownership of a characteristic not particular to the person's individual self, and secondly, that the crime is committed by a group (for example, a state). The first criterion makes a crime international by being committed against a person (or group of people) because of one's being part of a group. What is being attacked isn't so much the individual person, but rather the characteristic that is shared by all of the members of the group the victim belongs to, and the victim is merely representing everyone in the group to which the victim belongs.

In addition to this, May makes a distinction between *assaults* and *offenses* against humanity; for him, understanding this distinction is necessary in determining whether a crime can be one that is international or not. Any time a person is treated wrongly because of a non-individual reason (in other words, because of the victim's membership in a group), that treatment is an offense to humanity. Cases that involve offenses can be more easily and more appropriately dealt with in domestic courts. An assault against humanity is a type of offense that is "especially egregious and deserving of sanction," involving much more serious, non-individualized maltreatment of victims that might be better dealt with in an international court. A harm against humanity is one that assaults humanity, not merely offends it.⁷ Moreover, what makes a crime "especially egregious," making it an assault, is that the harm is widespread, having more of a collective effect than an individual one.⁸ When a harm against humanity is widespread, it becomes a crime that is of

with domestically, falling under the state's duty to protect its citizens (which I will mention in more detail in the next section). When a crime becomes so widespread, harming a greater

I will now show how May incorporates his international harm principle into a justification for international jurisdiction, by adding an additional principle—the security principle.

Justification for International Jurisdiction

The justification May gives for an international court to try a crime rests on two principles—the international harm principle I have just mentioned, and the security principle. The security principle provides the reasoning for why a state’s sovereignty can be surpassed, and instead, an international body can claim jurisdiction to prosecute a crime. When a state does not perform its duty of providing “physical security and subsistence” to its citizens, then two statements are true.¹² The first statement is that the state in question no longer has the right to deny an international body from overriding the state’s sovereignty and coming in to provide the security the state has denied its citizens. The second statement is that international bodies may have justification to override the state’s sovereignty when the body’s genuine motive for doing so is to protect that state’s citizens.¹³

The inclusion of *both* principles is important for May. The security principle explains when some international body *may* step in. Important to keep in mind is that, in asserting that some international body may step in and have jurisdiction, May is not endorsing that jurisdiction to any particular international body that either currently exists or should exist. He is merely saying that the security principle allows that *some* international body may step in and take jurisdiction, rather than naming or alluding to any specific international body. The international harm principle is needed in conjunction with the security principle in order to make the

the core humanity that we all share.”¹⁶ This is the definition Renzo supports. The second is that it is a “crime against humankind”, i.e. crimes that harm not only their direct victims, and possibly the political community, but all human beings.”¹⁶ This is a description of May’s view that crimes against humanity are an attack on an entire group of people, and that the actual victims who were attacked were representative of the entire set.

When a crime is committed against humanness, what is attacked is the dignity that is possessed by human beings. Basic human rights are what protect human dignity, “so that [people] can have a minimally decent life.”¹⁷

arranged and coordinated plan to kill people for the same reason as the previous example, instead arbitrarily and haphazardly doing so whenever they got the chance or felt like doing so on a whim. The same results as the previous example arise, with hundreds or thousands of victims being killed.

According to May's theory, the perpetrators in both examples would *not* be committing crimes against humanity, and the interest in prosecuting these criminals would *not* be of international interest. This seems highly problematic. His theory is essentially saying that as long as the crime was not coordinated and carried out by either a state or a body that is similar to a state, then it is not an international harm, *even if* the crime/s carried out produce the same results. This conflicts with the focus May also has for international crimes to be widespread. There are instances, such as in my example, in which a large enough part of humanity is harmed—or killed—for the crime of the harm to be of international interest, and whether the interest is international or not should not be based upon whether the crime was carried out in a methodical, organized way or not.

What should be more important of a crime for it to be a harm against humanity and of

Now that I have explained what I believe are problems with the way May defines what international crime is, I will propose a way that his definition can be improved to be stronger and to better serve the international community of humanity.

May's

I have just identified the problems I have with May's account. I will now provide my own account that will eliminate those problems.

My Redefinition of International Crime

As I mentioned before, Larry May's definition of what constitutes an international crime

harmed that the crime is no longer merely a domestic concern, not that the crime is carried out in a specific way by a specific entity, or that the victims belong to a specific group. “[A] system of international criminal law should be well designed to minimize rights violations and maximize the prospects of effectively prosecuting whatever violations do take place,” and this system that I am proposing is designed in this way.²³ Under my proposal, basic human rights violations would be one of the fundamental international concerns, along with the “widespreadness” of the violations. Since my proposal puts emphasis on these rights violations, and May’s does not, it puts the system of international criminal law in a better position to minimize these violations than May’s does.

Under this definition, even if there is not an organized group of criminals carrying out the crime, or perhaps even a collection of criminals who are committing the same crime and have never even met each other, they may be prosecuted internationally. I believe there are times (or at least could be times in the future) in which criminals do not organize, or structure, how they are going to carry out crimes and instead unsystematically carry out their crimes. As long as the crimes that are carried out in a situation similar to this violate the victims’ basic human rights and the harm is widespread, these crimes should still be reason for international concern. Also, the victims do not need to share a similar characteristic for why they are being targeted that makes them part of a common group. The victims are already part of the common international group of humanity, and when their basic human rights are being violated, something that everyone in this world has is being abused, and the victims can be seen as representing the entire

international community. When crimes that violate these rights are widespread, enough victims are harmed by these crimes that the international community, as a whole, is harmed, and international jurisdiction is justified.

Unlike how May relaxes his criteria to require that only one or the other be fulfilled in order for a crime to qualify for international jurisdiction, I require that both of my criteria—violation of basic human rights and widespread harm—be fulfilled. This way, it will be more clear of when an international body is justified in claiming jurisdiction, and state sovereignty is

say, will be, times when it will be both more practical and more reasonable for a domestic tribunal to try a criminal that has committed an international crime, or for a system to be created that places international tribunal-like bodies in many cou

attribute this problem even to a domestic tribunal situation. It is hypothetically possible for an astounding increase in the number of people committing a domestic crime of theft. Would this staggering number of people who need to be prosecuted by the state the perpetrators are citizens of be a reason not to prosecute them? To say no to this question would undoubtedly be absurd. Yes, it will become much more costly (time, resources, money, expertise, etc.) to prosecute all these criminals, but this is not an excuse not to do so.

There is one more objection I would like to mention, one that could possibly be made by May himself. May places greater importance on honoring the accused's right to liberty than on the victim's rights that were allegedly violated. Because of this, he might be able to argue that my definition of an international crime is too broad, thus violating the accused's right to liberty more than is necessary or allowable. I will go over this objection and my response to it in the next section.

Objection to the Violation of the Accused's Right to Liberty

In the introduction of his book, May asserts that the rights of the victims "should not be the overriding concern of international criminal law," and that at least as much attention needs to be given to the rights of the defendants, so that they "are not themselves subject to human rights abuse."²⁷ That is the very reason why he wanted to restrict international jurisdiction only to crimes that are especially egregious. Universal sanctions should only be imposed on those who truly have committed extremely terrible acts, on a universal basis. If someone is prosecuted by an international body that has not committed such an act, his human rights to liberty have been severely violated. One could object that, because my proposal of how to define international

crime broadens the scope of who may be internationally prosecuted, it risks the possibility of more people being accused and brought to trial for allegedly committing international crimes that were wrongly accused. By not requiring that the criminals of international crimes be organized and systematic about carrying out their crimes, the level of specificity of identifying who is an international criminal and who is not is lowered, thus allowing for more mistakes and defendants wrongly brought to international criminal trials, which infringes on their human rights.

In reply to this opposition, I would claim that a accused's right to liberty is no more violated in an international court than it is in a domestic court. In both situations, the accused is

Conclusion

In this paper, I focused on the problems I had with the way that Larry May defines what an international harm is (or a crime against humanity). His requirements are too narrowing, focusing on the wrong aspects of crimes that target victims because of their group membership and putting too much emphasis on how the criminals organize carrying out their crime. The way I redefined an international harm removes these two requirements, refocusing on the harm that was done (violation of basic human rights) and what makes the harm an international concern (that the harm was widespread, affecting many victims).

Two objections can be made to the way I would redefine international harm. The first objection argues that my redefinition is impractical because it would cause a significant increase in the number of criminals who would need to be prosecuted internationally. However, the mistake in this argument is that it assumes that just because the new definition does increase the number of criminals who *may* be prosecuted internationally, that means that an international body, rather than a domestic body, under the principle of complementarity, *has* to prosecute all these criminals. I believe that it is a possibility for domestic tribunals to try many of the criminals who have committed international crimes, alleviating some of the burden an international tribunal would have to try *all* such criminals. The second objection is that international trials oversteps a defendant's human right to liberty in such a harsh way that the definition of international harm *should* be narrow, so as not to wrongly infringe on the defendant's right, to which I replied that the way in which an international trial infringes on such a right is no different from the way a domestic trial does.

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