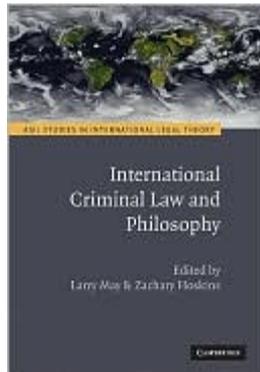


(This review originally appeared on the *Concurring Opinions* law professors' blog. It is still available on the site, but as *Concurring Opinions* has stopped operations, and may at some point disappear altogether, I am posting a copy of the review here now.)

## Book Review: May & Hoskins, *International Criminal Law and Philosophy*

by [Matthew Lister](#) · May 21, 2010



Larry May & Zachary Hoskins, eds., [\*International Criminal Law and Philosophy\*](#), Cambridge University Press 2010.

This anthology of new articles edited by Larry May and Zachary Hoskins explores a territory that has not received widespread or sustained philosophical consideration- international criminal law. While May himself has written several important books on the subject, philosophers and legal theorists in general have not focused on the topic. We can hope that this well-done volume, full of provocative and interesting articles, will help encourage more work in the area. The volume consists of a useful introduction by May and Hoskins, followed by four sections, devoted to sovereignty and universal jurisdiction; culture, groups and corporations; justice and international criminal prosecution; and punishment and reconciliation, for a total of eleven articles. While I did not find all of the articles to be equally convincing, all offered grounds for thought. I will focus on one article from each section while only briefly describing the others.

The first section begins with one of the most interesting papers in the book, by Win-chiat Lee, “International Crimes and Universal Jurisdiction”. Lee asks which crimes are “international crimes proper”, and answers this question by looking at universal jurisdiction- jurisdiction that any state may claim over a crime solely because of the nature of the crime, without any territorial or national link. Universal jurisdiction in this sense is distinct both from normal territorial jurisdiction, and also from cases of “jurisdiction pooling”, where states cooperate to better exercise what would otherwise be territorial or national jurisdiction. International crimes proper, Lee contends, are those that are properly subject to universal jurisdiction. Lee’s account has the consequence that the paradigm international crime turns out to be one that happens entirely within the borders of a state, namely, serious crimes committed by a state against its own citizens. These crimes undermine the legitimacy of a state, and therefore call into question its right to maintain a monopoly on the legitimate use of force within its territory. Such crimes need an alternative framework if we are to deal with them, one provided by international criminal law and universal jurisdiction, understood to include the jurisdiction of the ICC.

On this account, many traditional “international” crimes, such as piracy and aggression, turn out to not be “international crimes proper”. Lee argues that such crimes are better thought of as crimes against property or against a state, where primary jurisdiction grounds in the injured party. States have decided to allow something like universal jurisdiction in these cases as a means of pooling resources and providing collective security, but this is done for pragmatic reasons, and not for the more fundamental ones we find with international crimes proper.

The section concludes with papers by Kristen Hessler and Leslie P. Francis and John G. Francis. In “State Sovereignty as an Obstacle to International Criminal Law”, Hessler argues that sovereignty ought not be a barrier to intervention to prevent human rights violations, and that we must move to a “Post-Wesphalian” conception of sovereignty. Francis and Francis, in their provocative paper, “International Criminal Courts, the Rule of Law, and Prevention of Harm”, argue that the rules of procedure followed by international courts are modeled on principles of “ideal justice”, and that courts functioning in the non-ideal circumstances we find in conflict and post-conflict zones will often fail to protect the vulnerable if they attempted to apply these rules.

The second section turns to questions about the subjects and objects of international criminal law. In “Criminalizing Culture”, Helen Stacy argues that “cultural practices” such as female genital mutilation ought not be subjected to international criminal law. Rather, she argues, a better way to deal with these abhorrent practices is to empower local governments to improve human rights compliance among citizens. Joanna Kyriakakis, in her paper “Prosecuting Corporations for International Crimes: The Role for Domestic Criminal Law”, focuses on the role of domestic “international crimes” laws in prosecuting corporations. While international corporations are proper subjects for the criminal law, she claims, problems with the extra-territorial application of domestic law should lead us to include corporations under the jurisdiction of the ICC.

Larry May, in “Identifying Groups in Genocide Cases”, argues for a “nominalist” conception of groups, where the group that is the subject of harm must both self-identify as a group and be identified as a group by those doing the harm. If we reject “group realism”, May argues, we need both aspects if we are not to slip into merely “subjectivist” accounts that make the distinct harm of genocide hard to understand. The strength of May’s paper is in showing how one may be a nominalist about groups and still think that genocide is a distinct harm. Less convincing, to my mind, is the claim that a group must self-identify as such if genocide is to be a group harm. Here I would draw a parallel with refugee law. In refugee law, persecution must be “on account of” a “protected ground” for the harm in question to ground a claim for asylum. The protected grounds are often group-based. But, it is established law that group membership, political opinion, and the like may be merely “imputed” to the refugee by the persecutor, and that this is enough to establish the claim. Once we have abandoned the idea that only a realist account of groups can explain the distinctive harm of genocide it is not clear to me why we should not follow the path set out by refugee law.

Part three addresses justice and international criminal prosecutions. Steve Viner presents an interesting argument for including a “due diligence” condition on claims of state self-defense, in addition to the traditional limitations of immediacy, necessity, and proportionality, and argues that the U.S. policy of indefinite detention at Guantanamo Bay cannot meet the new condition. Anat Biletzki considers in what sense human rights standards that justify

international prosecutions are political, and argues that such standards are inherently political, but that accepting this can help make international law more legitimate.

Douglas Lackey, in his ambitious paper, “Postwar Environmental Damage: A Study in *Jus Post Bellum*”, builds from earlier arguments of his calling for an extension of just war doctrines to include duties after the end of fighting. Specifically, he contends that “participants in war have an affirmative obligation to restore the environment damaged by their military operations”. Importantly, this duty does not depend on fault or justness of cause, but merely on causation- each party has the obligation to repair any damage it has caused. This principle operates on a sort of strict liability standard. This approach has both pragmatic and more principled motivations. Pragmatically, it avoids the need to decide fault and may encourage parties to limit environmental damage. More fundamentally, Lackey suggests that we should see the environment itself as an innocent party in war, one that deserves to be made whole by whomever caused the injury, regardless of fault.

I have several worries about Lackey’s proposal. Though this is a book on criminal law, much of what Lackey proposes seems more at home in tort. He suggests that leaders of countries that fail to meet their obligations of environmental repair ought to face criminal sanctions, but this seems to stretch the category of criminal law too thin. More importantly, I do not think Lackey’s proposal can avoid the many serious objections that strict liability approaches face, even in tort. For example, as Stephen Perry has shown, there are serious difficulties in trying to make sense of the notion of causation used in strict liability accounts, and these accounts almost always turn out to be parasitic on an undefended account of fault. This does not mean that we must ignore environmental damage caused in war, or stick with our current, highly imperfect, system. Much of the good that Lackey seeks could be gained by a more consistent application of negligence standards, or of rules of *Jus en Bello* to limit the use of weapons that cause especially great environmental damage, such as depleted uranium munitions. Or, we might set up a no-fault insurance scheme, run by the UN and perhaps funded by taxes on munitions, to provide post-war environmental clean-up. Such a scheme seems to me preferable to the morally and theoretically dubious strict-liability approach suggested by Lackey.

The final two papers address issues of Punishment and reconciliation. In an interesting and largely convincing chapter, Colleen Murphy argues that international criminal trials have an important role to play in establishing the rule of law in post-conflict societies, and that this in turn helps provide the necessary basis for the trust needed for political reconciliation.

A more skeptical view is presented by Deirdre Golash in “The Justification of Punishment in the International Context”. Golash claims that we might plausibly think of punishment being justified on the basis of “crime prevention”, where this primarily means deterrence, and “condemnation”, – a method of communicating to offenders and others that an action is wrong. Punishment, on this account, has an “expressive” role, though the goal here, too, is ultimately crime prevention. Golash plausibly argues that, at least in the case of average role-players, the threat of punishment by international bodies is unlikely to have significant deterrent effect. The coercive power of the state and social pressures will usually be significantly more prominent in the mind of most minor actors, making any far-away threat of punishment by international bodies an impotent motivator. It is less clear to me that Golash is right in holding that this result applies to leaders as well. Given that both actual practice and theoretical writing on the subject (May’s earlier work provides an example) focus on punishment for “major” actors and leaders, it is not clear how serious an objection

this is to the very idea of punishment in the international realm, even if it is an important reminder of some limits.

Golash also argues that international criminal law cannot play a “condemnatory” or expressive role because it is not respected as an authority. I find this less convincing. International criminal law is still in its early days, and does not have the authority of domestic law. But, it is not clear that it cannot build this authority. Doing so will require it to operate within the bounds of legality and the rule of law, but this does not seem foreclosed. Finally, I note that Golash does not consider retributive or “justice” based accounts of punishment. These are not reducible to “condemnatory” accounts, and must be considered in a full evaluation of the justification of punishment. It would be unreasonable to expect Golash to consider every account in a short paper, especially one that does make other important contributions, but I was surprised to not see even a note saying such views would not be considered.

To sum up: this is a very nice anthology, full of rich and thought-provoking papers. It is likely to be useful for both lawyers and philosophers interested in either international law or criminal law, and their intersection. It could plausibly be used in a law school seminar or a graduate class in philosophy, except for the fact that it is currently available only in hard-back, and with an outrageous price of \$85. We can hope that Cambridge University Press will see fit to bring it out in a more reasonably priced paper-back format soon.