The Moral Foundations of International Criminal Law: A Review Essay

Abstract

This article reviews three books written by Larry May concerning the foundations of international criminal law: *Crimes Against Humanity: A Normative Account* (2005), *War Crimes and Just War* (2007), and *Aggression and Crimes Against Peace* (2008).

Larry May, in this multi-volume series, seeks to elucidate the normative foundations of international criminal law. May treats in separate volumes crimes against humanity, war crimes, and the crime of aggression. Although May's aim here is not to provide a systematic analysis of the newly established International Criminal Court (ICC) or its mandate (as stated in the 1998 Rome Statute), much of the practical and theoretical importance of his project is bound up with the ICC and its future development. May's work, however, does not represent a defense of the ICC or of the Rome Statute. Indeed, much of what is compelling in May's work urges a significant rethinking of the bases of international law, and argues for limits upon the conduct of international institutions such as the ICC. In this review, I provide an overview of May's arguments, and present one concern regarding the general project upon which May is embarked.

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Review Essay

The Moral Foundations of International Criminal Law

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Books under review in this essay:
Crimes Against Humanity: A Normative Account by Larry May. New York, NY: Cambridge University Press, 2005. 328 pp. $30.99, Paperback.

War Crimes and Just War by Larry May. New York, NY: Cambridge University Press, 2007. 357 pp. $29.99, Paperback.

Aggression and Crimes Against Peace by Larry May. New York, NY: Cambridge University Press, 2008. 368 pp. $27.99, Paperback.

Introduction

It should be remarked, first of all, that Larry May's project in these volumes is very ambitious.[1] The topic of international law is notoriously vexed, and international criminal law, in particular, carries with it a litany of conceptual puzzles and practical difficulties. May does not shy away from these problems, and, as a result, his attempt to provide a normative grounding for international criminal law requires him to engage with an impressive array of authors and arguments. The scope of May's work is further broadened by the capaciousness of his interests and expertise. This is not merely a philosophical exploration of international law but also a legal and historical study as well. May appears to be as comfortable discussing international case law (with a focus upon prosecutions carried out by the tribunals for Rwanda, the former Yugoslavia, and Nuremberg) as he is the history of political theory (thoughtful explorations of Hobbes, Grotius, Vattel, and others help to orient many of May's own arguments). Fortunately, the clarity of May's writing and his consistent practice of reminding the reader of the structure of his argument allow him to synthesize these diverse topics into a coherent form that ought to be accessible to readers of many backgrounds. Indeed, it is difficult for me to imagine anyone, of any background, who would not learn a great deal from this impressive body of work. As a result, in May's avowed aim, to "spark the interest of both political philosophers and practitioners of international law" (May 2005, xiii), he should be assured of great success.

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Given the extensive scope of May's project, it is impossible for me to do justice to the entire sweep of his arguments here.[2] Thus, this study will focus upon one central element of May's arguments: the moral foundations of international criminal law. I will focus upon the relationship between the morality and the legality of the actions that May places under scrutiny. This will lead me to neglect many interesting legal and political claims, but I hope that it will permit me to highlight May's most important arguments. The primary insight that I draw from May's impressive study of international criminal law is just how difficult and multifaceted the moral problems facing international legal theorists really are. In both the fundamental orientation of international criminal law and in the interpretation of legal specifics, May reveals a bewildering complexity of moral and legal issues. Given the difficulty of these issues, and the fact that May himself seems to endorse such different strategies for reconciling the morality and legality of different aspects of international criminal law, I will argue that what is currently lacking in discussions of international criminal law is the need for open and transparent procedures capable of treating these difficulties. The international community needs to develop permanent, formal mechanisms allowing individuals of various nationalities to participate in the further development of international criminal law. In the absence of a standard legislature, it is not sufficient to rely upon individual judges to resolve difficult questions concerning the alteration and interpretation of international criminal law. Although the International Criminal Court (ICC) has provisions for the periodic review and amendment of the Rome Statute,[3] more thought needs to go into how to make international criminal law more accessible and responsive to the people upon whom it is binding.

In what follows, I will begin by introducing H. L. A. Hart's challenge to international law, interpreting it as a demand for international procedural justice. Then I will outline the central arguments in each of May's books, focusing upon the moral grounds May proposes for international criminal law. Next, I will explain the difference between May's moral and legal assessment of actions undertaken in the international sphere. Finally, in the conclusion of this review, I will return to my concern about procedural justice in international criminal law.

Hart and the Challenge to International Law

One of the central and perennial problems for international law concerns the charge that it ought not properly be understood as law. This challenge, inspired by H. L. A. Hart's work in *The Concept of Law*, contends that international law, in virtue of its being international (and thus transcending the formal legal institutions of individual states), fails to possess some of the basic structural features required of a mature legal system. In particular, Hart contended that international law is comprised only of primary rules (rules that enjoin or prohibit behavior) without secondary rules (which enable the recognition, change, and adjudication of primary rules).[4] Most importantly, this objection has been taken (though not necessarily by Hart) to entail that because there is no consensus amongst legal experts about what is or is not valid international law, international legal norms ought not be binding upon individuals and states.[5] Historically, the lack of permanent international legal institutions, and the *ad hoc* nature of international criminal tribunals, led many to believe that international criminal law was but a disparate and shifting collage of treaties, informal multinational agreements, and simple custom. This has inclined many to reject the legitimacy of prosecutions for international crimes, dismissing them as mere show trials meting out victor's justice.

The signing of the 1998 Rome Statute by some 139 states indicates the growing acceptance of the role of international criminal law (the fact that approximately 30 of

these states have not yet ratified the treaty—and that the United States and Israel have not signed the treaty—gives an indication of the dissensus yet remaining). What we seem to be witnessing is the gradual emergence of rules for identifying valid international criminal law. In this way, we appear to be making progress towards diffusing one element of Hart's challenge: There may be an emerging consensus about how to recognize valid law in the international legal community. Yet, even if this is the case, and there is indeed an emerging rule of recognition for international criminal law, I will argue that this does not fully answer Hart's challenge. What we still lack in international criminal law are secondary rules for changing, interpreting, and augmenting such law. Until institutions and mechanisms enshrining such rules are forthcoming, there will continue to be those who refuse to acknowledge the legitimacy of international criminal law.

Outline of the Arguments

Crimes Against Humanity: A Normative Account (2005)

In the first volume in this series, May attempts to provide a philosophical justification of international prosecutions for crimes against humanity. It is important to emphasize the peculiarity of such prosecutions: They are to be trials of individual citizens of sovereign states, conducted by international tribunals, for crimes committed against groups of people. Defendants in such cases are not being tried for murder, torture, or rape. Instead, they are being prosecuted for a set of crimes (including genocide, ethnic cleansing, and other group-based offenses) that are not normally part of a domestic criminal code. May here sets himself the task of justifying such prosecutions, against a series of objections that deny the need, moral appropriateness, or legitimacy of such international legal proceedings.

May's justificatory strategy is to argue that there are limits to state sovereignty and that, when those limits are transgressed, the international community has jurisdiction over crimes committed by individuals within the offending states. More specifically, May proposes two principles for international criminal law. First, the Security Principle places limits of the sovereignty of states. This principle holds that if a state either fails to protect, or actively undermines the physical safety and security of its citizens, it forfeits its prima facie right to noninterference from the international community. The second principle, the International Harm Principle, restricts the class of crimes that should fall under the jurisdiction of international tribunals. May claims that only crimes perpetrated against groups of people (rather than against particular individuals) ought to be prosecuted as international crimes.

If we focus upon the moral claims advanced here, we notice a particularly fascinating move made by May: He grounds his analysis of crimes against humanity in an extended discussion of Hobbes' moral minimalism (see in particular May 2005: 14–35 and 216–219). May follows Hobbes in tracing our moral obligations back to our long-run self-interest but then uses our right to protect ourselves as the justification for an international (rather than merely domestic) legal regime. Although May refrains from framing his argument in this way, we can gain some insight into May's strategy here if we reconstruct his claims in contractarian terms: Individuals desire protection, and so they collectively contract to subject themselves to a sovereign in order to gain such protection. In certain cases, however, the sovereign fails to protect and instead victimizes them. In such cases, individuals are no longer obligated to obey their sovereign. In addition to this standard Hobbesian story, May seems to be arguing that individuals in such a situation would consent to the authority of an international organization that could protect them, were such an organization to exist. Given their hypothetical consent to an international legal regime, they are therefore obligated by

the laws of the international community. So far, this helps to explain May's Security Principle. To see how May derives his second principle, we must recognize the possibility that, just as a sovereign might victimize its subjects, an international organization might also overstep its authority. This, I take it, is why May limits the jurisdiction of international criminal law to a subset of crimes that could be perpetrated by sovereign states (to what he calls group-based crimes). Furthermore, we see here the grounds of what May calls his defendant-oriented approach to international criminal law. The same Hobbesian suspicion of authority that undergirds his moral minimalism also motivates him to be wary of the possibility of overextending international legal structures in a way that victimizes citizens rather than protecting them.

War Crimes and Just War (2007)

In May's second volume, he turns his attention to international crimes committed during the course of armed conflict. May uses traditional just war theory as a backdrop and foil for a reformulated account of international humanitarian law (as this body of law has come to be called). War crimes pose a particularly difficult challenge for May due to the conventional features of many elements of this body of law. Unlike genocide and ethnic cleansing (whose wrongness is intrinsic to the crimes themselves), many—though certainly not all—rules of war seem to be grounded in contingent agreements between warring states (for example, May argues convincingly that there is no principled reason to outlaw chemical weapons while permitting the use of high-altitude aerial bombardment). The challenge for May, therefore, is to provide a compelling justification for international prosecutions for war crimes while at the same time recognizing the historical contingency of many of the relevant laws.

The cornerstone of May's argument here is what he calls the principle of humaneness. This principle is intended to serve as the unifying ground of many of the just war tradition's own principles (in particular, May attempts to derive the principles of discrimination, necessity, and proportionality from his principle of humaneness). The specific content of the principle of humaneness remains somewhat obscure, but May's general point is clear: He thinks that prosecutions for war crimes ought to be justified by recourse to a moral duty to treat people humanely. What is most interesting in this strategy is that the moral duty to treat others humanely is not a moral duty that binds all equally. Rather, it is an expansion of our standard moral duties, which obliges soldiers and military officials specifically. May claims that soldiers must, lest they be transformed into mere thugs and murderers, be bound by a code of honor that requires more expansive mercy than is required from ordinary civilians.

It is this code of honor that May argues ought to serve as the moral ground of trials for war crimes. Soldiers have a duty to treat others humanely, and states have an obligation to instill and enforce a military code of honor capable of ensuring such humane treatment. The duty to treat others humanely requires soldiers to exhibit mercy and compassion even in the face of great danger to themselves. This generates, among other things, a moral demand not to target vulnerable individuals, stewardship duties toward prisoners, and an obligation to minimize suffering. Soldiers, therefore, are to be held morally liable for breaches of their duty to act humanely in wartime, and leaders are morally responsible for ensuring that soldiers adhere to this duty.

Despite the very expansive moral requirements set out by May's principle of humaneness, he thinks that it warrants few criminal trials. According to May, the duty to treat others humanely extends also to potential defendants in trials for war crimes, and this

entails, somewhat surprisingly, that most soldiers who fail to live up to the code of military honor should be exempted from international criminal prosecution. Instead, May argues that leaders who order or allow soldiers to act inhumanely ought to be the primary targets of international criminal tribunals.

Aggression and Crimes Against Peace (2008)

May's substantive argument in favor of prosecutions for the crime of aggression involves linking the crime of aggression to violations of fundamental human rights. He argues that if individuals, by initiating a war, undermine the ability of states to protect the human rights of citizens, then they have committed a grave moral wrong. May thus greatly complicates the traditional understanding of aggression that ties it merely to launching a first strike, or to the violation of the territorial integrity of another state. Despite this endorsement of international criminal trials for aggression, May spends much of the book arguing against interpretations of the crime of aggression that would lead to widespread prosecutions of civilians, military, or government officials. In general, May wishes to reserve such prosecutions for state leaders who clearly and unambiguously initiate the first wrong.

Unlike crimes against humanity and war crimes, the ICC is currently not authorized to prosecute individuals for the crime of waging aggressive war. As a result of widespread disagreement among signatories of the Rome Statute over how to understand aggression, the ICC has postponed (until 2009) its attempt to define the elements of the crime of aggression. Perhaps because of the timeliness of his discussion (this volume was published in 2008), we here see May engage most directly with contemporary legal discussions concerning the mandate of the ICC. Directly addressing a legal community divided over whether, when, and how individuals ought to be tried for breaking the peace, May argues forcefully for a highly restricted approach to prosecutions for crimes against peace.

The Distance between Moral And Legal Norms

In each of the above cases, a striking feature of May's argument is the distance he leaves between the appropriate grounds of moral condemnation and criminal prosecution. In general, May is very willing to blame individuals for their conduct in the international arena, but highly reluctant to use criminal law as a censure for their behavior. Throughout this series, he offers a number of reasons for this distance between morality and legality on the international stage.

First, May sees himself as proposing a defendant-oriented approach to international criminal law as a kind of corrective to what he sees as the traditional focus upon victims. May reminds his readers often that, while the crimes prosecuted by international courts might be some of the most worst unimaginable, the rule of law requires us to design legal procedures that will take seriously the presumed innocence of defendants. As a result, May seems willing to leave an enormous distance between actions he deems morally awful and those he argues ought to be the object of criminal punishment.

Second, May argues that in times of armed conflict, standard excusing conditions for illegal behavior will be common. May argues that the psychological conditions that typically obtain during war ought to exclude many people who act immorally from criminal prosecution before international tribunals. In particular, he claims that the defenses of duress and superior orders ought to shield most soldiers and civilians from criminal convictions. This leads him throughout this series to argue against the prosecution of minor players for

most international crimes. In cases of genocide, war crimes, and aggression, May claims that it ought to be leaders rather than followers who stand before international tribunals, largely because of the availability of compelling psychological excuses for those most directly involved in the atrocities.

Third, and most interestingly, during his discussion of the crime of aggression, May indicates that a central reason for the distance between his moral condemnations of behavior and his willingness to support criminal punishment derives from the way he understands collective action and collective liability.[6] Drawing upon his extensive past work on the subject of collective responsibility,[7] May argues that many of the actions under consideration in international law are best understood as collective actions. Further, May expresses a deep suspicion of collective liability schemes in criminal law, arguing that "Unlike non-criminal contexts, where it might make sense to hold people collectively responsible because the penalties are relatively light, things change dramatically when what is at stake is loss of freedom and even loss of life in criminal prosecutions" (May 2008: 266).

One of the most important and, in May's view, troubling legacies of the Nuremberg trials was the introduction into international criminal law of a theory of criminal conspiracy borrowed from American jurisprudence. According to this theory, we should be held individually criminally liable for participating in the actions of a criminal group. May argues that such a theory is ill suited to international criminal law (May 2008: 186 and 259). Although May's claims here are addressed to crimes against peace (and to the relationship between *mens rea* and *actus reus* considerations more specifically), I think this assertion can be quite productively generalized to the rest of his project. May appears to be arguing quite broadly against the use of collective liability schemes in international (and perhaps even domestic) criminal trials.

Because international crimes necessarily involve the actions of large groups or collectives, May is highly reluctant to assign individual criminal responsibility to the actors comprising those groups. In the case of crimes against humanity, it is not particular offenses of assault, murder, or rape that are to be prosecuted by international tribunals, but rather the crimes of genocide or ethnic cleansing. As such, the crimes falling under the purview of international criminal law involve large numbers of wrongful actions that are related in a systematic way. Similarly, in the case of war crimes, it is not merely the fact that individual soldiers committed acts of wrongful violence that merits special prosecutions, but it is the fact that such acts were conducted in the course of coordinated state military action. It is this systematic interconnection of wrongful activity that seems to justify the existence of a separate jurisdiction of international criminal law, but this same interconnection makes May intensely skeptical of the appropriateness of individual prosecutions. Especially in the case of aggression, May seems to doubt the possibility of being able to establish the elements of the crime (that is, the defendant had both a guilty mind and engaged in a guilty act) while still respecting the rule of law.

In the case of crimes against humanity, war crimes, and the crime of aggression, then, May places a heavy burden of justification on international criminal prosecutions. He urges that it will be quite difficult to successfully try individuals for offenses that they themselves committed, rather than merely assigning guilt indiscriminately with an overly broad brush. In each case, this leads May to argue for focusing such trials on state leaders, rather than on civilians, soldiers, or lower ranking officials. According to May, it is usually only in the case of state leaders that the actions of an individual and the actions of the collective are linked in a way sufficient to justify criminal liability.

For these reasons, May endorses only a highly restricted role for international criminal law. May is clearly very concerned that past tribunals have overstepped their legitimate

normative authority and seems to worry that the ICC will continue to do so in the future. As a result, May is quite receptive to proposals for condemning collectives, rather than prosecuting individuals. The primary mechanisms available for such censure, however, are political, involving such things as economic sanctions and embargoes. Beyond that, May acknowledges that, in some cases, reconciliation or amnesty programs might be better able to serve the aims of justice than an international criminal tribunal.

Conclusion

The result of all the above arguments is a rather conservative approach to individual criminal responsibility and a very limited defense of international criminal prosecutions. Although May clearly endorses the ICC and actively supports its functions, he is also arguing for the highly constrained use of the court's powers. Although May has shown conclusively that prosecutions for international crimes are fraught with conceptual difficulties, his very conservative approach to international criminal law will strike many as incompatible with his strong moral condemnation of the same actions that he wishes to absent from criminal prosecutions. To give just one example, May seems to morally endorse the idea of contingent pacifism (claiming that since no successful war can in practice be fought justly, no wars ought to be fought at all), while arguing that convictions for the crime of aggression ought to be exceedingly rare. As a result, he seems committed both to the view that all wars are morally wrong, and to the belief that hardly anyone should be held legally accountable for starting wars. For many, this will seem to be an untenable balance between moral censure and legal sanction.

Unfortunately, May's conservative approach may appear to some to be an attempt to generate consensus about international criminal law by divorcing it from its appropriate moral grounds. That is, it might seem that May is recommending a highly constrained mandate for international criminal law only because that is the most likely way to arrive at a consensus amongst states about the appropriate role for the ICC or similar institutions. I don't believe this is the case; May seems genuinely motivated throughout by a desire to remain faithful to the demands of the rule of law. However, the intricacy and difficulty of the arguments presented by May reveal just how many apparently reasonable views there may be on issues concerning international law. The fact that May himself uses such divergent strategies to provide a philosophical grounding for international law is also instructive. Although May claims throughout all three volumes to be presenting a morally minimalist account of international criminal law, we can identify three different sorts of moral foundations in his three volumes. In the case of crimes against humanity, May seems to be grounding international law in moral rights derivable from our basic interests in safety and security. In the case of war crimes, May attempts to ground international prosecutions in an expanded set of duties and expectations specific to soldiers and military professionals. Finally, in the case of aggression, May ties his account of international criminal law to a conception of human rights, grounding the justification for such prosecutions in the undermining of a states' ability to protect human rights. Seen in this way, these are quite different strategies for grounding international criminal law, drawing upon quite dissimilar normative foundations. Even if May is correct in carving up the conceptual terrain in this way, there seems to be sufficient room here for reasonable disagreement over the proper normative orientation of international criminal law.

If we return to H. L. A. Hart's initial challenge to international law, we can see just how much progress has been made in the debate over international criminal law. Over the

course of the last twenty years, the international community has come to an unprecedented amount of agreement regarding international criminal law. In generating this emerging consensus regarding the content of international criminal law, however, there is a danger of stripping such law of any perceived legitimacy. For, although we have seen an increasing amount of consensus amongst legal experts about what counts as valid international law, what remains to be seen is progress towards the development of effective mechanisms for changing, interpreting, and adding to international criminal law. The fundamental challenge articulated by Hart is not just the lack of a rule for identifying what is valid international law but the absence of the institutions that normally generate such consensus. It is in large part the presence of a domestic legislature that provides societies the means to identify, to alter, and to interpret laws and that generates a mature legal system. International criminal law has no legislative branch and, as a result, it lacks the legitimacy conferred by such an institution.[8]

Although legal experts appear to be approaching consensus on some matters of international law, and on the Rome Statute in particular, the procedural mechanisms governing such laws remain distant and obscure. What seems to be lacking from May's analysis of international criminal law (and from such discussions generally) is an account of how this body of law ought to be generated, altered, and interpreted, rather than simply how it ought to be applied. In the absence of a recognized and accessible legislative body, many who reject the legitimacy of the court will be unimpressed by the increasing acceptance of a rule for recognizing what counts as valid law in the international arena. Much of what was lacking in Hart's era is still absent today: formal and accessible procedures for generating, changing, and reinterpreting the contents of international law.

There should be no doubting the importance of Larry May's valuable contribution to international legal scholarship. His three volumes (and one can only expect the same from his fourth) reveal an impressive mastery of a whole array of issues and problems. It is as a result of his ability to muster such powerful arguments that May's work is able to reveal the deficiencies of the institutions of international criminal law: The fact that May is making such important and sophisticated arguments ought to make us very optimistic about the prospects for international criminal law; the fact that he is doing so outside of formal legal institutions ought to cause us concern.

Notes

1. A fourth volume in May's series, entitled *Genocide: A Normative Account*, has just been released by Cambridge University Press.
2. Useful reviews of the individual books have been published by Christopher Gray (2005), Peter Tramel (2007), and Douglas Lackey (2008).
3. See Article 123 of the Rome Statute (http://www.icrc.org/ihl.nsf/FULL/585).
4. See Hart (1961: 208–231).
5. For May's own analysis of Hart's challenge, see May (2005: 29–32).
6. Although May discusses issues concerning collective responsibility in each of his works (see May 2005: 246–253; May 2007: 25–47), it is not until the third volume that we see how deeply the relationship between collective moral and legal responsibility informs his understanding of international criminal law (May 2008: 278–289).
7. See especially his *The Morality of Groups* (1987), *Sharing Responsibility* (1992), and *The Socially Responsible Self* (1996).
8. For an argument in favor of the importance of legislatures for legal and political philosophy, see Waldron (1999).

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