

Cambridge University Press

978-0-521-19151-7 - International Criminal Law and Philosophy

Edited by Larry May and Zachary Hoskins

Excerpt

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Introduction

Larry May and Zachary Hoskins

This volume brings together some of the best recent work by philosophers and legal theorists on the conceptual and normative grounding of international criminal law. Philosophers and other theorists are only just beginning to write about the emerging field of international criminal law. International law has taken a significant turn in recent years. Rather than being primarily concerned with the relations of states, one significant branch of international law – namely, international criminal law – now concerns the relations of individuals, specifically, the responsibility of individuals for mass atrocities. As with any such change, there are many questions and problems that arise. In our book, we begin with considerations of the conflict between state sovereignty and universal jurisdiction; examine thorny issues raised when the victims or the perpetrators of international crimes are groups or corporations; proceed through various specific questions related to justice and human rights; and conclude with chapters on how international criminal trials should be seen in terms of theories of punishment and reconciliation. Throughout, these chapters relate thinking in political philosophy, ethics, and jurisprudence to cases and issues in the practice of international criminal law.

The collection of authors and chapters is somewhat distinctive. More than half of the authors have law degrees and all of them have, or soon will receive, doctorates, mostly in philosophy. The authors are primarily from North America, although the collection also includes scholars from Australia and Israel; all of the authors have previously published in the fields of jurisprudence and political philosophy. The chapters were all initially written for various workshops sponsored by the Internationale Vereinigung für Rechts- und Sozialphilosophie (IVR) and reflect the broadly interdisciplinary nature of those conferences. The authors have had occasion to interact with each other, making the volume somewhat of a dialogue about these important issues. Most significantly, this is the first anthology of works by philosophers and legal

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scholars on the normative and conceptual grounds of international criminal law.

The chapters here are organized into four broad themes. First, sovereignty has been a subject of political philosophy since at least the writings of Thomas Hobbes. Hobbes actually did consider some international issues, although not in the detail that his contemporary Hugo Grotius did. Both philosophers recognized that the idea of state sovereignty is in conflict with the idea that all people in the world have rights. The problem is that to protect rights it sometimes is necessary to confront what sovereigns do to people in neighboring states, or even what states do to their own people. To confront such abuse of rights, seemingly, sovereignty will have to be abrogated. If rights protection requires universal jurisdiction, then such an idea will be in direct conflict with the powerful idea of state sovereignty. At least in part, this is because international justice issues are played out in the sphere of imperfect justice. International criminal courts and tribunals have recognized this fact but have not explored the ensuing conflicts in the conceptual and normative terms offered in the chapters in our first section.

Second, there are quite controversial questions of who should be the subject of international criminal law. This field is set up to deal with individual human persons, as is true of all subfields of criminal law, but there are interesting theoretical questions about whether corporations – that is, individual nonhuman persons – should be subject to international criminal law as well. Much of this field is focused on mass atrocity cases, calling into question whether it is groups more than individuals, both as victims and as perpetrators, that should be the subject of international criminal law. Also, when we come to think of the context of such international crimes, how much should variations in culture matter, and should cultures play as prominent a role as groups and corporations?

Third, considerations of social justice also are significant in international criminal law, just as they are in other fields of law. These conflicts are perhaps nowhere clearer than in the case of Guantánamo Bay. Here, considerations of justice supposedly come up against considerations of security. In addition, there are conflicts about protecting the environment and economic prosperity. Both of these topics are addressed in the chapters in the second section. In addition, there are concerns that the very rhetoric of rights and justice might conflict with the possibility of the betterment of people's lives, calling into question the very importance of manifestos and discussion of rights.

Fourth, our authors also consider complex normative questions about how to think of punishment and reconciliation in international criminal law. Deterrence in the international arena has been notoriously difficult, but is this primarily because of conceptual or practical considerations? Given that state

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leaders are the most likely to end up in the international dock, are they as prone to deterrence, or as deserving of retributive blame, as normal criminals? Also, does the holding of international trials make the prospects for reconciliation better or worse? Finally, what does reflection on such criminal trials and their rationale tell us about the nature of reconciliation or the justification of punishment? Our authors make progress on these tough questions in the final section of the book.

A. SOVEREIGNTY AND UNIVERSAL JURISDICTION

The first section addresses fundamental issues regarding state sovereignty, namely, when and to what degree (if at all) it can be overridden by international legal institutions. In the opening chapter, Win-chiat Lee takes up the conceptual question of what constitutes an international crime, as distinguished from a municipal crime. Lee contends that many crimes currently recognized as international crimes (e.g., piracy) are more properly understood as crimes against states, but that these crimes are recognized as international crimes merely as a matter of advantageous or convenient policy. Regarding those crimes that constitute international crimes in the strict sense, Lee argues that such crimes cannot be distinguished according to some independent, conceptually prior feature of the crimes themselves (e.g., that they involve more than one nation or the crossing of national boundaries), a distinction that can then be used to sort out questions of territorial, national, or universal jurisdiction. To the contrary, he contends that jurisdictional questions must be resolved first. That is, international crimes proper can be distinguished from crimes against states only because the former are properly subject to universal jurisdiction whereas the latter are subject to territorial or national jurisdiction.

Thus, the crucial question for Lee becomes, “Which crimes are properly subject to universal jurisdiction?” On his account, universal jurisdiction is appropriate in cases in which a state commits, condones, or is unable to prevent or punish serious crimes against its own citizens. In such cases, the state is in violation of the conditions under which its exercise of political authority is legitimate. Insofar as such crimes are subject to universal jurisdiction, Lee believes that they can be distinguished as international crimes in the strict sense. On his account, then, a war crime committed against a state that is able to prosecute and punish the crime itself would not constitute an international crime in the strict sense (although it might still be treated by states as an international crime for reasons of strategic advantage).

Kristen Hessler picks up the issue of universal jurisdiction, as she asks when, and to what extent, state sovereignty should constitute a hurdle to international

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prosecutions. Hessler focuses on the accounts of sovereignty espoused by Larry May and by Andrew Altman and Christopher Wellman. Although Altman and Wellman's account disagrees with May's on some points, Hessler contends that the two agree on the general point that, although sovereignty can be overridden in various sorts of emergency cases, there should nevertheless remain a broad presumption in favor of nonintervention in states' affairs. It is this presumption that Hessler aims to bring into doubt. The increasing willingness among theorists to endorse limits on sovereignty in emergency cases, Hessler claims, represents an initial move away from the traditional Westphalian notion of sovereignty. On her view, this growing consensus that sovereignty may properly be overridden in certain emergency cases should spur theorists likewise to reconsider their assumptions about whether sovereignty may be overridden in other cases – cases that, although they may not rise to the level of emergency, may nevertheless be quite serious.

As an alternative, Hessler endorses a disaggregation of the elements of sovereign authority, which would allow the various claims of sovereignty to be evaluated independently. Such a strategy could actually facilitate individual states' cooperation with international criminal prosecutions because, under this disaggregated conception of sovereignty, international prosecutions might be less likely to be seen as usurping the state's sovereignty in its entirety. Thus, by jettisoning the presumption in favor of even a defeasible right of state sovereignty in the traditional all-or-nothing sense, Hessler believes that we would allow ourselves the freedom to consider how authority – specifically, the authority to prosecute or punish serious human rights abuses – might be best allocated so as to respect human rights.

Like Hessler, Leslie and John Francis worry that respect for state sovereignty may often be in tension with the goals of deterring violence and protecting human rights. More broadly, Francis and Francis are concerned with whether the International Criminal Court (ICC) and other international criminal courts, insofar as their activities are grounded in principles such as the rule of law and respect for state sovereignty, may be ill suited to achieving the goal of preventing violence. Their chapter contends that, whereas the goals of justice and prevention may be mutually supportive in ideal theory, these goals may pull apart in circumstances of partial compliance (i.e., in circumstances of widespread violence and injustice such as those we face in the world today). When these goals do pull apart – that is, when considerations of ideal justice tend to undermine the goal of preventing atrocities – the authors argue that the goal of prevention must be paramount.

Francis and Francis contend that rule-of-law restrictions such as due-process guarantees and limits on retroactivity may prevent the successful prosecution

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of persons who are in fact guilty of serious crimes. Rule-of-law limits tend to make convictions more difficult to achieve – thus, they serve as protections against wrongful convictions of the innocent. Rule-of-law restrictions also will inevitably mean that the guilty will sometimes go free, however, and because deterrence requires the probability of punishment, rule-of-law limits may thus weaken the deterrent function of international prosecutions. Similarly, respect for state sovereignty, insofar as it may limit the ICC’s ability to prosecute and punish the perpetrators of serious injustices, may thus tend to undermine the ICC’s deterrent function. The authors call for a reevaluation of the ICC that acknowledges the circumstances in which we actually live, circumstances of grievous injustice and violence in which the goal of prevention should be given priority.

B. CULTURE, GROUPS, AND CORPORATIONS

In addition to philosophical questions about sovereignty and jurisdiction, international criminal law also has generated conceptual puzzles related to groups. International crimes – crimes against humanity, genocide, and so forth – are distinctive in that they are typically group based in the sense that they are typically either committed by groups, are targeted at groups, or both. Thus, the second section focuses on questions that international criminal law raises regarding the identity of these two groups, the perpetrators and the victims of international crimes. First, Helen Stacy asks whether international criminal law is the appropriate mechanism for addressing human rights violations committed as traditional practices of cultural groups. Stacy acknowledges that international criminal prosecutions are important in responding to the leaders (the “big fish”) who commit massive human rights violations such as genocide, but many of the more common violations of human rights (e.g., female genital cutting or honor killings) are cultural practices that reflect a given community’s values. As such, these practices are not likely to change merely because of the threat of criminal sanctions imposed by the international community. Instead, attempting to force changes in cultural practices through international criminal sanctions may increase hostility among community members, who may hear the intended message of public condemnation as, instead, imperialistic or culturally insensitive. Rather than preventing such practices, international criminal sanctions may only force the practices to adapt – to “go underground,” so to speak – and may even result in more egregious rights violations.

Rather than emphasizing criminal prosecutions of individuals who have committed culturally based violations, Stacy suggests that human rights may be protected more effectively by stressing the role of national governments in

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fostering respect for human rights among their citizens. Protecting its citizens' rights is a national government's responsibility, and this requires provision for effective institutions of education, economic development, and public health, among others. For instance, she writes, in countries where female genital cutting is an embedded cultural practice, government-sponsored education programs may do more eventually to reduce the practice than would prosecuting and punishing parents who believe they are doing what is best for their daughters. Focusing on the role of national governments in changing embedded cultural practices, Stacy contends, is thus more effective, as well as fairer, than punishing those members of the cultural group who participate in the practices.

Continuing with this issue of groups and the special concerns they raise for international criminal law, Larry May's chapter addresses the conceptual puzzle of how victim groups should be defined, which has a direct bearing on whether a charge of genocide is appropriate. May advances a nominalist account of group identification, according to which an aggregation of individuals constitutes a victim group, for purposes of a genocide prosecution, if the victim group both self-identifies and is identified by the perpetrator group as a group. Neither of these criteria is sufficient on its own: Identification by the perpetrator group is crucial to establish that the attacks are *intentional* attacks against a group. Identification by the victim group is important to establishing that the group exists in more than merely the minds of the perpetrators, so that the attacks can be seen as genuinely *group based* rather than individual.

May's nominalist account contrasts with an objective approach to group identification, according to which a group must have some objective existence to count as a group for purposes of genocide law. On one version of this view, developed by William Schabas in his book *Genocide in International Law*, the four categories of groups recognized by the 1948 Genocide Convention – racial, ethnic, national, and religious – meet the requirement of objective existence, but it would be a mistake to recognize additional groups, or especially to allow subjective determinations of group existence. May's nominalist response is that the remedy to purely subjective group identification (understood here as identification merely on the basis of what one group thinks) is not objective identification but rather *intersubjective* identification: Again, both the perpetrator group and the victim group must identify the victim group as such. Unlike Schabas, then, May endorses the recognition of more than the four categories of groups, so long as these additional groups meet his requirements of self-identification and identification by the perpetrators.

In the next chapter, Joanna Kyriakakis shifts focus from the identification of victims to the prosecution of perpetrators, specifically corporations, for

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international crimes. Kyriakakis examines the use of domestic “international crimes” laws in prosecuting corporations, an issue that brings together two distinct debates in legal philosophy: whether corporations can be the subjects of criminal prosecutions, and when (if ever) states may claim extraterritorial criminal jurisdiction. She explains that criminal law has been reluctant to recognize corporate criminal liability, in particular because of doubts about whether corporations could act with intention or make moral determinations. Armed with substantial literature from recent decades on the topic of groups and collective responsibility, however, she critiques the traditional view that corporations are not the sort of entities that can be said to be criminally liable.

Regarding the question of territoriality, Kyriakakis discusses various considerations that may tend to inhibit states from establishing extraterritorial criminal jurisdiction: the international legal principle of nonintervention, which limits a state’s permissible intervention in the internal affairs of another state; the principle of predictability in criminal law, which may impact whether a corporation falls under a particular jurisdiction; and the possibility of negative impacts on a state’s foreign relations. Given these deterrents to prosecution of corporations for international crimes, Kyriakakis advocates including private corporations in the jurisdiction of the ICC. She contends that the ICC’s complementarity model would encourage states, concerned with maintaining their sovereignty, to enact and apply domestic “international crimes” laws. Inclusion in ICC jurisdiction also would help to legitimize such national prosecutions of corporations for international crimes.

C. JUSTICE AND INTERNATIONAL CRIMINAL PROSECUTIONS

The third section moves from broad, conceptual questions regarding jurisdiction or the status of groups to focus on a variety of more particular issues surrounding the role of international criminal law in securing justice and protecting victims. In particular, the essays in this section suggest, either implicitly or explicitly, an expanded role for international criminal law in securing social justice.

The first two chapters examine questions related to just war theory, the doctrine of when and how wars justifiably may be waged. Traditionally, just war theory is divided into two areas: *jus ad bellum*, which concerns the conditions under which a state is justified in engaging in war; and *jus in bello*, which concerns the means, or tactics, that parties in a conflict may justifiably employ. In the first chapter, Douglas Lackey focuses on an often-overlooked casualty in international conflict – the environment – and he advocates

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international criminal law as the appropriate domain for ensuring environmental cleanups in the wake of such conflicts. Lackey proposes, in addition to the traditional just war principles of *jus ad bellum* and *jus in bello*, a principle of *jus post bellum*, according to which parties in a war are responsible for cleanup and restoration of the environment when it is damaged by their military operations. Lackey contends that environmental damage is better addressed within the international law of war than in civil suits. In support of this conclusion, he cites the reluctance of civil courts to take sides in political controversies, and also the fact that it often may be difficult to determine a particular injured party in cases of environmental damage. In addition, he argues that locating these environmental obligations within the law of war, rather than in a system of international environmental law, would provide greater incentive for military commanders to take such obligations seriously.

Within the law of war, Lackey argues that environmental damage is not clearly addressed by the various *ad bellum* or *in bello* considerations, for a state might engage in a war for justified reasons and employ justified tactics, but nevertheless its military operations might result in damage to the environment for which the state would be responsible. Thus, Lackey's *post bellum* principle confers strict liability: A state is responsible for postwar environmental restoration simply because it caused the damage, regardless of whether it did so as part of a justified military operation in a just war. Interestingly, his view implies that a state fighting a just war according to *ad bellum* and *in bello* principles is responsible for environmental damages it causes but not responsible for the enemy state's innocent civilians whom it kills. Lackey offers several reasons to support this claim. Notably, he points out that a damaged environment often can be restored (unlike killed citizens and destroyed cultural artifacts), and that the citizens of a state are involved in the acts of their state in a way the environment is not.

Similarly to Lackey's chapter, Steve Viner's contribution focuses on a variety of injustices that can result in times of international conflict – specifically, the injustices of the U.S. policy of indefinite detention at Guantánamo Bay, part of the Bush administration's self-described “war on terror.” Viner questions whether this policy can be justified, as the United States claims, according to the recognized international legal right of self-defense. He analyzes the three restrictions (immediacy, necessity, and proportionality) of the right of self-defense as it is currently recognized, and he argues that it is plausible to believe the U.S. practice of indefinite imprisonment at Guantánamo meets each of these limitations. He introduces a fourth principle, however, the due diligence principle, and he argues that it is with respect to *this* limitation

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that the current U.S. policy fails. The due diligence limitation requires that a nation use all reasonable, available measures to make certain that each person subject to its indefinite detention policy is in fact a proper target (i.e., poses a sufficient threat). The U.S. policy of indefinite imprisonment at Guantánamo fails to meet this limitation, Viner claims, because the policy fails to implement sufficient “truth-conducting” procedures (essentially, the traditional due process protections) to assist in determining whether a detainee actually poses a threat.

The due diligence limitation can be seen as similar to the “principle of distinction,” which is recognized in international law as a requirement that a state’s military not target civilians or nonmilitary buildings because these are not legitimate military targets; however, Viner points out certain differences between the principle of distinction and his due diligence principle. Whereas the principle of distinction limits targets to legitimate military objectives, the due diligence principle limits targets to actual, or reasonably believable, threats. Thus, Viner believes his principle improves on the principle of distinction in that it would permit the targeting of civilians who nevertheless pose an actual threat to a state, and also it would prohibit the targeting of military units that pose no genuine threat to the state. Note that, by framing the issue of the detainees’ treatment in terms of the international legal right of self-defense, Viner appears to imply that the detainees’ cases are matters of international criminal law; thus, this account, like Lackey’s, would represent an expanded role for international criminal law in the service of advancing social justice.

Anat Biletzki’s chapter continues to examine the role of international law in securing social justice, this time as a vehicle for the work of human rights organizations. Biletzki begins with the observation that, despite a growing number of human rights violations by political entities, human rights groups are traditionally wary of appearing to take sides in political disputes. The practice of not mixing human rights work with politics has emerged both from the principled view that human rights are inherently universal and the pragmatic concern that appearing partisan in a political imbroglio might lead to restrictions on a group’s access within a given state or region, and thus might undermine its ability to assist those most in need of aid. Drawing on the example of the Israeli–Palestinian conflict, however, Biletzki contends that maintaining a strict distinction between human rights and politics is untenable and, ultimately, undesirable. The promotion and protection of human rights is inextricably connected with the political, and thus the question becomes how human rights groups are to embrace the political without becoming bogged down in the partisan.

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Biletzki encourages human rights groups to frame their work in terms of protecting victims, an ideal that is inevitably political (it sets human rights groups against abusive governments) but nevertheless also universal (victims may appear on either side, or both sides, of political disputes). The vehicle for politicizing human rights in this way, she contends, is international law. The language of international law provides a generally accepted framework within which organizations may couch their condemnation of policies that violate human rights without appearing to take sides in the relevant political dispute. Thus, international law serves as a vehicle for human rights groups to embrace as part of their mission the achievement of political results, not in service of a partisan agenda but rather in the service of a universal norm: the protection of innocent victims. Biletzki's account raises certain questions for international criminal law in particular, which may have a role in bringing human rights violators to justice, but which brings up potentially thorny issues of standing. This is especially evident in complex cases of the sort on which Biletzki focuses, in which Israeli activists protest abuses by the Israeli government against Palestinian citizens within Palestinian borders.

D. PUNISHMENT AND RECONCILIATION

The final section focuses on questions related to what comes after international criminal trials. In the first chapter, Deirdre Golash provides both a vivid illustration of the circumstances surrounding various cases of international crimes and a critique of the justification of punishment as an international response to such crimes. Her objection to punishment may seem counterintuitive, particularly for international crimes, given that such crimes typically are committed on a larger scale or are more grievous than are typical domestic crimes. Golash contends, however, that the circumstances of international crimes tend to undermine the justification of punishment as a response. Specifically, she suggests that punishment in the international context may be less effective in achieving the goals of prevention and condemnation, two frequently cited justifications of punishment.

Appealing to examples of international atrocities in Yugoslavia, Rwanda, and Uganda, Golash first considers whether the goal of prevention may be promoted by punishing international crimes. She cites various pressures that often encourage individuals to participate in wrong acts, whether direct threats from authorities or the substantial social and psychological pressures often explored in the psychological literature. She suggests that, given these pressures, the threat of punishment is unlikely to be a sufficient deterrent in many