

Cambridge University Press
0521840791 - Crimes Against Humanity: A Normative Account
Larry May
Frontmatter
[More information](#)

Crimes Against Humanity

A Normative Account

Crimes Against Humanity is the first booklength treatment of the philosophical foundations of international criminal law. Its focus is on the moral, legal, and political questions that arise when individuals who commit collective crimes, such as crimes against humanity, are held accountable by international criminal tribunals. These tribunals challenge one of the most sacred prerogatives of states – sovereignty – breaches of which can be justified only in limited circumstances, following what the author calls a “minimalist account” of the justification of international prosecution.

The book is divided into four parts. Part A provides a definition of international crime and justifies the existence of norms that can achieve a universal binding force. Part B identifies and defends several principles of international criminal law. Part C turns to institutional arrangements for prosecuting group-based crimes. Part D looks at defenses, as well as alternatives, to international criminal prosecutions, such as amnesty and truth and reconciliation programs.

Written in a clear and accessible style, *Crimes Against Humanity* will appeal to anyone with an interest in international law, political philosophy, international relations, and human rights theory.

Larry May is Professor of Philosophy at Washington University in St. Louis.

Cambridge University Press
 0521840791 - Crimes Against Humanity: A Normative Account
 Larry May
 Frontmatter
[More information](#)

Cambridge Studies in Philosophy and Law

GENERAL EDITOR: GERALD POSTEMA
 (UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL)

ADVISORY BOARD
 Jules Coleman (Yale Law School)
 Antony Duff (University of Stirling)
 David Lyons (Boston University)
 Neil MacCormick (University of Edinburgh)
 Stephen R. Munzer (UCLA Law School)
 Phillip Pettit (Princeton University)
 Joseph Raz (University of Oxford)
 Jeremy Waldron (Columbia Law School)

Some other books in the series:

Stephen R. Munzer: *A Theory of Property*
 R. G. Frey and Christopher W. Morris (eds.): *Liability and Responsibility: Essays in Law and Morals*
 Robert F. Schopp: *Automatism, Insanity, and the Psychology of Criminal Responsibility*
 Steven J. Burton: *Judging in Good Faith*
 Jules Coleman: *Risks and Wrongs*
 Suzanne Uniacke: *Permissible Killing: The Self-Defense Justification of Homicide*
 Jules Coleman and Allan Buchanan (eds.): *In Harm's Way: Essays in Honor of Joel Feinberg*
 Warren F. Schwartz (ed.): *Justice in Immigration*
 John Fischer and Mark Ravizza: *Responsibility and Control*
 R. A. Duff (ed.): *Philosophy and the Criminal Law*
 Larry Alexander (ed.): *Constitutionalism*
 R. Schopp: *Justification Defenses and Just Convictions*
 Anthony Sebok: *Legal Positivism in American Jurisprudence*
 William Edmundson: *Three Anarchical Fallacies: An Essay on Political Authority*
 Arthur Ripstein: *Equality, Responsibility, and the Law*
 Heidi M. Hurd: *Moral Combat*
 Steven J. Burton (ed.): *"The Path of the Law" and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.*
 Jody S. Kraus and Steven D. Walt (eds.): *The Jurisprudential Foundations of Corporate and Commercial Law*
 Christopher Kutz: *Complicity: Ethics and Law for a Collective Age*
 Peter Benson (ed.): *The Theory of Contract Law: New Essays*
 Philip Soper: *The Ethics of Deference*
 Timothy Machlem: *Beyond Comparison: Sex and Discrimination*
 Steven A. Hetcher: *Norms in a Wired World*

Cambridge University Press
0521840791 - Crimes Against Humanity: A Normative Account
Larry May
Frontmatter
[More information](#)

Crimes Against Humanity

A Normative Account

Larry May

Washington University



Cambridge University Press
 0521840791 - Crimes Against Humanity: A Normative Account
 Larry May
 Frontmatter
[More information](#)

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
 The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
 The Edinburgh Building, Cambridge CB2 2RU, UK
 40 West 20th Street, New York, NY 10011-4211, USA
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia
 Ruiz de Alarcón 13, 28014 Madrid, Spain
 Dock House, The Waterfront, Cape Town 8001, South Africa

<http://www.cambridge.org>

© Larry May 2005

This book is in copyright. Subject to statutory exception
 and to the provisions of relevant collective licensing agreements,
 no reproduction of any part may take place without
 the written permission of Cambridge University Press.

First published 2005

Printed in the United States of America

Typeface Times Roman 10/12 pt. *System* L^AT_EX 2_ε [TB]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

May, Larry.

Crimes against humanity : a normative account / Larry May.

p. cm. – (Cambridge studies in philosophy and law)

Includes bibliographical references and index.

ISBN 0-521-84079-1 (hbk.) – ISBN 0-521-60051-0 (pbk.)

1. Crimes against humanity. 2. International offenses. I. Title. II. Series.

K5301.M39 2005

345'.0235–dc22 2004045112

ISBN 0 521 84079 1 hardback

ISBN 0 521 60051 0 paperback

Contents

<i>Acknowledgments</i>	<i>page xi</i>
A. UNIVERSAL NORMS AND MORAL MINIMALISM	
1 Introduction	3
I. IDENTIFYING INTERNATIONAL CRIMES	5
II. THE CONTINGENT PRESUMPTION FAVORING SOVEREIGNTY	8
III. SOVEREIGNTY AND TOLERATION	11
IV. HOBBS AND THE PURSUIT OF SECURITY	14
V. SOLVING THE PROBLEM OF SOVEREIGNTY	18
VI. SUMMARY OF THE ARGUMENTS OF THE BOOK	20
2 <i>Jus Cogens</i> Norms	24
I. UNIVERSAL NORMS IN AN INTERNATIONAL SETTING	26
II. CONTEMPORARY LEGAL POSITIVISM	29
III. MORAL MINIMALISM	32
IV. CONTEMPORARY NATURAL LAW THEORY AND ITS CRITICS	35
3 Custom, <i>Opinio Juris</i>, and Consent	40
I. SOME LESSONS FROM HUME	42
II. A NON-CRIMINAL MODEL: THE OIL NATIONALIZATION CASES	44
III. IRAQ’S INVASION OF KUWAIT	48
IV. THE THREAT TO USE NUCLEAR WEAPONS	50
V. WHAT IS THE RELATIONSHIP BETWEEN CUSTOM AND UNIVERSAL NORMS?	53
VI. DEFENDING CUSTOM	55
B. PRINCIPLES OF INTERNATIONAL CRIMINAL LAW	
4 The Security Principle	63
I. INTERNATIONAL CRIMES AND MORAL LEGITIMACY	64
II. THE SECURITY PRINCIPLE	68

viii	<i>Contents</i>	
	III. A HOBBSIAN DEFENSE OF THE SECURITY PRINCIPLE	72
	IV. OBJECTIONS TO THE SECURITY PRINCIPLE	76
5	The International Harm Principle	80
	I. HARMING HUMANITY	81
	II. HUMANITY AND WIDESPREAD HARM	84
	III. GROUP-BASED ACTIONS AND SYSTEMATIC HARM	87
	IV. OBJECTIONS TO THE INTERNATIONAL HARM PRINCIPLE	90
6	International Crime: The Case of Rape	96
	I. RAPE AS A WAR CRIME	98
	II. RAPE AS A CRIME AGAINST HUMANITY	100
	III. RAPE AS PERSECUTION	103
	IV. WHY NOT INDIVIDUALIZED INTERNATIONAL CRIMES?	106
	C. PROSECUTING INTERNATIONAL CRIMES	
7	Prosecuting “Minor Players” for Crimes Against Humanity	115
	I. ETHNIC CLEANSING AND THE ACTS OF DUSKO TADIC	117
	II. THREE UNCONTROVERSIAL ELEMENTS OF CRIMES AGAINST HUMANITY	119
	III. DISCRIMINATORY INTENT	124
	IV. KNOWLEDGE OF THE PLAN	128
	V. PROSECUTING ETHNIC CLEANSING AS A CRIME AGAINST HUMANITY	132
8	Prosecuting State Leaders for Crimes Against Humanity	139
	I. COMMAND RESPONSIBILITY AND GROUP HARM	140
	II. GROUP ONTOLOGY AND THE STATE	143
	III. RESPONSIBILITY AND PUNISHMENT OF STATES	146
	IV. THE PINOCHET CASE	148
	V. HEAD OF STATE IMMUNITY	152
9	Prosecuting Genocide Amidst Widespread Complicity	157
	I. THE GREATEST OF EVILS	158
	II. SIMILARITY OF BEHAVIOR	160
	III. THE ACT ELEMENT IN THE CRIME OF GENOCIDE	164
	IV. THE INTENT ELEMENT IN THE CRIME OF GENOCIDE	167
	V. SHARING RESPONSIBILITY FOR POLITICAL CRIMES	170
	VI. RESPONSIBILITY AND PUNISHMENT FOR GENOCIDE	174
	D. DEFENSES AND ALTERNATIVES	
10	Superior Orders, Duress, and Moral Perception	179
	I. THE NUREMBERG DEFENSE	181
	II. NORMAL PERCEPTION IN ABNORMAL TIMES	184
	III. OUTRAGE AND THE SENTIMENTS OF HUMANITY	188

Cambridge University Press
0521840791 - Crimes Against Humanity: A Normative Account
Larry May
Frontmatter
[More information](#)

<i>Contents</i>	ix
IV. RESTRICTED MORAL CHOICES	191
V. ARTICLES 31 AND 33 OF THE ICC CHARTER	196
11 The International Rule of Law	201
I. THE CONCEPT OF THE RULE OF LAW	202
II. RETROACTIVITY	207
III. SELECTIVE PROSECUTION	211
IV. LET THE PUNISHMENT FIT THE CRIME	214
V. A HOBBSIAN APPROACH TO THE INTERNATIONAL RULE OF LAW	216
12 Victims and Convictions	220
I. RESTORING THE RIGHT	222
II. EXPRESSING CONDEMNATION	224
III. TRIALS AND THE INTERNATIONAL RULE OF LAW	227
IV. THE FAILURE TO CONVICT INTERNATIONAL CRIMINALS	230
13 Reconciliation and Amnesty Programs	235
I. THE GOALS OF RECONCILIATION	236
II. THE CONCEPT OF EQUITY	239
III. FORGIVENESS AND AMNESTY	243
IV. COLLECTIVE RESPONSIBILITY	246
V. COLLECTIVE REMEDIES	249
Conclusions	254
<i>Notes</i>	259
<i>Bibliography</i>	295
<i>Index</i>	305

Acknowledgments

This book has taken me a long time to write, nearly twice as long as any of my previous books. Part of the problem was that first I had to learn quite a bit of international law before I felt competent enough to provide philosophical reflections on international criminal law. As an undergraduate, I had sat in classrooms at Georgetown's School of Foreign Service, enthralled by developments in the emerging field of international law. Eventually, I put those interests aside to pursue a career teaching moral and legal philosophy. I only occasionally dabbled in international law until I found myself in a law school classroom, again as a student. This book began life as I sat in these classes realizing how much the world had changed in the twenty-five years since my undergraduate days. My long-dormant interests in international law were rekindled. I am grateful to Steve Legomsky and Peter Mutharika for igniting that spark and for putting up with that older and troublesome student who took more and more of their courses.

As I finished my law school studies, I was bitten by the criminal law bug, and I have subsequently helped in the defense of several defendants accused of murder. My emerging interest in this field of legal practice dovetailed with my intense interest in the newest field of international law – international criminal law. Here was a hothouse experiment in how to derive *legal* prescriptions from *moral* ones, and hence a field ripe for philosophical exploration and for discussions of individual and collective responsibility. It was also a field in need of a defendant-oriented approach. I am grateful to Peter Joy and Bob Wolfrum for helping to fuel my general interest in criminal law, and to Leila Sadat for providing me with such a rich introduction to the field of international criminal law.

As always, my greatest debt of gratitude goes to those theorists who have read and commented on my work. Carl Wellman read the entire manuscript in early draft and gave me valuable feedback and encouragement. Jack Knight, James Bohman, and Andrew Rehfeld read big chunks of it at crucial early points in the drafting. Thad Metz assigned several chapters in his graduate course and

conveyed very helpful information about how his students responded to my arguments. I have also benefited from all-too-brief conversations with the following scholars of international law: Richard Goldstone, Robert Wise, Ruth Wedgewood, and M. Cherif Bassiouni, who convinced me that I had something important to say. In addition, at a crucial point, I received significant advice and support from Allen Buchanan, whose generous comments on a late draft of the book have improved it immeasurably.

As the project neared completion, I received an extraordinary opportunity. Kit Wellman invited me to present the book manuscript at a summer workshop held for Atlanta-area philosophers and political theorists. For two extremely intense days, and in a spirit of deep cooperation, eight theorists mulled over the penultimate version of the manuscript and made an enormous number of excellent suggestions and objections. The book could never have gotten into its current form without the collective efforts of this group, whose members included Andrew Altman, William Edmundson, Peter Lindsay, George Rainbolt, Andrew Valls, Kit Wellman, Clark Wolf, and the Washington outsider David Luban. Luban has been especially generous with his sympathetic criticisms.

I have read various versions of all of these chapters at meetings of the American Philosophical Association and American Political Science Association and at conferences in Albuquerque, Amsterdam, Belgrade, Boston, Calgary, Chapel Hill, Cleveland, London, Lund (Sweden), Portland, Washington, DC, and St. Louis University Law School. I wish to thank the organizers of these various conferences for inviting me to present early versions of these chapters. One of the chapters has been translated into Italian and published in *Ars Interpretandi* (an annual journal of legal hermeneutics). Another chapter was published by Wilfred Laurier Press in Canada. One chapter will soon be published in Serbian.

Many, many other people contributed helpful comments on particular chapters. I would especially like to thank the following: Bat-Ami Bar On, Marcia Baron, Alyssa Bernstein, Jovan Bobic, Susan Brison, Matthew Cashen, Frances Foster, Trudy Govier, James Harold, Thomas Hill, Pauline Kleingeld, Aleksandar Jokic, David Lyons, Geoffrey Sayre-McCord, Angelika Means, Lukas Meyer, Christopher Morris, Ian Mueller, Peter Mutharika, James Nickel, Thomas Pogge, Eric Rovie, Mortimer (Tim) Sellars, Wayne Sumner, Roy Tsao, Steve Viner, Jeremy Waldron, and Iris Young.

The editor of Cambridge University Press's Philosophy and Law series, Gerald Postema, read several versions of this book. He has acted in the best traditions of an excellent editor. At an early stage of the book's development, he expressed strong interest and encouragement. At later stages, he insisted that I make the book as good as I possibly could. I will always be in his debt. I am also indebted to Ronald Cohen, whose copyediting greatly enhanced the clarity of the arguments in this book. Nancy Viner provided the index.

Cambridge University Press
0521840791 - Crimes Against Humanity: A Normative Account
Larry May
Frontmatter
[More information](#)

Acknowledgments

xiii

Finally, I would like to thank Marilyn Friedman, who discussed most of these chapters over many dinners and who helped me out of many a pickle I had gotten myself into. I dedicate this book to our daughter, Elizabeth, whose own emerging interest in criminal justice, stemming from a deep concern for the victims, kept me honest.

This book is the first volume of a projected multi-volume work on the normative foundations of international criminal law. The next volume will concern war crimes. It is hoped that these volumes will spark the interest of both political philosophers and practitioners of international law.