

International Criminal Tribunals: A Normative Defense, Larry May and Shannon Fyfe
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In *International Criminal Tribunals: A Normative Defense*, Larry May and Shannon Fyfe set out to demonstrate that international tribunals provide “the fairest way to deal with mass atrocity crimes in a global arena” (p. 1). To do so, the authors take up a wide range of critiques that scholars and others have leveled at international criminal tribunals and argue that although most have some validity, none are fatal to the enterprise of international criminal justice. The authors’ analysis of the various critiques yields both normative arguments about the value of international criminal tribunals and suggestions about how the institutions can be improved. In advancing their normative claims and supporting their prescriptive suggestions, the authors draw on a deep well of philosophical and theoretical concepts, including legitimacy, fairness, effectiveness, and efficiency. The result is a book that not only canvases and addresses the broad array of critiques leveled at international criminal tribunals but adds significantly to the rather scant literature on the philosophical justifications for international criminal justice.

The authors first address criticisms of international criminal tribunals rooted in concerns about state sovereignty, arguing that most such criticisms apply a misguided conception of sovereignty as absolute power. Drawing on a Hobbesian consent-based theory of sovereignty, they conclude that because in many cases states themselves consent to the establishment of tribunals, the institutions do not violate state sovereignty. The authors note that “only when there are nonconsensual international tribunals is there truly cause for alarm,” and assert that even those concerns can be alleviated by following certain policy prescriptions, such as avoiding any appearance that international criminal tribunals are coercing weak states (p. 48).

Next, the authors address criticisms related to the justifications for punishment and the difficulties of allocating responsibility for group crimes. Their proposed justification for punishment at the international level combines deterrent, retributive, and expressive rationales—the most frequently cited justifications for criminal punishment generally. They point out that while international criminal tribunals face difficulties in achieving such goals, those challenges also exist in domestic systems, and none of them “succeeds in derailing the promotion of international criminal prosecution and punishment” (p. 71). With regard to the allocation of responsibility, the authors agree with some of the criticisms, including the charge that the International Criminal Tribunal for the former Yugoslavia (ICTY) engaged in “patent discrimination in the prosecutorial strategy” when its early indictments involved only Serb defendants (p. 89). As with problems related to justifying punishment, however, the authors assert that such issues should be addressed through reform rather than serving as a basis for eliminating the tribunals entirely.

In addressing concerns about the effectiveness and efficiency of international criminal tribunals, May and Fyfe turn to standard arguments about suasion rather than coercion as the primary force behind international law’s “compliance pull.” They also note that international trials are an important vehicle for expressing the outrage of the international community at such egregious crimes as genocide, crimes against humanity, and at least some war crimes. According to the authors, some of the concerns about politicized decision-making at international criminal tribunals are well-founded. For instance, with regard to the International Criminal Court (ICC), they believe “that there are aspects of the way the ICC has functioned in the past that look far too political for a judicial body” (p. 137). Yet they do not view such behavior as undermining the

institution's normative legitimacy because it is not a function of the nature of the institutional structures, but rather of individual decision-making.

The book's chapter on fairness addresses charges that international prosecutors are engaged in victors' justice and biased and unfounded prosecutions. The authors cite the ultimately failed prosecution of Kenya's President Uhuru Kenyatta as a situation where the ICC promoted "at least the appearance of unfairness" by failing to heed "reasonable requests for postponement of a very high-profile case concerning a very popular African leader" (p. 182). Although May and Fyfe recommend that international prosecutors continue to improve their practices related to case selection and other issues, they assert that such concerns do not detract from their conclusion that international criminal tribunals are "the fairest way to deal with crimes of mass violence" (p. 188).

One contribution this book makes to the still embryonic literature on the normative legitimacy of international criminal tribunals is that it compiles in one volume many of the most frequent and pressing critiques of those institutions. Previously, those critiques were largely addressed in a piecemeal fashion by authors concerned about a particular aspect of the institutions' operations. By adopting a holistic approach to addressing the legitimacy challenges, May and Fyfe demonstrate important interrelationships among them. Concerns about fairness, for instance, arise at various points throughout the book. The authors also argue convincingly that many of the normative critiques of international criminal tribunals can be addressed by clarifying the underlying goals that they pursue and ought to pursue.

If the book's strength lies in its breadth of topics and the variety of solutions it proposes, some of its analysis, perhaps necessarily, lacks depth. For instance, in arguing that international criminal tribunals such as the ICTY engage in discriminatory prosecutorial strategies when they

indict defendants from only one side of a conflict, the authors overlook normative arguments in the literature that might support one-sided prosecutions in some situations. One such argument, put forward by the well-regarded expert William Schabas, is that when a particular group has committed the most egregious crimes in a conflict, a tribunal risks conveying a false moral equivalency if it pursues all sides equally. Likewise, May and Fyfe's claim that the ICC inappropriately singled out Uhuru Kenyatta for prosecution overlooks counter-arguments that such prosecution expressed important global condemnation of election-related violence. Finally, in arguing that certain particularly egregious crimes require international-level prosecution, the authors assert, but do not demonstrate, that such crimes "adversely affect humanity" in a way that distinguishes them from national-level crimes (p. 108).

May and Fyfe characterize their book as a strong rebuttal to critics who wish to abolish international criminal tribunals, yet many if not most of the scholarly works that they discuss share the authors' commitment to improving the international criminal justice system. For instance, in discussing punishment, the authors cite Mark Drumbl's concerns about the justifications for international punishment, but Drumbl's work clearly conveys an ambition to improve, rather than undermine or dismantle, the international criminal justice system. Like Drumbl, many of the authors that May and Fyfe cite as international criminal law "critics" would agree that "reform rather than disbandment is needed" (p. 192). Only a small number of commentators advocate the abolition of international criminal tribunals, and the book's effort to rebut such abolitionism sometimes distracts from its laudable efforts to suggest institutional reforms. Indeed, the authors' focus on possible institutional destruction seems to limit the depth with which they engage existing debates about institutional reform. That preoccupation also prevents the kind of detailed comparative analysis that would be necessary to support the

authors' claim that international criminal tribunals are the fairest venues for adjudicating particular kinds of crimes.

Despite these omissions, the book's impressive breadth makes it an important vehicle for promoting debates about the normative underpinnings of global criminal justice. It is written clearly and accessibly, which will foster participation by a broad and diverse audience. Scholars will find the book useful as a resource for arguments about the normative strengths and weaknesses of international criminal tribunals, and practitioners of international criminal law should give careful consideration to the authors' prescriptive suggestions.

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