

Cambridge University Press
978-0-521-15235-8 - Global Justice and Due Process
Larry May
Frontmatter
[More information](#)

GLOBAL JUSTICE AND DUE PROCESS

The idea of due process of law is recognized as the cornerstone of domestic legal systems, and in this book Larry May makes a powerful case for its extension to international law. Focusing on the procedural rights deriving from Magna Carta, such as the rights of habeas corpus (not to be arbitrarily incarcerated) and non-refoulement (not to be sent to a State where harm is likely), he examines the legal rights of detainees, whether at Guantanamo or in refugee camps. He offers a conceptual and normative account of due process within a general system of global justice, and argues that due process should be recognized as *jus cogens*, as universally binding in international law. His vivid and compelling study will be of interest to a wide range of readers in political philosophy, political theory, and the theory and practice of international law.

LARRY MAY is W. Alton Jones Professor of Philosophy, and Professor of Law, at Vanderbilt University, as well as Professorial Fellow at the Centre for Applied Philosophy and Public Ethics at Charles Sturt and Australian National Universities. He is the author of *Crimes Against Humanity: A Normative Account* (Cambridge, 2005), *War Crimes and Just War* (Cambridge, 2007), *Aggression and Crimes against Peace* (Cambridge, 2008), and *Genocide: A Normative Account* (Cambridge, 2010). He is also the editor of *International Criminal Law and Philosophy* (Cambridge, 2009).

Cambridge University Press
978-0-521-15235-8 - Global Justice and Due Process
Larry May
Frontmatter
[More information](#)

GLOBAL JUSTICE AND DUE PROCESS

LARRY MAY

*Vanderbilt University
Charles Sturt and Australian National Universities*



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
 978-0-521-15235-8 - Global Justice and Due Process
 Larry May
 Frontmatter
[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
 São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press
 The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521762724

© Larry May 2011

This publication 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 2011

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

May, Larry.

Global justice and due process / Larry May.

p. cm.

ISBN 978-0-521-76272-4 (Hardback) – ISBN 978-0-521-15235-8 (Pbk.)

I. Due process of law. I. Title.

K3251.M39 2011

347'.05–dc22

2010028667

ISBN 978-0-521-76272-4 Hardback

ISBN 978-0-521-15235-8 Paperback

Cambridge University Press has no responsibility for the persistence or
 accuracy of URLs for external or third-party internet websites referred to
 in this publication, and does not guarantee that any content on such
 websites is, or will remain, accurate or appropriate.

Contents

<i>Acknowledgements</i>	<i>page viii</i>
I Introduction: understanding global procedural justice	I
1.1 Magna Carta's procedural rights	4
1.2 The infirmity of international law	6
1.3 International outlaws, detainees, and the Stateless	8
1.4 Procedural justice and the international rule of law	II
1.5 Summary of the arguments of the chapters in this book	14
PART I PROCEDURAL RIGHTS AND MAGNA CARTA'S LEGACY	
2 Magna Carta and the interstices of procedure	2I
2.1 Magna Carta and its twelfth-century background	22
2.2 Preconditions for the rule of law	26
2.3 Parallels between Magna Carta and international law	30
2.4 Future directions for the development of international law	34
2.5 Objections	37
3 The nature and value of procedural rights	43
3.1 Nowheresville and Guantanamo	44
3.2 Distinguishing procedural and substantive rights	47
3.3 Instrumental and intrinsic value of procedures	52
3.4 International procedural rights	57
3.5 Objections	60
4 International law and the inner morality of law	66
4.1 Hart on international law	67
4.2 Fuller on procedural natural law	72

vi	<i>Contents</i>	
4.3	Fundamental procedural rights	75
4.4	Habeas corpus and international law	78
4.5	Objections and replies	80
PART II HABEAS CORPUS AND ‘JUS COGENS’		
5	Habeas corpus as a minimalist right	87
5.1	Habeas corpus and the value of procedural rights	88
5.2	The deterrence argument	90
5.3	The disappeared argument	93
5.4	The torture argument	95
5.5	The Ring of Gyges	98
5.6	<i>The principle of visibility</i>	100
6	Due process, judicial review, and expanding habeas corpus	104
6.1	Problems with minimalist habeas corpus	104
6.2	Due process of law	107
6.3	Judicial review and habeas corpus	109
6.4	Assessing the role of judicial review	114
6.5	Global due process	117
7	Habeas corpus as <i>jus cogens</i> in international law	120
7.1	The idea of <i>jus cogens</i> norms	120
7.2	<i>Jus cogens</i> and equity	126
7.3	Arbitrary incarceration in European human rights law	130
7.4	The Inter-American Commission on Human Rights	133
7.5	David Hicks and the <i>MV Tampa</i>	137
7.6	An objection	140
PART III DEPORTATION, OUTLAWRY, AND TRIAL BY JURY		
8	Collective punishment and mass confinement	145
8.1	Collective responsibility and punishment	146
8.2	The Just War tradition and international law	150
8.3	Collective liability and confinement	154
8.4	Refugee detention and equity	156
8.5	Objections	160
9	Non-refoulement and rendition	164
9.1	The problem of “vicarious dirty hands”	165
9.2	What is non-refoulement?	168
9.3	Non-refoulement as a <i>jus cogens</i> norm	172

Cambridge University Press
978-0-521-15235-8 - Global Justice and Due Process
Larry May
Frontmatter
[More information](#)

<i>Contents</i>		vii
9.4	Expanding the scope of non-refoulement	178
9.5	Objections	180
10	The right to be subject to international law	184
10.1	The concepts of outlawry and Statelessness	185
10.2	Outlawry and Statelessness in international law	189
10.3	Being a subject of international law	191
10.4	Trial by jury	193
10.5	Citizens of what?	197
PART IV SECURITY AND GLOBAL INSTITUTIONS		
11	Alternative institutional structures	205
11.1	A world court of equity	206
11.2	Global administrative law	210
11.3	Enhancement of international human rights institutions	213
11.4	A progressive development of alternatives	215
11.5	Due process institutions	217
12	Global procedural rights and security	221
12.1	Human rights, peace, and security	222
12.2	Conflicts between security and rights	225
12.3	Linking the rights of Magna Carta	230
<i>Bibliography</i>		235
<i>Index</i>		244

Cambridge University Press
978-0-521-15235-8 - Global Justice and Due Process
Larry May
Frontmatter
[More information](#)

Acknowledgements

The central guiding idea of this book is that we need to make sense not only of substantive rights to liberty and life at the international level but also of the rights to due process through which appeals of deprivation of substantive rights can be made. I first encountered these issues in both a theoretical and very practical context. In law school, Steve Legomsky first introduced me to many of these issues in a course on human rights law. Later, the courses I co-taught with Jack Knight on the rule of law inspired me to think more carefully about due process than I had before. And then, I had occasion to participate in a few cases of habeas corpus appeal from first degree murder convictions, several involving the death penalty, in the US. This practical experience solidified my belief in the importance of due process matters. In my research about international law I became increasingly convinced that debates about global justice needed more attention to due process as well.

In this book I argue that there is value in due process as constituting a rule of law that exceeds the benefit of protection of substantive rights. And I also argue that international procedural rights can become the cornerstone of an “international” rule of law that will cure many of the infirmities of international law today. This book addresses a gap in the political philosophy literature on global justice. Its focus is on procedural issues, whereas most of the literature is on substantive issues. And its focus is on legal rights of detainees, whether at places like Guantanamo or in refugee camps, whereas most of the literature is on economic rights. In international law there is a burgeoning literature on the topics that I will address, but there has also been very little theoretical literature here as well. As in any discussion that fills a gap, it is best seen as a first approach.

Several chapters of this book were published as free-standing essays. Chapter 2, “Magna Carta and the interstices of procedure,” was published by the *Case Western Reserve Journal of International Law* in 2009. Chapter 4, “International law and the inner morality of law,” was

Cambridge University Press
 978-0-521-15235-8 - Global Justice and Due Process
 Larry May
 Frontmatter
[More information](#)

Acknowledgements

ix

published in a volume called *The Hart/Fuller Debate in the 21st Century*, edited by Peter Cane (Oxford: Hart Publishing, 2009). This chapter, in a somewhat different form, was also published, under a different title, in the *Leiden Journal of International Law* in 2010. A partial reading and discussion of Chapter 5, “*Habeas corpus* as a minimalist right,” was recorded on Public Ethics Radio, in conjunction with the Carnegie Council on Ethics and International Affairs in October of 2008. Chapter 12, “Global procedural rights and security,” was published in a volume called *Security: A Multi-Disciplinary Approach*, edited by Cecilia Bailliet (Leiden: Brill Publishers, 2009).

In writing this book I have benefited from the comments of many people who have heard versions of these chapters at conferences and colloquia in 2008–2010 in: Buffalo, Cambridge, Canberra, Carbondale, Chicago, Cleveland, Delft, London, Melbourne, New Orleans, Oslo, Oxford, Philadelphia, St Louis, The Hague, Sydney, and Toronto. I would like to mention the following as having provided especially helpful advice: Susan Appleton, Cecilia Bailliet, Jim Bohman, Tom Campbell, Peter Cane, Hilary Charlesworth, Tony Coady, Adrienne Davis, Toni Erskine, Lenn Goodman, Clarissa Hayworth, Zach Hoskins, Peter Joy, Jack Knight, David Konig, Chris Kutz, Tony Lang, David Luban, Ian MacMullen, Seumas Miller, James Nickel, Philip Petit, Gerald Postema, Andrew Rehfeld, Neil Richards, David Rodin, Kim Rubenstein, Leila Sadat, Nancy Sherman, Ken Shockley, Helen Stacy, Wayne Sumner, and Richard Vernon.

My greatest debt goes to those faithful colleagues and friends who read all or large parts of this manuscript. I am especially grateful to Mark Drumbl, Marilyn Friedman, Bob Goodin, and Kit Wellman, who were often my fiercest critics and also my most supportive interlocutors. I also wish to thank Hilary Gaskin and the staff of Cambridge University Press for encouragement and support of this project. And I am very grateful to Jeffrey Tlumak and Carolyn Dever, from Vanderbilt University, for crucial support during the final stages of this project. I also thank Paul Morrow for supplying an excellent index.