

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

CHAPTER I

*Introduction: understanding global
 procedural justice*

No freeman shall be taken or imprisoned or disseised or exiled or outlawed . . .

Magna Carta, 1215, Chapter 29 (39).

No one shall be subject to arbitrary arrest, detention, or exile.

Universal Declaration of Human Rights, 1948, Article 9.

Throughout this book I will discuss issues of global justice from two different perspectives. First, I will address global justice as a matter of morality, especially as a matter of moral fairness. Second, I will also address the issue of global justice from the perspective of international law as an emerging system of norms. This dual perspective calls for an interdisciplinary analysis where philosophical principles and legal practices are brought into conversation with each other as it were. I have employed this approach in my previous books on international criminal law. And I have benefited from employing historical materials from the Just War tradition, which provides a common core for both moral philosophers and international lawyers. In the current work I will also draw much guidance from the historical case of Magna Carta and the debates in many countries about how best to understand and instantiate the rights of Magna Carta's legacy.

The debates about global justice typically concern economic distributive justice or criminal retributive justice. Both of these forms of justice concern substantive justice, namely they concern the substantive rights that people have by virtue of either their economic need or their status as victims. I wish to discuss a third subject matter in the field of global justice, namely the procedural rights that constitute an international rule of law. I will contend that procedural rights provide a moral core to any system of law, and this is even more the case at the international level than at the national level. Such procedural rights provide at least minimalist protection concerning substantive rights as well. In this

2 *Introduction: understanding global procedural justice*

respect, the moral content of the natural law may very well be best exemplified in the institution of the rule of law.¹ Any substantive rights can be held hostage if the person who would claim these rights can be incarcerated unjustifiably.

My previous work in international law has been about substantive international justice, with volumes on the normative grounding of crimes against humanity, war crimes, the crime of aggression, and genocide.² I now turn to procedural issues in international law. In the jurisprudential and political philosophy literature, this is a vastly underdeveloped field, with the global justice literature exploding about substantive rights of victims, as well as economic rights of those who are the worst off, yet with proportionately little attention being given to what I call global procedural justice.

This book will focus on what are sometimes known as “due process” rights. These rights are procedural rights that set a moral minimum on what oversight is necessary for individuals who have been detained or incarcerated by governments. As James Nickel has said:

Due process rights protect us not only directly when we are accused of a crime, but also indirectly by serving as checks on governmental power. They make less available tempting but tyrannical ways of governing, and thereby promote good government. They do this by requiring that a number of procedural steps be taken before sentencing someone to jail. They also make tyrannical ways of governing less available by making criminal procedure transparent.³

In addition, as I will argue, due process considerations prevent abuses in the way that individuals are deported or outlawed within their own countries, in refugee camps or detention centers, for instance. I will focus on due process rights as global rights, not merely rights that exist in particular States. In this sense, I will address due process rights as human rights and as a matter of global justice.

The book is motivated by three concerns. First, in reading the literature on Magna Carta I was struck by the way that the rights secured in the main article of Magna Carta, drafted in the first few years of the

¹ See the debate between H. L. A. Hart and Lon Fuller on this point, as discussed later in Chapter 4.

² See my previous recent work on these topics: *Crimes Against Humanity: A Normative Account*, NY: Cambridge University Press, 2005; *War Crimes and Just War*, NY: Cambridge University Press, 2007; *Aggression and Crimes Against Peace*, NY: Cambridge University Press, 2008; and *Genocide: A Normative Account*, NY: Cambridge University Press, 2010.

³ James W. Nickel, *Making Sense of Human Rights*, Oxford: Blackwell Publishing, second edn, 2007, p. 109.

thirteenth century, tracked the same rights that had been denied to those at Guantanamo, Cuba and Bagram, Afghanistan, as well as in many refugee camps, in the first few years of the twenty-first century. In 800 years it looked as if we had made no progress, and indeed had regressed. In part, this is because Magna Carta concerned the rights *inside* England, whereas in Guantanamo and even more in some refugee camps, the rights were said to lie *outside* of a State's jurisdiction. I will argue that since these rights are so important, they should also be enshrined in international law.

Second, I was struck by the fact that the rights of Magna Carta were not substantive, but procedural, although not in the normal sense of that term. The rights were in a sense collateral to the criminal law system, yet provided a foundation, indeed a moral core for that legal system. So, I set out to try to make sense of these rights, especially the right to habeas corpus and the rights against rendition and Statelessness, as rights that are prior to and in some cases more important than even substantive rights. Such procedural rights are most important in times of extreme turmoil, when people's substantive rights are most at risk – largely because of the possibility of indefinite detention in detainee centers and refugee camps.

Third, I was intrigued by possible parallels between the way that the English law had developed since Magna Carta and the way international law has developed since the end of the Cold War. In both cases, law developed in a slow and piecemeal manner where autonomous or semi-autonomous entities struggled in the formation of an overarching legal system: the feudal barons struggling with King John, and the sovereign States struggling with the United Nations (UN). One of my tasks is to try to explain in terms of political philosophy and normative jurisprudence why habeas corpus and other related rights have such a peculiar and significant status, and why they may constitute an international rule of law. These topics are of the utmost importance and yet have received little attention.

In this chapter I will outline in the first section why I find Magna Carta to be a good source for thinking about international law today, especially in its emphasis on procedural rights. In the second section I will explain the ways in which international law is currently infirm and how a Grotian approach to understanding law in general and international law in particular could help cure some of these infirmities. In the third section I discuss the broad category of being an outlaw that informed Magna Carta and can also inform debates in international law today, especially as we

4 *Introduction: understanding global procedural justice*

seek to find ways to fill in legal black holes that exist in such places as Guantanamo and some refugee camps. I also provide some of the seventeenth-century normative background to my analysis in the rest of the book. In the fourth section I discuss the idea of an international rule of law and the place that procedural rights play in that idea. In the final section I provide a summary of the arguments advanced in the various chapters of the book, as well as a sense of what binds these particular arguments together.

I.1 MAGNA CARTA'S PROCEDURAL RIGHTS

As I said this project is inspired by two events, 788 years apart. The first is the signing of Magna Carta in 1215 and the second is the establishment of US prisons at Guantanamo and Bagram in 2003. It may seem odd to link these two events, but I do not think it is odd at all. Magna Carta established that any person is entitled to due process of law. Guantanamo and Bagram were defended by the idea that certain prisoners can be denied due process if they fall through the cracks in the various extant legal regimes: the criminal justice system of the US and the system of international law. Magna Carta was an agreement extracted from King John of England by feudal barons. Chapter 39 (normally referred to as Chapter 29 in the 1225 revised version of King Henry III) says:

No freeman shall be taken or imprisoned or desseised or exiled or outlawed or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.

There are at least four distinct rights in this document, which came to stand for the core of procedural due process, and all four were violated by the establishment of the prisons at Guantanamo Bay and Bagram Air Base.

The rights enshrined in Magna Carta are: 1) the right not to be arbitrarily imprisoned; 2) the right not to be sent into exile; 3) the right not to be removed from the protection of the law; and 4) the right to trial by jury. At Guantanamo Bay, all four rights were violated. The right of habeas corpus was denied to these prisoners. Several prisoners were sent from Guantanamo to countries that were known routinely to use torture. The prisoners were described by the Bush administration officials as being in a "legal black hole" in that they were neither within the jurisdiction of US courts nor under the jurisdiction of the laws and customs of war, since they were unlawful combatants. And the prisoners at Guantanamo were denied trial by jury.

In many ways, my best case though is not Guantanamo but the refugees and political prisoners of the world who are literally in a legal black hole. Several of the early Articles of the Universal Declaration of Human Rights (UDHR) concern these procedural rights and will help frame my understanding of global procedural justice. In particular, I would mention three articles of the UDHR:

Article 9. No one shall be subject to arbitrary arrest, detention, or exile.

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. 1. Everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense.

2. No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.⁴

It seems to me that these rights are basic rights, on all fours with better known economic and retributive concerns. The UDHR is largely hortatory. We will see that these rights have been instantiated in human rights treaties that have wide-ranging scope, but are not afforded the same status commensurate with substantive rights. Indeed, the procedural rights of the UDHR are considered suspendable in times of emergency. I will argue that international law should be changed so as to elevate the status of procedural rights.

I will argue that certain rights, which I contend are best seen as procedural rights, should be the core of global due process. These include:

The right of habeas corpus.

The right of non-refoulement.

The right to be subject to international law.

The right to trial by jury.

One might consider these to be special procedural rights, which can be derived from or gain their normative support from the rights listed in the UDHR. Indeed, some of these rights, such as habeas corpus and trial by jury, are considerably older than the Universal Declaration itself. It is my contention that such rights are the backbone of a minimal respect for

⁴ Universal Declaration of Human Rights, U.N.G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948).

6 *Introduction: understanding global procedural justice*

human rights generally and if recognized globally would significantly fill gaps in an international rule of law.

One of the ideas proposed in this book is that there should be an international legal body that has the authority to hear claims of deprivation of basic procedural rights anywhere in the world that there is a person in detention who claims that the charges against him or her do not support the detention. How this court or other institution would come into being would probably require a multilateral treaty among most of the States in the world. As with other such international courts and institutions, the main reason that States would agree to such a proceeding would be out of concern for the protection of basic human rights across the world. Even the strongest of States, like the US, recognize that they are part of an interdependent world where constraints that protect rights ultimately benefit everyone.

At the moment, the International Criminal Court (ICC) has four substantive crimes as the basis of its jurisdiction: genocide, crimes against humanity, war crimes, and the crime of aggression (the last is currently not operational because of a lack of consensus on what constitutes aggression). These crimes are very specifically defined and are only likely to be prosecuted when there has been a mass atrocity. In addition, the ICC is governed by the important principle of complementarity, which requires that the prosecutor can only take a case if the State that otherwise would have jurisdiction has refused or indicated that it cannot hear the case on its own. I see the global procedural justice rights as corollary to, but also undergirding, the substantive rights already protected at the ICC. And I will argue that there is reason to be cautiously optimistic that sizeable numbers of States would sign on to a multilateral treaty protecting global procedural rights.

1.2 THE INFIRMITY OF INTERNATIONAL LAW

As H. L. A. Hart observed over twenty-five years ago, international law is infirm because it lacks an “international legislature, courts with compulsory jurisdiction, and centrally organized sanctions.”⁵ The primary rules of the international legal regime, such as against murder, are often virtually the same in content as those of domestic legal systems. But the form of these rules, or at least the form of the underlying secondary rules, especially concerning sanctions, are infirm, calling into question whether

⁵ H. L. A. Hart, *The Concept of Law*, Oxford University Press, 1984 [1960], p. 214.

1.2 *The infirmity of international law*

7

international law is indeed a system of law or merely a loose set of laws. In the last decade we have been moving toward an international rule of law, but we are definitely not there yet.

We will not soon have a full-scale solution to the problem of compulsory jurisdiction and centrally organized sanctions. But in the meantime, gap-filling can increase the claim to an international rule of law. Chief among the measures of gap-filling is a system of international procedures including indictments and arrests for violations of international law, especially international criminal law, along with gap-fillers for protecting the rights of those indicted and arrested, such as those found in the call for the institutional protection of the rights of habeas corpus, non-refoulement, and similar measures at the global level. The question posed today about whether the President of the Sudan, Al Bashir, should be indicted and arrested for his role in the Darfur genocide and other atrocities goes directly to the heart of the issue of how best to move toward an international rule of law.

As I said, international law is currently infirm – at best it is a patchwork quilt of norms. The infirmity concerns the lack of coercive sanctions and of centrally recognized authority for resolving disputes. We could add more international substantive norms (e.g., on cluster bombs, anti-personnel bombs, land mines, etc.). Instead, I believe we should work toward an international rule of law by strengthening international procedural norms. These norms are valuable because they add a further layer of protection to substantive norms, but more importantly they fill gaps in the existing system of substantive norms, in that they allow for remedies to rights violations that are not clearly linked to “black letter” substantive norms. Throughout this book, I argue that we can learn quite a lot from historical sources like Magna Carta about how to construct a fully functioning international legal system from the ground up rather than from the top down.

I will begin with a bit of background from the Just War tradition. The most significant figure concerning the ethics and law of war was Hugo Grotius. Writing in 1625, he proposed that there is an “association which binds together the human race, or binds many nations together” and that such an association “has need of law.”⁶ Grotius then famously defended the idea “that there is a common law among nations, which is valid alike for war and in war.”⁷ As one commentator has recently noted:

⁶ Hugo Grotius, *De Jure Belli Ac Pacis* (On the Law of War and Peace) (1625), Francis W. Kelsey (trans.), Oxford: Clarendon Press, 1925, p 17.

⁷ *Ibid.*, p. 20.

8 *Introduction: understanding global procedural justice*

Grotius, too, is of course fully aware of the importance of independent nations ... However his ultimate frame of reference remains the Ciceronian *humani generis societas* inherited from Stoicism, a society of mankind rather than States.⁸

Grotius spoke explicitly of such a society bound together “by good faith” and “tempered with humanity.”⁹ Grotius recognized that “law fails of its outward effect unless it has a sanction behind it.” Even when there is no sanction, law “is not entirely void of effect,” as long as “justice is approved, and injustice condemned, by the common agreement of good men.”¹⁰ The conscience of humanity can be affected even without sanctions, but the international society is even better served if the condemnations of injustice can be backed by sanctions against those States that act unjustly. Whatever the sanctions of law, even the sanctions of war, these should be governed by the singular task of “the enforcement of rights.”¹¹ In this vein, I will argue for international sanctions for violations of due process rights at the international level.

The most significant international substantive rights against genocide, crimes against humanity, war crimes, and aggression are partially protected by the ICC. I will argue that we also need some other significant addition to international law that will protect procedural rights like habeas corpus and non-refoulement. Whether that institution is primarily just an expansion of already existing international human rights committees or councils, a new administrative regime at the international level, or a full-blown court, procedural rights need stronger protection than currently exists for there to be anything that lays claim to an international rule of law.

1.3 INTERNATIONAL OUTLAWS, DETAINEES,
AND THE STATELESS

The main focus of this study is the fate of those who in some States have been deprived of basic rights protection through detention or confinement. The two kinds of case I am most interested in are, first, those involving individuals in detention centers such as Guantanamo and Bagram, as well as domestic immigration detention facilities in the US, Australia, and the UK. Second, I am also interested in those cases where people are refugees or Stateless, either for political or economic reasons,

⁸ Peter Haggenmacher, “Grotius and Gentili,” in *Hugo Grotius and International Relations*, Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds.), Oxford University Press, 1990, p. 172.

⁹ *De Jure Belli ac Pacis*, pp. 860–861.

¹⁰ *Ibid.*, pp. 16–17. ¹¹ *Ibid.*, p. 18.

1.3 *International outlaws, detainees, and the Stateless* 9

currently occupying camps and who have fled or been exiled from their home countries and yet have not been accepted into the host countries where the camps have been established.

These two groups of cases are similar in that the inhabitants have become “outlaws,” people who do not receive the protection of domestic or even international law. They seem to exist in a Hobbesian state of nature or a legal black hole that exists because of the infirmity of international law, which has gaping holes in its system of human rights protection, despite the theoretical guarantee of protection for all. Hobbes famously sets out the infirmities of such a state as follows:

And because the condition of man ... is a condition of Warre of every one against every one; in which case everyone is governed by his own reason; and there is nothing he can make use of, that may not be a help unto him, in preserving his life against enemies; It followeth, that in such a condition, every man has a right to every thing; even to one another's body.¹²

The underlying pessimistic account of human nature need not be accepted in order to see the intuitive idea that without the rule of law people will be strongly tempted to abuse one another and even to take each other's life, despite the theoretical recognition of these rights.

I will say much more about “outlaws” in subsequent chapters. Here let me merely indicate the source of the idea. At about the time of Magna Carta it was apparently a practice in England for those who were disfavored or thought to be dangerous or in some other way suspicious to be exiled either outside or within England itself. For the latter to be accomplished, the person was removed from the normally populous regions of England where the king's law was enforced into a region where no laws were enforced. The term “outlaw” merely refers to those who exist outside the jurisdiction and protection of the law, even though formally they may be rights-bearers. While some outlaws were formally rightless, the cases that interest me are outlaws who remained formally rights-bearers but who were not afforded the effective protection of the law.

The best-known example of an outlaw in England is Robin Hood, who was exiled to Sherwood Forest, an area that was beyond the king's enforcement.¹³ There is some question of whether Robin Hood is

¹² Thomas Hobbes, *Leviathan* (1651), Richard Tuck (ed.), NY: Cambridge University Press, 1996, Chapter 14.

¹³ There is considerable debate about whether the fictional stories about Robin Hood were modeled on a particular actual case.

supposed to have voluntarily exiled himself so as to avoid the king's punishment or whether he was forcibly exiled by the king. But in any event, the effect was the same: Robin Hood was an outlaw in the sense that he was beyond the enforcement of the king's law and this meant, among other things, that anyone in England was free to kill or harm him if they so chose. Robin Hood was in a legal black hole, perhaps somewhat like the situation faced by those detainees at Guantanamo Bay who discovered that they did not have their rights protected by the US, or even by international legal authorities. It is true that Robin Hood was not technically detained, although he was apparently told that if he left Sherwood Forest he would be subject to punishment, perhaps capital punishment, and thereby deterred from leaving and regaining the protection of the laws.

Grotius said: "Violence is characteristic of wild beasts and violence is most manifest in war; wherefore the most diligent effort should be put forth that is tempered with humanity lest by imitating wild beasts too much we forget to be human."¹⁴ There is a sense in which Grotius's remarks direct our attention to the situation that exists when law and its sanctions are not in place, as in some refugee camps. Hobbes stated the point boldly by discussing this as the state of nature as opposed to the state of civil society.¹⁵ There is a wide difference in conceptions of human nature that separates Hobbes's pessimism and Grotius's optimism, yet they both form the same extremely negative assessment of what it is like to be outside of the realm of law.

In detention centers and refugee camps, violence is indeed rampant. Reports regularly circulate about widespread rapes in refugee camps, such as those in Darfur, and of widespread torture in detention centers, such as Abu Ghraib. What is needed is for there to re-emerge the rule of law that among other things seeks to temper the desire to perpetrate violence with a sense of humanity, a civilizing sentiment that is as relevant in domestic as in international matters. Indeed, what the detention centers and refugee camps illustrate is the incredibly depraved way that some people will behave toward those under their care when they are assured that what I will call "visibility" is absent. Visibility encompasses the idea that political practices that affect the rights of people should not be allowed to be conducted in secrecy. When people are assigned to detention

¹⁴ Grotius, *De Jure Belli Ac Pacis*, p. 861.

¹⁵ Thomas Hobbes, *Leviathan* (1651), Chapter 13.