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MAGNA CARTA, THE INTERSTICES OF PROCEDURE, AND GUANTÁNAMO

Larry May*

This paper is inspired by two events, seven hundred and eighty-eight years apart. The first is the signing of Magna Carta in 1215 and the second is the establishment of U.S. prisons at Guantánamo 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. Guantánamo and Bagram stand for the idea that certain prisoners can be denied due process if they fall through the cracks in the various extant legal regimes. Magna Carta was an agreement extracted from King John of England by feudal barons. We need an international agreement that protects Magna Carta legacy rights so that detainees will not fall through the cracks and be deprived of their procedural rights as they were at Guantánamo.

INTRODUCTION

In this paper I will explain how an understanding of Magna Carta in 1215 might provide an intriguing model for understanding “global procedural justice.” The story of how Magna Carta influenced English law gives us a model, but also a cautionary tale, of how international law may develop as well. The process was a very slow and gradual one, and the process largely proceeded through gap filling, especially in the domain of procedural rights rather than substantive ones. Magna Carta laid the groundwork for English rule of law by laying out basic procedures that had to be followed, including procedures for challenging arbitrary imprisonment or exile. These procedural rights opened the door for the kind of equitable review of potentially arbitrary use of power by courts and even by the King, so that other more substantive abuses could be exposed and condemned as well. In this way, even as significant substantive rights were lacking in the legal system, procedural rights became gap fillers. Accountability was the main thing accomplished by Magna Carta and that then led to the possibility of a centralized system of law enforcement across England, just as may be true some day with international law. The process required significant input

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from Parliament, which extended and solidified Magna Carta's rights. Because there is no international legislature, other legal institutions will have to play the role of Parliament in extending basic procedural rights globally.¹

In the first section of this paper, I will explain what the rights are that were first described at the time of Magna Carta and how they were abridged in Guantánamo. In section two, I provide some historical background on Magna Carta, rehearsing a story that by now has achieved wide consensus among historians. In the third section, I will explain why it was that Magna Carta's rights came to be considered fundamental law in England, and why it is especially important that fundamental law be understood in procedural terms for the development of the rule of law. In the fourth section, I draw out some parallels between the development of a legal system in England from the time of Magna Carta and the development of an international legal system today. In the fourth section, I explain some of the changes in international law that would be especially important for the eventual creation of a truly international legal system, again drawing on the model of Magna Carta. And in the final section, I respond to several objections.

I. MAGNA CARTA'S LEGACY AND GUANTÁNAMO

Magna Carta's Chapter 39 (normally referred to as Chapter 29, in the 1225 revised version of King Henry III) says:

No freeman shall be taken and imprisoned or disseised . . . or outlawed, or exiled, 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.²

There are at least four distinct rights in this document.

First, is the right to trial by jury, which is so important that the other rights cannot be abridged unless a jury determines that such abridgement is justified. Second, is what came to be called the right of habeas corpus, the right not to be arbitrarily imprisoned. Third, is the right not to be disseised, which meant the right not to be arbitrarily dispossessed or deprived of citizenship rights, including the rights to certain "of any free tenement or of his liberties or free customs . . ."³ And fourth, is the right not to be outlawed or exiled arbitrarily, at least in part what is today called the right of nonre-foulement, namely the right not to be arbitrarily sent out of a country where one resided to another country where one was likely to be harmed. These rights, including the vaguer right not to be destroyed in any other way, are

¹ I am grateful for David Konig's help on some of these historical issues.

² FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION* 68 (1948).

³ This wording was added in the 1225 version of Magna Carta. *See id.*

the core rights that were thought to be necessary to protect any substantive freedoms. For if one could be arbitrarily sent to prison, outlawed, or exiled, what good would substantive rights to property, or to receive compensation for military service, do.

At Guantánamo Bay, all four Magna Carta legacy rights were violated. The right of habeas corpus was denied to these prisoners. Several prisoners were sent from Guantánamo to countries that were known routinely to use torture. The prisoners were described as being in a “legal black hole” in that they were neither within the jurisdiction of U.S. courts nor under the jurisdiction of the laws and customs of war, since they were unlawful combatants. And the prisoners at Guantánamo were denied trial by jury.

Of most significance for my study is the right not to be arbitrarily imprisoned, which is similar to the emerging right of habeas corpus. Bracton clearly lists the writ in his *De Legibus et Consuetudinibus Angliae* (c. 1230), and specifies its form as follows:

[T]hat he produce his body [“et nunc praecipietur vicecomiti quod habeat corpus”] on another day by a writ of this kind: The king to the viscount greeting. We enjoin you before our justiciaries & C. on such a day the body of A., to answer to B. concerning such a plea . . .⁴

Here we see the writ described as addressing the official who is detaining or jailing a person, requiring him or her merely to produce the body of the prisoner and provide an answer concerning why the prisoner should continue to be deprived of his or her freedom. So, the right of habeas corpus is not a “get out of jail free” card, but only a right to be brought out of the dungeon quite temporarily, where it may be that one is then subjected again to incarceration and suffering soon thereafter.

The folk history of habeas corpus has it that there are three things that are important about this right. First, the body must be produced to demonstrate that the person has not merely been killed. Second, bringing the body into the light of day allows one to see if there are marks on the body indicating torture or other forms of physical abuse. Third, the public reading of the charges against the prisoner is meant to act as a deterrent against arbitrary or unlawful incarceration. It is the third factor that is often said to be the most important as a cornerstone of all other rights.

But habeas corpus also meant more than merely being brought out of the dungeon to have the charges against one read publicly. For another key phrase of Bracton’s formulation of the writ of habeas corpus is “before

⁴ WILLIAM F. DUKER, *A CONSTITUTIONAL HISTORY OF HABEAS CORPUS* 16 (1980) (quoting BRACTON, *DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE* 474–75 (Sir Travis Twiss ed., 1883)).

our justiciaries”.⁵ The phrase is sufficiently ambiguous that it could mean several different things. But there is one meaning that would fit nicely with a somewhat expanded notion of habeas, beyond merely the minimalist interpretation, and that is that the reading of the public charges must be in the context of some kind of hearing, before a judicial official, and not merely before the public.

Today, habeas corpus in the U.S. means much more than the rudimentary concerns I have been discussing, and includes an examination of any violations of a person’s constitutional rights. Federal habeas corpus cases are collateral attacks on the constitutional firmness of the conviction that caused the prisoner to be incarcerated. Surprisingly, perhaps, innocence is a controversial basis for a successful habeas appeal. Typically when one is successful, the remedy is either a retrial or out-right exoneration and freedom from incarceration. The leading scholars of habeas corpus law in the U.S. call habeas “[a] civil, appellate, equitable, common law, and statutory procedure.”⁶ Hertz and Liebman go on to explain that habeas corpus has become a broad “surrogate for Supreme Court review”⁷ of whether the petitioners “constitutional rights have been preserved.”⁸

In certain countries, those who are in prison may get out of prison and have the charges against them made public by filing a habeas corpus petition. For over eight hundred years in the English speaking world, the right to file such a petition has been sacrosanct. Important legal theorists, such as William Blackstone, have said that this procedural right is the cornerstone in the “preservation” of personal liberties, since without protection of habeas corpus a prisoner can be incarcerated in such a way that his or her “sufferings are unknown or forgotten.”⁹

There is some reason to think that historically the right not to be arbitrarily exiled was meant to cover cases of being deported so as to be deprived of basic rights. In addition, Magna Carta’s Chapter 29 also speaks of the right not to be “disseised”.¹⁰ The term, disseised, meant the dispossession of one’s property.¹¹ The very next right is the right not to be exiled.¹² Such a connection between these rights would constitute what is today

⁵ See, e.g., DUKER, *supra* note 4 (quoting BRACON, *supra* note 4, at 469).

⁶ RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.2 (2001) (1988).

⁷ *Id.* § 2.4.

⁸ *Id.* § 2.5 at 86 (quoting Justice Oliver Wendell Holmes in *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923)).

⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 132 (1799) (1765).

¹⁰ See THOMPSON, *supra* note 2.

¹¹ See BLACK’S LAW DICTIONARY 506 (8th ed. 2004) (defining disseise as “to wrongfully deprive (a person) of the freehold possession of property.”).

¹² See THOMPSON, *supra* note 2.

called nonrefoulement. For one way to dispossess a person of property is to exile that person to a place where the person's property rights would not be respected. Indeed, most forms of exile dispossess a person.

The underlying moral principle of the right of nonrefoulement, and the larger rubric of rendition cases that nonrefoulement falls under, is that no one be forced to go to a State where his or her basic human rights are likely to be jeopardized. The current way that the right of nonrefoulement is characterized does not fit well with this underlying rationale, and can only be made to fit if there is an expansion of the domain of cases that fit under nonrefoulement. There is no in principle reason to restrict cases of nonrefoulement to ones that involve group-based deprivation of individual rights.

Being an outlaw was recognized at the time of Magna Carta as something that a person needed specific procedural protections against. Indeed, there is a sense that the entire of Magna Carta's famous Chapter 29 could be understood as an attempt by the barons to extract from the King a set of guarantees that people in England would not be rendered as outlaws, even when they were legitimately confined to prison or sent back to their home countries. In international law, such a right is the right to be subject to the guarantees of human rights and hence not to lose one's status as a rights bearer, and to be forced outside the protection of any legal system. It is my contention that such Magna Carta legacy rights are the backbone of a minimal respect for human rights generally and if recognized globally would significantly fill gaps in an international rule of law. And if such procedural rights are protected situations like Guantánamo would be less likely to happen again.

II. MAGNA CARTA AND ITS TWELFTH CENTURY BACKGROUND

In order to set the stage for understanding how Magna Carta might be a model for international law today, we need to understand what gave rise to Magna Carta. The first thing to note is that in twelfth century England there was not a strongly centralized State. Indeed, if anything there was strong decentralized power. This decentralization took two significant forms. First, England was a feudal society, which meant that there were often quite strong feudal lords who reigned over large tracts of land in England and many did not feel that they were less powerful or authoritative than the king himself. Second, there were also many courts and systems of courts that had various levels of autonomy and subject matter jurisdiction.

England had had courts in existence for many years before Magna Carta. One type of older court was called "Courts of the Hundred". These courts were generally held as open-air meetings in the territorial districts called hundreds, larger than villages but not as large as counties or shires. Judges administered the Salic law of the Franks in these courts, and there

was a kind of “manual of law and legal procedure for the use or guidance of free judges” of the Hundred Court.¹³ Here there was a “deliberate attempt to furnish an alternative to violence and bloodshed”¹⁴ These courts were autonomous of the king; the king “is merely represented in it by a class of officers who collect his share of the fines imposed”¹⁵ Only much later does “the popular president of the Hundred Court, the Thingman, disappear, and his place is taken by the Graf or Count, the deputy of the King.”¹⁶ From the earliest of times, England had autonomous local courts, and this was still true at the time of Magna Carta.

Here is how the distinguished historian Frederick Maitland describes the Twelfth Century legal scene:

At the beginning of the twelfth century England was covered by an intricate network of local courts. In the first place there were the ancient courts of the shires and the hundreds, courts older than feudalism, some of them older than the English kingdom. Many of the hundred courts had fallen into private hands Above all these rose the king’s own court. It was destined to increase, while all the other courts were destined to decrease; but we must not think of it as a court of first instance for all litigants; rather it, like every other court, had its limited sphere of jurisdiction.¹⁷

And at the beginning of the thirteenth century, the jurist, Bracton, is “forced to make something like an apology for the activity of the king’s court”¹⁸

In the twelfth and thirteenth centuries, there was great distrust for the king’s court, as well as for the king’s growing political and military power. Here is just one example of the difficulty faced by the growing strength of the crown:

The problem of local government, then, was fast taking a new form, namely, how best to protect the weak from unjust fines and oppressions inflicted on them by local magistrates. The sheriff’s local power was no longer a source of danger to the monarch, but had become an effective part of the machinery which enabled the Crown to levy with impunity its always increasing taxation.¹⁹

¹³ HENRY MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 168 (1886).

¹⁴ *Id.* at 169.

¹⁵ *Id.* at 171.

¹⁶ *Id.* at 172.

¹⁷ FREDERICK W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 10 (A.H. Chaytor & W.J. Whittaker eds., 1971) (1909).

¹⁸ *Id.* at 12.

¹⁹ WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* 15 (1914).

King John and the feudal barons had been warring about such matters for several years when things came to a crisis point. The barons refused to pay the king's taxes or to provide him with soldiers to fight for lands in Normandy that the king claimed as his by right. By the time of Magna Carta, the barons were in open rebellion and King "John found himself, for the moment, without power of effective resistance" ²⁰ The barons "asked a plain acceptance of their plainly expressed demands" and King John was "constrained to surrender" ²¹

Magna Carta was a charter, a kind of compact, drafted on June 15, 1215 and agreed to by the feudal lords on one side and King John on the other. The compact comes to take on mythical proportions by the seventeenth century, especially due to the writings of Edward Coke. But it is not terribly controversial to say that Magna Carta was originally thought of as an agreement between parties that were roughly *de facto* equal in order to help dispel distrust and provide for harmonious relations within England. As one historian put it: "The barons on that day renewed their oaths of fealty and homage: this was the stipulated price of 'the liberties.'" ²² Magna Carta, the Great Charter between King John and the feudal barons, was primarily a bargain struck so that the king could retain his crown and the barons could get assurances that the king would stop abusing his power. Both parties paid a high price to get what they desired from the compact. Initially, Magna Carta did not appear to be anything other than an agreement struck between the leaders of England in the very early years of the thirteenth century.

King John bristled under the terms of the charter and tried to extricate himself from its terms by enlisting the aid of the Vatican, which attempted to annul Magna Carta. But events intruded, making quite a difference. Here is William McKechnie's analysis:

At a critical juncture, when fortune still trembled in the balance, John's death at Newark Castle, on the morning of 19th October, 1216, altered the situation, rendering possible, and indeed inevitable, a new arrangement of parties and forces in England. The heir to the throne was an infant, whose advisers found it prudent to reissue voluntarily, and to accept as their rule of government, the essential principles of the Charter that had been extorted from the unwilling John. ²³

So, in the very early years after its adoption the character of the charter changed.

Magna Carta was an agreement between semi-autonomous feudal lords and the king, and was in some respects like a multilateral treaty among

²⁰ *Id.* at 35.

²¹ *Id.* at 38.

²² *Id.* at 40.

²³ *Id.* at 47.

sovereign States, and indeed I will later look to the way that Magna Carta may help us in understanding such treaties. But Magna Carta as a historical document probably would not have had such an enormous impact if not for the fact that successive kings and parliaments continued to reaffirm it, each time allowing the Great Charter to live up to its name by both expanding its reach and confirming its permanency. The seventeenth century jurist, Edward Coke, claims that there were twenty-nine reaffirmations of Magna Carta from 1215 to the early seventeenth century.²⁴ By the early seventeenth century the charter was said to have established fundamental or constitutional law in England, despite its humble original meaning. Over time, the charter or “treaty” was expanded in scope and jurisdiction, and given a life of its own that would be the basis of many other founding documents such as the American Bill of Rights.

What is often cited as the most important provision of Magna Carta, and that which is closest to a provision of the American Constitution, is Chapter 29:

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.

These liberties are described at the beginning of Magna Carta, in Chapter 1, “to have and to hold to them and their Heirs, of Us and our Heirs for ever.”²⁵ This supposedly fundamental character of being final and immemorial probably did much to cement the importance of Magna Carta when the document was referred to over the centuries.

The phrase, “by the law of the land”, came to be understood as “due process of law” by the fourteenth century. Indeed, Magna Carta is now so closely associated with due process rights that it is a bit of a shock to realize that the term “due process” does not appear in Magna Carta, except in this wide interpretation of the phrase “by the law of the land”. The first explicit mention of due process of law as an interpretation of Magna Carta’s Chapter 29 (39) seems to be in 1352 with the second of the six statutes during Edward III’s rule:

Whereas it is contained in the Great Charter of the Liberties of England, that none shall be imprisoned . . . unless it be by indictment of good and lawful people of the same neighbourhood where such deeds be done, *in*

²⁴ THOMPSON, *supra* note 2, at 9–10. Faith Thompson, a contemporary historian, corrects this figure upward to a total of forty-four including both parliamentary and royal decrees of affirmation of Magna Carta. *Id.* at 10.

²⁵ Note that this wording also conveys the idea that the Charter initially only applied to those who signed and their heirs, not to all of the living in England.

due manner, or by *process* made by writ original at the common law . . .
²⁶

Thus, in just a few years, Magna Carta is cited to stand for the right of due process in a number of English statutes and cases, even though the phrase itself does not appear there.²⁷ It is not at all clear that this is what was foremost on the minds of the barons who sued to get the king to agree to this compact. Yet, even as the phrase habeas corpus also does not appear in Magna Carta either, surely the root idea barring arbitrary imprisonment is there in Chapter 29 (39).

III. PRECONDITIONS FOR THE RULE OF LAW

The rights contained in Chapter 29 (39) of Magna Carta are what are sometimes referred to as fundamental law. It is interesting to speculate, as I will do in subsequent sections, how such fundamental law could serve as a model for international law today. A number of historians, including Holdsworth, date the idea of habeas corpus to an earlier time than Magna Carta. And interestingly, the earliest uses of habeas corpus also do not stand for such a broad right as due process, but only for the right to challenge one's imprisonment, a purely procedural right. Such rights do not specify any right to a particular form of treatment or liberty that the State must protect. Rather these rights are simply what minimally must be done so that arbitrariness does not creep into the way that people are deprived of their liberty by being incarcerated, outlawed or exiled. What is not initially clear, but what I will explore in the next sections, is how pure procedural rights could come to be thought of as fundamental or constitutional law.

By the time of the seventeenth century, those who defended limitations on sovereignty found in Magna Carta a symbolic way to make their case that customary rights formed an immemorial law that restricted the prerogative of kings. As Pocock said:

In this way there grew up—or rather, there was intensified and renewed—a habit in many counties of appealing to “the ancient constitution”, of seeking to prove that the rights it was desired to defend were immemorial and therefore beyond the king's power to alter or annul.²⁸

These rights were imbued with a power stronger than reason, namely immemorial custom that no one could deny. Nonetheless, Edward Coke chose to add to the legitimacy of Magna Carta's rights the fact that many times

²⁶ THOMPSON, *supra* note 2, at 91 (emphasis added). Faith Thompson claims that this is the first mention of due process in the context of Magna Carta. *See id.* at 92.

²⁷ *See id.*

²⁸ J.G.A. POCKOCK, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 16 (1957).

Parliament had affirmed them as checks against sovereign prerogative, and he also appealed to the fact that an early English king had voluntarily restrained himself in conformity with these ancient rights.²⁹ Thus the great rights of Magna Carta were not merely legitimated by the Charter but more importantly by immemorial custom, a moral constitution, which in effect is merely expressed in the Charter rather than founded by it.

The great rights in Chapter 29 (39) of Magna Carta are best seen as procedural rights.³⁰ They are not themselves what people normally mean by “due process rights” and they are not those listed in the canonical treatment of the rule of law by Lon Fuller.³¹ Fuller does mention habeas corpus in passing, as part of the congruence between official action and declared rule. He lists this right along with the right to appeal, not as part of “procedural due process,” but as rights “in part directed toward the same objective” as due process, in that lack of such rights can contribute to a broken or arbitrary system.³² This seems right, if a bit more understated than I will put it later.

Perhaps the provisions of Magna Carta’s Chapter 29 (39) should be seen as “purely procedural”, but in any event they are not substantive in the normal sense of the term since they do not secure any particular liberty. Purely procedural rights would be those that are necessary for the efficacy of procedural rights, but do not have the normal features of being procedural themselves. Habeas corpus says only that there must be some ability of a prisoner to be made visible, to get his case reviewed, and this right can act in a way to deter the most egregious forms of arbitrariness. But it does not specify what that procedure should be. Nonetheless, I will generally continue to talk about these rights as procedural, but one should note that I do recognize the distinction between procedural rights that are a precondition even for other procedural rights, and procedural rights that are not a precondition for other rights.

When the struggles over English sovereignty took place in the seventeenth century, the part of Magna Carta that people fixed on were these rights in Chapter 29 (39).³³ Here is how a distinguished legal scholar characterizes this later development:

Thus the Habeas Corpus Act [1679] provides heavy money penalties against all who offend against its provisions: *e.g.*, judges who refuse to is-

²⁹ See *id.* at 44–45.

³⁰ See THOMPSON, *supra* note 2.

³¹ See LON L. FULLER, THE MORALITY OF LAW 33–94 (rev. ed. 1969). See also Larry May, *International Law and the Inner Morality of Law*, in THE HART/FULLER DEBATE IN THE 21ST CENTURY (forthcoming 2010).

³² FULLER, *supra* note 31, at 81–82.

³³ See THOMPSON, *supra* note 2.

sue the writ, officers who send a prisoner out of England. The right of the penalty is a private right, enforceable like any debt; and the King has no power to pardon, at any rate, after the proceedings have been commenced. In other cases the right of action is given to the “common informer,” that is, any member of the public who chooses to take proceedings; in others, again, to some corporation which represents professional interests, such as the Law Society or Goldsmiths’ Company.³⁴

The provisions of Chapter 29 (39) were seen as crucial for “enforcing the law” especially for making sure that the legal rights were not denied by spiriting a potentially complaining party away, either into jail or out of the country altogether. No rights would be secured without these rights of habeas corpus and other similar rights enforced.

Consider for instance the practice of basing conviction merely on the King’s claim of “notoriety” of the deeds of the accused. Magna Carta was cited to show that there must be some kind of judicial proceedings, with the accused present, for conviction and execution to be lawful.³⁵ What transpired over the centuries after Magna Carta was “the long, slow progression toward the ‘rule of law.’”³⁶ Even kings, such as King Edward II, would declare that they could not act “contrary to Magna Carta and the common law of the realm”,³⁷ although initially kings used the cover of Magna Carta to rule in ways they wanted to on other grounds. Procedure was incredibly important in giving legitimacy to what would otherwise seem to be controversial, even for those who were kings.

Henry Maine well stated the most important point I am trying to establish in this section:

So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.³⁸

The substantive rights of liberty, especially the right to be free in one’s bodily movements, are indeed first approached in a system of law that moved beyond the purely local, in this somewhat surprising way. Perhaps, a similar kind of move can be made in international law today. Rather than focusing directly on substantive rights, perhaps it is procedural rights, such as habeas corpus that we should turn to, since the substantive rights developed much more slowly in medieval English legal debates.

³⁴ W. M. GELDART, *ELEMENTS OF ENGLISH LAW* 238–39 (1911).

³⁵ See THOMPSON, *supra* note 2, at 73.

³⁶ *Id.* at 84.

³⁷ *Id.*

³⁸ HENRY MAINE, *DISSERTATIONS ON EARLY LAW AND CUSTOM* 389 (1886).

It is also true that many other types of early law, including Irish and Indian legal systems, give “an extraordinary prominence” to procedure.³⁹ When early legal systems focus on procedure they display an awareness that what is most important is that “service to mankind was to furnish an alternative to savagery, not to suppress it wholly” by limiting but still partially allowing private remedies.⁴⁰ As long as the appropriate procedures are followed, these private remedies were important since early tribunals often lacked the “power of directly enforcing their own decrees.”⁴¹ Procedures, like those that set limits on the arbitrary use of power, nonetheless allow a wide variety of enforcement mechanisms, something that is especially important when there is no centralized sovereign power, as of course is true of international law today.

Maitland tells us how the forms of action were absolutely crucial in determining whether there even was a wrong that had been committed.⁴² As Maitland put it, one didn’t see a wrong and then look for a form of action, but one first had to find a form of action before there was any wrong that was legally actionable.⁴³ Maitland also explains how the growing importance and consolidation of forms of action contributed to the gradual increase in sovereign power within England.⁴⁴ Here is how he characterized the incremental move toward centralized sovereignty:

Had the worst come to the worst the king might have claimed these things, jurisdiction over his own immediate tenants, jurisdiction when all lords have made default, a few specialty royal pleas known as pleas of the crown. To this he might have been reduced by feudalism. . . . That his court should fling open its doors to all litigants . . . is a principle that only slowly gains ground.⁴⁵

Magna Carta did not instantly transform English legal culture into a centralized system. Instead, procedural consolidation merely set the stage by restricting the form of law so that later a consolidation of substance could proceed. Indeed, the whole process took at least four centuries, and to a certain extent has not ended yet.

There is no doubt, though, that Magna Carta came to be seen as hugely important. A. E. Dick Howard makes the point quite succinctly, if quite controversially:

³⁹ See *id.* at 374, 386.

⁴⁰ *Id.* at 387.

⁴¹ *Id.*

⁴² See MAITLAND, *supra* note 17, at 2–5.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 11.

By the end of the fourteenth century, Magna Carta had established itself as more than simply a venerable statute; by then it was fundamental law. In 1368, for example, a statute of Edward III commanded that the “Great Charter and the Charter of the Forest be holden and kept in all Points; and if there be any Statute made to the contrary, it shall be holden for none.” Here we see Magna Carta treated as a superstatute, in other words as a constitution . . . an obvious similarity to the language of the American Constitution . . . and to the doctrine of judicial review.⁴⁶

Parallels to the Rome Statute are also apt.

IV. PARALLELS BETWEEN MAGNA CARTA AND INTERNATIONAL LAW

In this section, I will discuss some of the parallels between the development of English law after Magna Carta and the development of international law after the end of the Cold War. I am interested in the parallels between the way the semi-autonomous feudal barons and their courts were eventually brought together under a single umbrella of English sovereign law, and the way that the sovereign States and their legal systems are very slowly being brought under the umbrella of a system of international law in the twenty-first century. In both cases, what was sought was a way to make it less likely that individuals fall through the cracks and have no forum where abuse of their rights can be redressed.

First, there is an interesting parallel in the way that provisions of Magna Carta were enforced and the way enforcement works in international law. Recall that initially there were both public enforcement mechanisms and also several types of private enforcement. Universal jurisdiction in international criminal law has meant also various forms of universal prosecution and punishment, that is, where any State that has the wherewithal can prosecute and attempt to punish flagrant human rights violations such as those that occur in genocide or crimes against humanity, or in Grave Breaches of the rules of war. It is interesting to contemplate what it would mean to have truly private outsourcing of enforcement of international criminal law. Perhaps think of private bounty hunters who would attempt to find and bring to The Hague indicted political leaders. But at the moment, things are less radical in that the International Criminal Court’s (ICC) principle of complementarity allows for multiple trial forums and also for multiple enforcement mechanisms, while still providing the beginnings of a uniformity to such trials.

Second, there is a parallel concerning the development of jurisdiction. Perhaps it was inevitable that when the ICC opened its doors seemingly to all litigants, it would be seen as moving too quickly as well, at least by the U.S. and other major powers like China. If the progress of international

⁴⁶ A. E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 24–25 (1998) (1964).

criminal law takes four centuries, or even eight centuries, I would not be surprised. In the mean time, as also in the case of Magna Carta, changes are occurring nonetheless even though they do not constitute a complete break with the past. And as time passes slowly in this progress, it is the procedural provisions that may do the most work, by filling gaps in the substantive system of rules. So there are two issues: who is to be addressed by a system of law, and what are the types of norm that the law seeks to enforce. In both cases, we are at the very beginning of a recognition that international law might someday address all people concerning a variety of causes of action, just as was claimed to be true at the time of Magna Carta, but where the realization of this goal took a very long time.

Third, what is “secreted in the interstices of procedure” may indeed fill the gaps left because of an incomplete system of substantive rights in international law, just as Sir Henry Maine said was true of the time of Magna Carta.⁴⁷ I have in mind that the recognition of such things as an international right to habeas corpus could stand-in for due process considerations that may come to include even substantive due process. Indeed, the line between procedural due process and substantive due process is often hard to draw. Substantive norms are concerned with the proper aims or ends to be sought by legal rules. Procedural norms have to do with what makes something a rule, or a system of rules, in the first place. “Purely procedural” norms may be different yet, having to do with enforcement of the norms of both sorts set out above.

Fourth, Chapter 29 (39) of Magna Carta⁴⁸ and other early forerunners of due process did at least two significant things: the elimination of the most egregious forms of arbitrary power over individuals, and the harnessing of various forms of private enforcement mechanisms in the service of a single conception of justice. It is easy to see how international criminal procedures today have been accomplishing these goals as well, even if only in a still preliminary way. The diminishing of arbitrariness has mainly come in the form of prosecutions of those who would otherwise achieve impunity. But surely another way would be for international criminal tribunals to hold out the prospect of intervention to deal with arbitrary incarceration and deportation, as was one of the chief goals of the famous Chapter 29 (39) of Magna Carta. Another way that international criminal tribunals are having an effect is in the harnessing of “private” enforcement mechanisms so that international tribunals do not have to provide such enforcement themselves, which would be well beyond their means, as was also true of the beginning of the King’s courts in England just after Magna Carta.

⁴⁷ See MAINE, *supra* note 38.

⁴⁸ See THOMPSON, *supra* note 2.

I must enter a cautionary caveat about the use of “private” enforcement mechanisms. There was a worry that the private enforcement mechanisms at the time of Magna Carta, and this included the way even criminal trials proceeded, could abuse the system for personal revenge or gain, especially concerning the use of “common informers”. Similarly, today we should worry about prosecutors in Spain and Belgium who take upon themselves the task of enforcing international criminal law, with a similar possibility of abuse. Vigilante justice is the term most often used for the abuse of these types of “private” enforcement of the norms of international criminal law.

But there is a sense of “private” enforcement that was less controversial at the time of Magna Carta and the first centuries after its adoption, even as it was still a source of some abuse. The Law Society monitored and enforced standards of professional conduct of lawyers, and the Goldsmiths’ Company performed a similar task concerning the enforcement of statutes regulating the weighing and sale of gold and silver, as well as the general professional standards of goldsmiths in England. In both cases, these private groups were given the right to enforce the statutory standards against their members, with due penalties as well. Such systems of private enforcement have their parallels in the systems of private arbitration and dispute resolution in international law that has the blessing of the various international tribunals and political bodies in international law.

Despite some reservations, I would also endorse the more robust way that international law has incorporated the municipal courts of States into the system of enforcement of international law. The English political leaders at the time of Magna Carta realized that it would be a huge mistake to try to dismantle the local courts in favor of national courts. Instead, as I have indicated, the King gradually inserted himself into these local courts, eventually replacing the Thingmen and other local magistrates with those who were employees of the crown. But this process took a very long time, and in the period during transition the King simply exercised a bit of oversight and collected fees from these courts, rather than disbanding them or taking them over completely. The transition was a gradual and largely uncontroversial one, at least after the death of King John and the subsequent reaffirmations of Magna Carta discussed earlier. It has been important that international tribunals have been composed of judges from throughout the world as a way to indicate that the tribunals are not merely Western attempts at hegemony.

In addition, the ICC, for instance, has not sought to abrogate the right of State courts to prosecute individuals for international crimes such as genocide and crimes against humanity. Indeed, the court’s principle of complementarity specifically allows for States to prosecute and only asserts the Court’s jurisdiction when a State is unable or unwilling to prosecute international crimes through its own courts. So far, such a system has made

the ICC not nearly as controversial as one might otherwise have predicted. The experience of Magna Carta is that a gradual process is needed in such a transformation. The king's sheriff intrudes gradually into a local process that is otherwise left pretty much unchanged. This experience helps explain why a similar process in international law is much less controversial than might have been anticipated.

The experience of the reception of Magna Carta in England can help us understand the recent reception of the internationalization of criminal courts. One cannot stress enough though how historical events can make such a difference in an otherwise seemingly impossible situation. If King John had not died a year after Magna Carta, he would have continued to resist the reforms of the barons. And if the Cold War had not come to an end, the Security Council would have remained stalemated in its attempt to form international tribunals. Of course, gradualism is one of the key lessons. But one can be a good bit more specific by looking at parallels between aspects of the reception of Magna Carta and the reception of international multi-lateral treaties like the ICC's Rome Statute. In the next sections, I will also offer some thoughts about what needs to happen next in international law for the idea of procedural protections to go forward and for new international institutions to develop in spite of the lack of international governance structures.

V. FUTURE DIRECTIONS FOR THE DEVELOPMENT OF INTERNATIONAL LAW

Magna Carta was a compact in 1215 that was somewhat similar to the ICC's Rome Statute that was a multi-lateral treaty in 1998. Seven hundred and eighty-three years separate these two treaties, yet the former can still give guidance for the development of the latter. I have been focusing on the importance of procedural matters in the reception and development of Magna Carta, and will here offer some suggestions about procedural matters at the ICC as well as other international institutions. There has been quite a lot of focus on procedural matters at the ICC itself, that is, concerning how prosecutions are to be run once a case lands at The Hague. I want to focus on a somewhat different matter, namely how to deal with cases that are unlikely to make it to The Hague on substantive grounds, but which are nonetheless matters concerning which the ICC or some other international institution could begin to exercise some oversight over basic procedural rights protection.

The first matter to discuss is what might be called international habeas corpus rights. The leading U.S. law hornbook on habeas corpus describes the unusual status of habeas in the U.S. as "a civil, appellate, equita-

ble, common law, and statutory procedure.”⁴⁹ Hertz and Liebman go on to explain that habeas corpus has become a broad “surrogate for Supreme Court review”⁵⁰ of whether the petitioners “constitutional rights have been preserved.”⁵¹ Indeed, some courts and individuals have said that the right of habeas corpus is simply the right of due process of law.⁵²

The International Criminal Tribunal for Rwanda (ICTR), in its appellate decision in *Prosecutor v. Barayagwiza*, declared that the right of habeas corpus “is a fundamental right and is enshrined in international human rights norms, including Article 8 of the Universal Declaration of Human Rights”⁵³ Yet currently, the right of habeas corpus is only recognized by international tribunals and courts in a limited way. On May 23, 2000, the ICTR held that: “the notion of habeas corpus at the international level is limited to a review of the legality of the detention” of those held by the ICC, seemingly not for those held in custody in other settings such as Guantánamo or Bagram.⁵⁴

A second, and related, idea is to set up international institutions so that they act as much on considerations of equity as on statute. The chancery courts in England developed into courts of equity, which sat alongside courts of common law. The Chancellor was considered the conscience of England. In a similar vein, one writer has proposed that we need an international habeas corpus court that would be “the keeper of the world’s conscience.”⁵⁵ International criminal tribunals have seen themselves on this model, but have mainly restricted their role to prosecuting substantive mass crimes. I envision expanding this domain so that a range of serious violations of due process would also fall under the domain of these courts. Equity considerations would involve, among other things, egregiously unfair rulings by national tribunals and courts, along with denial of basic human rights.

And in this respect, again returning to the Guantánamo case, it should not be allowed that an individual fall between the cracks of legal jurisdictions. The Bush administration declared that Guantánamo was a

⁴⁹ See HERTZ & LIEBMAN, *supra* note 6, at 7.

⁵⁰ *Id.* at 23.

⁵¹ *Id.* at 86 (quoting Justice Oliver Wendell Holmes in *Moore v. Dempsey*, 261 U.S. 86, 87–88 (1923)).

⁵² See HERTZ & LIEBMAN, *supra* note 6, at 20 (stating that habeas corpus is designed to ensure that “no arbitrary authority might act without warrant, or ‘due process of law’”) (quoting *In re McDonald*, 16 F. Cas. 17, 21 (E.D. Mo. 1861) (No. 8751)).

⁵³ Case No. ICTR-97-99, ¶ 88 (Int’l Crim. Trib. for Rwanda App. Chamber Nov. 3, 1999), available at <http://www.ictor.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm>

⁵⁴ *Prosecutor v. Kanyabashi*, Case No. ICTR-96-15-1, ¶ 28 (Int’l Crim. Trib. For Rwanda Trial Chamber May 23, 2000).

⁵⁵ LUIS KUTNER, *WORLD HABEAS CORPUS* 14 (1962).

black hole—where neither U.S. criminal law nor the Geneva Convention and other aspects of international law applied. In my view, this is the kind of unfairness that an international court of equity or similar international institution should take up, and where the purpose of such a proceedings is to fill the gaps that occur as we move very slowly away from a system of law completely dependent on States toward one that will someday, perhaps, be independent of States.

A third new direction is for there to be international oversight and possibly prosecution of State leaders that violate nonrefoulement by engaging in deportation of individuals to countries where they will be tortured or otherwise harmed, or who engage in extraordinary rendition of prisoners of war or others captured on the battlefield. There are international instruments that recognize the right of nonrefoulement, but they have not often been enforced, as was true at Guantánamo. In my view, what is needed is for an international court like the ICC, or some other international institution, to have this as part of its subject-matter jurisdiction as a way to protect some of the most vulnerable of people, those who are currently stateless. I would extend nonrefoulement further than it is recognized now, so that all refugees are under its purview.

A fourth new highly controversial direction is for international institutions to promote trial by jury. In many Western countries, trial by jury in criminal matters is an acknowledged right. And this is probably the most controversial of the four proposals I have put on the table. For there have not yet been major international instruments that have recognized trial by jury as a requirement of criminal proceedings. This was one of the lynchpins of the evolving Magna Carta doctrine. It is my view that the right to trial by jury of one's peers is crucial for justice. Yet today there are no international jury trials, so this right is a long way from being recognized and enforced, although the recent U.S. Supreme Court opinion in *Boumediene v. Bush* seems to be on the road to recognizing this as a universal right.⁵⁶

As the development of the rights recognized in Magna Carta took a long time to be enforced in English courts, so I would envision a slow process of recognition and enforcement of these rights as properly enforced through international courts and other international institutions. Like the development of Magna Carta, this process will probably involve the extension of the reach of rights protections to an increasing circle of individuals. That the process will be slow, perhaps very slow, is no reason not to start working toward this eventual goal now.

⁵⁶ See 128 S. Ct. 2229, 2256 (2008). Kennedy cites Harlan's concurring opinion in *Reid v. Covert* as criticizing *In re Ross*, 140 U.S. 453 (1891), in wondering "whether jury trial *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas." *Reid v. Covert*, 354 U.S. 1, 75 (1955).

I would think that the order of these rights is that habeas corpus and nonrefoulement are the ones that should be put first on the agenda today, with the others taken up in turn only as the international climate for such considerations changes over time. The first of these rights, habeas corpus (at least as a right to be brought out of secrecy and into visibleness), is already given some recognition by both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, whereas the fourth is not recognized by these instruments. Nonrefoulement and certain other equity considerations are recognized, but not currently enforced in an effective way. As international institutions move from the first to the fourth of Magna Carta legacy rights, we will move increasingly toward an international rule of law and toward at least piecemeal cosmopolitanism.

VI. OBJECTIONS

Critics of my view have voiced the objection that I am engaging in a kind of cultural imperialism in assuming that what is good for certain Western countries should be simply applied whole-cloth to the rest of the world as well.⁵⁷ This criticism is especially strongly put in the case of trial by jury, which is not recognized as an important right in most of the world at the moment. But this criticism has also been voiced about habeas corpus, which in its Western form at least is not recognized as an international right. The idea here is that various societies have gotten along quite well over the centuries, if not the millennia, with customary forms of procedure that are especially well suited to the cultural traditions of those societies.⁵⁸ Indeed, there is a sense that Magna Carta rights I have trumpeted grew out of a set of customs that were suited for situations in England. Why assume that this set of English practices should be applied to the rest of the world?

I agree that Magna Carta grew out of a particular set of cultural and social conditions in England in the late Middle Ages. But over time Magna Carta gave rise to a set of procedural norms that were adopted in diverse societies and that came to be the model for various international instruments that have been found acceptable by a significant proportion of the States in the world. Of course, this still could be said to put priority on what States as opposed to communities have found acceptable. But at least this is a start at trying to show that Magna Carta legacy rights I have been discussing are not merely acceptable to those in England who had already adopted many of

⁵⁷ Leila Sadat has been an especially sharp critic of my view in this respect. Mark Drumbl and Helen Stacy have also voiced this criticism. I am grateful to them all for forcing me to see the importance of this point.

⁵⁸ See Laura Grenfell, *Legal Pluralism and the Challenge of Building the Rule of Law in Post-Conflict States: A Case Study of Timor-Leste*, in *THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS*, 157–76 (2009).

these rights in their customs. In the end, the proof of the value of Magna Carta legacy rights is in the usefulness as protectors of substantive rights and as constituents in a reasonable conception of a minimalist international rule of law.

The critique of cultural imperialism has also been raised against the human rights movement generally, not merely against those of us who are pushing for global procedural rights. In its most famous form, scholars from African and Islamic societies criticized human rights, especially social and cultural rights, as also imposing Western values on the rest of the world in a one size fits all manner. The criticism of cultural imperialism is especially apt, say my critics, since I rely on a specific historical document from so long ago to stand as a model for all of contemporary international law. Indeed one scholar has said that all of international law is merely an attempt to “civilize” non-Western States in an especially harmful form of colonialism.⁵⁹ I will attempt to respond to this important line of criticism in the remainder of this paper.

The larger criticism of the human rights movement is an interesting place to start in dealing with the more specific objection to my defense of Magna Carta legacy rights as international procedural rights. In an earlier work I tried to respond to this line of criticism at the beginning of my textbook on applied ethics seen from a multicultural perspective. The first point to note is that a cultural diversity approach has the disadvantage that it has trouble strongly condemning practices such as female genital mutilation that have been supported by certain cultures. The point is that it is strongly counter-intuitive to allow cultural pluralism to dominate these debates about human rights so that no criticism is possible of a wrongful practice if it has support in a given society.⁶⁰

In the context of Magna Carta legacy rights, habeas corpus, and nonrefoulement are especially prone to be denied in certain societies and yet their deprivation constitutes quite a serious wrong, perhaps a wrong on the same order as substantive wrongs such as genocide and crimes against humanity. And the tendency to deny these rights is as true of Western as of non-Western States. It may well be true, as multicultural proponents such as John Mohawk have said, “that we are going to have make peace with those

⁵⁹ See generally MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2002).

⁶⁰ See Martha Nussbaum, *Judging Other Cultures: The Case of Genital Mutilation*, in *SEX AND SOCIAL JUSTICE* 118 (1999), reprinted in *APPLIED ETHICS: A MULTICULTURAL APPROACH* 15–26 (Larry May, Shari Collins-Chobanian, and Kai Wong eds., 2006) [hereinafter *APPLIED ETHICS*].

who are different from us.”⁶¹ But it would completely upset the very idea of human rights as universally applicable if respecting difference means that serious wrongs cannot be criticized if a society disregards those rights for whatever reason, especially if the reason is not a good one.

Concerning habeas corpus in particular, I think that the cultural imperialism objection somewhat misses the mark. I am not necessarily advocating that all of the world conform to the specific wording of this right that comes down to us from eight hundred years ago in a very particular historical context. The various components of a habeas corpus right are recognized by an assortment of international documents and customs. And there is a core minimalist right that is very hard to argue against in that it is so strongly associated with giving minimal protection to a host of substantive rights that have garnered universal acceptability, such as rights against genocide, torture, and crimes against humanity.

There is another component of my response that is equally important, namely, it is much harder to make cultural arguments against procedural rights than against substantive rights. Substantive considerations, such as that some individuals can be legitimately harmed for mating or coming-of-age rituals, are one thing, but it is hard to see what cultural traditions would be seriously offended if habeas corpus or nonrefoulement rights were to be protected globally. Rather than offending deep-seated cultural norms, it is far more likely that the objections will come from government leaders who find the increased transparency in their societies that comes from respecting procedural rights to be inconvenient or downright obstreperous in their attempts to suppress their populations. It is not my intention to argue against the need to consider contextual differences in the way that procedural rights are protected. But that certain procedural rights should achieve universal protection is not obviously opposed to cultural practices in the way that the similar protection of substantive rights has been opposed on cultural imperialism grounds.

A more practical variation of the cultural imperialism objection is that there may be other and even better ways to protect individuals than to insist that Magna Carta legacy rights are protected everywhere. I am not in principle opposed to the thrust of this variation of the cultural imperialism objection. I would, though, say two things. First, it is unclear to me what would be the specific cultural pluralism objection to habeas corpus that should cause one to back off from a full-throated defense of such rights at the global level. Second, I am certainly willing to accept cultural variations of these rights. My approach to these procedural rights leaves room for sig-

⁶¹ John Mohawk, *Looking for Columbus: Thought on the Past, Present, and Future of Humanity*, in *THE STATE OF NATIVE AMERICA: GENOCIDE, COLONIZATION, AND RESISTANCE* 443 (M. Annette Jaimes ed. 1992).

nificant cultural variation. Indeed, my model is the complementarity principle in international criminal law, where international institutions only get involved at all if it is clear that States are unwilling or unable to provide their own protection for the core of these rights.

One last variation of the objection under consideration is that I have too closely allied myself with a “liberal” orientation to rights and am thereby showing a theoretical bias that is open to cultural imperialism charges. My response here is simply to admit that my approach is quite broadly liberal in the sense that I am working within a context of rights of individuals that is largely Western. But I would also point out, as others have as well, that most if not all major non-Western theoretical perspectives also are supportive in principle of the kind of rights that form the background of my thinking about procedural issues.⁶² So, I am willing to take the cultural imperialism objection quite seriously, but fail to see it undermining the approach I adopt in this paper.

There is also a methodological variation of the above objection, namely that my approach is liberal and Western in that it is rationalistic rather than impressionistic, or some such. Again, it is unclear to me how my project can go forward in providing a philosophical analysis of procedural rights in international law if it were only impressionistic rather than rigorously analytic. Nonetheless, I suppose I will simply have to accept this criticism, if anyone makes it, and acknowledge the limitations of my study as well as my own limitations as a thinker and writer. Nonetheless, I continue to think that my approach can have merit even if it displays some of the biases that I have attempted to address in this section.

Ian Langford has challenged the idea that there is anything universal to the idea of right to a fair trial, or to the use of the idea of fairness as involving specific procedures that must be followed.⁶³ Langford argues that it is not even true that the idea of a fair trial is unique to all Western legal systems. Rather, he contends that this idea is only of very recent vintage even in Western societies. It is primarily a twentieth-century concept, and one that is confined to certain Western societies even today. On the basis of his empirical work on the usages of the idea of a fair trial, Langford con-

⁶² See Abdullahi Ahmed An-Na'im, *Islam, Islamic Law, and the Dilemma of Cultural Legitimacy for Universal Human Rights*, in *ASIAN PERSPECTIVES ON HUMAN RIGHTS* 31 (Claude E. Welch, Jr. & Virginia A. Leary eds., 1990), reprinted in *APPLIED ETHICS*, *supra* note 60, at 101–10. See also Claude Ake, *The African Context of Human Rights*, in *APPLIED ETHICS*, *supra* note 60, at 111–16; Joseph Chan, *A Confucian Perspective on Human Rights for Contemporary China*, in *THE EAST ASIAN CHALLENGE FOR HUMAN RIGHTS* 212 (Joanne R. Bauer & Daniel A. Bell eds., 1999), reprinted in *APPLIED ETHICS*, *supra* note 60, at 117–32; Kenneth K. Inada, *A Buddhist Response to the Nature of Human Rights*, in *ASIAN PERSPECTIVES ON HUMAN RIGHTS* 91 (Claude E. Welch, Jr. & Virginia A. Leary eds., 1990), reprinted in *APPLIED ETHICS*, *supra* note 60, at 133–42.

⁶³ Ian Langford, *Fair Trial: The History of an Idea*, 8 *J. HUM. RTS.* 37, 37–52 (2009).

cludes that “fair trial is like rugby, the boy scouts, and television, simply a diffused cultural trait.” The idea that there is an “inherent nature of human rights in all people is a kind of secular utopianism, an attempt to foist a single ideology on the world.”⁶⁴

Like many of the critics of the universality of human rights, Langford seems to confuse normative claims with empirical ones. Even if it were *empirically* true that specific human rights, such as the right to a fair trial, are only discussed in the West in the twentieth century, it does not follow that *normatively* the idea of a right to a fair trial is merely supported by a particular ideology. One could similarly show empirically that it was not until the late nineteenth century, and primarily in Western countries, that slavery was condemned as violating the rights of slaves. But this does nothing to blunt the normative claim that slavery violates the rights of slaves. Universal normative truths are not dependent on their being recognized at all, although one hopes that once the case is made for particular rights that they will be seen as largely compelling. If there is anything utopian about claims concerning universal rights, it is mainly that they will indeed one day be so recognized by all people. But the normative status of such claims does not turn on empirical facts about the diversity of practices across cultures and times.

At the moment, the 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 a corollary consideration to the substantive rights already protected at the ICC.

In this paper I have been inspired by events nearly eight hundred years apart, the signing of Magna Carta, and the creation of the prison in Guantánamo Bay, to consider what might be significant in the piecemeal movement toward an international rule of law. Eight hundred years is little time in evolutionary terms, and in many ways it is little time in terms of legal progress. But perhaps the lessons learned from both events can propel us forward, incrementally, toward global procedural justice. And the place to start is in the interstices of procedure—procedures that were denied to those at Guantánamo.

⁶⁴ *Id.* at 51.