

International Criminal Law and the Inner Morality of Law

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Abstract

I will investigate what Fuller called “procedural natural law” in contemporary international criminal law. Most of the theoretical and normative writings about international criminal law have so far been about substantive law, focusing on the four crimes over which the International Criminal Court has jurisdiction: crimes against humanity, war crimes, genocide, and the crime of aggression. International justice is thought to have come to maturity as these four substantive crimes have been prosecuted by international tribunals and courts. In my view, it is time for legal theorists and practitioners to take into account procedural issues in as much detail as has been given to substantive ones. I will argue that procedural rights are part of what constitutes the rule of law and are especially important as gap fillers in creating an international rule of law that respects fundamental fairness. International criminal law will not come to maturity as a system of law unless protections of fundamental fairness, such a global right of habeas corpus, are put in place. I will use the Hart/Fuller debate as a springboard for assessing procedural rights within the context of the international rule of law. I will argue that procedural rights need to be better protected in international law, if it is to have a claim to legitimacy as a mature legal system. I end by discussing the case of Guantanamo, where the lack of protection of habeas corpus rights was so striking.