Staying the hand of **vengeance**
the rule of law and international human rights

By Maarten Vlot

"The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

Excerpt from the opening statement of chief US prosecutor, Robert Jackson, at the Nuremberg Trials in 1945.

At the time these comments were made, the fire of war had only just been extinguished in Europe. Bringing the perpetrators of horrendous atrocities to book represented a remarkable feat of restraint on behalf of the victors of World War II; the courts would apply the rule of law, and justice would be done.

World War II also proved the catalyst for a new mood of internationalism, which led to the formation of the United Nations and the creation of key human rights instruments. Participating nations sought to prevent the horrors of the two world wars from reoccurring by establishing a universal set of principles designed to assert the natural rights of all people, and a legal system – soundly based on the rule of law – to punish the perpetrators of any violations.

The importance of the rule of law is paramount in war crimes trials which, by their very nature, deal with the most grotesque of offences. Often, only the ultimate penalty is considered sufficient. However, it is important that justice be done – not only to the perpetrator, but also for the victims. Justice, of course, is not done when revenge creeps into trials. Strict adherence to the rule of law, and to practice and procedure, are vital in preventing political interference in such serious proceedings and outcomes based on revenge.

This article examines the history and importance of the rule of law in international human rights jurisprudence, and the particular challenges faced by the International Criminal Court (ICC) in war crimes prosecutions.

PHILOSOPHY

Adherence to the rule of law is not only something to be strived for, but is an essential component of an equitable judicial system. Nonetheless, it is a difficult and multifaceted concept in practice.

From a jurisprudential point of view, the rule of law means that no one is above the law, and that law is based upon identifiable principles that are considered to be fundamental and inviolable.

The fundamental principles upon which the rule of law is based are said to stem from the natural need for justice between people and in society. Hugo Grotius extended this concept, arguing that people were social beings by their very nature, and that the society they aspire to is an organised and peaceful one. Therefore, the social nature of people is 'the mother of the law of nature'.[1]

This 'natural' law can run counter to the dictates of law-makers, 'whose legitimisation is derived only from [their] power to legislate, so that any effective legal order must be regarded as law and obeyed'.[2] Ultimately, the aim of the rule of law is to achieve fairness and justice for both victims and perpetrators, even where atrocities are sanctioned by a state's legal system.

But overuse of the term, and particularly overuse in the absence of clearly defined principles, prompted Judith Shklar, then Professor of Government at Harvard University, to note:

> 'It would not be very difficult to show that the phrase "the rule of law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians.'[3]

Nonetheless, the close alignment between fairness, justice and the rule of law has found particular meaning in the conduct of war crime trials, and in the development of the human rights, since 1945.

RHETORIC AND REALITY

The importance of having a clear understanding of the function and purpose of the rule of law was emphasised on 1 October 2001, when the then mayor of New York, Rudolph Giuliani, addressed the General Assembly of the UN in a special session on terrorism. He emphasised that, in order to obtain peace, terrorism must be eradicated. In order to eradicate terrorism, it is necessary to promote democracy, the rule of law and the respect for human life.

> 'The best long-term deterrent to terrorism – obviously – is the spread of our principles of freedom, democracy, the rule of law and respect for human life... On one side is democracy, the rule of law, and respect for human life; on the other is tyranny, arbitrary executions and mass murder. We are right, and they are wrong. It is as simple as that.'[4]

Made at a time when terrorism had become headline news in a shocking way, these remarks made it clear that the rule of law was not only considered a moral right, but had also become the politically correct way of emphasising moral righteousness.

But in an unfortunately paradoxical turn of events, the rule of law is often the first casualty of measures taken to combat terrorism. The need to preserve the rule of law is often used to justify actions that undermine it.

The erosion of the rule of law in the context of political rhetoric should not cloud the fact that, even for the most grotesque of crimes – such as war crimes, where the prosecution is invariably difficult – it is imperative that justice be done. War crimes trials are by their nature political and follow times of war, itself a political act.[5] It is precisely to avoid political interference and to ensure a fair trial for all that the rule of law must prevail in such circumstances.

THE RULE OF LAW IN INTERNATIONAL JURISPRUDENCE

Human rights law has always had a close relationship with the concept of the rule of law. Indeed, human rights are important because they apply equally to all people, and are said to represent inherent or natural rights.

Organisations that promote and protect human rights frequently invoke the rule of law as the ultimate safeguard of human rights: if the legal process is based upon the rule of law, then no transgressions of human rights can occur.

One such organisation is the International Commission of Jurists (ICJ). It was established in 1952 in Berlin, by a large number of eminent jurists from around the world, to defend human rights through the rule of law.[6]

According to the ICJ:

> 'The International Commission of Jurists is dedicated to the primacy, coherence and implementation of international law and principles that advance human rights. What distinguishes the ICJ is its impartial, objective and authoritative legal approach to the protection and promotion of human rights through the rule of law.'[7]

Here the concept of the rule of law has developed beyond justice and the needs of society. It has become a tool to protect and promote human rights.

The ICJ held a number of conferences during the 1950s to attempt to come to a consensus about the concept of the rule of law, and how the ICJ should be promoting it. Nearly 200 judges, lawyers and law professors decided, with the Act of Athens, that the rule of law should be summarised by the following four points:

1. The state is subject to the law.
2. Governments should respect the rights of the individual under the rule of law and provide effective means for their enforcement.
3. Judges should be guided by the rule of law, protect and enforce it without fear or favour and resist any encroachments by governments or political parties on their independence.
4. Lawyers of the world should preserve the independence of their profession, assert the rights of the individual under the rule of law and insist that every accused is accorded a fair trial.

The principles from the Act of Athens provide clear guidelines for society as a whole, but particularly for lawyers and the judiciary on applying and preserving the rule of law.

A large number of European countries were motivated by these principles to ratify the Convention for the Protection of Human Rights and Fundamental Freedoms in Rome on 4 November 1950. Its preamble states:

> 'the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law...take... steps for the collective enforcement of certain of the rights stated in the Universal Declaration [of Human Rights]'.[8]

The convention was drawn up by the Council of Europe, which still monitors any suspected breaches. Taking as its starting point the 1948 Universal Declaration of Human Rights, it seeks to pursue the aims of the Council of Europe by maintaining and developing human rights and fundamental freedoms. The convention represents the first attempt to collectively enforce certain rights set out in the Universal Declaration.

Three institutions were set up to enforce the convention's obligations on member states: the European Commission of Human Rights (1954); the European Court of Human Rights (1959); and the Committee of Ministers of the Council of >>

Europe (comprising ministers of foreign affairs of member states, or their representatives).

Over time, it became clear that protecting human rights, as set out in the Universal Declaration, required enforcement globally, not just in Europe. After years of international negotiation, the Rome Statute of the International Criminal Court was entered into on 17 July 1998. This statute established the ICC to try 'the most serious crimes of international concern'.[9] These are defined in the statute as being the crime of genocide, crimes against humanity, war crimes and the crime of aggression.[10]

The statute came into effect on 1 July 2002, and 105 countries are currently party to it. A commission from the UN drafted detailed Rules of Procedure and Evidence and also defined the elements of the crimes over which the court has jurisdiction. Together with the Rome Statute and the Regulations of the Court, these bind the court to strict rules of practice and procedure that ensure fairness by keeping politics out of the trials.

The Rome Statute, by its very nature, applies only to the states that are party to it. This ultimately means that it does not apply to nationals of states who are not signatories, including the United States and China, for jurisdictional reasons. Nonetheless, the ICC has been able to act as an impartial arbiter of justice in a number of difficult prosecutions, demonstrating the value of courageous adherence to the rule of law.

WAR CRIMES PROSECUTIONS AND THE IMPORTANCE OF POLITICAL INDEPENDENCE

At his trial for war crimes at the International Criminal Tribunal for the Former Yugoslavia in The Hague, Slobodan Milosevic made frequent statements accusing the prosecution of using his trial for political purposes. He stated that, in any criminal trial, be it domestic or international, politics should be kept out of the proceedings. To ensure a fair trial, the judiciary and the prosecution have to be independent, so that no outside forces can affect the outcome.

When Milosevic's trial began in February 2002, he sought to appear on his own behalf. The original presiding judge, Britain's Richard May, ruled that 'under international law, the defendant has a right to counsel, but he also has a right not to have counsel'.

As a result of this ruling, Milosevic was able to open the proceedings with an 18-hour long opening statement, the length alone of this soliloquy confirming his despotic qualities. During this statement, and many times subsequently, he alleged that the Tribunal did not have the proper jurisdiction, and that the prosecution was conducting a political trial.

The Chief Prosecutor, Carla Del Ponte, responded, in exasperation: 'This is a criminal trial. It is unfortunate that the accused has attempted to use his appearances before this Chamber to make interventions of a political nature.'

In a remarkable parallel, both the prosecution and the defendant accused each other of conducting a political trial, both expressing the conviction that politics should be kept out of it. Both Milosevic and Del Ponte stated that any criminal should be subject to the rule of law.

Charles Taylor is currently facing the Special Court, for his involvement in atrocities committed in Sierra Leone in the late 1990s. Not present at the start of the trial on 4 June 2007, he attempted to frustrate proceedings by claiming to be subject to an unfair trial. Through Mr Karim Khan, his counsel, he informed the court:

> 'I have only one counsel to appear on my behalf, one counsel against a prosecution team fully composed of nine lawyers. … I am driven to the conclusion that I will not receive a fair trial before the court at this point. … It is not justice to throw all rights to a fair trial to the wind. … Justice is immune to politics.'

He refused to attend the hearing and instructed his counsel to cease to act for him.[11] Since the trial of Milosevic, however, the ICC has developed a body of experience in running serious war crimes trials, and Taylor must surely have realised that any accusations of political influence on the court were unjustified. Thus, instead, he attacked the practice and procedure of the court as being inherently unfair.

And unlike Milosevic, Taylor has not questioned the inherent jurisdiction of the court, or its impartiality. The ICC has previously delivered fair trials by applying appropriate practice and procedure – by adhering to the rule of law.

CONCLUSION

In a truly remarkable development, the world has moved on from ad hoc war crimes tribunals – such as the Nuremburg Trials – to institutionalised prosecution of these most serious crimes at the ICC, seeking to apply the rule of law, and thereby avoid victor's justice and revenge.

As chief prosecutor Robert Jackson also remarked, at the Nuremburg Trials:

> 'we must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.' ■

Notes: **1** Hugo Grotius, *De Jure Belli Ac Pacis*, sll. **2** A Verdross and HF Koeck, 'Natural Law: the Tradition of Universal Reason and Authority', in R Macdonald and D Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy and Theory*, Martinus Nijhoff, 1983, p17. **3** Judith N Shklar, 'Political Theory and the Rule of Law', in *The Rule of Law: Ideal or Ideology?*, Allan C Hutchinson and Patrick Monahan (eds), 1987, p1. **4** Rudolph Giuliani, opening remarks to the UN General Assembly Special Session on Terrorism, 1 October 2001. **5** G Simpson, *Law, War and Crime*, 2007, pp11-14. **6** At http://www.icj.org/article.php3?id_article=2957&id_rubrique=11&lang=en. **7** *Ibid*. **8** Convention for the Protection of Human Rights and Fundamental Freedoms. **9** Rome Statute of the International Criminal Court, Art. 1. **10** *Ibid*, Art. 5. **11** *The Prosecutor of the Special Court v Charles Ghankay Taylor*, Case No. SCSL-2003-01-T, Special Court for Sierra Leone, Transcript 4 June 2007, at pp8-26.

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