



## **What Happened to the International Criminal Court and the Rule of Law?**

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**CRIMINAL JUSTICE**

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### *Introduction*

One of the guiding principles of Anglo-American jurisprudence is adherence to the Rule of Law. We all remember that, right? Government of laws and not of men or women? The Magna Carta? The Constitution? The founding principle of the American Bar Association?

Yet, the actual application of the principle of the Rule of Law has had a spotty history in this country and elsewhere. Personal agendas, the craving for power and the politics of fear and hatred pull people away from adherence to this principle. It is easy for political leaders, and the people being led, to believe that what they are doing is right. We tend to be able to see these lapses from the Rule of Law clearly only after time has passed. We remain vulnerable to these lapses when they are occurring right in front of our faces.

Domestically, we now see pretty clearly how misguided and outright violative of the Rule of Law some of our legislative, executive and judicial decisions have been. Some obvious examples are the Alien and Sedition Acts, slavery and the Dred Scott decision, segregation and Plessy v. Ferguson, Japanese internment and the Korematsu decision. I am fairly certain that during that the last few decades the United States has done some things that future generations will look upon with shame or embarrassment.

Nevertheless, since the Second World War, there have been great strides made toward creating respect for the Rule of Law internationally. The United States originally supported this movement but, more recently, has declined to participate and has actually sabotaged the efforts. In this month's *Criminal Justice* column we will look at the international Rule of Law and, in particular, the International Criminal Court.<sup>[1]</sup>

### ***The International Rule of Law***

During this last presidential administration, the Rule of Law has not fared well either domestically or internationally. The vetting of Supreme Court Justices was based on their commitment to the "unitary executive." This is code for allowing the President and Vice-President to exercise power without restraint of the Rule of Law. In place of the Rule, we have seen the most dramatic increase in the power of the executive in the history of this country and we have seen the greatest inroads into individual rights since reconstruction.

The manifestation of this phenomenon domestically was, among other things, the suspension of the writ of habeas corpus; the holding of people without charges, the right to know the charges against them or the right to counsel; the approval of administrative subpoenas essentially negating the fourth amendment requirement of a warrant; the routine interception of private e-mail and telephone communications; and the refusal to allow anyone else to have access to executive documents so that the public could see what the government was doing.

In addition, internationally, President Bush and his predecessors in office carried on the concept of “signing statements” to hedge full commitments to international agreements and treaties. This was accompanied by the outright approval of torture in violation of longstanding international law, the refusal to acknowledge the International Court of Justice and the use of bilateral immunity agreements.

President Bush will have to await the judgment of history. However, President Obama has made a general commitment to bring the United States back within the legal proscriptions of modern international law. He has rejected torture and has made statements to the rest of the world that he wants America to resume its role as a world leader. During his campaign he has spoken favorably of the developments at the International Criminal Court.

Having said that, the fate of the International Criminal Court is still unknown. The Court was based on the “Statute of Rome” which is more accurately a treaty. The treaty took effect on July 1, 2002 and the Court has jurisdiction over offense occurring on or after that date. Over 140 countries in the world have signed the treaty and over 100 are full members of the Court. President Clinton originally signed the treaty on behalf of the United States but, immediately upon taking office two years later, President Bush rescinded the signature. This put us in the company of China, Russia, India and Israel as opposing the treaty and opposing the International Criminal Court itself. President Obama has not yet publicly stated that he will sign the Rome Treaty or submit it to the Senate.

### ***The Nuremberg Effect***

Justice Robert Jackson, as we all recall, left the bench of the United States Supreme Court to be the lead prosecutor in the Nuremberg War Crimes Trials. More importantly, he was the United States representative at the London conference during which the ground rules for the trials were developed. Justice Jackson pushed for full and fair trials for the German leaders. Churchill wanted to summarily execute the captured Nazis. Stalin wanted to have trials - but show trials resulting in swift execution. Jackson stood almost alone in insisting on real trials with due process. Had President Roosevelt lived longer, Jackson probably would not have gotten his way. However, President Truman came into office and agreed that the United States and the other victorious powers should set an example.

Jackson saw this as an opportunity to show the world that victor’s justice could be based on the Rule of Law. It was something new and something to be proud of. However, he also saw the trials as an opportunity to set a new standard for the world in the future. From now on, political, military, medical and industrial leaders

who engaged in crimes against humanity could be tried in a court of law. Ironically, to do this at Nuremberg required that one fundamental principle of law be abrogated - the prohibition against *ex post facto* legislation - because, despite the horrific nature of Nazi genocide, there was no international statute prohibiting it or setting a punishment.

Nevertheless, with all the flaws and occasional controversies, the Nuremberg trials did set a precedent that persists to this day. In addition to the idea of prosecuting leaders for crimes against humanity and genocide, the Nuremberg trials had lasting effects in our own society. Justice Jackson returned to the United States Supreme Court and took up the issue of racial segregation. In the aftermath of his service as prosecutor and his first hand knowledge of the evidence of racial hatred and bigotry, he could not do anything other than to urge his fellow justices to end racial segregation in the United States. The trials of the medical professionals at Nuremberg also had the effect instituting a procedure for obtaining informed consent on the part of patients, particularly in the context of experimental procedures. And, the increased regard for due process and the rights of the accused during the fifties and sixties also gained considerable impetus from the Nuremberg trials.

One of the most significant results of the Nuremberg trials was the idea that an international tribunal can exercise jurisdiction over political, military, industrial and other individuals who have waged a war of aggression or who have engaged in crimes against humanity. Justice Jackson and the United States promulgated and implemented this new use of the Rule of Law in international tribunals. After Nuremberg, the concept remained alive. It was codified in international treaties and understandings. But little was done to actually convene tribunals.

### ***The International Criminal Court***

In the late 1990's, the United Nations commenced discussions to try to establish a court that would have a role similar to that of the Nuremberg tribunals but which would be truly international. Instead of an *ad hoc* tribunal that had the aura of victor's justice, this court would be permanent. It would be available to hear the most serious cases where no other court would take responsibility. Ultimately in June of 1998, the Rome Statute was drafted. The Statute, actually a treaty, was signed by representatives of the founding countries, including the United States.

President Clinton signed the original treaty in 1998. However, as soon as President George W. Bush took office, he rescinded the Presidential approval. The treaty was never ratified by the Senate and the United States has not been a party to it. Interestingly, 140 other countries around the world, including a number in Africa, have signed the treaty.

The ICC has four basic categories of crime it can prosecute: genocide, crimes against humanity, war crimes and initiation of wars of aggression. To date the ICC has commenced investigations into four general areas: Northern Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur. The Court has issued public arrest warrants for twelve people; six of them remain free, two have died, and four are in custody.

The first trial in the ICC is currently underway. The trial of Congolese militia leader, Thomas Lubanga Dyilo, began on January 26, 2009. At the time of this writing, witnesses are being called to the stand who were child soldiers General Lubanga pressed into service. His prosecution for war crimes and specific violations of the Rome Treaty is being watched all over the world with interest. It is not only the first trial in the ICC but an important one that should send a loud message to war lords and aggressors around the world. The Court is proceeding with a presumption of innocence and basic rights of due process of law. It is commanding the respect of the international legal and political communities. The fact of the trial itself, regardless of outcome, is a victory for the Rule of Law.

However, under the Bush Administration, the United States has done more than simply refuse to ratify the Rome Treaty. It has actively interfered with the operation of the Court; some say the United States opposition has amounted to sabotage. The United States has withheld funding and has intimidated countries which participated in certain procedures. The Bush Administration has forced over 100 countries into signing Bilateral Immunity Agreements basically saying that we will withhold all foreign aid to the country if it makes any effort to bring an American before the ICC. Why have we been so opposed to the imposition of the Rule of Law through the ICC? What are we afraid of?

There is certainly concern that highly placed members of the Bush Administration, and even the former President and Vice President themselves, could be subject to international criminal charges before the ICC. This is a sobering thought. Has the United States waged a war of aggression on Iraq? Have we committed war crimes? Crimes against humanity? Have members of the government approved torture and other acts which violate international treaties? Were the ICC to assert jurisdiction what would be the defense?

### ***The Future of United States Involvement with the ICC***

Whatever happened in the past, the United States will find it difficult to join in the condemnation of war criminals in other countries while refusing to submit, not only to the jurisdiction of the Court, but to the basic Rule of Law. History does repeat itself - it has been said that the first lesson of history is that we do not learn

from the lessons of history. The United States has recently engaged in the kind of hubris - outrageous arrogance - that has accompanied the downfall of so many world powers. Cressis had to try to conquer the Persians, the Persians thought they could conquer the Greeks - or more recently, both Napoleon and Hitler thought they could fight two front wars. All of them fought wars of aggression and slaughtered people in their path.

It is a lesson of history that hubris on the part of the leaders and their followers overcomes the sense of justice and the Rule of Law. The citizens of a country rally behind their leaders as they wage wars of aggression and as they gradually take away the rights of the enemies and the citizens themselves. Is that what we have done? Can a new President -- sworn to transparency in government and to restoring our place in the international community - bring us back from the dangerous and arrogant journey that we have embarked on? Time will tell.

However, one of the fundamental things that the President and the Congress should do immediately is to sign and ratify the Treaty of Rome. We should make a full commitment to join with the other 140 nations, to submit to the rules on genocide, crimes against humanity, war crimes and wars of aggression. The United States should make an immediate commitment to support and fund the Court, to cooperate in all of its investigations and to abide by its judgments.

### ***Conclusion***

International law - the Rule of Law - is here to stay. It is the hope of the future to avoid wars and maybe someday a war we cannot win. But, in order for that to work, international law needs the authorization and the moral and financial support of the leading countries of the world. Can we do it? We will keep a good thought!

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[1]. Rather than my usual practice of footnotes, let me recommend for further reading Norbert Ehrenfreund, *The Nuremberg Legacy*, 2007, Palgrave Macmillian. Judge Ehrenfreund is a remarkable man who served in the United States Army in combat in Europe during World War II. He then took a job as a cub reporter for *Stars and Stripes* during which time he had the opportunity to cover the Nuremberg trials. He returned to go to law school and has served as a Superior Court Judge in San Diego for the last thirty years before retiring. His book chronicles not only the history of the trials but the effect on domestic and international law.

The information about the International Criminal Court itself, is derived largely from the web pages of the ICC at <http://www2.icc-cpi.int/Menus/ICC?lan=en-GB>. The Treaty of Rome (the “Rome Statute”) is found at <http://www2.icc-cpi.int/NR/ronlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E1...> And the elements of the Crimes chargeable in the ICC are at <http://www2.icc-cpi.int/NR/ronlyres/9CAEE830-38CF-41D6-AB0B-68E5F908254...>

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