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The contributions to this publication have their roots in a three-day symposium, "Churches and the Rule of Law", co-sponsored by the John Knox International Reformed Center and the World Communion of Reformed Churches. Contributors reflect on issues such as the biblical and theological traditions of the state and the rule of law, contemporary challenges to the rule of law, and the emerging internationalization of the rule of law, as well as the tasks facing church and ecumenical organizations in promoting the rule of law nationally and internationally.

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Stephen Brown

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Preface

The John Knox International Reformed Center in Geneva organised in October 2012 a consultation on the theme "Churches and the Rule of Law". The consultation was well attended by international and local participants. Well received presentations and lively discussions made the consultation to a success. The topic was new and challenging to many. In this book you will find the papers presented at the consultation together with an introductory article.

The John Knox centre will continue to have regular conferences that will lead to new editions in this series. We hope that though these publications the outreach of the conference will be wider than the group of participants only.

The programme commission of the John Knox centre thanks all who have made the conference possible and also all those who have contributed to this book. It is our wish that it may inspire many in their involvement within church and society.

Douwe Visser
President of the John Knox Programme Commission

Introduction

Stephen Brown

In September 2012, the general assembly of the United Nations held a high-level meeting on "the rule of law at the national and international levels", the first time that heads of state and government had gathered at the UN general assembly to discuss the rule of law. In his contribution to this volume, Martin Robra of the World Council of Churches notes the lack of political will among the state representatives to strengthen the power of the United Nations to implement and to enforce international law. Robra's assessment is shared by other observers such as James A. Goldston, the executive director of the Open Society Justice Initiative, and a former coordinator of prosecutions at the International Criminal Court. After more than a year of planning, Goldston wrote, all that the world leaders could muster "was another day of talk".[1] The initial vision for the meeting offered the prospect of genuine, concrete action that might begin to constrain the exercise of arbitrary power, Goldston noted, but "it provoked fierce opposition from political leaders determined not to shed an ounce of sovereignty – whether in the security council or on national territory."

Nevertheless, the very fact that the meeting took place points to the increasing role being played by the "rule of law" in international politics, and Robra and Goldston note several positive developments in the final declaration. These include the link between human rights, the rule of law and sustainable development, the role of the International Criminal Court in ending impunity, and the need for the rule of law to play a role in the post-2015 development agenda.

[1] James A Goldston, "UN meeting on the rule of law was just another day of talk", *guardian.co.uk*, 26 September 2012, http://www.guardian.co.uk/law/2012/sep/26/united-nations-rule-of-law-talk

More than six decades ago, churches and ecumenical bodies played a significant role in the elaboration of the Universal Declaration of Human Rights, one of the foundations of the international rule of law, and particularly its provisions on religious liberty.[2] Today they face new challenges nationally and internationally. At the national level, churches have helped where the rule of law is fragile because of weak political structures, while aid and human rights organizations have often chosen to work with churches because they can provide trustworthy structures. In other places, churches are grappling with laws such as those dealing with discrimination against gay and lesbian people or the display of religious symbols in public places. Internationally, in common with representatives of other religions, they are being challenged to become advocates for human rights to be the bedrock of the international rule of law.

The contributions to this publication have their roots in a three-day symposium, "Churches and the Rule of Law", organized in October 2012 by the John Knox International Reformed Center and the World Communion of Reformed Churches (WCRC). Contributors, from both secular and church backgrounds, reflect on issues such as the biblical and theological traditions of the state and the rule of law, contemporary challenges to the rule of law, and the emerging internationalization of the rule of law, as well as the tasks facing church and ecumenical organizations in promoting the rule of law nationally and internationally.

In the first contribution to this volume, Carlos Lopez, senior legal advisor at the Geneva-based International Commission of Jurists (ICJ), notes how since the Second World War the rule of the law has been a dynamic concept, whose meaning often depends on the context and perspective of those elaborating the definition. The distinctive contribution of the ICJ, for example, has been its emphasis on representative democracy, free elections, economic, social and cultural rights. Nevertheless, Lopez argues that there are a number of essential requirements for the rule of law: equal protection under the law; limits to arbitrary discretion; the possibility for judicial review of decisions; respect for human rights; access to courts; guarantees of a fair trial; and free elections and representative

[2] For a detailed description of the efforts of ecumenical bodies such as the Commission of the Churches on International Affairs, see John Nurser, *For All Peoples and Nations: Christian Churches and Human Rights* (Geneva: WCC Publications, 2005); Matti Peiponen, *Ecumenical Action in World Politics* (Helsinki: Luther-Agricola-Society, 2012).

democracy. While at the national level, it is the responsibility of the state to ensure compliance with these requirements, at the international level there is a fundamentally decentralized system, where nation-states are themselves responsible for enforcement. The establishment of the International Criminal Court, though it faces many obstacles to its effectiveness, thus represents an important step forward.

This is an issue that forms the background to the contribution by Harmen van der Wilt, professor of international criminal law at the University of Amsterdam, on the "precarious but indispensable project" of international criminal justice. While, historically, criminal justice has been wedded to the nation-state, the crimes committed during the Second World War led to the beginnings of international criminal justice. Such efforts received further impetus in the 1990s from the genocide in Rwanda and the wars in the former Yugoslavia. The *ad hoc* tribunals set up in response to these situations paved the way for the International Criminal Court to deal with state aggression, genocide, crimes against humanity and war crimes. Van der Wilt highlights the issue of state criminality and its consequences for international criminal justice, as well as the related topic of collective liability, given the tendency of criminal law to focus on individual guilt.

In their contribution, Beatrice de Graaf and Liesbeth van der Heide of the Centre for Terrorism and Counterterrorism at the University of Leiden point to what they describe as a process of "securitization", in which national security becomes the focus of policy making and risks undermining the democratic rule of law. The attacks of 11 September 2001 have led to fundamental changes in the areas of freedom and security, with intelligence agencies expanding their reach, and new methods of risk control being introduced. Protection against an all-seeing, omniscient government is a necessary precondition for some of the principles of the democratic rule of law, the authors argue. While it is often claimed that new security measures are intended as an exceptional response to a situation of heightened risk, they have a tendency to take on a more permanent role. Furthermore, the process of "securitization" threatens to undermine one of the most crucial elements in society: trust – both in one another and trust in the authorities. The inability of official institutions to fulfil the expectations invested in them increases cynicism among the public as a whole. When governments start to undermine the relation-

ships with their citizens based on mutual trust and the presumption of innocence, they undermine the foundations of the democratic rule of law. Security, the authors write, always results from law, not the other way round.

If, as Carlos Lopez notes, the idea of the rule of law is generally ascribed to the work of a British jurist and constitutional law expert in the late 19th century, several contributors point to its biblical and theological roots. James W. Skillen, former executive director of the Center for Public Justice in Washington, DC, describes the Bible as one of the most important sources for any contemporary discussion about representative government, the rule of law, religious freedom, and the health of civil society. Central to the idea of equality before and within the law is the biblical affirmation that all human beings, male and female, have the same identity and the same calling to steward and govern the earth. According to the Bible, he argues, human beings have been created to exercise responsibility under God in developing and governing creation. God has ordained government under Christ to render public service by means of just restraint and punishment, as well as just distribution, for the common good. Political authorities have a service to perform if they do justice as required of the office to which God has called them. John Langlois, a practising lawyer and chair of the Religious Liberty Commission of the World Evangelical Alliance, argues that the Christian church worldwide should advocate the rule of law through its affirmation that God has created an ordered universe, and that since God is a God of order, humankind should be similarly ordered in society. When the people of Israel wanted a human king, as set out in the book of Samuel, God endorsed the principle that it was for the people to decide, as free agents who should bear the consequences of their own actions. In creating humankind in God's image, God has imprinted God's concept of justice on humanity, and in the scriptures reveals principles of general application to all peoples. The church should advocate these principles in the governance of every human society, while laws should be enacted by democratically chosen representatives of the people.

However, it is often forgotten, recalls Martin Robra, that until the mid-20th century many theologians and church leaders had difficulty in relating constructively to secularized society and the concept of universal human rights. Only with the Second Vatican Council (1962-5) did the

Roman Catholic Church embrace human rights through its assertion of the dignity of the human person. Many Protestant and Anglican churches also had difficulties in fully embracing human rights. As far back as 1943, however, the future general secretary of the World Council of Churches, W. A. Visser 't Hooft referred explicitly to need for international relations to be subordinated to the rule of law. The Commission of the Churches on International Affairs, founded immediately after the Second World War, played a significant role in the elaboration of the religious liberty provisions of the Universal Declaration of Human Rights. Today churches are challenged by the rule of law in areas such as constitutional reform, civic education and election monitoring, the death penalty, and in exploring the legal implications of climate change and the regulation of international financial markets.

Nevertheless, as Carlos Lopez notes, the relationship between the authority structures of religions and the rule of law in wider society requires clarification. On the one hand, religion has traditionally been the source of rules and norms that are at the origin of the modern concept of the rule of law, and many defenders of freedom and human rights, such as Martin Luther King or Archbishop Desmond Tutu, have been inspired by religious traditions. On the other hand, there may be clashes between two normative systems – law and religion – over issues such as gay and lesbian rights, abortion, or the display of religious symbols. The situation is further complicated, as John Langlois points out in his contribution, in multicultural, multireligious and multiethnic societies, where people from diverse religions and traditions interpret the rule of law quite differently from each other. The worldwide church, Langlois argues, needs to advocate a rule of law based on the generally applicable principles of law and justice found in scripture, not those solely applying to Israel or to the Christian church. The church, he states, has to proclaim a rule of law that contain principles which apply to all human beings on our planet, just as the Universal Declaration of Human Rights sought to do in 1948, and grounded in a worldview which is based on justice and fairness without discrimination, applying to every human being. James W. Skillen advocates "principled pluralism" – the idea that governments should uphold structural and confessional pluralism as a matter of principle – and the idea of "common good", a constitutionally limited political community whose purpose is to uphold justice for all in a complex,

diversified society. Christians and churches can respond to God's injunction to do justice by helping to build just political communities and a just world order under the rule of law.

Martin Robra describes how churches have contributed to the development of the notion of the rule of law as a limitation to the arbitrary misuse of power and to various basic principles of international law. In recent decades, he notes, they have been struggling with a more substantive understanding of the rule of law, on such issues as the role of states, national and international law, the use of force, human rights and impunity. For many in the global South, he argues, the prevailing geopolitical relationships reflect similar dynamics of power, exclusion and resistance to those underlying the rule of law in the colonial era. This creates the suspicion that the UN system, including its human rights instruments, is used by the dominant powers when it serves their interests but bypassed when this is not the case. An issue for the future is the impact of contemporary geopolitical shifts on this discourse. In this context, the World Council of Churches needs a much stronger emphasis in future on international affairs and peace with justice, Robra states.

Still, a question remains as to how churches react when confronted with the lack or denial of the rule of law. As Harmen van der Wilt notes, the example of Nazi Germany is one example where churches were confronted by state repression and the breakdown of political structures. Writing shortly after Hitler's coming to power, Dietrich Bonhoeffer distinguished various ways of the church relating to the state.[3] It can throw the state back on its responsibilities by asking the state whether its actions are legitimate and in accordance with its character as state, or it can aid the victims of state violence. However, in a situation where the state fails in its function of creating law and order – either by bringing about too much, or too little, law and order – direct political action is required. Here there is a parallel to what van der Wilt describes as one of the justifications for the international community to intervene juridically in the internal affairs of nation-states: when the state is either actively involved in the commission of crimes against its population ("too much law and order") or too weak to protect them ("too little law").

[3] Dietrich Bonhoeffer, "The Church and the Jewish Question", in idem, *No Rusty Swords: Letters, Lectures and Notes from the Collected Works*, ed. Edwin. H. Robertson (London: Collins (The Fontana Library), 1970), 221-2.

For van der Wilt, churches and religion have a role to play in developing a "norm expressive" perspective on international justice, whose symbolic function lies in expressing the shared moral values of the international community that transcend political institutions and states. Churches have often demonstrated their value as refuges of human rights and humanity, particularly in situations of repressive state action. International crimes demonstrate the fragility of human constructions and the lack of moral points of reference. In such situations churches have the right, and potentially also the duty, to keep alive the hope and perspective of eternal justice. Here there is a convergence with de Graaf and van der Heide, who argue for the need to counterpose the vision of securitization with a Christian emphasis on redemption and liberation. The role of the church, they argue, should be to demand a fundamental debate on issues of privacy and security. In the final analysis, they state, Christian security is not about fear or threats, nor about a secular future, but about the hope for an eternal kingdom.

Reflections on the Rule of Law

Carlos Lopez

The concept of the rule of law can be located as part of a long tradition of concepts or categories for which there is general appreciation and support but about the content of which there are often widely divergent views. The Preamble of the Universal Declaration of Human Rights refers to the rule of law as being essential for human rights: "Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."[1] However, there is no universally accepted definition of the rule of law. This demonstrates that many people or countries find the principle potentially controversial. Instead of attempting to provide a definition, this paper will first provide an outline of the fundamental components of the rule of law as an evolving concept and as a political reality. It will then address the actual and potential links between the concept and religion, outlining areas of tension and/or challenge.

Three definitions of the rule of law

As a starting point, let us highlight three widely disseminated definitions of the rule of law by people coming from very different perspectives: the then UN Secretary-General Kofi Annan in 2004, the late British Law Lord, Ian Bingham, (basing himself on A.V. Dicey) and the definitions proposed by the congresses of the International Commission of Jurists. According to the UN Secretary-General,

> The 'rule of law' is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and enti-

[1] United Nations, *The Universal Declaration of Human Rights*, http://www.un.org/en/documents/udhr/index.shtml

ties, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[2]

In his recent book *The Rule of Law*,[3] Lord Bingham cited Professor A.V. Dicey and his book *An Introduction to the Study of the Law of the Constitutions*, credited for creating the concept of the rule of law in 1885. Dicey suggested that the rule of law has three aspects. First, "that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." Second, "no man is above the law, but (which is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals." Third, "the general principles of the constitution (...) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts ..."[4] Using these three elements, Lord Bingham goes on to propose his own core definition of the principle of the rule of law, "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts."[5]

The International Commission of Jurists (ICJ), an international non-governmental organization of jurists and lawyers founded in 1952, has worked since 1955 to define the essential requirements of the rule of law. From the beginning, it accepted that the concept of rule of law is made up of more than the straightforward application of the existing legal norms in each state. At its first congress in Athens 1955, it defined a dynamic concept of the rule of law as an emanation of the rights of the individual

[2] United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, UN Doc. S/2004/616, 4 (para. 6) http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf

[3] Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010).

[4] Ibid., 6-7.

[5] Ibid., 8.

achieved through time in struggles for freedom of expression and association and "the right to hold free elections with a view that the laws be made by people representatives duly elected and protect all equally".[6]

At its congress of New Delhi in 1959, held well before the International Covenant on Economic Social and Cultural Rights was adopted, the ICJ adopted a declaration underscoring that "the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible" not only to protect civil and political rights but also to create the social, economic and cultural conditions under which people's legitimate aspirations may be fulfilled and human dignity guaranteed.[7] Subsequent conferences underlined other aspects. The "Law of Lagos", adopted at the African Conference on the Rule of Law in 1961,[8] highlighted the need to protect individuals against abusive and illegal interference by the administration. The Conference of Bangkok (1965) emphasized social, educational and cultural aspects: it acknowledged that the subsistence of the rule of law and the existence of a representative government are often threatened by hunger, poverty and lack of employment, and thus the duty of all jurists is to dedicate their expertise and training to fight such problems.

Essential elements and requirements of the rule of law

The definitions above show differences but also complementary aspects. Each definition carries with it the particular perspective of the "drafter" in trying to respond to the needs of their time. The UN Secretary-General writes from the perspective of international affairs, to meet the needs and requirements of Security Council action in peacekeeping and in rebuilding societies torn apart by conflict and past widespread abuse. Here, the challenges of political stability, peace, and transitional justice are prominent. The late Lord Bingham wrote from the perspective of a judge in England and Wales, deeply attached to the traditions and categories of what many consider to be the nation that gave birth to the concept of the rule of law. Thus, he describes the "sovereignty of Parliament", a typically British institution, as a component of a global concept of rule of law

[6] International Commission of Jurists, *The rule of law and human rights: principles and definitions* (Geneva: ICJ, 1966).

[7] International Commission of Jurists, *1952-2012: Congresses and major conferences of the International Commission of Jurists* (Geneva: ICJ, 2012), 30.

[8] Ibid., 44-5.

(albeit in a qualified manner, given the current debates about constitutional changes in the United Kingdom). Finally, the International Commission of Jurists is a particular kind of "drafter", a "collective drafter", whose composition changes and evolves over time and is thus naturally affected by and responsive to the needs of its particular circumstances. One crucial element of the work of the ICJ is the emphasis on representative democracy, free elections, and the economic, social and cultural rights and development needs of newly independent countries, many of which were born just as the ICJ was working on defining the rule of law.

Given the evolving and dynamic nature of the concept, it is likely that any given definition or iteration of its components will be incomplete. Mindful of this limitation, the following section will outline some elements that are widely regarded as essential requirements of the rule of law.

1. Equal protection under the law

There are two sides to this principle. On the one side, the principle requires that the law and its application should not make distinctions among people that are not warranted by objective circumstances. This principle does not presume that all persons should be treated equally or exactly the same in all circumstances, but accepts that there may be objective reasons that require different people to be treated in a different way. For instance, people with mental or physical disabilities may need to receive different treatment in the provision of social and public services because of their objective circumstances.

The other side of the principle of equal protection under the law is the need for all people to enjoy equally the protections provided by the law. For instance, the remedy of *habeas corpus* should not be refused to non-citizens or non-nationals who are within the jurisdiction of the state, solely on account of their foreign nationality.[9] Another example is that the possibility to have access to courts or tribunals should not be denied to children or young people solely on account of their age, but that access to court should be adapted to their needs and capabilities.

[9] International Commission of Jurists, *Assessing damage, urging action: report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights* (Geneva: ICJ, 2009).

2. Legality: limits to arbitrary discretion

Rights and obligations should be defined by law and not through the discretion of public officers or private individuals. The law defines rights and obligations, and courts safeguard the primacy of the law. This principle does not mean that everything in relation to rights and obligations has to be decided by courts or that all criteria for the application of the law be defined in statute. What matters is that decisions on rights and liabilities should be based on criteria that are clearly stated, publicly available and accessible to all, and that decisions are subject to legal challenge. Public officials have a degree of discretion to apply the law, but no more and no less than the law gives to them. Judges have an important role in upholding the principle of legality, but are also subject to the law. This is underpinned by a well-known principle of the rule of law: nobody is above the law. No discretion shall be unfettered or arbitrary. Whether requesting a construction permit, public health services or a tax exemption, decisions by a public official should be based on law and on the criteria established under the law, not on political or personal allegiance.

3. Judicial review

It is an essential element of the rule of law that decisions on rights and liabilities taken by the administration or public officials be open to challenge before courts or tribunals to test their consistency and/or conformity with the law or the constitution. Public servants cannot act beyond or against the law, and the courts have traditionally been granted authority to grant remedies to correct illegal conduct and decisions that may bring an actual prejudice to individuals. Courts and tribunals have the power not only to grant legal remedies for violations of the rights of an individual but also to review decisions made by administrative or executive officers in administrative proceedings concerning rights and obligations. Judicial remedies may include a *habeas corpus*, to verify that the detention of a person has been performed according to the law or to order the release of the person, a *mandamus* order for the public officer or private individual to comply with or to execute the law, and so on.

Judicial review of administrative decisions does not imply that the judges will assess the facts and circumstances that were or were not taken into account in the decision that was made, but will examine only the legality of the decision, i.e. whether or not the decision was taken fol-

lowing the procedure prescribed by law and that it complied with other criteria set down in the law.

4. Human rights and fundamental freedoms: civil, economic, social, political and cultural rights

Human rights – a term encompassing civil and political as well as economic and social rights[10] – has become the distinctive characteristic of the modern and evolving concept of the rule of law. The strong linkage between human rights and the rule of law are made explicit in international human rights instruments. The Universal Declaration of Human Rights, as noted above, makes a clear statement linking the rule of law and human rights. The European Convention on Human Rights of 1950 also makes an explicit link.[11] The convention is concluded as an instrument of European countries "which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration".

The European Union treaty also provides that, "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

However, the universe of rights encompassed by the term "human rights" is sometimes disputed by countries that do not recognize civil and political freedoms, on the one hand, and economic and social rights, on the other, as having equal status. Many countries have not ratified conventions on economic and social rights, or, after having ratified them, regard these rights as mere programmatic principles and/or political commitments. In certain countries, such as Nigeria, the constitution does not recognize economic and social rights as fundamental rights but only as policy objectives of the state, depriving these rights of the protection of

[10] See "International Covenant on Economic, Social and Cultural Rights", entered into force 3 January 1976, 993 UNTS 3; and International Covenant on Civil and Political Rights (ICCPR), 23 March 1976, 999 UNTS 171 and 1057 UNTS 407.

[11] "European Convention for the Protection of Human Rights and Fundamental Freedoms", entered into force 3/9/53, ETS 5; 213 UNTS 221. See also American Convention on Human Rights "Pact of San Jose, Costa Rica" entered into force 07/18/78, OAS, Treaty Series, No. 36.

judicial enforcement. Notwithstanding such obstacles, there is a growing universal consensus that the term "human rights" should encompass the evolving universe of all internationally recognized rights. It is indeed the recognition of a number of fundamental social rights and needs that has given birth to the concept of the "social rule of law" (more exactly, in Spanish "*Estado social de derecho*", or French "*état social de droit*").

5. Dispute resolution

According to Lord Bingham "people should be able, in the last resort, to go to court to have their civil rights and claims determined. An unenforceable right or claim is a thing of little value to anyone."[12] This is a principle that enjoys wide acceptance among international human rights experts. Indeed, rights are meaningless without the possibility to have recourse to courts for remedies and enforcement.

This principle does not mean that every single dispute should be decided by judges. Ideally, disputes about rights and obligations should be resolved through methods such as mediation or conciliation that are simpler, cheaper and speedier. Arbitration is also another option, widely used in the commercial world. However, when the parties to a dispute do not agree on reaching a compromise, then the rule of law requires that each of them should have the right to have access to a court of law to request final judicial determination as to their rights and obligations.

Typical obstacles that stand in the way of access to justice are the high costs usually involved in civil litigation, throughout the world, and the time it takes to reach a final enforceable decision.

Costs in both civil and criminal cases are usually dealt with by legal aid schemes, mostly to meet the costs of legal representation. Despite the existence of remedies such as *habeas corpus* and other similar remedies that do not require the intensive involvement of lawyers, the expertise of a lawyer is usually required to increase the chances of success. In some countries such as the United Kingdom, there are other methods of meeting the growing burden that judicial costs represent for public budgets. These take the form of conditional fee agreements ("no win, no pay"), while in other countries such arrangements are prohibited. Insurance for litigants is another method that is being tried in some countries with varying degrees of success. However, costs are a function of the length

[12] Bingham, *Rule of Law*, 85.

and complexity of the procedure, and, depending on various factors, this can be more problematic in certain countries than in others. The principle nonetheless remains that costs should not be so prohibitive that they frustrate the right to have access to courts.

6. Guarantee of a fair trial

While the right to have access to courts or tribunals guarantees the right of everyone to "have their day in court" (as it is usually called in the United States), it needs to be complemented by another principle ensuring that once court proceedings are started the case is dealt with fairness, independence and impartiality. Fair trial guarantees are spelled out in articles 10 and 11 of the Universal Declaration of Human Rights, and in even greater detail in articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

UDHR Article 10 provides that: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 11 UDHR and 14 ICCPR elaborate the minimum guarantees of criminal justice, such as the right to be informed of the charges, to be tried without undue delay, to be presumed innocent until proved guilty, to a public trial and judgment, to a proper defence, and to legal assistance, including a lawyer assigned to the accused if necessary, to cross-examine witnesses, not to be compelled to incriminate oneself, and non-retroactivity of laws and penalties.

Fairness in the procedure entails three concomitant aspects: the principle of fairness applies to both sides (plaintiff and defendant, prosecutor and defendant), for which the European Court of Human Rights has coined the term "equality of arms"; fairness is also an evolving concept; finally, a fair trial requires judges who are independent and impartial.

7. Free elections and representative democracy

This is an aspect that is contested by certain quarters more than others, but following the doctrine on this matter developed by the ICJ is considered here to be among the requirements for the rule of law. This is a principle that is sometimes equated with that of the "sovereignty of people" or the "sovereignty of Parliament", but it is not the same thing, or at least it reflects a much deeper and encompassing principle: if laws are to be obeyed by all, they should be made "by all". If law is to govern the state, then everybody should be able to participate in the making of law. If taxes are to be applied to all people or only to some, the people concerned should be able to participate in the decision: "No taxation without representation."

Separation of powers is a corollary to this principle, to ensure that government is organized in such a way that the rule of law is respected, everybody is subject equally to the law, there is no room for arbitrary discretion in the exercise of power, and there are checks and balances across the institutions of national and sub-national government. The rule of law also requires an independent and courageous legal profession to defend and to promote it. This is an element that is not as peripheral to an independent and impartial judiciary as some people might believe. In many respects, it is crucial for the respect of the rule of law.

If the rule of law requires separation of powers, in the Christian world it also requires the separation of state from the institutional expression of religion: the church. However, the state should respect and protect freedom of religion as part of the human rights embedded in the system.

Relationships to other structures of authority

The state as an expression of the exercise of public authority should obey the law and the law alone. In this sense it should be separate from any other source of authority such as religion. Within churches and other religious institutions, priests and other religious authorities derive their authority from the foundational texts of the religion, such as the Bible, the Qur'an, or other texts, as well as from their own internal systems of governance. However, in a state based on the rule of law, these do not represent the source of legitimate authority.

This does not mean that in a society based on the rule of law, churches or religious authorities have no rights, freedoms or role. In fact, they enjoy freedom of expression and assembly, and are able to speak on any issue – social, political, judicial or other – within the parameters set down in the law (i.e. without interfering with the rights of others or the independence of the judiciary). They have the right to express their views in any manner, and to teach them to others. However, they do not have the right to impose their views or teachings. Instead, they need to convince and persuade.

Article 18 of the ICCPR provides for freedom of religion in the following way:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Although in certain countries there is a radical separation of state and church, in others the separation is not as obvious even when the law and the constitution so provide. In practice, religion and rule of law are not and cannot be radically separated. There are at least two areas in which their relationship might be either complementary or antagonistic.

On the one hand, religion has traditionally been the source of rules and norms that are at the origin of certain fundamental norms that have found their way into the modern concept of the rule of law in the form of fundamental rights and freedoms. Religious systems usually enact codes, rules of conduct and suchlike, as with the Ten Commandments, the book of Leviticus, the Qur'an, and so on. It is the essence of religions to provide for such rules because religions are community based, and they respond to the fundamental questions of why something exists, why human beings exist, what human beings are here for, and other basic questions of life. These codes contain rules that are meant not only to govern relations with God but also between members of the community *inter se*. Fundamental rules such as those that prohibit murder or the taking of others' property or possessions find their origin in codes supported by religion and are still fundamentally upheld by religious belief. The same can be said of the rule that prohibits discrimination. Saint Paul's Letter to the Galatians is often quoted in this respect when he said: "There is no longer Jew or Greek, there is no longer slave or free, there is no longer male and female; for all of you are one in Christ Jesus" (Gal. 3:28).

The link between the rule of law and religion is here so strong that for many people it is religious belief that provides the foundation for the right to life and the prohibition of capital punishment. Religion has also inspired some of the most courageous defenders of freedoms and rights, such as Archbishop Desmond Tutu, the Rev. Martin Luther King and the Dalai Lama. Many people have been motivated by their religion to refuse to perform military service or other tasks, although such refusal in certain cases can affect the rights of others (such as in the cases of abortion and sexual orientation discussed below).

On the other hand, the relationship between religion and the rule of law has also been problematic. Religious authorities have the right to express their opinions, impart teaching and provide guidance. Each individual has the right to adopt and follow these teachings and doctrines, and to practise them in public. Because people who profess certain religious beliefs live in a real world where they have to work and interact with others, teachings and doctrines of religious origin have practical implications in real life where law is supposed to be supreme. In most cases, legal and religious norms can coexist without tension, while in others, tension and conflict is bound to occur.

Issues and subjects where these two normative systems have collided include abortion, sexual orientation (lesbian, gay, bisexual and transgender (LGBT) rights), and, in some countries, even education, marriage and women's rights. Where the law provides the right to have access to medical services to terminate pregnancies, or marriage for gay people and lesbians, many people have felt it is their right to object to recognize or to perform such actions. Judges, medical doctors and personnel and civil servants have refused to perform and carry out services and duties that they feel would constitute an affront to their religious belief. From the point of view of the state and the rule of law, individuals cannot refuse something prescribed by law unless the law allows a discretionary choice. Nobody is above the law.

Religious believers may assert a right to conscientious objection on account of their religious beliefs. Article 18.3 ICCPR declares that the right to manifest one's religion or belief is subject to limitations under the law, or for reasons of morality or health. In practice, each state has to set the boundaries to the exercise of rights, striving to keep a balance between the rights of some and the freedoms of others. Practice differs from

country to country. In Spain, for example, judges are obliged to conduct homosexual marriage or to resign from office.

Less contentious than issues of abortion and LGBT rights, but sometimes equally problematic is the question of the social rules and public demeanour prescribed by religious authorities or with their support and proscribed by the public authority. One example is the use of the veil or the burq'a in public places. States have quite a diverse practice on this issue. The use of the veil is prohibited in public schools in France, but is permitted in the United Kingdom. The question arising in this context concerns the limits of the power of the state to regulate and prescribe social conduct: can the state dictate to people what to wear and what signs may be displayed in public? People have in principle the right, as a consequence of their fundamental freedoms, to choose *inter alia* their clothes and shoes as well as their hairstyle, provided that this does not constitute an infringement of the rights of others.

As in the case of freedom to manifest one's religion, most rights can be subject to limitations to protect the rights of others, or their protection under these rights may be abrogated for a period of time and under strict and special circumstances. Limitations of rights should be prescribed by law and any limitation should be necessary to protect the rights of others or public health and morals.

The rule of law in international affairs

The last section in this paper deals with a matter that may not appear to concern directly the rule of law within nation-states nor the relationship with and/or position of religion. However, the question of whether principles of the rule of law are observed in international affairs is clearly one that is of utmost relevance for the internal order of nation-states. However, there are important differences of approach and content that make necessary a separate treatment.

The observance of the rule of law in international affairs is characterized by the gradual development of norms that govern an increasing number of areas of international relations, on the one hand, and, on the other, a weak system of enforcement of these rules, or the existence of a fundamentally decentralized system of enforcement where individual states are responsible for enforcement, and international justice has only a limited role. The question of whether international law is really "law" is still posed when faced with the reality that important areas of international law are not enforceable in the way that national law would be. There are obvious differences between nation-states, which have parliaments, and executive and judicial branches that supervise the law and the use of force within the relevant jurisdiction, and the international community which has neither a parliament nor an executive, and is made up of states, all equally sovereign. From a rule of law perspective, the relevant question is not about the existence of such political institutions proper to nation-states, but whether the basic requirements of the rule of law are respected in international interaction. The answer is mixed.

On one hand, there is a great need for international law in international affairs, not least because many issues are transnational in nature, such as the protection of the environment, air, sea, trade, and transnational crime, and cannot be regulated effectively by national states alone within their national frontiers. At the same time, all states are aware of the limited value of a law whose legitimacy and effectiveness depends on the consent of those to whom it is addressed, and does not bind them all equally. Although the UN Charter is frequently seen as a world constitution, it can be so only in a very special and particular way. Rights and liabilities in international affairs are often defined by their economic power, or, still worse, by the power of weapons. We need only to consider the invasion of Iraq, the powers of the UN Security Council that tend to be used arbitrarily in the fight against terrorism, the situation and treatment reserved to Palestine and Palestinians, among others issues, to realize how limited the rule of law is in international affairs.

Judicial protection, review and supervision – another essential requirement of the rule of law – makes slow and hesitant progress in international law. The International Court of Justice, the world court, has jurisdiction only over inter-state disputes and its jurisdiction is based on consent. Other courts have more limited jurisdiction. Human rights courts have come closer to establishing regional regimes based on the rule of law, as in the case of the European and inter-American systems, but enforcement remains a crucial challenge. In the inter-American context, for example, states periodically threaten to leave the Inter-American Court and/or withdraw from the American Convention on Human Rights. One of them, Venezuela, is currently shifting from words to action and withdrawing its ratification of this convention.

In a world of limited or weak judicial protection and enforcement of rights, the establishment of the International Criminal Court (ICC) has been an important step forward. The ICC has jurisdiction over a number of international crimes: crimes against humanity, war crimes and genocide, as well as the crime of aggression. It is being ratified by an increasing number of states in the world, and operates under the principle of complementarity whereby it will assume jurisdiction over a case only if the state concerned is unable or unwilling to do so or to carry out investigations and proceedings effectively and in good faith. However, the young ICC faces many obstacles to its effectiveness, including limited resources, the paucity of national implementing legislation, and the reluctance of important states to cooperate with the court. Powerful countries such as the United States, China and India have not yet ratified the Rome Statute for the ICC. Given this, it can only be concluded that the rule of law in international affairs is a work in progress, a constant challenge.

The Bible and the State

James W. Skillen

It might seem odd to turn to the Bible for insight into the state, since the state is a modern invention and the Bible in our day is often associated with a history of political injustices, beginning with the Roman imperialism of Constantine and running through to the crusades, the European religious wars of the 16th and 17th centuries, and modern European and American empire building. Nevertheless, with respect to any contemporary consideration of representative government, the rule of law, religious freedom, and the health of civil society, the Bible may be one of the most important sources to consider.[1] In all too brief a fashion, let me present some of the evidence.

Creator, creatures, and Christianity

First of all, the Bible presents a very high view of human beings as created in the image of God, male and female in their generations. If there is anything that militates against the idea that one person, or class of persons, or institution may rightfully rule over others considered lower in stature and dignity, it is the Bible's revelation that all humans, male and female, have the same identity and the same high calling to steward and govern the earth. I stress this point at the outset because it is central to an

[1] Considerable attention is being given today to a reexamination of the Bible and politics. A few of the noteworthy examples are: Michael Walzer, *In God's Shadow: Politics in the Hebrew Bible* (New Haven: Yale University Press, 2012); Alan Storkey, *Jesus and Politics* (Grand Rapids: Baker Academic, 2005); Joshua A. Berman, *Created Equal: How the Bible Broke with Ancient Political Thought* (Oxford: Oxford University Press, 2008); Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Cambridge: Harvard University Press, 2010); Oliver O'Donovan, *The Desire of the Nations* (Cambridge: Cambridge University Press, 1996).

understanding of political life and just government from a biblical perspective. Many Christians throughout the world practise Christianity as a religion of sin and salvation. But who is the Christ who saves? And who are the ones the Bible calls sinners? Is there more to the biblical story than sin and salvation? Indeed there is. John's Gospel, the letter to the Colossians, and the letter to the Hebrews all begin by stating that the Son of God who became incarnate in Jesus Christ is the one in and through whom all things were created: "All things came into being through him, and without him not one thing came into being" (John 1:3); "for in him all things in heaven and on earth were created ... He himself is before all things, and in him all things hold together" (Col. 1:16-17). He is the one who sustains "all things by his powerful word" (Heb. 1:3). The saviour announced in the New Testament is first of all the one through whom and for whom God created everything.

And what does the Bible say about sinful human creatures? The first thing is not that they are sinners but that they are created in the image of God. Humans are creatures of the highest dignity, made to walk and work with God (Gen. 1:26-27). The psalmist sings in amazement: "O Lord ... You have set your glory above the heavens ... When I look at your heavens, the work of your fingers, the moon and the stars that you have established; what are human beings that you are mindful of them, mortals that you care for them?" The answer is that God has "crowned them with glory and honour. You have given them dominion over the works of your hands; you have put all things under their feet" (Ps. 8:1, 3-6). This is the creature that has so foolishly broken trust with the creator and turned away from the path of life to paths to destruction. Sin and its consequences unfold as the dark and enduring tragedy of our lives, our personal relations, our political societies, and even our churches. Yet sin arises only within the context of our relation to God, to one another, and to all other creatures. Thus, the reason the story of God's saving work in Jesus Christ is so profound is not first of all because of what it does for sinners but because of what it does to reveal the glory of God in fulfilling God's creational purposes through the reconciliation of all things to God. It is in Christ's judgment and redemption of creation that sinners are called back to life, that the bride of Christ, the children of God, the citizens of God's kingdom find their redemption from sin and the fulfilment of all things.

Let us look at the significant phrase "under their feet", which the poet of Psalm 8 uses to describe the high position in which God has placed humans in relation to other creatures. The praise of Psalm 8 (which recapitulates Genesis 1 and is quoted in Hebrews 2:6-8) is a celebration of the good order and purpose of creation. The picture of God putting everything under human feet tells us of the immense responsibility men and women have been given to rule and develop creation in the service of their creator toward the end of celebrating the glory of God in seventh-day fulfilment, in God's sabbath joy.

This picture of everything placed under human feet is not one of retributive judgment against enemies who have dishonoured God and misled humans into pathways of death. I make that point because there are several passages in the New Testament that use the same phrase to convey precisely an image of judgment. In 1 Corinthians 15:16-28, for example, Paul says that Christ must rule until he has put every enemy, and finally death, *under his feet*. This is the image that typically comes to the mind of Protestant Christians, in particular, when they think about government having the task to punish evildoers. They follow Augustine in believing that government was established because of sin to restrain and punish those who do evil. But I want to suggest that the positive, creation-order meaning of "under their feet" is the first and foundational meaning of the phrase, and it supports a positive understanding of governance and political community as one of the ways our creaturely identity works its way out in the course of historical development.

At root, political life has the positive meaning of public administration for the common good – public justice for all. Government's restraining and punishing responsibility arises because of sin, but the latter is not the originating cause of political community. Notice what follows in the passage from 1 Corinthians. Paul continues, "But when it says, 'All things are put in subjection', it is plain that this does not include the one who put all things in subjection under him [Christ]. When all things are subjected to him, then the Son himself will also be subjected to the one who put all things in subjection under him, so that God may be all in all" (1 Cor. 15:27-28). Christ's retributive judgment against sin and death is necessary to restore and fulfil the good and just order of creation. The Son's final act of submission to the Father, as described by Paul, is not the act of a defeated enemy who has been pushed under God's feet in tri-

umph. Rather, it reveals the humility of the incarnate Son who has restored the order of creation in submission to his Father, and the Father then blesses the Son's sacrificial service by elevating him to the right hand of majesty on high. It is in Christ's death and resurrection that sinful humans are called to repentance, leading to the restoration of their proper place and responsibility under God.

There is another important thing to notice about the two meanings of the expression "under his [or their] feet". Positively speaking, humans have been created to exercise responsibility under God in developing and governing creation. In the negative, sinful sense, enemies of God, including human beings, who challenge divine authority and try to lord it over others, are the ones Christ defeats and puts under his feet in judgment. Augustine, in his treatise, the *City of God*, made a point about this kind of disorder: "Sinful man hates the equality of all men under God and, as though he were God, loves to impose his sovereignty on his fellow men. He hates the peace of God which is just and prefers his own peace which is unjust."[2]

By contrast, says Augustine, God intended no man "to have dominion over man, but only man over beast. So it fell out that those who were holy in primitive times became shepherds over sheep rather than monarchs over men, because God wishes in this way to teach us that the normal hierarchy of creatures is different from that which punishment for sin has made imperative."[3] We will return to Augustine's point to ask whether government of human society is unnatural and a dominion made necessary only because of sin. Or is the art of governing and building political communities something that belongs to us as a creaturely vocation, as part of the good order of creation through which we need not and may not put other humans under our feet even when sin makes it necessary for government to exercise restraint and punish evildoers?

[2] Augustine, *City of God*, ed. Vernon J. Bourke, abridged edition (Garden City, N.J.: Image Books, 1958), bk. xix, ch. 12, 454.

[3] Augustine, *City of God*, bk. xix, ch. 15, 461.

God's law for the king

Let us go back to the Bible and look briefly at Deuteronomy's kingship law (17:14-20). In this passage God instructs Israel on the kind of king they *should* have:

> When you have come into the land that the Lord your God is giving you, and have taken possession of it and settled in it, and you say, 'I will set a king over me, like all the nations that are around me', you may indeed set over you a king whom the Lord your God will choose. One of your own community you may set as king over you; you are not permitted to put a foreigner over you, who is not of your own community. Even so, he must not acquire many horses for himself, or return the people to Egypt in order to acquire more horses, since the Lord has said to you, 'You must never return that way again.' And he must not acquire many wives for himself, or else his heart will turn away; also silver and gold he must not acquire in great quantity for himself.
> When he has taken the throne of his kingdom, he shall have a copy of this law written for him in the presence of the levitical priests. It shall remain with him and he shall read in it all the days of his life, so that he may learn to fear the Lord his God, diligently observing all the words of this law and these statutes, neither exalting himself above other members of the community nor turning aside from the commandment, either to the right or to the left, so that he and his descendants may reign long over his kingdom in Israel.

There is nothing similar to this passage in all the known records of other Near Eastern kingdoms. Israel's king was simply one of the people, called to serve in a particular office of authority within the covenant community. Moreover, the king was to be subject to the same law of God that bound all of Israel, and he received the law from the priests who had their own God-given authority. This meant there was to be no hierarchy of rule in Israel where one person or class of persons would hold ultimate, omnicompetent authority over all other Israelites. God's covenant with Israel, which embraced every office of authority among the people, put humans in many high positions of service, but none was superior to the others.

Furthermore, this passage and some of the kingship psalms depict the righteous king as revelatory of the divine king. When a king governs justly in harmony with a righteous people, the community becomes a revelatory image of God's rule among his redeemed people who are

made righteous by following the way of the covenant.[4] The meaning of kingship is not found in the monarch's dominance over the people but in his service to them in ways appropriate to the office and authority of government. According to Old Testament scholar Patrick Miller, the word "servant" in many of the psalms "is to be associated with two figures, the ruler and the torah lover" who merge into one. Psalms 15 to 24 "may be seen as defining proper kingship at the beginning of the Psalter. Obedience to torah and trust in Yahweh's guidance and deliverance are the way of Israel and the way of kingship."[5]

What does this mean for the practice of government? There are many examples in the Bible of both faithful and unfaithful efforts in this regard. Think, for example, of the contrast Jeremiah draws between Josiah, the righteous king, and his unrighteous son Shallum (Jer. 22:11-17). Shallum wants to build bigger palaces and amass wealth and power. He thinks that is what makes him a king. Josiah, by contrast, had remained humble and sought to keep the law, defending the cause of the poor and the needy. And God declares, "Is not this to know me?" (Jer. 22:16)

Another compelling illustration of a faithful and diligent public servant is Job. In the 29th chapter we read Job's reflections on his early days of glory and joy, before devastation befell him. "O that I were as in the months of old, as in the days when God watched over me," he says. Where do those nostalgic reflections lead him? They lead him back to the days when he was an elder in the gate – a local judge.

> When I went out to the gate of the city,
> when I took my seat in the square,
> the young men saw me and withdrew,
> and the aged rose up and stood;
> the nobles refrained from talking,
> and laid their hands on their mouths;
> the voices of princes were hushed,
> and their tongues stuck to the roof of their mouths.
> When the ear heard, it commended me,
> and when the eye saw, it approved;
> because I delivered the poor who cried,

[4] A fine book showing the connection between Deuteronomy 17:14-20 and the Psalms is Jamie A. Grant, *The King as Exemplar: The Function of Deuteronomy's Kingship Law in the Shaping of the Book of Psalms* (Atlanta: Society of Biblical Literature, 2004).

[5] Quoted in Grant, *King as Exemplar*, 176.

> and the orphan who had no helper.
> The blessing of the wretched came upon me,
> and I caused the widow's heart to sing for joy.
> I put on righteousness, and it clothed me;
> my justice was like a robe and a turban.
> I was eyes to the blind,
> and feet to the lame.
> I was a father to the needy,
> and I championed the cause of the stranger.
> I broke the fangs of the unrighteous,
> and made them drop their prey from their teeth. (Job 29: 7-17)

The way Job acted as a local official was in tune with the "law of the king" in Deuteronomy 17:14-20. The kind of governing officials God wants are those who meditate on the precepts of the covenant day after day and follow a straight and narrow path of doing justice, turning neither to the right nor to the left.

This is also the message that comes through in every verse of Psalm 119 where a variety of words are used to convey the breadth and depth of God's covenant. The psalmist recognizes that God's directing precepts and promises serve as "a lamp to my feet and a light to my path" (Ps. 119:105). God's laws and statutes are not abstract rules or arbitrary impositions from a master to a slave but the expression of a bond of love and trust between the Lord and Israel. God's decrees point the way to a rich and rewarding path of life.

What comes through in all of the passages to which we have referred is that a public official is not a mechanic or mere scribe installed to deal with injustice in an awkward, unnatural, and arbitrary way apart from any creational basis for that responsibility. A public official must make artful and considered judgments, assessing distinct and changing circumstances in order to discern what justice demands in this case and the next. The Bible's description of knowing and keeping God's law, particularly in regard to what we would call public lawmaking and adjudication, portrays judges and elders in the gate responding to divine *norms* that hold for creation and call humans to the exercise of their responsibilities in the service of their neighbours for the good of all.

Under the rule of Christ

Let us now move to the New Testament where, as we noted, the Son of God who became incarnate in Jesus Christ is revealed as the one through whom all things were created, and that in him all things are held together. Yet this first and final Word of God became human in order to serve, not to be served. He became one with us as elder brother and kinsman redeemer. And, precisely because of his humble service all the way to death, God raised him from the dead to rule on high. At his feet every knee will bow and every tongue confess that he is lord. When the resurrected Christ met with his disciples he again called them into his service, commissioning them to bear witness to him throughout the world as the one who holds "all authority in heaven and on earth" (Matt. 28:18).

What conclusions should we draw from this about earthly governing responsibilities? What does it mean for the disciples of Jesus to be servants of and witnesses to the king of kings? Does the resurrection and ascension of Christ imply that Christians should now try to rule as if from on high as if they have been given authority to put other humans under their feet? Consider the parable in Matthew 13 about the field workers who wanted to pull up weeds found growing among the good plants. The workers represent those who want to serve Christ by going out immediately to clean up the field of the world, to destroy the enemies of God's kingdom. But the master in the parable tells his servants not to pull up the weeds, "for in gathering the weeds you would uproot the wheat along with them. Let both of them grow together until the harvest" (Matt. 13:29-30). Jesus then explains that those authorized to carry out the harvest and to separate the wheat from the weeds are angels, not humans. Jesus does not deputize his disciples to initiate the final judgment; that is God's responsibility. On the contrary, the disciples are told to be patient just as God is patient, for he sends rain and sunshine on the just and the unjust alike (Matt. 5:45). The role of the disciples is to be servants just as Jesus was a servant. God will decide about final judgments and about cleaning up the field of the kingdom. Christ is now king, according to the New Testament, but he has not yet returned for final judgment and his angels have not yet been sent to separate the wheat from the weeds. If, then, Christ, who is enthroned on high, is governing with such great patience and mercy, unwilling that any should perish but that all should

come to repentance, surely human governments should operate in tune with that pattern – the pattern of mercy toward all established by the one who holds all authority in heaven and on earth.

Now, look at the familiar opening verses of Romans 13 and note that they are situated in a broader context that begins at 12:1 and runs to the end of chapter 13. In the whole of those two chapters Paul is urging the Christians in Rome to live in accord with the law of love. Christians are to love their neighbours and live at peace with everyone insofar as it is within their power to do so. They are not to take revenge against those who mistreat them but are to leave vengeance in God's hands. Government should indeed punish evildoers but it should also encourage the good so that the cycle of personal vengeance-taking can be stopped. Yet God's authorization of government does not position rulers above other humans in a hierarchy of dominance. Rather, the office of government is a servant of God and God is the only one who rules over all, including the government officials. Government thus has its own God-given responsibility within the order of love.

We see also in Romans 13:1-7 that God's ordination of government is direct, not indirect via or under the church. If the Anabaptist reformers of the 1527 Schleitheim Articles had affirmed that government's authority comes from *beyond the Christian community* rather than saying government exists "outside the perfection of Christ", they would have hit the mark, in my estimation.[6] For Christ claims all authority in heaven and on earth, but not all of his authority is channelled through or embodied in the church. As long as God continues to send rain and sunshine on the just and unjust alike, Christians should accept with thankfulness God's ordination of government under Christ to render public service by means of just restraint and punishment, as well as just distribution, for the common good. Government's role is a gift of God's mercy and there is nothing about the responsibilities of that office of public service that is incompatible with Christian subservience to, and service of, Jesus Christ. God is at present extending time in this age for all sinners to repent and turn to God. Political authorities, too, have an important, limited service to perform in accord with that law of love, patience, and mercy if only

[6] Excerpts from the Schleitheim Articles can be found in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*, ed. Oliver O'Donovan and Joan Lockwood O'Donovan (Grand Rapids: Eerdmans, 1999), 631-7.

they will do justice as required of the office to which God has called them.

Insofar as God has authorized governments to encourage and protect the public, there is every reason for Christians to honour that office and, when qualified and called upon, to hold such an office as one way to love and serve their neighbours in obedience to Christ. From this point of view, we can affirm the point made by Augustine that God did not create humans to lord it over others but to rule over non-human creatures. However, I think we should take issue with Augustine's idea that it was because of sin that God established government to lord it over others in order to maintain a degree of peace and order in this sinful world. While it is certainly true that governments often act unjustly, putting some people under their feet for the benefit of others, God did not establish government for that purpose. Augustine, I believe, mistakenly started with sin rather than with God's good creation in his reflections on the origin and purpose of government.

God's patience, mercy and judgment

During this time between the first coming of Jesus and his promised return there are two key dimensions of political responsibility that find their grounding in the New Testament and that support the rule of law, the just treatment of diverse human responsibilities, and the equal treatment of all faiths in public life. The first dimension concerns the diversity of human responsibilities and institutions that arise from our creaturely identity as the image of God. The second concerns God's patience and mercy in judging human disobedience through the person and work of Christ.

In speaking of doing justice to "diverse human responsibilities and institutions" I have in mind our responsibility "to do right by" – to do justice to – everything God has made us to be. Genesis 1 says repeatedly after each creative act of God: "God saw that it was good." And when the entire creation comes into view, the text says, "God saw everything that he had made, and indeed, it was *very* good" (Gen. 1:31, emphasis added). Consequently, humans who are God's created vicegerents must pay very close attention to every distinct aspect of created life in order to learn the meaning of God's declaration that everything created is very good.

Just as farmers, for example, must learn the distinct qualities of different soils and plants as well as the distinct needs of cattle, sheep, and

other animals in order to be good farmers, so, husbands and wives need to learn what it means to love one another as marriage partners; parents need to do justice to each child; teachers must learn how to distinguish different learning styles of students and encourage each one to learn and mature. The more humans accomplish, the more new tools, foods, clothing, and organizations they create, organizations such as schools, hospitals, engineering firms, banks, publishing companies, art institutes, scientific laboratories, and many more. Each is distinct in character and needs to be treated justly for life to flourish.

Many of the Bible's proverbs deal with these matters of gaining wisdom, discerning how to act and live in tune with the distinct identities and relationships of God's creatures. Part of wise discernment is gaining an understanding of who is responsible for what. What is the proper responsibility of citizens and government in the political community in contrast to the responsibilities that belong to families, schools, business enterprises, hospitals, and churches? How should each one do what is right and good to fulfil its purpose? And how should public justice be done to each one? Questions such as these pertain to the first dimension of learning to do justice to God's diversified creation, and they have everything to do with our concern today to recognize and protect human rights, civil society, good government, and the rule of law.

The second dimension of justice we want to highlight has to do with God's mercy and patience in dealing with human disobedience and suffering. You know the cries of distressed and persecuted people: "Why, O Lord, do the righteous suffer and the unrighteous prosper?" Cries like this went up to God from many an ancient Israelite, and they continue to rise up from people today who are dying of hunger and preventable diseases or suffering every conceivable kind of oppression and persecution at the hands of fellow humans. The dilemma is real. God calls for righteous living but does not redress every injustice and hatred. What we read in the Bible does not always satisfy us when we experience injustice and witness even greater crimes being committed around us. To believe that God is exercising patience and mercy in order to fulfil his creation purposes may not provide much comfort to those who are starving or suffering abuse. Final judgment may be coming, but it has not yet come. In the meantime, those who take pride in their folly and act unjustly are storing up deeds for the Day of Judgment. Those who repent and seek

God's forgiveness are called to learn patience and to be merciful themselves, following the pattern of life that Christ exhibited. And we also know from the Bible that those who put their trust in God are to come to the aid of their neighbours, to seek remedies for the injustices suffered by them, to weep with those who weep, and to give up our lives for their sake. From the one who has received much, much is required.

In this regard, I want to contend as strongly as possible that governments bear important responsibility to contribute to these remedies, to redress injustice, to restrain and punish evildoers for the sake of the innocent and oppressed. Nevertheless, public officials of earthly regimes have not been given authority to initiate final judgment, to separate believers from unbelievers in the field of this world. Consequently, equal and impartial treatment of all citizens with respect to both distributive justice and retributive justice seems to follow from God's gift of rain and sunshine to the just and unjust alike and from Jesus' instruction to his disciples that the weeds as well as the good plants should be allowed to grow up together in the field until harvest time. As long as it is today, Christians who confess that Christ is lord should act politically in accord with this mode of Christ's patient, gracious, impartial mode of governance, redressing public grievances, seeking remedies for injustice, and building just political communities.

Together these two dimensions of just governance entail the responsibility to discern the distinct identities of each creature, including each human person and each kind of human relationship, organization, and institution. It means giving each its due – a mode of attributive and distributive justice grounded in the good order of creation. I would call this the principle of "structural pluralism" and it should be part of the constitutional ordering of any political community. Second, just governance should entail equal treatment of all citizens without regard to the faith they practice. This is in keeping with Christ's patient and merciful rule between the times of his coming and his coming again. I would call this the principle of "confessional pluralism", and it, too, should be part of the constitutional ordering of any politically organized society. Together these two principles can be summed up in the phrase "principled pluralism", meaning that governments should uphold structural and confessional pluralism *as a matter of principle*, as a matter of public justice.[7]

The 'common good' as political norm

There is a phrase used often in the social teachings of the Catholic Church that refers to the importance of human solidarity. It is the phrase, "common good". This phrase is not politically specific, however, and can also be used by non-political organizations and institutions when referring to the solidarity of their memberships. I would like to argue, therefore, that if the common good is be recognized as a meaningful standard for a political community, it needs to be qualified more specifically as the norm of public justice.[8] Where the phrase "common good" is used by family, clan, or tribal members, or by university administrators, labour union leaders, or those who bear responsibility for some other community or organization, it means something quite different in each case because each is a different kind of community or institution. Furthermore, the common good of any one of those institutions or associations does not constitute the common good of everyone in a political community. Where the phrase is most fitting, then, is in reference to the political community, and in that context it coincides with the norm of public justice. To say this, however raises some important questions of a constitutional nature.

If the common good refers to a universal good or to what is good for the most extensive and inclusive community humans can organize, does this imply that the political community will subsume or dissolve into itself all other goods for the sake of the common good? If that were true, the phrase would call for a totalitarian or omnicompetent state, but that is the opposite of what I am proposing. In view of everything we have said about the plural structure of society and the just treatment of diverse communities of faith, it is not possible for a totalitarian state to be just or to do justice. What the phrase calls for is a constitutionally limited political community whose purpose is to uphold justice for all in a complex,

[7] The twofold idea of "principled pluralism" is developed in several of the essays in my book, *In Pursuit of Justice: Christian-Democratic Explorations* (Lanham, Md.: Rowman and Littlefield, 2004). For further background, see James W. Skillen and Rockne M. McCarthy, eds, *Political Order and the Plural Structure of Society* (Grand Rapids: Eerdmans, 1991).

[8] These remarks draw on my essay, "The Common Good as Political Norm", in *In Search of the Common Good*, ed. Patrick D. Miller and Dennis P. McCann (New York: T&T Clark, 2005), 256-78.

diversified society. The normative demands of the common good require recognition and protection of all the responsibilities people have and not only the responsibilities they hold in common as citizens of a political community. The common good, then, refers to the kind of bond that can be realized only in conjunction with the public-legal protection of the diversity of nonpolitical responsibilities. Constitutionally, the common good goes hand in hand with principled pluralism.

The phrases "principled pluralism" and "the common good" do not come from the Bible, but I hope that what has been presented here is sufficient to show how the light of biblical revelation points in their direction and urges us to respond with a new sense of urgency to God's call to do justice to our neighbours – all of our neighbours. And one of the ways churches and all Christians should render that service is by helping to build just political communities and a just world order under the rule of law so that every citizen can experience just treatment in the bond of a healthy public commons.

Has Security become the New Religion?

The risks and pitfalls of securitization

Beatrice de Graaf and Liesbeth van der Heide

They shall no more be plunder for the nations, nor shall the animals of the land devour them; they shall live in safety, and no one shall make them afraid. (Ezekiel 34:28)

Introduction

In recent years, we have gained a new fundamental human right: the right to security. In the Netherlands, we even have a special ministry devoted to security: the Ministry of Security and Justice. When this department was set up in 2010, the new minister, André Rouvoet, who was minister for child care at the time, said that that instead of calling the new ministry "Security and Justice", it should be named "Justice and Security", because the function of the state is to do justice. The state should foster and maintain law and order, and this should lead to a more secure society. Security always results from law, not the other way round.

The Universal Declaration of Human Rights speaks of bodily integrity in the form of a "right to life ... and security of person" while the United Nations Charter refers to the "territorial integrity" of a state.[1] In each of these cases, however, the reference is to direct and tangible violations of absolute norms: a violent crime or the invasion of a country, rather than the promotion of a state of security within a society or country. A coun-

[1] Article 2(4) of the UN Charter states that "All Members shall refrain ... from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

try's constitution does not commit the government to prevent crimes or catastrophes. If it did, we would consider it mission impossible. There is no right to the security of life. Nevertheless, it seems we all presume such a right does indeed exist. Is this true? And if so, is it good or bad?

The rise of securitization as a new principle of order

What has caused "security" to rise up the political agenda over the past decade? Are we living in a profoundly different world compared to the one that existed before the new millennium?

The terrorist attacks of 9/11 have led to a more fundamental change in the areas of freedom and security than we are sometimes aware of. We could speak of a "paradigm shift", to use the words of Thomas Kuhn.[2] From the perspective of international peace and security, the 1990s were characterized by many small wars and conflicts, but in the end it came to be seen as a period that heralded the victory of liberalism, as in Francis Fukuyama's dictum, "The End of History and the Last Man". However, on 11 September 2001, a new era commenced: the era of *securitization.*

The concept of "securitization" refers to a process in which national security becomes the focal point of policy making. Within the process of securitization, more and more policy issues, which originally might or might not be related to security, are dragged into the realm of national security, with security measures implemented on a much larger scale. The determining argument in this debate is the idea that we are living in a constant state of emergency, where exceptional measures need to be taken to control the threat(s) and danger(s) we face.[3] In recent years, new laws have been passed not just against criminals and terrorists, but against weaker social groups, such as football supporters and immigrants, who have also been framed and treated as problems of security. In the Netherlands, a new so-called "football law" allows a mayor to refuse football supporters access to a particular area before a match even if they have not yet committed a crime.[4]

[2] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 3rd ed. (Chicago/London: University of Chicago Press, 1996).

[3] See Barry Buzan, Ole Waever and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder: Lynne Rienner Publishers, 1998), 25.

[4] See "Klappen gekregen? Dan mag u het stadion niet meer in", *NRC Handelsblad*, 26 August 2010.

This process of securitization largely escapes our attention. It is a gradual process that is easily "sold" to the public. Who would refuse greater security? Critics have a much more difficult time in opposing the adoption of new security measures while proponents of new measures are quick to create – and implement – still more security measures.

It is not our intention to sketch new moral frameworks nor to make judgments that will lead only to greater indifference, since people are often wary of such a normative approach. What fascinates us are the consequences of this process of securitization. The role of the church should be to demand a fundamental debate on issues of privacy and security. This paper provides some initial guidelines for such a debate.

To explain the process of securitization, and the accompanying need for security, we need to digress into the field of social psychology, and, more specifically, *Terror Management Theory*. Terror Management Theory can be traced back to the 1980s and takes as its starting point the conflict between the universal feeling of temporality (the idea that everything eventually comes to an end) and the drive to live. Human beings are better able to accept and cope with such feelings of temporality and danger when they are able to fall back on a cultural, normative or ideological worldview. A worldview provides human beings with a frame and structure to decide what is of value in a world that faces danger and uncertainty.[5]

This phenomenon becomes apparent when an individual is confronted with death, the so-called "mortality salience effect". An example of this is research in which photographs of 9/11 were shown to a group of people, after which their attitudes to strangers were measured. They were more positive towards their own in-group and more negative towards the "other", the out-group.[6] Other research showed that parents who were confronted with pictures of the collapsing World Trade Center towers took on a more hierarchical parenting style and punished their children

[5] Sheldon Solomon, Jeff Greenberg, Tom Pyszczynski, "A Terror Management Theory of Social Behavior: The Psychological Functions of Self-Esteem and Cultural Worldviews", in *Advances in Experimental Social Psychology* 24, ed. Mark P. Zanna (New York: Academic Press, 1991), 93-159.

[6] Mark Dechesne, J. Greenberg, J. Arndt and J. Schimel, "Terror management and the vicissitudes of sports fan affiliation: the effects of mortality salience on optimism and fan identification", *European Journal of Social Psychology*, 30, no. 6 (2000), 813-35.

more severely.[7] In short, this becomes a downward cycle into terror management. Danger leads to attempts to control the danger; but every new danger creates an even darker picture of "the other" or the out-group and demands more "security".

If this is such a normal social-psychological phenomenon, how is that it seems we are being dragged into the downward cycle of securitization so much easier and faster today? And what are the effects on society? Churches have also used instruments of threat management such as the fear of the wrath of God and the promise of prosperity in the afterlife to secure adherence to church norms, as well as to enhance the image of the in-group, and many of us, or our parents, were afraid of the "Red Scare", the Russians, and the bomb.

There is, however, a significant difference to the situation of 20 years ago. After the Cold War, the collective manifestations of terror management have been expanded extensively. They have become more fluid, are no longer kept within the in-group, while media magnify such collective manifestations in a much more intense way. We live in a medial society, dictated by media logic and the dramatization of imagery and information.[8] The 9/11 attacks were a dramatic climax within that process.[9] From a "media perspective", we have been living in a state of permanent catastrophe ever since.[10]

That is not all. While families are confronted more often with the imagery of fear and violence, and with greater impact, we should be able to limit the consequences of this process to the practices already described of more hierarchical parenting styles and more severe punishments. An issue only becomes an issue of politics when people attach political meaning to it. Fear and insecurity have to be politicized and marketed. This is the new context in which we live today.

[7] "Ouders strenger na foto's van aanslag", *NRC Handelsblad*, 7 October 2010.

[8] Gabriel Weimann, "The Theater of Terror: Effects of Press Coverage", *Journal of Communication* 33, no. 1 (1983), 38-45, here 38 and 45.

[9] Brigitte L. Nacos and Oscar Torres-Reyna, *Fueling Our Fears: Stereotyping, Media Coverage, and Public Opinion of Muslim Americans* (Lanham: Rowman and Littlefield, 2007), 101.

[10] *The Power of Nightmares*, documentary dir. by Adam Curtis (2005); see also: Frank Furedi, *Invitation to Terror: The Expanding Empire of the Unknown* (New York/London: Continuum, 2007); David L. Altheide, *Terror Post 9/11 and the Media* (New York: Peter Lang, 2009) esp. Chapter 7, "Terrorism Programming", 134ff.

Three developments demand our attention: governments that offer more and more security and policies and measures to deal with risk; increased feelings of discomfort and insecurity within society, leading to demands for more security policies and measures; and an ever expanding "security industry" of threat and security engineers, marketing their goods and convincing the public of their need for security.

First, securitization is a new phenomenon in the history of the West, shifting the underlying structuring principle within society. Politics and policy measures originally took place within the context of solidarity, the redistribution of wealth, and the promotion of equality and liberty. Since the start of the new millennium, however, safety and security have become the new structuring principles: risk-taking versus risk-averse behaviour. Since 9/11 we have been living in a so-called "risk society" (*Risikogesellschaft*).[11] Security is no longer directed towards averting a threat from outside (protecting the territory), but is nowadays directed towards averting risk in general. We have shifted from what Hans Boutellier, a professor in security and citizenship, has described as a "defensive" society to a "preventive" society.[12] Measures are increasingly directed towards a "feeling of insecurity" rather than a specific threat or enemy, based upon possible risks in the future.

An example of this is that the insecurity resulting from terrorism has been expanded into a threat of general radicalization, as demonstrated by the reports of the Dutch intelligence services between 2004 and 2009.[13] The theme of security has been taken out of the domain of international terrorism into the domain of local upheaval, and riots and ethnic and religious tensions. A Dutch newspaper in the Netherlands stated: "We used

[11] See Ulrich Beck, *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (Frankfurt am Main: Suhrkamp, 1986); ET *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992).

[12] See Hans Boutellier, *De veiligheidsutopie, Hedendaags onbehagen en verlangen rond misdaad en straf* (Den Haag: Boom Juridische uitgevers, 2002); see also Manuel Castells, *The Rise of the Network Society*, The Information Age: Economy, Society and Culture, vol. 1 (Cambridge, MA/Oxford: Blackwell, 1996).

[13] See Algemene Inlichtingen en Veiligheidsdienst, *Van dawa tot jihad. De diverse dreigingen van de radicale islam tegen de democratische rechtsorde* (Den Haag: AIVD, 2004); See also *De gewelddadige jihad in Nederland* (Den Haag: AIVD, 2006); *Jihadisten en het internet* (Den Haag: AIVD, 2006); *Radicale dawa in verandering. De opkomst van islamitisch neo-radicalisme in Nederland* (Den Haag: AIVD, 2007).

to be afraid of the Russians, now we're afraid of the Moroccans."[14] But the Russians came from outside, whereas the Moroccan community is made up of our fellow Dutch citizens.

Promoting a more secure society is a central goal of most governmental policy in the European Union. But how much security can a government offer? And how much insecurity has to be sacrificed in the process? Terrorism and criminality, droughts and floods, epidemics and financial crises – dangers and threats are everywhere. These days, governments throughout the world adhere to a scientific rationale that leads them to believe they can control danger.[15] At the same time, governments increasingly perceive themselves as businesses that have to meet the needs of their clients, the citizens, who demand protection against dangers and threats. Thus, the government becomes a business in the field of risk reduction; a sector specialized in collective prevention techniques.

This brings us to the second issue. What is it exactly that the client, or rather, the citizen wants? The citizen demands social security, welfare and protection for their personal happiness in life. But with every security incident, their dissatisfaction with the services offered increases. In Europe, we focus very much on risk and securing ourselves against it. In the Netherlands, for example, people pay on average €4640 each year for insurance premiums. We are doing so well that we are no longer used to misfortune in our lives. It seems that people who are doing too well and who are not used to the concept of misery are people who are fearful.[16]

Third, these people represent a market for the salespersons of fear and security. We can trace a general pattern in western democracies. In the United States, in France, in Germany and in the Netherlands, politicians make bold statements and exaggerate their displeasure (usually focused on how the nation is being undermined by immigration, vandalism by criminal foreign youths. and the threat posed by Islam).[17] They address society and try to mobilize and manipulate it so as to ensure greater in-

[14] See "Vroeger bang voor Russen, nu voor Marokkanen", *NRC Handelsblad*, 2-3 January 2010.

[15] For an excellent overview, see A.H. Berg, *De eigen aard van de overheid* (Den Haag: Sdu, 1998).

[16] Kees Versluis and Paul van der Kwast, "Verzekeren is dom, maar we kunnen het niet laten", *Intermediair*, 7 October 2010.

[17] Bas Heijne, "Wie populisme niet snapt, verliest het debat", *NRC Handelsblad*, 6 September 2010.

vestment in security. Consultancies, security consultants and terrorism experts fare well in this context. The mayor of Utrecht, a city of 316,000 citizens in the heart of the Netherlands, has estimated that he received a total of 240 kilos of disaster plans during the last year from within his region.

Where does it lead? Digitalization of society

Because of this threefold pressure – governments offering greater security, increased feelings of discomfort and insecurity within society, the ever-expanding "security industry" – the process of securitization increases exponentially. Intelligence and security services continue to expand their authority and measures, infringing on privacy. Electronic communication is tapped on a continuous basis: since 1998 it has been legal to tap telecommunication channels, and Internet communication followed in 2001. Since 2004, as a result of the European guideline on data retention, telecom providers are obliged to give intelligence services access to phone traffic records. Laws have also been passed to oblige Internet providers to store user traffic and location data for twelve months to allow investigation of serious crime. Thus, criminal law is being used in preventive ways against individuals who are not yet suspected of anything, but who were near a suspect or suspicious location.

Terrorism and serious crimes have serious consequences. This is why security measures and the violations of privacy that accompany them are so easily accepted. When a national public transport chip card was introduced in the Netherlands, only 32 per cent of people said they opposed the use of traffic data for investigation purposes.[18] Another example is the widely accepted use of body scanners at airports.[19] New ways of controlling and preventing risk are created and new issues are dragged into the security domain. People are simply not ready to accept another terrorist attack or case of child abuse. Proponents of these security measures tell critics to stop whining and accept the pre-eminence of security.

[18] See Christian van 't Hof, Rinie van Est and Floortje Daemen, *Check in/check uit: Digitalisering van de openbare ruimte* (Rotterdam: NAi , 2010), 53; ET: *Check In Check Out: The Public Space as an Internet of Things* (Rotterdam: NAi, 2011); see also "Iedereen verdacht", *NRC Handelsblad*, 12-13 May 2007.

[19] See, for example, "Passagiers accepteren bodyscan Schiphol", 21 July 2010, security.nl, http://www.security.nl/artikel/33935/1/'Passagiers_accepteren_bodyscan_Schiphol'.html

A direct consequence of securitization is the development of the "glass" or "surveillance society", according to John Gilliom and Torin Monahan, in their recently published book, *SuperVision*.[20] They refer to a society where individual behaviour is extensively monitored and where personal life becomes more transparent. They label this process "crystallization" as it leads to an ever more open and transparent society in which everything is able to be known about most individuals. This process of "crystallization" is accelerated by function creep and overspill effects. Function creep refers to the use of projects (laws, policies, measures) for purposes other than those for which they were originally intended (for example, the use of the public transport card for investigative purposes). Crystallization is also advanced by the new "public management" perspective that has been on the rise since the 1990s. Governments are striving for rationalization and efficiency. They want to provide better services to the citizen while at the same time creating and maintaining an efficient government administration. The business world is following the same path of efficiency, service, cost reduction and marketing. Thus, they resort to "social sorting": databases are filtered by certain characteristics and categories to better identify and serve target and risk categories. All in all, we live in glass houses, and our lives and our daily business become every day more transparent.[21]

At the same time, it seems as through society is not really worried by these developments. The increasing securitization and need for control is taking place at the same time as the development of new digital "empowerment". At first, most people do not view new information technologies as a threat, but rather as a tool to widen their scope of action, to free themselves from geographic or other limitations and to mobilize themselves.[22] We are eager to accept and use navigation systems and smartphones that register our location. Almost everybody is online in the Netherlands: in 2009, 93 per cent of people possessed an Internet connection.[23]

[20] John Gilliom and Torin Monahan, *SuperVision: An Introduction to the Surveillance Society* (Chicago: University of Chicago Press, 2013).

[21] Jacob Kohnstamm, "Glazen samenleving in zicht", *Nederlands Juristenblad* (82), no. 37 (2007), 2369-75.

[22] Manuel Castells, *Network Society*; idem, *The Power of Identity*, The Information Age: Economy, Society and Culture, vol. 2 (Cambridge, MA/Oxford: Blackwell, 1997).

[23] See Van 't Hof et al, *Check in/check uit*, 20.

Meanwhile, more and more people are making a conscious decision to be present on the World Wide Web. Without a LinkedIn or Facebook account, a person is isolated. Our current society no longer values privacy as something to fight for. The opposite is true. Virtual and media presentations are the main capital of society today. Who does not want their "fifteen minutes of fame" on Facebook or to post a promotion and gain new "relations" on LinkedIn? The current *Zeitgeist* might best be described by saying, "I am visible, therefore I am." We live in a society that wants to see and to be seen.

The need for control by government and the business world goes hand in hand with citizens voluntarily making their identities available. Facebook and the smartphone are today's digital or electronic bracelet, but we do not seem to mind. We no longer feel that we are prisoners of the state; it is our own need for services, entertainment and security that binds us.[24] Protesters against the invasion of privacy are often misunderstood and criticized for "privacy prudence".[25] We walk through today's glass society without being aware of our environment. We are confronted with the excesses of this process only when we are faced with "identity theft", or, more commonly, system errors.

Three risks of a glass society

In this section, we focus on three negative consequences of this process of securitization and crystallization of society. First, many new security policies and measures do not provide a solution for the problem that they are intended to deal with. Take, for example, the new law initiated by the European ministers for justice and internal affairs that requires telephone companies to store the user data of phone and e-mail communication for a longer period of time. This measure was aimed at the timely identification of terrorists or terrorist suspects. However, research has shown that the utility and necessity of this measure for investigative purposes cannot be demonstrated. The underlying problem is not the lack of user data, but inert decision-making processes and rigid bureaucratic procedures in international cooperation to fight crime.

[24] See Friedrich von Borries, "Lieber großer Bruder, bitte folge allen meinen Wegen! Von der Fußfessel zu Google Street View: Wie wir Überwachung lieben lernten", *Die Welt*, 10 August 2010.

[25] Peter Giesen, "De privacypreutsheid. Kom maar op met die bodyscan", *De Volkskrant*, 9 January 2010.

Storing more data (and thus greater capacity to control that data) does not offer a solution to the problem of terrorism. The 9/11 attacks and the Breivik attacks in Norway were committed by people who were already partly on the radar of intelligence and security services. The perpetrators had already been registered in the databases of the security system. However, most intelligence is not linked or shared efficiently, something known as the "connecting the dots" issue. Gathering increasing amounts of data to find the needle in the haystack cannot be the answer to the (very small) risk of a terrorist attack. Instead, we need first to put much more effort into improving the use and efficiency of existing competences before thinking of new measures, and new competences should first be tested for their effectiveness and utility – a process that hardly ever takes place. On the contrary, the rise in new counter-terrorism policies and measures tend to create problems of their own. Suspected terrorists, once registered on an EU or UN blacklist usually stay on those lists – even after they die. If innocent citizens are accidentally put on such a list (due to grammatical or typing errors for example) it can be very difficult to get removed again. The costs of security and counter-terrorism measures place a heavy load on the budget, but once they have been put in place, it becomes very difficult to get rid of them.[26]

A second risk of securitization and crystallization is that they encroach upon the boundaries of the democratic rule of law. Violations of the protection of personal data are a violation of the international rule of law as laid down in Article 8 of the European Convention on Human Rights. Rationalization and securitization thus present a threat to the democratic rule of law. Our personal freedom is at stake when governments and businesses disclose information that we would rather keep secret. We are presented with conflicting interests when faced with the dichotomy between security and personal freedom. But we have a right to be left alone. Those who claim they have nothing to hide either "have a very boring

[26] See Beatrice de Graaf and Bob de Graaff, "Counterterrorism in the Netherlands: the 'Dutch approach'", in *Intelligence, Security and Policing Post-9/11*, ed. Jon Moran and Mark Phythian (London: Palgrave Macmillan, 2008), 183-202; see also: M.J. Borgers, *De vlucht naar voren* (Den Haag: Boom, 2007); T. Roos, "Terrorisme en strafrecht in Nederland", in *Hedendaags radicalisme. Verklaringen & aanpak*, ed. S. Harchaoui (Apeldoorn/Antwerpen: Het Spinhuis, 2006), 81-113.

life" or "they overlook an essential condition for individual development in peaceful co-existence with others."[27]

Protection against an omniscient government is a necessary precondition for some of the important principles of the democratic rule of law: individual autonomy, informational equality and equal treatment. This is how we prevent harm and injustice. Harm and injustice are inevitable aspects of life. The principles of equal treatment and solidarity are already being violated when the government or businesses resort to the use of "social sorting". Living in certain risk areas or being part of a weaker group in society can lead to intensified monitoring by the police or increasing costs for insurance.[28] (According to Frank Furedi, more and more groups are being labelled as weak: elderly people, handicapped, immigrants, gay people, women.) Having a high risk profile, however, is often not someone's own fault. How responsible is a poor dock worker for living in a bad neighbourhood? And what if an honest football supporter becomes the victim of a new law against hooligans? And how do we deal with the ever growing intolerance towards those we perceive of as "different"? Football hooligans and terrorists are dangerous, but what about pregnant women or Reformed Christians who do not accept vaccination?

New security measures are often presented against the background of urgent and immediate threats, and are often said to be an exception to the rule. Nevertheless, one of the alarming characteristics of security measures is their tendency to become the new *status quo*, becoming normalized in the process. Security cameras are no longer placed only in shops, they follow us out onto the streets. The threat of "ethnic profiling" becomes increasingly acute due to new surveillance systems and security demands. People undergo body searches, are apprehended or refused entrance to cafes based upon skin colour, sexual orientation or even something as minor as clothing style.[29]

[27] Jacob Kohnstamm, "Een bruikbaar rechtsgoed. Veiligheid en de Wet bescherming persoonsgegevens". Johan de Wittlezing, Dordrecht, 4 October 2006.

[28] See David Lyon, ed., *Surveillance as Social Sorting. Privacy, risk, and digital discrimination* (London/New York: Routledge, 2002).

[29] See Open Society Justice Initiative, *Ethnic Profiling in the European Union: Pervasive, Ineffective, and Discriminatory* (New York: Open Society Institute, 2009).

The third and most essential threat posed by securitization and crystallization is the withdrawal of the most crucial element within society: trust – both trust in one another, and trust in the government. According to Furedi, a strong preoccupation with risk leads to a fatalistic image of human beings: "be careful or else."[30] With such an image, all we focus on is initiating more preventive measures, controlling and expanding existing measures and fearfully waiting for what might happen. The overload of measures also leads to exaggerated expectations. When we do introduce measures (or know the government is doing it), we are no longer willing to accept that a terrorist or a paedophile slips through the loopholes of our security system. Each bomb that explodes thus becomes an explosive that undermines trust in the state.

At the same time, cynicism increases. Internationally, Europe still has a high score on trusting other people and trusting the government.[31] Nonetheless, the trend shows a downward pattern because citizens are increasingly confronted with institutional failure: hospitals, police and justice organizations, financial institutions or schools dealing with personal data in an inaccurate way. Think of what happened in the United Kingdom, where intelligence officials left CDs containing people's personal data on the streets. When laws on personal data protection are viewed as an obstacle, and government and businesses, as well as citizens themselves, deal with such data in a thoughtless manner, general trust in government and civil society will continue to wane.

This process of decreasing trust due to the web of security measures and the establishment of the glass society is not inevitable. More attention has been given in recent years to the downsides of these processes. Citizens are starting to ask more questions about what is acceptable and where the boundaries lie.[32] More research is being done into the effects of new counter-terrorism laws. Politicians are starting to pay greater attention to the principles of utility and necessity when deciding on new powers for intelligence and security services. However, there remains the fear that without a clear vision of the conflicting interests between the need for security and the right to privacy, current events and technological

[30] Furedi, *Culture of Fear*, 170.

[31] European Foundation for Improvement of Living and Working Condition, *Second European Quality of Life Survey* (Luxembourg: EFILWC, 2009).

[32] See "Emphasis on what is permissible", *NRC Handelsblad*, 9 August 2007.

developments will dominate the debate. It takes only one terrorist attack and the pendulum swings towards the side of more security, less privacy.

Conclusion

Freedom is often placed on the opposite end of the spectrum to security, and the case is often made that sacrificing a small amount of freedom for the promotion of security makes sense. Indeed, there are cases where individual freedom must be compromised to guarantee the safety or security of a bigger group, a principle called *Salus populi suprema lex esto* (the wellbeing of the people is the highest law).[33] Security measures and the digitalization of personal life enable us to increase that wellbeing. Intelligence services should be able to tap phone conversations of terrorism suspects and their contacts. It is of vital importance that a group of medical experts is able to share their opinions and information about their patients through electronic files. Attempts by governments to push back street criminality should be supported. Striving for security in an all-embracing manner is an old biblical concept. For Christians, real security is translated as *shalom*, the wholeness of peace and security of human beings amongst each other and in relationship with their Lord.[34] In the Bible (Ezekiel 34), security includes both the physical safety of the flock, and their moral wellbeing, represented by Ezekiel's call to the shepherds to act as responsible, moral leaders.

Security measures are necessary and the condition for a well-functioning society. They do not, however, offer a solution to the many kinds of underlying, unarticulated problems that can be traced back to moral discomfort, displacement and insecurity. When governments start to replace the existing relations with their citizens – based on mutual trust and the principle of innocence until proven otherwise – with relations built on institutionalized mistrust, they undermine the roots of the democratic rule of law.

Our wellbeing is not well served by offensive or even totalitarian security ambitions. Privacy, according to the British philosopher A.C. Grayling, is crucial to our autonomy and social wellbeing.[35] Wellbeing, as the

[33] Beatrice de Graaf, own translation, based on Cicero, *De Legibus*, III, 3.

[34] See Andries Zoutendijk, "Het veilige land", in idem, *Mensenkind* (Zoetermeer: Uitgeverij Boekencentrum, 2003), 55-9.

[35] Cf. A.C. Grayling, "We know where you live", *guardian.co.uk*, 5 December 2008, http://www.guardian.co.uk/commentisfree/2008/dec/05/humanrights-privacy

underlying basis of security, begins with trust, social cohesion and personal fulfilment. A society does not become more secure only by erecting security gates, nor through over-reliance on governmental efforts, but through pre-political notions of solidarity, mutual trust and care.

Roel Kuiper, a Reformed philosopher in the Netherlands, recently argued that we should balance our secularized Hobbesian perspective of life as nasty, brutal and short with a Christian emphasis on redemption and liberation.[36] Security is a condition for social virtues to prosper. But we have to remind ourselves there is always a connection between "the good life" and "just institutions".[37] We can exceed our own natural and primitive cravings, we can follow in Jesus' footsteps and care for one another. The future is open, thanks to Jesus Christ. We do not have to fear death and destruction, we do not need to insure ourselves against every form of loss and damage. Otherwise we are in effect rooting out all the seeds of transcendence, unselfishness and self-sacrifice we, and our society, need. Of course, security benefits from institutionalization, governmental measures and oversight. However, there is a close relation between "the good life" and "just institutions". Righteous rulers, institutions, authorities and persons will protect their flock against dangers, but they are not to terrorize that flock with exaggerated images of destruction themselves. In the end, Christian security is not about fear or threats, nor about a secular future, but about our hope for the eternal kingdom.

[36] Roel Kuiper, *Moreel kapitaal. De verbindingskracht van de samenleving* (Amsterdam: Buijten & Schipperheijn, 2009), 80-3.

[37] See Paul Ricoeur, *Oneself as Another*, trans. Kathleen Blamey (Chicago: University of Chicago Press, 1992), 180, 262.

International criminal justice

A precarious but indispensable project

Harmen van der Wilt

Introduction

Historically, criminal justice has been strongly wedded to the nation-state. As famously expounded by Émile Durkheim, communities tend to reserve criminal punishment for the purpose of protecting the values most dear to them and whose infringement therefore causes the greatest shock. Criminal law enforcement both demonstrates the overwhelming power to counter such challenges and reinforces the moral strength of those values, thereby contributing to social cohesion and "collective conscience".[1] Criminal law enforcement obviously requires strong and stable institutions. We need a legislative body that defines precisely the kinds of harmful behaviour that qualify for criminal punishment, determines appropriate punishment and sets out the procedure that should guarantee a fair trial and respect the fundamental rights of the accused who is presumed innocent until their guilt is proven "beyond a reasonable doubt". Courts engage in public rituals whose legitimacy is predicated on judges meticulously following the prescribed procedural guidelines. And – last but not least – the entire system needs to be sustained by a strong executive, and a police force that is capable of apprehending suspects, bringing them before the courts and ensuring that criminal sentences are in fact served by those who have been convicted.

All these institutional ingredients, more or less taken for granted in the domestic context, are shaky and far less secure when we start considering

[1] Émile Durkheim, "Two Laws of Penal Evaluation", *Année Sociologique* 4 (1901), 65-95. For an excellent introduction to Durkheim's reflections on criminal law, see Steven Lukes and Andrew Scull, *Durkheim and the Law* (Oxford: Martin Robertson, 1983).

the realm of international criminal justice. One of the greatest problems, causing embarrassment at Nuremberg and Tokyo, was that the most heinous crimes had not previously been adequately defined. No one had ever stood trial on the charge of having committed a crime against peace, an offence that prominently featured in the indictments against the major war criminals, and this prompted the Indian Judge Pal in Tokyo to vote for the acquittal of the accused.[2] To a certain extent it was inevitable that the tribunals could not fully meet the demands of *nullum crimen sine lege*, the moral principle in criminal law and international criminal law that a person cannot or should not face criminal punishment except for an act that was criminalized by law before they performed the act.[3] The Military Tribunals in Nuremberg and Tokyo were pioneering the field of international criminal justice. They had to start from scratch, because, apart from some half-hearted attempts in the wake of the First World War, no one had envisioned such a dauntless task. Besides, although human history is replete with sad examples of those in power trampling on the rights and lives of the weak and vulnerable, the crimes committed during the Second World War were unsurpassed both in scope and in depravity. Humanity cannot define and prohibit what it cannot conceive as being possible in reality. In that sense the atrocities were truly and literally "unimaginable".[4]

In the meantime, the world community has made some headway. The Rome Statute, in force since 1 July 2002, not only serves as the constituent document for the International Criminal Court, but also enumerates, precisely and in detail, the core crimes that constitute the subject matter that comes under the jurisdiction of the Court: aggression, genocide, crimes against humanity and war crimes. The ICC was preceded by the *ad hoc* tribunals (for the Former Yugoslavia and Rwanda) that simultaneously underlined the urgency of the establishment of a permanent court and

[2] Neil Boister and Robert Cryer, eds, *Documents on the Tokyo International Military Tribunal* (Oxford: Oxford University Press, 2008).

[3] http://www.law.cornell.edu/wex/nullum_crimen_sine_lege. For the scope and significance of the principle in international criminal law, see Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Antwerpen-Oxford-New York: Intersentia, 2002).

[4] The apposite title of the latest book of William Schabas, *Unimaginable Atrocities; Justice, Politics, Rights and the War Crimes Tribunals* (Oxford: Oxford University Press, 2012).

paved its way by contributing to the further development of international criminal law.[5]

The International Criminal Court is intended to serve as an instance of last resort. It is only allowed to intervene when states prove to be "unable or unwilling" to carry out investigations into international crimes and to prosecute the perpetrators. This so-called "principle of complementarity" conveys the idea that domestic jurisdictions are best suited to engage in criminal law enforcement.

The project of international criminal justice has thus made some progress. A body of legal provisions has solidified and there is a court that administers the law in tandem with domestic courts, aspiring to "end impunity" by forging a closed system of criminal law enforcement, leaving no loopholes.[6] However, by no means have all problems been solved. In view of the abundance of complaints and possible "cases", compared to the limited resources at hand, the prosecutor has to make clear choices. What "situations" and "cases" should she select? And should the prosecutor focus (only) on those "bearing the greatest responsibility" or should she cast the net wider? Moreover, how is the ICC to obtain evidence, witness statements and custody of the accused? The International Criminal Court is utterly dependent on the cooperation of states and they may be reluctant to oblige, as they are often themselves involved in the crimes. Arguably, the greatest challenge facing international criminal justice today is the enforcement deficit.

Given the limited scope of this essay, I can only highlight and briefly discuss a small number of topics. In the next section, I will reflect on the essential feature of core crimes, being that they are committed or condoned by the state and on the consequences for international criminal justice. In the third section, I will address the related, but distinct topic of collective liability, in the context of the natural proclivity of criminal law

[5] "Hybrid" or "internationalized" tribunals which display a blend of international and national legal features have been established in Sierra Leone (Special Court for Sierra Leone), East Timor (Special Panels in East Timor), Kosovo, Cambodia (Extraordinary Chambers in the Courts of Cambodia) and Lebanon (Special Tribunal for Lebanon). On this phenomenon, see Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner, *Internationalized Criminal Courts* (Oxford: Oxford University Press, 2004).

[6] According to the Preamble of the Rome Statutes the States Parties are "Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

to focus on individual guilt. In the fourth and final section, I will briefly reflect on the main goals of international criminal justice, starting from the premise that international criminal courts and tribunals are often overburdened by "great expectations". A more modest approach would welcome the symbolic, "norm-expressive" qualities of international criminal justice and in this context I intend to pay some attention to the contribution of churches and religion.

State criminality

What gives the International Criminal Court, as proxy of the international community, the right to arrogate powers of criminal law enforcement and intervene in domestic jurisdictions? Since criminal law is closely connected to the sovereignty of the state, such trespassing on state prerogatives requires justification. One particularly strong and valid reason for the international community to interfere is if the state fails to perform its primary "Hobbesian" duty to secure and protect the life, liberty and property of its citizens. By defaulting on its primary obligations, the state forfeits its sovereign rights and its concomitant claim to ward off international intervention. Alternatively – instead of harassing their own population – states may threaten the lives and well-being of citizens of other states by engaging in aggression and warfare. This would also trigger the interests of the international community, because world peace and public order are at stake. Larry May has tried to condense into two principles the moral right of the international community to intervene in domestic affairs by engaging in criminal law enforcement – the "security principle" and the "international harm principle" – both of which need to be satisfied to warrant international prosecutions.[7] Now the core crimes under the jurisdiction of the ICC neatly comply with both of May's principles. In the case of genocide, crimes against humanity and war crimes, the state is either actively involved in the commission of crimes against its population, or is too weak to protect them and stem the tide of anarchy. Either of these situations triggers the security principle. Simultaneously, according to May, the international community is harmed as well, as these crimes are "group-based", either because they target larger

[7] Larry May, *Crimes against Humanity: A Normative Account* (Oxford: Oxford University Press, 2005).

groups of victims (on the basis of their belonging to the group), or because they are committed by collective entities.[8]

It is uncontested in scholarly literature that core crimes are characterized by active state involvement or that they are at least condoned by states.[9] Moreover, the most conspicuous feature of international crimes – that the state is somehow involved – underlies the principle of complementarity, which, although postulating the primacy of domestic courts, silently assumes that states will often default and for that very reason secures the fallback option of the ICC.

At the same time, we are confronted with an obvious paradox and dilemma: how can the ICC count on the loyal assistance of a state if that state itself is the perpetrator of the crimes the court seeks to address (or is unable to reign in unruly armed forces, because of the collapse of its judicial system)? The procedural law of the International Criminal Court does not allow trials in the absence of the accused and this implies that the accused must be surrendered to the court. States parties to the Rome Statute are under an obligation to cooperate with the court in its investigation and prosecution of international crimes, which among other things, entails the duty to transmit evidence and surrender suspects.[10] Moreover, states parties are not allowed to invoke personal or functional

[8] In May's own words: "Only when there is serious harm to the international community, should international prosecution against individual perpetrators be conducted, where normally this will require a showing of harm to the victims that is based on non-individualized characteristics of the individual, such as the individual's group membership, or is perpetrated by, or involves a State or other collective entity." The Preamble of the Rome Statute confirms that the core crimes are "the most serious crimes of concern to the international community as a whole". May, *Crimes*, 83, footnote 3.

[9] A. Cassese, *International Criminal Law*, 2nd ed. (Oxford: Oxford University Press, 2008), 7: "Strikingly, most of the offences that [international criminal law] proscribes and for the perpetration of which it endeavours to punish the individuals that allegedly committed them are also regarded by international law as wrongful acts by states to the extent that they are large-scale and systematic: they are international delinquencies entailing the 'aggravated responsibility' of the state on whose behalf the perpetrators may have acted." G. Werle, *Principles of International Criminal Law*, 2nd ed. (The Hague: T.M.C. Asser Press, 2009), 41: "Crimes under international law typically, though not necessarily, presume state participation." William A. Schabas, *The International Criminal Court; A Commentary on the Rome Statute* (Oxford: Oxford University Press, 2010), 40: "These are generally crimes of State, in that they involve the participation or acquiescence of a government, with the consequence that the justice system of the country is unlikely to address the issue."

[10] Cf. Article 86 and, more generally, Part 9 of the Rome Statute.

immunities of heads of state or other official representatives.[11] However, states have ample opportunities to obstruct international criminal justice by remaining aloof from the common venture. Besides, international criminal law enforcement operates in the context of inter-state relations and therefore has horizontal ramifications as well. States parties may prefer to observe their obligations vis-à-vis other states that have not ratified the Rome Statute.[12]

This quandary cannot be easily resolved. The International Criminal Court cannot act on its own. States that are loyal to the international criminal justice project can compensate for their "unwilling or unable" colleagues and can, albeit on a very modest scale, accept their share by exercising universal jurisdiction over international crimes. Although universal jurisdiction is by no means undisputed,[13] international criminal justice can probably not entirely do without it.[14]

Collective responsibility

The core crimes under the jurisdiction of the International Criminal Court are typical examples of "system criminality". They require a multitude of perpetrators, acting together and cooperating in a more or less coherent way, within the framework of hierarchical organizations.[15] State crimes are by definition also forms of system criminality, but the reverse does not necessarily hold true, as large private corporations and "the Mob"

[11] Article 27, Rome Statute.

[12] In the case of *Democratic Republic of Congo v. Belgium* (Yerodia case), ICJ General List No. 121, 14 February 2002, the International Court of Justice confirmed that personal immunities still subsist in inter-state relations. The issue came to the fore when state party Malawi refused to surrender Sudan's incumbent president Al-Bashir who is sought by the Court on charges of crimes against humanity and war crimes, see for example Paola Gaeta, "Does President Al Bashir Enjoy Immunity from arrest?" *Journal of International Criminal Justice* 7, no. 2 (2009), 315-32.

[13] See for example George Fletcher, "Against Universal Jurisdiction", *Journal of International Criminal Justice* 1, no. 3 (2003), 580-84.

[14] Cf. H. van der Wilt, "Universal jurisdiction under attack: an assessment of the African misgivings of international criminal justice as administered by Western states", *Journal of International Criminal Justice* 9, no. 5 (2011), 1043-66.

[15] See the different contributions to André Nollkaemper and Harmen van der Wilt, *System Criminality in International Law* (Cambridge: Cambridge University Press, 2009) and the observation of Raul Hilberg, the chronicler of the Holocaust, in idem, *The Politics of Memory*, (Chicago: Ivan Dee, 2002), 59: "The killing was no atrocity in the conventional sense. It was infinitely more, and that 'more' was the work of a far-flung, sophisticated bureaucracy."

also engage in macro or system criminality. The term "system criminality" was coined by the Dutch judge B.V.A. Röling who took part in the Tokyo Tribunal. He reserved the concept to qualify criminality that is caused by the system, serves the system and corresponds with the prevailing climate in the system.[16]

System criminality presupposes that several perpetrators act together in order to accomplish a criminal result and by definition implies collective responsibility. Now, criminal law and criminal lawyers are strongly geared to individual agency and culpability and generally feel uncomfortable when they have to deal with collective guilt. International criminal lawyers are equally hesitant to embrace collective responsibility. The most famous quote from the International Military Tribunal at Nuremberg reads that "crimes are committed by men, not by abstract entities".[17] The focus on the individual has generally been defended by the claim that entire nations or populations are not on trial and should be exonerated of collective guilt.[18] The downside of this individualistic approach is that criminal trials fail to capture the mechanisms and machinations of collective crime. Chopping up a string of events and interactions into individual acts and deeds distorts the picture of the common enterprise and therefore is found wanting as an explanatory narrative and moral messenger. There is another aspect to this as well. While it may be unfair to hold collectives responsible for the crimes of individuals, it would be equally unwarranted to place the entire blame on the head and shoulders of an individual such as Adolf Eichmann. After all, the crimes of the collective exceed Eichmann's personal contribution and guilt. Moreover, collectives are not only capable of accomplishing what separate individuals are unable to do, they also have their own social dynamics, enticing individuals to overcome moral inhibitions and perform hideous

[16] B.V.A. Röling, "The Significance of the Laws of War", in *Current Problems of International Law*, ed. A. Cassese (Milano: Giuffré Editore, 1975), 133-55.

[17] Nuremberg IMT, "Judgment and sentence", *American Journal of International Law* 41, no. 1 (1947), 221.

[18] Cf. Gerry Simpson, "Men and abstract entities", in Nollkaemper & van der Wilt, *System Criminality*, 80-1, who observes: "The apparent exoneration of the *Wehrmacht* at Nuremberg and at the post-war Control Council Trials can be understood as part of this process of ridding Germany of the guilt of nations."

crimes which alone they would never contemplate.[19] The moral premise of Nuremberg is thereby turned on its head.

International criminal tribunals have vacillated between their adherence to the principle of individual guilt and the need to take the collective dimension of system criminality into account.[20] The Nuremberg Tribunal introduced the concept of criminal organizations as a vehicle to cast the net of criminal responsibility as wide as possible, but at the end of the day rejected the proposition, advanced by the prosecutor's office, that mere membership of the organization would suffice for criminal responsibility. True to its commitment to the principle of individual guilt, the Nuremberg Tribunal exhorted national courts to convict persons only if they had been aware of the malicious intentions of the organization and nonetheless had voluntarily joined its ranks.[21]

The *ad hoc* tribunals and the International Criminal Court have addressed the challenges of system criminality in two ways. Firstly, in order to be able to prosecute and try those holding positions at the top of the hierarchy – as political or military leaders – the tribunals have developed and refined the doctrine of "superior responsibility".[22] The ICC has exhibited a certain preference for German doctrine by embracing the *Organisationsherrschaftslehre,* the exercise of control by means of an organized hierarchical structure, as an adequate basis for the attribution of criminal responsibility to the political and military leadership.[23] Secondly, the tribunals have made an effort to respond to the involvement of larger

[19] The most famous protagonist of this psychological mass mechanism is Christopher Browning, *Ordinary Men: Reserve Battalion 101 and the Final Solution in Poland* (New York: Harper Perennial, 1998).

[20] For a moving account of these competing forces, see George Fletcher, "Liberals and Romantics at War: The Problem of Collective Guilt", The Storrs Lectures, *Yale law Journal* 111, no. 7 (2002), 1499.

[21] Judgment of the International Military Tribunal, 30 September and 1 October 1946, "The Accused Organizations".

[22] Cf. for military commanders in particular the landmark judgment of the ICTY Trial Chamber in the Celebići-case: *Prosecutor v. Mucić and others*, Judgment, Case No. IT-96-21-T, T. Ch. II, 16 November and for civilian superiors *Prosecutor v. Kayishema and Ruzindana*, ICTR (Trial Chamber), Case No. ICTR-95-1-T, T. Ch. II, 21 May 1999.

[23] *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Confirmation of Charges, ICC-01/04-01/07), Pre-Trial Chamber I, 30 September 2008. For a critical comment, see Thomas Weigend, "Perpetration through an Organization; The Unexpected Career of a German Legal Concept", *Journal of International Criminal Justice* 9, no. 1 (2011), 91-111.

collectives by introducing the Joint Criminal enterprise doctrine which entails that responsibility is predicated on a common purpose, binding the members of the group together.[24] Overzealous attempts to convict all members of a group, without paying much heed to mutual agreements and specific contributions, have been censured for losing sight of important principles of criminal law.[25]

The quest for effective and just concepts of criminal responsibility and their proper application is bound to subsist, as the tension between the respect for basic principles of criminal law and the need to portray the broader dimensions of system criminality is a real one.[26] For the time being, international criminal law will borrow "bits and pieces" from the major legal traditions, but it will quickly come of age, as it operates within a highly specific political and social context.

On the goals of international criminal justice

While international criminal justice in general and the ICC in particular face major challenges and difficulties, it makes sense to reflect on the major goals of criminal justice in order to dampen exaggerated hopes and expectations. It would be wonderful if the International Criminal Court were to contribute to reconciliation and restoration of peace – and in the long run it may do so. But it is not realistic to expect this as a short term institutional goal and effect, because the very purpose of international criminal tribunals is to select and punish the main perpetrators, who are often the local heroes of the warring factions.

Basically the objectives of international criminal justice are not different from those of criminal law in general. In the Čelebići case, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia confirmed that "deterrence and retribution are the main purposes of sentencing".[27] That may be true in the most general sense, but surely the

[24] First introduced in the judgment of the Appeals Chamber in the Tadić-case: *Prosecutor v. Tadić*, Judgment of the Appeals Chamber, Case No. It-94-1-A, 15 July 1999.

[25] See for instance Allison M. Danner and Jenny S. Martinez, "Guilty Associations: Joint Criminal Enterprise Command responsibility and the Development of International Criminal Law", *California Law Review* 93, no. 1 (2005), 75.

[26] See the title of my article, Harmen G. van der Wilt, "The Continuous Quest for Proper Modes of Criminal responsibility", *Journal of International Criminal Justice* 7, no. 2 (2009), 307-14.

[27] *Prosecutor v. Mucić and others*, Judgment of the Appeals Chamber, Case No. IT-96-21-TA, 20 February, § 799.

specific nature of the crimes and the institutional context of their repression bear upon the weight and relevance of the goals. Retribution is problematic in so far as it demands that the punishment is proportionate to the crime, because, as Hannah Arendt has observed, these crimes are incommensurate to any earthly vindication. Deterrence or "general prevention" faces the Kantian reproach that each person is a goal in themselves and that therefore no one should be abused as a tool to influence the behaviour of others. Utilitarianism, which does not adhere to this principled rejection, has a hard case to prove that deterrence "works" in the context of international crimes. After all, perpetrators of international crimes operate in a legal and moral environment that considers the commission of the most hideous atrocities as exemplary conduct. In this way, they are buffered against the prospect and threat of future punishment.[28]

An arguably more modest aim of international criminal justice is gradually gaining currency under the tag of "expressivism". The gist of the quest to "end impunity", as articulated in the Preamble of the Rome Statute, is that the international community counters the awkward silence which traditionally has surrounded the commission of international crimes.[29] International criminal trials convey the message that the international community is no longer standing idly by, and they express moral disapproval of international crimes in the strongest terms. This symbolic function of international criminal justice reminds us of the theories of Émile Durkheim, transplanted to the global level. Criminal law serves the function of vindicating our shared moral values, which have been jeopardized and called into question by horrendous crimes. Some eminent legal scholars have indeed defended this point of view. The late Edward Wise, though not adopting all the broader implications of Durkheim's general theory of law, avows that "this particular insight about the function of criminal law in affirming and strengthening feelings of social solidarity and community seems particularly apt – indeed stunningly so – when we consider the likely effects of the Rome Statute."[30] And Mirjan Damaska seems to share Wise's view about the appropriateness of Durkheim's analysis for international criminal law, where he highlights the functions of "normative expression" and didactics in international criminal justice.[31]

[28] Slightly differently see Kai Ambos, *Treatise on International Criminal Law; Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013), 69-70, who, although acknowledging the objections against general prevention just made, asserts: "Still, it seems at least intuitively plausible that the prosecution of international crimes at the international and/or national level (possibly by third states) produces a (general) deterrent effect."

[29] Cf. Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), 3, who correctly observes that "silence and impunity have been the norm rather than the exception."

The term "international community" admittedly suffers from conceptual vagueness and in this pluralist world it may not be easy to find a common denominator of shared moral values. However, if we were asked to identify such a realm, we would propose abhorrence of genocide and crimes against humanity as eminently suitable to designate such shared moral values.

As a protagonist of international criminal justice, the international community is certainly made up of more than political institutions and states, precisely because international crimes are often committed by states. In my view, churches and religion more generally have an important role to play in "norm expression". Churches have often proved their value as havens of human rights and humanity, in situations of state oppression and where political structures have broken down.[32] The examples of Nazi Germany and apartheid South Africa come to mind. The involvement of churches in "politics" – and there is no denying that international criminal justice has a clear political dimension – has always been contested and precarious, because churches lack a clear political mandate and often the expertise for such involvement.[33] In secular circles, the "rule of law" is commonly identified with social contract theory entailing a trade off between the citizens' pledge of allegiance and the state's offering security and its promise to abide by the law itself. Churches are not parties to this arrangement, and this should make them cautious of interfering in "daily politics". But the point of international crimes is that they demonstrate the fragility of human constructions and the disappearance

[30] Edward M. Wise, "The International Criminal Court: A Budget of Paradoxes", *Tulane Journal of International and Criminal Law* 8, Spring 2000, 267.

[31] M. Damaska, "What is the Point of International Criminal Justice?" *Chicago-Kent Law Review* 83, no. 1 (2008), 329.

[32] Cf. Charles Taylor, *A Secular Age* (Cambridge, MA/London, England: The Belknap Press of Harvard University Press, 2007), 598.

[33] For a forceful critique of the political engagement of churches, see H.M. Kuitert, *Alles is politiek maar politiek is niet alles* ("Everything is politics, but politics is not everything"), Baarn: Ten Have 1985.

of moral points of reference. In such extreme cases, churches have the right and arguably even the duty to keep alive the hope and the perspective of eternal justice.

Churches and the Rule of Law

John Langlois

The churches have a special part to play in demonstrating to the world what the Rule of Law is, and in particular what the principles governing the rule should be. While those without a faith and those who deny a divine creator grapple to find principles on which the rule should be based, such as a social contract between human beings, the churches have through divine revelation the "big picture" of the whole cosmic universe, which is governed by laws which reflect what we should aspire to as human beings and normally do so through innate intuitive concepts of right and wrong. The churches can demonstrate that God has created the universe which follows orderly laws; God has imprinted these laws in the hearts and minds of humankind; God has entrusted to the Christian church a written record of these laws; God has given to the Christian church a mandate to proclaim his laws.

I use the word "church" rather than "churches" because it is the worldwide church, the spiritual Body of Christ, which, united and indivisible, should have a common witness to the world.

At first sight the concept of the Rule of Law appears to be a very simple one. It is the application of the principle that governmental authority is legitimately exercised only when governmental bodies enact and administer laws which are openly passed with the consent of the people and enforced by impartial tribunals. It is an essential safeguard against arbitrary government. The legal rights and liberties of individuals depend upon it. No one should be exempt from it.

As we consider the application of the Rule of Law we have to delve deeper into what we mean. We need to ask the question "Which law should we apply?" In homogenous societies, that is societies where citizens come from backgrounds based on similar worldviews, the identifi-

cation of the content of the Rule of Law is relatively straightforward. However, in multi-cultural, multi-religious and multi-ethnic societies, where people from diverse cultures, religions, traditions and worldviews interpret and reinterpret the concept of the Rule of Law quite differently from each other, the situation is quite different.

We can demonstrate this by the paradigm shift that occurred in Europe in the 18th century. Until the last part of that century the jurisprudence of continental Western Europe was based on Roman law as developed by the teaching of the Christian church after the adoption of Christianity as the imperial religion. That era of a distinctly Christian worldview in Europe came to an end in certain parts of Europe at the time of the French Revolution, when the secular worldview of the Enlightenment prevailed, a worldview which elevated reason as the basis of law rather than tradition, faith and revelation. No longer was the church the primary source of jurisprudence. No longer did the rulers believe that law emanated from God. Nor did rulers believe that their own authority derived from God. The most graphic illustration of this is the coronation of Napoleon Bonaparte in 1804 when he took the imperial crown from the hands of the archbishop of Paris and placed it on his own head. In his case, law was henceforth to emanate from him, as the secular ruler, not from God.

Outside Europe there are other concepts of the Rule of Law. In the Muslim world the Rule of Law stems from tradition, faith and revelation in the form of the Qur'an, as formulated in Shariah law and interpreted by theologians. Hindus, Buddhists and followers of other faiths have their own understanding of the Rule of Law.

So which Rule of Law are we talking about when we apply it in France, Belgium, Denmark, England, Brazil, India, Sri Lanka, Uganda or any other country? What is to be the role of the church in the application of the Rule of Law where others understand it differently? Does the church have a role? There has been some debate in Europe as to whether separate laws should be applied to distinct communities, such as Shariah law to Muslims. That is nothing new. In the colonial period of the European empires different laws applied to different communities in the various territories subject to European rule. The British applied different laws to the different religious communities of India so it is hardly surprising that the issue has now been raised in Europe. Muslims want to be governed

and judged by the religious values of their own community. Such a change would inevitably conflict with the concept that laws should apply impartially and without exception to everyone in a particular geographical area. Even within countries different laws apply in different regions, provinces, towns and smaller communities.

This means that if the church is to advocate a Rule of Law it has to contain principles which apply to all human beings on our planet, just as the Universal Declaration of Human Rights sought to do in 1948. As the church we have to proclaim a Rule of Law grounded in a worldview which is based on justice and fairness without discrimination and which applies to every human being. Every human being is made in God's image and so his concepts of law and justice should be applied globally as they are universally.

At the time of the Protestant Reformation in Europe these questions were considered by theologians, scholars and statesmen in great detail. The inadequate legal concepts of the Dark Ages, which were subsequently inadequately redeveloped in the Middle Ages, were refined and redefined. Each country in Europe did it in its own way. Each country has its own history of how the law in that country developed from the earliest times to the present. My own knowledge of the development of law is based primarily on what happened in England and I shall turn to that law to illustrate what happened there.

In my first year of studies in English law I read jurisprudence, that is, the philosophy of law. As part of the course I read a book called *Ancient Law* by Professor Sir Henry Maine,[1] who was professor of law at the University of Oxford in the 19th century. In the book, which he wrote in 1861, he traced the origins of English law back to the ancient codes of Mesopotamia, something I had not expected. Three years later as part of my theological course I studied the philosophy of religion. It came as a further surprise to me that the reading list in that course took me back to precisely the same ancient codes of Mesopotamia referred to by Professor Maine that I had studied for my law degree.

It was evident to me that from the very dawn of history, law has had a prominent place in the history of the human race. There seemed to be something in the human psyche of our ancient ancestors which accepted

[1] Henry Sumner Maine, *Ancient Law: Its connection with the early history of society, and its relation to modern ideas* (London: John Murray, 1861).

the concept of law and orderliness. They intuitively recognized this as they gazed into the night sky. They sensed that the concept of order governed the universe with extreme mathematical precision. Without electricity or artificial lighting nights were long, often cloudless, giving a panoramic display of the wonders of God's creation. Humankind concluded very early on that the order of the universe was astonishing. Chinese astronomers could predict with complete confidence the precise position in the sky of the planets and stars over millennia, quite apart from the monthly course of the moon and its various phases. In recent years, and particularly in the last ten or twenty years, modern cosmologists have been astounded by the precise order of the universe. Professor Sir Martin Rees, the Astronomer Royal in the United Kingdom, in his book *Just Six Numbers* demonstrates how just six numbers imprinted in the "big bang" determined the essence and existence of the universe.[2] If any one of these six mathematical values had been a trillionth of a degree greater or lesser the universe would not and could not exist. With all our modern knowledge we are still astonished by the order of the universe.

One of the three interpretations proposed by Professor Rees for that order is the argument from design attributed to William Haley, namely, a beneficent creator, who formed the universe with the specific intention of creating us. Rees states his own preference to be that of multiple universes rather than one universe, although he concedes that this is "still conjectural" (that is, there is absolutely no evidence for it whatsoever).[3] Perhaps it is because I am a practising lawyer who deals with facts on a day to day basis with their attendant standard of proof, but I personally prefer to base my fundamental beliefs on facts rather than complete conjecture. Be that as it may, as Christians we believe that a divine creator purposely designed the universe and gave order to the universe he had created. God designed our human planetary home and all life on our planet in the same ordered way. Thinkers concluded at the beginning of recorded human history that the universe is subject to laws that the creator has ordained and further concluded that laws should apply to humankind in the same way.

[2] Martin Rees, *Just Six Numbers: The Deep Forces That Shape the Universe* (London: Orion Books, 2000).
[3] Ibid., 166.

This is illustrated by an experience I had about thirty years ago when I attended a *Son et Lumière* presentation at Karnak in middle Egypt. There being re-enacted in front of me were the priests of ancient Egypt who each day performed very detailed ceremonies to maintain order in the world and in so doing they sought to prevent the world from being sucked back into the primordial chaos which prevailed when the earth was created, the same chaos we read about in the first chapter of Genesis. What struck me was that it was none other than Moses, God's lawgiver, who would have observed and participated in these daily ceremonies as a member of Pharaoh's royal household. He was schooled in the arts and sciences of the maintenance of law and order in the world. God chose none other than Moses to write down his laws for an orderly society, the Torah, which governed the nation of ancient Israel.

These two experiences (reading Professor Maine's book and the presentation in Karnak) led me to conclude very early on as a young lawyer that law is part of God's divine creation story, which is etched into the human psyche. It is not primarily a human invention. It is not primarily based on a social contract. It is intrinsic to our existence. It cannot be discarded at will. Those who refuse to believe in a supreme Creator-God must at the very least conclude that physical laws and orderliness are intrinsic in the observable universe and that the Rule of Law is at the very epicentre of human nature, existence and experience.

To see where all this fits in, we as Christians turn to the Bible, which is the reliable record of God's knowledge, wisdom and law revealed to humankind. That is what the Reformers did in the 16th century. They concluded from the record in the first chapters of the book of Genesis that God created the universe in an orderly way. He was a God of order, not chaos. He created laws governing the universe. For example, he established the law of gravity which affects our every step and posture in every place on Earth. We cannot avoid it and if we try to do so we suffer the consequences.

This Rule of Law has applied from the dawn of civilization. God told our ancestors, Adam and Eve, that the principles of his Rule of Law were, "If you do x it will result in y." If you eat of the fruit of the tree in the middle of the garden, you will die. Actions result in consequences. We see this right through the Old Testament and indeed we see it right through recorded human history. If we do "this" the consequence will be

"that". At this fundamental level the Rule of Law is supreme. Human beings have free will. We can choose whether or not to obey. We are not divinely created automatons.

The Old Testament is primarily a collection of books about law and what happened when the Jews flouted God's law. Jews, including Jesus, did not refer to the Jewish scriptures as "*History* and the Prophets", they spoke about the "The *Law* and the Prophets" (Matt. 5:17). The Torah in the Old Testament sets out the laws that God ordained for Israel and the history of how the people either obeyed, or more often disobeyed those laws, as early as the incident of the worship of the golden calf at Sinai right through to the destruction of Jerusalem, which was God's punishment for disobedience of his law. The people had the power and right to disobey as well as to obey.

As we have noted, God prepared Moses as his lawgiver by giving him an education in ancient Egyptian law from the cradle, as the adopted son of Pharaoh's daughter. He was schooled in the elaborate rituals to ward off primeval chaos. After 40 years schooling and 40 years reflection in the desert he was ready to lead the people of Israel and to give them laws which would not only ward off primeval chaos, but also give God's ordained structure for a successful society consisting of individualistic tribes people. It was God himself who wrote on tablets of stone with his own finger the foundational commands of the Torah, the Ten Commandments (Ex. 31:18).

God's intention for Israel was that he would be the ruler of his chosen people. They would live under the Rule of Law that God himself had decreed. The people who would administer his laws would be judges. God would be their king, but he would not reign in the sense of an absolutist monarch of that era, who could do whatever he wished arbitrarily, even though he was the creator of the universe and its laws. God gave his people rational laws which were written down and made known beforehand to those who had to obey them. Parents were required to pass on the knowledge of these laws to their children. The problem, as was apparent later, was not with the laws themselves but with the administration of those laws. Samuel, a good judge, appointed his two sons to be judges. They were corrupt. They accepted bribes and perverted justice (1 Sam. 8:3). The law was good but the administration of justice was corrupted by people, as happens today.

When the Israelites demanded a human king, God told Samuel that the people had rejected him as their king, the perfect king whose rule and laws were perfect to secure a well-ordered society and justice for all. God didn't like the people's demand, nor did Samuel. God told Samuel to show the people how a human king would reign over them (1 Sam. 8:8). The people would live to regret their choice. It would be the very antithesis of the Rule of Law. A human king would take their sons and daughters, he would take the best of their fields, vineyards and olive orchards and give them to his servants, he would take a tenth of their grain and the fruit of their vines and give it to his officers and to his servants. He would take their male and female servants and the best of their young men and put them to his work and he would take a tenth of their flocks. They would be his slaves just like the nations around them (1 Sam. 8:11-17). In spite of these warnings the people refused to obey God's advice. They demanded to have a king so that they would be like all the other nations, a king who would judge them and go out before them and fight their battles. God gave his chosen people a choice. They had a free will that they could exercise. God endorsed democratic rule.

Their human king would be an absolutist monarch like all the other nations. He would be their lawgiver, their prosecutor and their judge. This would be quite the opposite of the principles of the Rule of Law to which we aspire today. The subsequent story of the people of Israel is a tragic one. They never learnt. The prophet Habakkuk mourned: "People are stealing things and hurting others. They are arguing and fighting ... the law is weak and not fair to people. Evil people win their fights against good people. So the law is no longer fair, and justice does not win anymore" (Hab. 1: 3-4).[4]

It has been thus throughout most of human history. It is still the same today. From the story of Samuel we take a huge jump to today's newspapers, a jump of four thousand years. Too often we see that a strongman is elected as president through a rigged election. He controls parliament (if there is one); he controls the making of laws; he controls the prosecutors and police, including the secret police; he controls the judges. He controls everything. He sends to prison those who oppose him. In the meantime

[4] Cited according to the *Holy Bible: Easy-To-Read Version* (Ada, MI: Baker Pub. Group, 1987).

he strips the country of its wealth and puts it in secret bank accounts outside the country. Nothing has changed in four thousand years.

What then should we, the church, do about it? The answer is as simple as it is impossible to implement in today's unjust world where billions of our fellow human beings are denied justice. As God's spiritual Israel the church is to be a light to the nations (Is. 49:6). We have to proclaim constantly the Rule of Law established by a God of justice, a Rule of Law based on revelation, faith and tradition. That cannot, of course, be the Torah, which is a body of law for Israel, a theocratic state. The worldwide church needs to advocate a Rule of Law based on the generally applicable principles of law and justice found in scripture, not those solely applying to Israel and, in the Christian era, to the church.

After the demise of the Roman Empire much of Europe sank back into the lawless barbarity of the Dark Ages. At times the church was far from the public square, such as monks in monasteries, but at other times the church was at the forefront of the governance of communities and often provided the only orderly structure for society.

In the ninth century in Wessex in England, King Alfred, a Christian king, wanted to work towards a better system of justice than the one he had inherited. He issued a long legal code which included translations into Anglo-Saxon English of the Ten Commandments, some chapters from the Book of Exodus and the "Apostolic Letter" in the Acts of the Apostles 15:23-9. In the introduction to the code, Alfred meditates upon the meaning of Christian law, tracing the continuity between God's Law given to Moses and his own laws issued to his people. By doing so he linked his contemporary lawgiving to the original Mosaic laws but, quite rightly, he did not attempt to apply the Torah. Importantly, Alfred understood monarchy to be a sacred ordinance instituted by God for the governance of his people. He was a servant of his people under a divine mandate. Successor kings were not as committed as Alfred to the Rule of Law. For instance, King John, one of Alfred's Norman successors, went way beyond his royal remit and was taken to task by his nobles, who forced him to sign the Magna Carta, the "Great Charter", of 1215, which was written by the Archbishop of Canterbury, who enshrined Christian concepts of justice in the law of the land.

Three centuries later, in the 16th century, during the time of the English republic, when there was no king or queen, Oliver Cromwell and his

followers undertook a radical rethink of the law in which they sought to enshrine Biblical law in English law, in a similar way to what Muslims today want to do with Shariah. It failed. It was bound to fail because England was not biblical Israel. The Bible is a reliable guide to justice but it is not a textbook of legal and political structures. We have to extract good principles from its pages.

In the late 17th century, when England was sliding towards civil war, parliament intervened and replaced the Catholic king, James, with the Protestant William and Mary of Orange in the so-called "Glorious Revolution" of 1688. That event set the stage for the limits of royal power which prevail until the present day. The Bill of Rights passed at the time secured a limited constitutional monarchy, freedom of speech, regular elections, parliamentary privilege and a subject's right to petition the monarch without retribution – a combination of political liberties unique in Europe at the time – all principles based on the nation's guide book, the Bible. It was the main source of the American Bill of Rights.

The coronation service of William and Mary was remodeled to reflect the Protestant faith. For the first time, a Bible was carried in procession in Westminster Abbey. The king and queen had to swear to rule according to the "true profession of the gospel". Once crowned, Bibles were handed to each "to put you in mind of this rule and that you may follow it". The oath taken by the sovereign was fundamentally different from the previous traditional coronation oath which recognized laws as being the grant of the king. The new oath required the sovereign to rule according to the laws decreed by parliament. The will of the people was sovereign. Democracy was entrenched in the constitution of the land, albeit the electorate was limited until the 20th century.

The coronation service of every sovereign since 1688 has retained the same form and wording, including the coronation of Queen Elizabeth II in 1953. She vowed: "The things which I have here promised, I will perform and keep. So help me God." She kissed the Bible and signed the oath. After this, the Archbishop of Canterbury presented her with a Bible, saying, "Our gracious Queen, to keep your Majesty ever mindful of the law and the Gospel of God as the Rule for the whole life and government of Christian Princes, we present you with this Book, the most valuable thing that this world affords." To this the Moderator of the Church of Scotland added, "Here is Wisdom; This is the royal Law; These are the

lively Oracles of God." The wording of the service is based on the conviction that royal power should be limited and that the sovereign will have to give to God Almighty an account of the discharge of his or her duties. This reflects words of a letter written by Cathwulf, probably the Abbot of the royal Abbey of Saint Denis in Paris, to the great Emperor Charlemagne, ruler of the Holy Roman Empire, 700 years before, in the late eighth century, when he wrote: "Always remember ... my king, with fear and love for God, your king, that you are in His place to look after and rule over all His members and to give account on judgment day even for yourself."

As the established religion, the Church of England continues to advocate the Rule of Law throughout the realm. Every time Holy Communion is administered the Prayer Book requires the priest to read each of the Ten Commandments distinctly and following each one the people respond "Lord, have mercy upon us and incline our hearts to keep this law." In more recent times it also provides an alternative shortened version, which is normally followed, but the principle remains the same. It also includes the words: "We beseech Thee ... to save and defend ... Thy servant, Elizabeth, our Queen, that under her we may be godly and quietly governed. And grant unto her whole Council and to all that are put in authority under her that they may truly and indifferently administer justice."

The writers of the American Declaration of Independence and the American Constitution, who were very much influenced by the ideas of the Enlightenment, took a half-way position with regard to divine authority. Rather than refer to the Christian God they preferred to refer to the somewhat nebulous concept of "providence". The Declaration of Independence merely refers to "nature's God" and "divine providence". The Constitution does not refer to any divine person or concept. It is promulgated in the name of "We the people". Nevertheless, until very recently a copy of the Ten Commandments appeared in American court rooms. The constitutions of other countries rarely, if ever, follow the English pattern and more often follow the separation of church and state, a pattern which was proposed enthusiastically in the first few years of the Enlightenment. As we have noted already, the French Revolution, which influenced the law in almost every western European country through the adoption of the Napoleonic Code, largely replaced divine

authority for law with the principles of the Enlightenment, that is, a desire for human affairs to be guided by reason, rather than by faith or revelation, in a worldview increasingly validated by science rather than by religion or tradition.

As the Christian church, if we are to be true to the revelation given to us by God, we must advocate generally applicable principles of the Rule of Law as defined in our scriptures, not resort primarily to ideas based on Enlightenment concepts of human reason. We should adopt the best ideas from wherever they come, although we should not allow them to displace principles of divine reason as divinely revealed. I realize that this is controversial in our modern secular world but as Christians we should not be strangers to controversy. Our mission is to stand for enduring truth, not transitory political correctness. Jesus was a radical and today we are required to apply radical solutions to broken societies, even if they are old solutions. As we have noted previously, that is not to say or to even imply that we should apply to human society the laws which applied specifically to God's people, Israel. That would fail, as it did in Cromwellian England as well as in communities in New England and probably also in Calvin's Geneva. We should identify principles that should apply to all humankind, whether Christian or not.

Throughout most of recorded human history the Rule of Law has been applied very inconsistently and indeed very rarely. Absolutist monarchs have not generally been subject to any Rule of Law and when they have been they have usually suspended or avoided all or most restrictions. Many countries today give lip service to the Rule of Law but do not apply it in practice.

One fundamental principle which is often flouted is that laws should only be enacted with the consent of the people. Not only is this flouted in totalitarian regimes, it is often flouted in so-called democracies. For example there are complaints that under the 1957 Treaty of Rome there is a democratic deficit in the European Union, inasmuch as laws are imposed on the people of Europe without their consent by an unelected Council of Ministers, which lacks the democratic accountability of their national governments. This has been somewhat alleviated by the establishment of an elected European Parliament which has power to either approve or reject EU legislation.

When in government, political parties often enact laws which have not been proposed in the party's manifesto or debated at the time when the people voted for their elected representatives. Laws are sometimes enacted against the wishes of the people by being rushed through parliament before a general election to ensure that the people have no say. Some governments go out to "consultation" while making it clear that they will not take any notice of any representations made unless they are in favour of the government's proposals. In so doing governments flout the wishes of the people. It is an abuse of the Rule of Law and of democracy itself. It is the people who should decide.

In some countries the people vote on propositions only to see their wishes annulled by the courts. In so doing the judges themselves flout the Rule of Law. It is the people's prerogative to decide the laws under which they will be governed.

As we have already noted, when the people of Israel wanted a human king, God endorsed the principle that it was for the people to decide. God endorsed democracy as the right system of government for human beings who are free agents who should bear the consequences of their own actions.

The Christian church worldwide should advocate the Rule of Law by restating that:

– God has created an ordered universe. He has shown himself to be a God of order. Humankind should be similarly ordered in society.

– God created humankind in his image and in so doing has imprinted his concept of right and wrong and of justice in our hearts and minds.

– God has revealed in the Christian scriptures, principles of general application to all peoples. The church should advocate those principles in the governance of every human society.

– Laws should be enacted by democratically chosen representatives of the people so that the wishes of the people are paramount.

As we do so, we need to acknowledge that throughout the history of the Christian church we have not always lived up to these precepts. We are all capable of falling short of acceptable standards. When we go beyond the confines of the Christian church we venture into much more complicated territory where we have to act in a humble, restrained and godly manner.

Rule of Law and the Churches

Martin Robra

Introduction

In speaking about the "rule of law", we find ourselves within a dynamic reality. We cannot ignore the fact that all debates about the rule of law are embedded in the wider struggle for just, sustainable, and participatory political, economic and social relationships, in the pursuit of peace and for the constitutional, legal and jurisdictional frameworks supporting and fostering such relationships at national and international levels. The United Nations has been and continues to be the most visible arena for this struggle at the international level, with impetus from and consequences for developments at national levels.[1]

This was again demonstrated at the High-level Meeting on the Rule of Law at National and International Levels in New York in September 2012.[2] As in his previous reports on the subject, UN Secretary-General Ban Ki-moon supported a more substantial concept[3] of the rule of law

[1] For the first fifty years of the existence of the United Nations see Ian Brownlie, *The Rule of Law in International Affairs. International Law at the Fiftieth Anniversary of the United Nations*, The Hague Academy of International Law (The Hague/Cambridge MA: Kluwer Law International, 1998). According to the UN website on *United Nations and the Rule of Law* the General Assembly has dealt explicitly with the rule of law since 1992 and more consistently since 2006; the Security Council addressed the rule of law in 2003, 2004, 2005 and 2006 with resolutions on women, peace and security, children in armed conflict, and the protection of civilians in armed conflict. http://www.un.org/en/ruleoflaw/index.shtml

[2] *High-level Meeting on the Rule of Law*, 24 September 2012, http://www.unrol.org/article.aspx?article_id=168

[3] Given the fact that – embedded in different histories and contexts - there are widely divergent ideas about what the rule of law means and implies in theory and practice, the definition by the UN Secretary General in his *Report on the Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* in 2004 has become an important point of reference (S/2004/616): "For the United Nations, the rule of law refers to a principle of governance in

that is essential to just and durable peace[4] in post-conflict situations, builds on human rights and is a requirement for their realization, holding all accountable, including the state, to laws that have been formulated, promulgated and enforced in due legal process and based on human rights.

In the preparatory process for the high-level meeting, the UN Secretary-General had called for a programme of action with clear outcomes to strengthen international dispute resolution through the International Court of Justice, the rights of women and children, housing and property rights, and the rights of victims of war crimes.

The UN High Commissioner for Human Rights, Navi Pillay, called for a substantive understanding of the rule of law based on human rights, reminding the heads of state of her own experience with the apartheid regime in South Africa, which used the pretext of the rule of law to institutionalize injustice.

The political will of the state representatives to further develop international law and to strengthen the power of the UN to implement and enforce it, was, however, only minimal. Of course, the outcome document recalled the basic principles of earlier UN resolutions, underlining that states must reject impunity regarding genocide, crimes against humanity and war crimes. It called on states to accept the jurisdiction of the International Criminal Court (ICC) and to develop international law

which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." This definition moves beyond thin formal interpretations as, for instance, advocated by Friedrich Hayek, the father of the neo-liberal school of thought. The distinction between a more substantial understanding of the rule of law linked to human rights and a formal or thin understanding is often made; see Brian Z. Tamahana, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

[4] It is indicative that the Commission on Just and Durable Peace of the Federal Council of Churches of Christ in the United States, which was established in 1940, has been at the origins of the WCC's Commission on International Affairs; see Matti Peiponen, *Ecumenical Action in World Politics. The Creation of the Commission of the Churches on International Affairs (CCIA), 1945–1949* (Helsinki: Luther Agricola Society, 2012), 67ff.; I am grateful to Matti Peiponen for allowing me to make use of the pdf file of his book in advance of publication.

based on human rights standards. There are also signs that the link between human rights, rule of law and sustainable development has been acknowledged. Yet there is still strong resistance to any significant transfer of sovereignty to bodies of the UN system. Only 67 of the 193 UN member states, and among them only one permanent member of the Security Council, the United Kingdom, accept the compulsory jurisdiction of the International Court of Justice. The apparent misuse of resolutions of the General Assembly and the Security Council by some of the most powerful nations for their own interests continues, discrediting initiatives for the "Responsibility to Protect" (R2P)[5] and the peace enforcing or policing functions of the UN.[6]

Churches have also been wrestling in recent decades with more substantive interpretations of the rule of law. They have been challenged to redefine their understanding of the role of states, national and international law, the use of force, human rights and impunity.[7] Confronted by misuse of power and privilege, they have discovered the continuing relevance of the misuse of power and legal systems to the detriment of Indigenous Peoples' communities and of the enslaved and subjugated in the colonial and neo-colonial era. This has surfaced on repeated occasions, for example, in discussions about R2P and the vision of "just peace".[8]

There is not the space here to outline the various positions taken by individual churches on these issues or the different approaches regarding

[5] The phrase "Responsibility to Protect" first appeared in a 2001 report of that title issued by the International Commission on Intervention and State Sovereignty, an initiative of the Canadian government, to reflect on how to move beyond what had been described in the 1990s as "humanitarian intervention" in connection with gross violations of human rights in places such as Rwanda, Bosnia and Kosovo. The United Nations subsequently studied this proposal, and in 2005 member states endorsed R2P. Cf. Tobias Winright, "Just policing and the responsibility to protect", *The Ecumenical Review* 63,. no. 1 (2011), 84-95.

[6] Cf. James A Goldston, "UN meeting on the rule of law was just another day of talk", *guardian.co.uk*, 26 September 2012, http://www.guardian.co.uk/law/2012/sep/26/united-nations-rule-of-law-talk

[7] Cf. Geneviève Jacques, *Beyond Impunity: An ecumenical approach to justice and reconciliation* (Geneva: WCC Publications, 2000).

[8] See the excellent book by the co-director of the Brookings Institution and former WCC staff colleague Elizabeth Ferris, *The Politics of Protection: The Limits of Humanitarian Action* (Washington DC: Brookings Press, 2011) and the WCC's *Just Peace Companion* (Geneva: World Council of Churches, 2011).

the role of the sovereign and the rule of law as they developed over centuries. This paper will briefly recall how churches contributed to the development of the notion of the rule of law as a limitation to the arbitrary misuse of power and to various basic principles of international law. It will then focus on the contributions to the discussion by the Roman Catholic Church and the World Council of Churches. The shared historical context, and the role of the United Nations as a point of reference, account for the parallels between much of the secular discourse on the rule of law and the evolving positions of the Catholic Church and the WCC at the international level.

Churches contributing to the emergence of the rule of law and of international law

It is sometimes assumed, in a secularized, post-enlightenment perspective, that the development of the modern state and the emphasis on the rule of law had to be won against the churches, which wanted to maintain and defend their own claims to supremacy and power. Such a perspective on European history is informed by the devastating reality of the post-Reformation wars in Europe and the necessary separation of spheres of influence through the Peace of Westphalia in 1648. Recent research about the emergence of the rule of law, however, shows a different picture.

In his comprehensive study on the history, politics and theory of the rule of law Brian Z. Tamahana[9] examines another important factor, in addition to the Magna Carta, which was essential for the development of the notion of the rule of law in the Anglo-Saxon world, and the role of Germanic customary law: the competition for supremacy between the pope and kings. Highlighting the reception of Aristotle by Thomas Aquinas and the scholastic tradition,[10] Tamahana explains how competition between pope and king provided a motivation for the emphasis on divine and natural law as limits to positive law set by the king as sovereign ruler. The king also needed to be to be subject to the rule of law that is rooted in the convictions of Christian faith which encompass all realms of

[9] Tamahana, *Rule of Law*, esp. 15ff.; see also Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010).

[10] While Aquinas held that the sovereign is exempt from the law, everyone who sets law should follow it himself. The sovereign would be limited by positive law and under the judgement of Divine Law and Natural Law by God.

life in medieval Europe. Tamahana describes this history as a sequence of philosophical and legal concepts and ideas.

Exploring the link between economic development and the rule of law, Charles M. North and Carl R. Gwin delve deeper into the contextual economic and political conditions for the emergence of the rule of law in medieval Europe.[11] They offer a fascinating account of the interplay between two different forms of being church: the church of power, i.e. the hierarchically structured church, and the church of piety of monastic movements and people. The activities of the monastic movements led to a significant increase in wealth, which between 900 and 1000 CE attracted the greed of feudal landlords and secular rulers. The impact of the monastic reform movements of the 11th century, together with the new discipline of canon law, inspired reforms by Popes Leo IX and Gregory VII to assert their authority over the kings and princes, establish a church-wide bureaucracy, and introduce a legal system with ecclesiastical courts based on canon law. It is worth quoting the concluding sentences of the study by North and Gwin:

> The canon law and the ecclesiastical courts thus developed laws that restricted the power of the state as against property holders (including the Church itself), and these legal principles were eventually put into the law of most countries of Western Europe. In this way, the Medieval Church's efforts to protect itself from princes and rulers led to a rule of law based on limited government – an innovation that paved the way for Western Europe's economic ascendance.[12]

In a similar way, the tension between the hierarchical "church of power" and movements of the "church of piety" can also been seen in the early colonial period. The natural law based school of Portuguese and Spanish Jesuits such as Las Casas, Sepulveda and Vittoria followed Thomas Aquinas and his critique of violence and misuse of power in the warfare of their times. This was the background for the intervention by Las Casas in support of Indigenous Peoples' communities in South and Central America. They lost out against the alliance of dominant powers of their time, supported by those who defended the use of force, expropria-

[11] Charles M. North and Carl R. Gwin, *Religion and the Emergence of the Rule of Law*, in Ilkka Pyysiäinen, ed., *Religion, Economy, and Cooperation* (Berlin/New York: Walter de Gruyter, 2010), 127-55

[12] William of Baskerville, the main protagonist in Umberto Eco's novel *In the Name of the Rose* (New York: Harcourt. 1983) reflects this new spirit of those times.

tion and cultural genocide in the interests of the more developed Christian nations over against the subjugated civilizations.[13]

Changing perspectives

There can be no doubt that until the late 19th century, the churches, with few exceptions, remained prisoners of a more static view of political power and the rule of law in support of the existing rulers. On the whole, they greeted the French Revolution and the emerging human rights discourse with suspicion. Today, church statements and documents often seem to suggest that Biblical anthropology and the conviction that human beings are made in the image of God, and thus endowed with inherent dignity, mean that churches have always embraced the human rights agenda. It is conveniently forgotten that until the 1960s and 1970s, most theologians and church leaders had great difficulties in relating constructively to secularized society and the idea of universal human rights.[14]

Pope Leo XIII, who played a key role in the development of the social teaching of the Catholic Church, saw the demand for universal human rights as a direct attack on the authority of the sovereign rulers, natural law and its interpretation by the church, and the authority of the church itself.[15] This position began to change only during the Second World War due to the impact of the huge destruction of life during the war and the role of the German and Italian fascist regimes in the Holocaust. After 1941, Pope Pius XII began to call for the restoration of human dignity and the God-given freedom of the human person, but still did not act in any decisive way to protect the Jews of Italy and Europe against the German terror. The breakthrough came only with Pope John XXIII and the Second Vatican Council. The Encyclical *Pacem in Terres* of April 1963 supported the main aspects of the Universal Declaration of Human Rights on the

[13] See Alexis Keller, *Justice, Peace, and History: A Reappraisal*, in *What is a Just Peace?* ed. Pierre Allan and Alexis Keller (Oxford/New York: Oxford University Press, 2006), 19ff., esp. 24ff.

[14] For the following see Wolfgang Huber & Heinz Eduard Tödt, *Menschenrechte. Perspektiven einer menschlichen Welt* (Stuttgart: Kreuz Verlag, 1977), 39ff and Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (Vatican: Libreria Editrice Vaticana, 2005), 61ff., 240ff. and 275ff.

[15] Cf. the encyclicals *Immortale Die* (November 1885) and *Libertas praestantissimum* (June 1888); see also the working paper on the *The Church and Human Rights*, Pontifical Commission Justitia et Pax, 1976.

basis of the recognition of the dignity of the human person. In the Pastoral Constitution *Gaudium et spes* and the *Declaration on Religious Freedom* (both December 1965), the Catholic Church embraced the dignity of the human person, equality, participation in all aspects of life in society and political decision making, and the rights and obligations that flow from the recognition of mutual dependence within one human family. States were now seen as having a primary task of protecting and promoting human rights.

The recognition of the dignity of the human person functions as the bridge between the interpretation of natural law, the social teaching of the church, and the secular understanding of human rights, which was embraced by the UN Universal Declaration of Human Rights but as such remains alien to the church.

The focus on the dignity of the human person allows the church to integrate human rights into the scholastic tradition of natural law. That it has to be based on natural law has consequences for the understanding of the rule of law. This was underlined during the high-level meeting on the rule of law by Archbishop Dominique Mamberti, who spoke as the delegate of the Holy See. The core of the present Catholic position is summarized in the two sentences below:

> Faced as we are by challenges old and new, the calling of the High Level Meeting on the Rule of Law is an important opportunity to reaffirm the will to find political solutions applicable at the global level with the aid of a juridical order solidly based upon the dignity and nature of humanity, in other words, upon the natural law.
>
> It will be possible to advance if … the United Nations remains a central point of reference for the creation of a true family of nations, where the unilateral interests of the most powerful ones does not trump the needs of the weaker ones. Such will be possible if legislation at the international level is marked by respect for the dignity of the human person, beginning with the centrality of the right to life and to freedom of religion.[16]

For a long time, most Protestant and Anglican churches had similar difficulties in relating to the concept of human rights. It also took many of them until the 1960s and 1970s to develop theological approaches to human rights. Such approaches usually focused on the inherent dignity of the human being as being made in the image of God, but still maintained

[16] http://www.unrol.org/files/Statement%20by%20Holy%20See.pdf.

the distinctive features and marks of Lutheran, Reformed or Anglican understandings of the relationships between church and state and political ethics (e.g. the Lutheran teaching of the two kingdoms, the Reformed Reign of Christ over all realms of life, and the Anglican appeal to reason and the tradition of the Magna Carta, *habeas corpus* and other cornerstones of the English legal system). It was far easier for them to relate to the different understandings of the rule of law in their specific national contexts (rule of law, *état de droit* or *primauté de droit*, *Rechtsstaat* and so on) than to offer support to the Universal Declaration of Human Rights and the development of other human rights instruments.[17]

The year 1970 was decisive for the two most important statements on human rights by Christian World Communions. The Lutheran World Federation, faced with the military dictatorship in Brazil as it prepared for its 1970 assembly in the Brazilian city of Porto Alegre, developed a statement on human rights. This statement was adopted by the assembly, which in the end had to be moved to Evian, France. In the same year, the general council of the World Alliance of Reformed Churches in Nairobi called for a study on human rights, which was published in 1976.[18] This study had major influence on other churches and ecumenical bodies, encouraging them to rethink their own approach towards human rights.[19]

Churches have been involved in the development and implementation of the rule of law in their own countries in various ways, such as accompanying processes of constitutional reforms, remaining vigilant about the just, equal and fair application of the law, civic education and election monitoring, critique of the death penalty, and legal initiatives on emerging challenges such as climate change or the regulation of international financial markets. Churches have, however, often faced conflicts over

[17] See the very useful overview and list of models in Huber/Tödt, *Menschenrechte*, 45ff. and 65ff. The problem to accept a universal perspective of human rights has something to do with a Christ-centred theology affirming the universal role of Christ, which made it more difficult to recognize the diversity of contexts and experiences in comparison with a Trinitarian approach that is opening up to diversity in creation and the role of the Holy Spirit sustaining life in its diversity.

[18] Jan M. Lochmann and Jürgen Moltmann, eds, *Gottes Recht und Menschenrechte* (Neukirchen: Neukirchener Verlag, 1976).

[19] With the 1974 consultation on human rights in St Pölten, Austria, the WCC updated its thinking on human rights. See *Human Rights and Christian Responsibility: Report of the Consultation St Pölten 1974* (Geneva: World Council of Churches, Commission of the Churches on International Affairs, 1974).

values when it comes to the right to life, abortion and lesbian, gay, bisexual, and transgender (LGBT) rights.

In recent years, all churches and Christian World Communions have been influenced and challenged by the same realities, such as increasing ecumenical exchange and dialogue and difficult questions regarding religious freedom and a multi-religious context (the WCC, for instance, recently hosted a meeting on the blasphemy law in Pakistan); debates on the "Responsibility to Protect" and peacebuilding operations by the military of UN member states under the mandate of the Security Council; and the holistic development of human rights, supporting also economic, social and cultural rights and the recognition of the rights of nature.

A focal point for these processes has been the debate on "just peace" as a core concept of the WCC's Decade to Overcome Violence, which culminated in the International Ecumenical Peace Convocation in 2011 in Kingston, Jamaica.[20] In many ways, the WCC has been a pioneer of such developments through the Commission of the Churches on International Affairs, established jointly by the WCC and the International Missionary Council (IMC) in 1946/1947 after a longer process of preparation.[21] It is widely recognized that the CCIA played a key role in the formulation of the text on religious freedom in the 1948 Universal Declaration of Human Rights. An important step towards the establishment of the CCIA was the publication of the memorandum on *The Church and International Reconstruction* with the subtitle: *An analysis of agreement and disagreement concerning the message of the Church about the creation of a just and durable peace* in 1943. The author of the memorandum was Willem Visser 't Hooft, the general secretary of the WCC in process of formation. This document presented ten faith statements, setting out areas of agreement and disagreement among the churches on major issues of post-war international reconstruction. It already contained in a nutshell the approach pursued by the CCIA and, to a large extent, anticipated the relevant section report of the 1948 Amsterdam assembly of the WCC. Faith statement VI referred

[20] For the concept and the documentation of the process see WCC, *Just Peace Companion*.

[21] See Peiponen, *Ecumenical Action*.

explicitly to the rule of law, stating that the church is to proclaim that international relations must be subordinated to law:[22]

> ... in the realm of political relationships the Lordship of Christ is to find its expression in justice. Justice becomes concrete in just law ... The anarchy of competing and unrestrained national sovereignties must be overcome and international authority must be created to declare the law and to enforce it ... The effectiveness of any legal system depends, however, on the degree to which the law is rooted in the consciences of the peoples concerned. The Church is, therefore, called to implement its demand for the rule of law by the effort to create a sense of moral obligation to the society of nations as a whole; a task which is all the more urgent since the masses have learned to think and to act in terms of mere power rather than of law and justice.

This text clearly anticipated the creation of the United Nations, whose task was seen as being to overcome the "anarchy of competing and unrestrained national sovereignties, in the interest of justice and peace" and to develop international law and respect for the rule of law in international relations.

Recognizing diversity as a precondition for common solutions

The CCIA continued to pursue the approach outlined by the memorandum and further developed its own positions on religious freedom and the protection and implementation of human rights. Although the context of the Cold War, in general, shaped the different perspectives on human rights, this was different for the churches cooperating in the WCC and the IMC. They were very much aware of the struggle for democracy and human rights against military dictatorships in Latin America and Asia, and against the apartheid regime in South Africa. These contexts probably had an even stronger influence on the churches internationally than the Cold War.

After the fall of the Berlin Wall and especially following the genocide in Rwanda, the debate centred increasingly on the Responsibility to Protect and peacekeeping and peacebuilding missions under the mandate of the UN Security Council. Churches that had in the past been confronted by military dictatorships, apartheid, and genocide were also concerned

[22] Provisional Committee of the WCC, *The Church and International Reconstruction. An analysis of agreement and disagreement concerning the message of the Church about the creation of a just and durable peace* (New York, 1943), 14.

about impunity for perpetrators of human rights violations. After 9/11, interreligious relations and approaches to religious freedom gained in importance. For the WCC and its member churches, these challenges had a central place in the Decade to Overcome Violence and the debate on "just peace",[23] which was, to a large extent, inspired by the rejection of war and the witness for non-violent action by the historic peace churches. This process was not without conflict. Many did not accept that justice should be reduced to being simply one characteristic of peace.[24] They were discontent with what they believed was an endorsement of the pursuit of the naked power interests of the United States and its allies under the cover of the UN mandate to protect and defend people against genocide and other crimes against humanity. So far, the WCC has been unable to shape this conflict, which reflects the tension between representatives of former colonial and neo-colonial powers, and those who had to fight for their independence and the recognition of their human rights. This conflict needs to be taken seriously both because of the power of the collective memories of slavery, marginalization and oppression, as well as the continuing asymmetries of power in favour of a few rich and powerful countries to the detriment of the majority of the world's population.

It is important to clarify the origins of this conflict. Alexis Keller has addressed the impact of a hegemonic and pre-dominantly Eurocentric view on the development of the law of nations and the rights of Indigenous Peoples through the centuries until today. Summarizing the results of his research, he writes:

> I have sought to outline how the classic tradition of international law is based on a vision of law and justice that allowed little room for the *principles of recognition*. In its formative period, it denied indigenous peoples the status of independent "nation" and flowed from uniform perception of culture, which took no account of diversity or idiosyncrasies. European theorists progressively conceptualized native peoples in ways that dehumanized them and represented their cultures or civilization as inferior. The belief in their own superiority allowed Europeans to ignore the problem of mutual understanding between themselves and those who were "different" or perceived as "uncivilized". By

[23] The United Church of Christ declared itself to be a just peace church in 1984; the Presbyterian Church (USA) addressed the "Rule of Law and Just Peace" in 1997. See WCC, *Just Peace Companion*, 212-5

[24] Most vocal were the members of the Peace for Life network (Ninan Koshy, Farid Esack, Kim Yong-bock and others).

using concepts such as "nation", "constitution", "people", "civilization" that were essentially European, and placing them above other conceptions of government and culture, Western theories of the law of nations not only denied cultural pluralism as a problem, it also imposed European values as universal standards.[25]

He continues:

> Nowadays, there is general consensus, on the pressing need to find a way of ending intercultural conflict. Racial, national, ethnic, religious, and linguistic animosities have become a key feature of international relations. All evidence suggests that large scale disruption, increased mobility and greater interaction between peoples as result of globalization will exacerbate cultural antagonisms. ... The question of our time is not whether one or another claim can be recognized. Rather the question is whether a settlement – or a peace – can give recognition to the legitimate demands of members of *diverse cultures* in manner that renders everyone their due, so that all would freely consent to this form of *Just Peace*.[26]

Others who have studied the "rule of law" in colonial and neo-colonial contexts have arrived at similar conclusions.[27] While recourse to the rule of law is able to be used by subjugated communities to defend their rights, far more important in collective memory is that the introduction of basic principles of Roman law, such as private property rights, was at times deliberately used to steal the land of Indigenous Peoples' communities and to deny recognition of their just claims for land and their right to live according to their own customs and cultures. Indeed, the rhetoric around the rule of law in the colonial era hid "the dynamics of local power, economics, exclusion, resistance, and transformation that exist

[25] Keller, *Justice*, 49.

[26] Ibid, 51.

[27] Cf. for example Ranjarit Guha, *Dominance without Hegemony: History and Power in Colonial India* (Cambridge MA: Harvard University Press, 1997) or Robert Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990), pointing to the often continuing coexistence of different legal systems. Cf. also John McLaren, "The Rule of Law in British Colonial Societies in the 19th Century: Gaseous Rhetoric or Guiding Principle?" Paper given at the colloquium on "The Transposition of Empire: Historiographic Approaches to the Translation of Juridical and Political Thought in Colonial Contexts", Monash Centre, Prato, Italy, April 20-22, 2009, http://www.ched.uq.edu.au/Transitions/McLaren.PratoPaper.pdf

beneath the surface of even the most pristine and venerable traditions of the rule of law".[28]

For many in the Global South, the prevailing geopolitical relationships still reflect similar dynamics. This is at the origin of suspicions that the UN system, including the human rights instruments, is used by the dominant powers when they want to and when it serves their interests, but is bypassed when this is not the case. An issue for the future will be how contemporary geopolitical power shifts will affect this discourse both for the wider public and for the churches. For the witness of the churches on human rights and the rule of law, it will be important to recognize such concerns and to embrace the diversity of perspectives and experiences in moving forward with developing the vision of just peace. I am convinced that the WCC needs to engage in this discussion if it wants to harvest the fruits of its Decade to Overcome Violence and to renew the mandate of the Commission of the Churches on International Affairs.

[28] Hamar Foster, Benjamin Berger and A.R. Buck, eds, *The Grand Experiment: Law and Legal Culture in British Settler Societies* (Vancouver: UBC Press for the Osgoode Society for Canadian Legal History, 2008), 2, quoted by John McLaren, *British Colonial Societies"*, 37.

Report of the Consultation

Participants at the consultation on "Churches and the Rule of Law" assembled on 29 and 30 October 2012 at the John Knox International Reformed Center in Geneva, Switzerland to present and discuss papers devoted to this theme. This theme was chosen in view of the growing international attention to the concept of "rule of law" in response to endemic economic and ecological injustices and to the global crisis of governance in states and institutions. The programme commission organized this consultation with the twofold aim of clarifying this concept and the relation of the churches to it. What exactly is the content of the rule of law? How do the churches interact with the rule of law? What conceptual resources from the Bible and their traditions can the churches bring to bear on the concept? Is the promotion of the rule of law within the scope of the mission of the churches? And if so, how can the churches promote the rule of law in societies? These seemed to be the guiding questions.

It seems appropriate to observe that the initial papers and responses concerned fundamental questions. Carlos Lopez oriented the discussion by developing in his paper a series of definitions of the rule of law. It soon became clear to the participants that the concept is elusive. More than one of them remarked that it is less a concept than an inventory of components necessary for ensuring a fair social order. "The concept of the rule of law can be inscribed within a long tradition of concepts with which everybody agrees ... but on the content of which there [are] often divergent views." Nevertheless, among these components some stand out as essential, including respect for human rights, equal protection before clear, public and accessible laws and access to independent courts. In response, participants asked about the limits of the concept. Does it not reflect an understanding derived from Western and Enlightenment ide-

als? To what extent does it apply to societies that have different traditions? Several affirmed that if principles can be universalized, cultural sensitivity is needed to discern their proper application in varied contexts. Several participants also expressed concerns about the mechanisms of enforcement. What recourse do the powerless have when and where the rule of law has been violated? Some examples were cited.

Lopez had concluded his paper with the claim that there is positive interaction between religion and rule of law, because religion is a source of law, of concepts of equality (cf. Galatians 3:28). James W. Skillen, Jason Garoncy and Setri Nyomi picked up this thread by examining the Bible directly. For Skillen the Bible does not envisage the modern state or the rule of law, but contains faith claims about human beings that can advance critical understanding of both. God alone rules over human beings; before one another they stand equal and together are commanded to steward and govern the earth. Sin disrupts this order, but does not abrogate God's original purposes. Government is part of God's good creation; it is not instituted as a consequence of sin. Here Skillen took issue with Augustine and the Augustinian tradition. Good governance is illustrated in the instructions that God gives to Israel on the kind of king they should have (Deuteronomy 17:14-20). Nyomi developed these perspectives in a Bible study devoted to this text. In this second elaboration of the law Moses is defining principles and structures needed for the nationhood of Israel. What Israel calls Torah bears an affinity with what we call rule of law. Both are concerned with right relationships. Both show no favouritism, even to rulers. In Torah the role of the leader is to honour God and treat people equally. Leviticus 19:10-16 spells out what this means.

Garoncy was less optimistic about the capacity of human governments to embody and advance God's good purposes in this world: "The goodness of creation as it now stands must not be confused with the goodness of creation as it is proleptically transfigured and prefigured in Christ alone." One cannot expect of the state the service that the church is called to render to the world in its witness to the Christ who was executed by a legitimate human government.

Participants observed that the critical reservations voiced by Garoncy illustrated the ambivalence of the Christian tradition(s) toward the rule of law. The relationship between the church and the secular authorities is

conceived differently in Roman Catholic, Lutheran, Reformed, and Anabaptist traditions.

The next two presentations exposed the limits of the rule of law. Liesbeth van der Heide explored in her paper the rise of the "security state" in the wake of the terrorist attacks of 9/11. Terrorism is an existential threat to the state, a rejection of the rule of law. Counterterrorist measures enacted by the state to ensure the security of its citizens, however, can undermine the rule of law when they infringe on the rights of citizens to individual autonomy and equal treatment in the interest of promoting security. But citizens acquiesce to this violation because the state, media and the security industry conspire to convince them of the necessity to protect them from every threat. Constant fear, however, erodes trust, which in turn undermines the very basis of a society.

If van der Heide thus posed the question to what extent the rule of law can be maintained in societies undergoing this process of "securitization", Herman van der Wilt raised it in the context of the international criminal justice system. International criminal tribunals can express norms consistent with the demands of the rule of law, but they are entirely dependent on states as far as enforcement is concerned. Nevertheless, norm expression sends the message that the international community condemns atrocities and pays attention to suffering victims. Van der Wilt suggested that the churches can assist here in fact finding and community building.

These papers elicited several responses from the participants. One wondered whether the security state points to a security religion, inviting a new "Barmen Declaration" against the "totalitarian" security state. Another asked how states can strike a balance between legitimate interventions to avert terrorist threats and unwarranted violations of the rights of citizens in the name of security. Others discussed the broader issue of what roles narratives play in shaping our perceptions and determining our judgments concerning threats to our security. Indeed, van der Heide's paper intimated at the end that the churches have another narrative about the ultimate basis of security in the modern *Risikogesellschaft* (risk society). In the case of crimes against humanity, what role do narratives play in norm expression, in determining culpability? How does one determine attribution for crimes against humanity? In view of the dev-

astation that some large corporations wreak in natural and social ecologies, can one attribute crimes against humanity to them?

The two final papers synthesized "churches" and "rule of law". In an historical overview, Martin Robra recounted the contributions of the churches to the emergence of the rule of law and of international law, showing how perspectives changed in the wake of the two world wars, the formation of the United Nations, and the Universal Declaration of Human Rights. John Langlois argued that the rule of law derives directly from natural and revealed law as articulated in the Christian tradition. He urged that the "worldwide church needs to advocate a rule of law based on the general principles of law and justice revealed to us in scripture".

In the end, the programme commission officers urged that the conference proceedings should be only a beginning. Participants were encouraged to explore how their churches can promote the rule of law in their communities. Ecumenical organizations were encouraged to interact with international institutions, to see themselves as members of international communities including the United Nations, to develop criteria for the rule of law in advocating for the weak and the vulnerable. Practical projects were recommended, such as the online library of African law and governance developed by Globethics.net. On the other hand, while churches and ecumenical organizations can issue declarations and documents, churches ought also to focus on how to nurture their members into responsible citizens who respect the rule of law and carry out their roles in institutions in a manner that promotes the rule of law and the common good.

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