

**INTERNATIONAL RULE OF LAW AND HUMAN RIGHTS:
THE ASPIRATION OF A WORK IN PROGRESS**

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Abstract

For the last 20 years, since the fall of the Berlin Wall, the international community has worked together to enhance a process that aspires to uphold the International Rule of Law, the dignity of victims and the need to prosecute serious violations of human rights within a framework of domestic and international law. A practical approach to the current concept of international rule of law and the current situation of rampant impunity and grave violations of human rights from the domestic and international perspectives, leading us to rethink and question the process of justice created by international law machinery for the protection of human rights. The current situation in Syria is presented here as an example.

*“Poi mi domandava perché il popolo italiano, prima della Guerra, non avesse fatto la rivoluzione per cacciare Mussolini. Io rispondevo: «Per non dare un dispiacere a Roosevelt e a Churchill, che prima della Guerra, erano grandi amici di Mussolini.» Tutti mi guardavano meravigliati, esclamando: «Funny!». Poi mi domandava che cosa fosse uno Stato totalitario. Io rispondevo: «É uno Stato dove tutto ciò che non è proibito, è obbligatorio». – Curzio Malaparte, *La pelle**

Later he asked me why the Italian people, before the war, had not started the revolution against Mussolini. I asked: «They did not started one in order not to annoy Roosevelt and Churchill, who before the war were both great friends of Mussolini». Every one looked at me in wonder, saying: «Funny».

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Later he asked what was a totalitarian State. I answered him back: « It is an State where everything that is not labelled as forbidden, is compulsory »

“Our Constitution and our philosophy of law have been characterized by a regard for the broadest possible liberty of the individual. But the dullest mind must now see that our national society cannot be so self-sufficient and so isolated that freedom, security, and opportunity of our own citizens can be assured by good domestic laws alone. Forces originating outside of our borders and not subject to our laws have twice in my lifetime disrupted our way of living, demoralized our economy, menaced the security of life, liberty, and property within our country. The assurance of our fundamental law that the citizen's life may not be taken without due process of law is of little avail against a foreign aggressor or against the necessities of war. Either submission or resistance will take life, liberty, and property without a semblance of due process of law...

But we are at this moment at one of those infrequent occasions in history when convulsions have uprooted habit and tradition in a large part of the world and there exists not only opportunity, but necessity as well, to reshape some institutions and practices which sheer inertia would otherwise make invulnerable...But we can have nothing in common with the cynics who would have us avoid disillusionment by having no ideals, who think that because they do not believe in anything, they cannot be fooled. We must keep the faith roughly stated by Lord Chief Justice Coke that even the King is "under God and the law..."

Any United Nations court that would try, say, Hitler or Goebbels would face the same choice. That is one of the risks that are taken whenever trials are commenced. The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.”

Robert H. Jackson, *The Rule of Law Among Nations*, Conference at the American Society of International Law, Washington, D.C. April 13, 1945

1. Introduction

The history of the 20th Century, and to a large degree the century that we are currently forging, could well be explained by looking at the role played by the rule of law and the aspirations of freedom, development and democracy.

Along these same lines, a thorough understanding of human rights in diverse countries is also illustrative; the totalitarianisms on one side – fascism and communism and the diverse pseudo-democratic regimes which dismantled the rule of law and the democratic system and systematically violated basic freedoms of people–. And, on the other side, the democracies that, with varying degrees of success, tried to strengthen democratic institutions, offering a framework of options and opportunities for their citizens as well as a basis for genuine public liberties.

Once again, in real time, we are witnessing the slow-motion killing of human beings, not only without a proper and immediate response to stop the massacres, but also without the realistic possibility of responding efficiently to the impunity and responsibility of those behind these international crimes.

On February 4 2012, at an anti-regime demonstration in the city of al-Qsair, south-west of Homs, where the UN confirmed that Syrian forces had killed more than 200 people- among them children and the elderly- a 12-year-old child held a placard with hand written letters in attempt to draw the media’s attention to their fate. It read, “*If you do not help us, we will be killed*”. Hours later, dozens of civilians were killed. It was as if we hadn’t believed that cry for help, and that our disbelief was a natural response. It was almost exactly as Ellie Wiesel had revealed to us in his book *Night* when he told the story of a Jewish citizen of his small village in Romania who managed to escape from a *verningstunlager* (extermination camp) and to whose story no one gave credit, until it was too late for those at Auschwitz.¹

¹ See WIESEL, : “I told him that I did not believe that they could burn people in our age, that humanity would never tolerate it (. . .)” Later on, after his release, and for many years Ellie Wiesel as an Auschwitz survivor has always recalled on the responsibility of the survivors as witness and keepers of the collective memory: “For the survivor who chooses to testify, it is clear: his duty is to bear witness for the dead and for the living. He has no right to deprive future generations of a past that belongs to our collective memory. To forget would be not only dangerous but offensive; to forget the dead would be akin to killing them a second time.” Wiesel, E., *Night*, Hill and Wang, New York, 1985, p.23. In the edition by Hill and Wang here quoted, see also at the end of book, a copy of his speech as Nobel Peace Laureate in Oslo, 10th December 1986. Also available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html

“This is what I say to the young Jewish boy wondering what I have done with his years. It is in his name that I speak to you and that I express to you my deepest gratitude. No one is as capable of gratitude as one who has emerged from the kingdom of night. We know that every moment is a moment of grace, every hour an offering; not to share them would mean to betray them. Our lives no longer belong to us alone; they belong to all those who need

There was no room for the UN Charter Chapter VII *Action with respect to threats to the peace, breaches of the peace, and acts of aggression*. Russia and China vetoed the UN Security Council Resolution². We feel, or perhaps we shiver at the idea, that again in 2012 we are observing glimmers of the Cold War.

International Law scholars, researchers, and observers of the violations of the Rules of War in the last 40 years are often poisoned by the Greek myth of Cassandra. Once the observer believes that he or she knows the future occurrence of a catastrophic event, having already seen it repeated in prior conflicts in the last 40 years (or even having experienced it first hand), the observer believes that there is nothing that can be done to stop the event from happening again and, particularly, that they will not be believed when they try to tell others.³ The evolution of International law since the dilemma of the doctrine of Humanitarian Intervention after Kosovo⁴, and the most recent principle of Responsibility to Protect⁵, has not only failed to demonstrate a capacity to act against grave violations of human rights, but instead has shown again that international law relies on the political decision of the Security Council members.

us desperately. (...) Without memory, our existence would be barren and opaque, like a prison cell into which no light penetrates; like a tomb which rejects the living. Memory saved the Besht, and if anything can, it is memory that will save humanity. For me, hope without memory is like memory without hope. (...)

What all these victims need above all is to know that they are not alone; that we are not forgetting them, that when their voices are stifled we shall lend them ours, that while their freedom depends on ours, the quality of our freedom depends on theirs.”

² Syria resolution vetoed by Russia and China at United Nations Saturday 4 February 2012 Paul Harris in New York, Martin Chulov, David Batty and Damien Pearse guardian.co.uk, 2012 22.28 GMT . The appalling photo of the children holding the poster from Alessio Romenzi/AFP/Getty

<http://www.guardian.co.uk/world/2012/feb/04/assad-obama-resign-un-resolution>

³ See HOMER, *The Iliad*, Penguin Classics, London, 1991. Cassandra was the daughter of King Priam in *The Iliad* and warned her father about the dreams about the future and she was doomed not to be believed. She was a cursed prophetess and her father King Priam did not want to believe her when she told him about the consequences of accepting the present of the Trojan horse, that finally meant the fall of Troy.

⁴ BAJORIA, JAYSHREE, "The Dilemma of Humanitarian Intervention", Council of Foreign Relations, March 24, 2011, <http://www.cfr.org/human-rights/dilemma-humanitarian-intervention/p16524>

⁵SG/SM/11701- 15 July 2008, Secretary General Ban Ki-moon Defends, Clarifies 'Responsibility To Protect' At Berlin Event On 'Responsible Sovereignty: International Cooperation For A Changed World'

<http://www.un.org/News/Press/docs/2008/sgsm11701.doc.htm>

2. Rule of Law in democratic societies

In all probability, in the weeks following the violent death of hundreds of innocent people in Syria, professors of International Law around the world will have had to strive to elaborate convincing arguments about the purpose of international law after these killings, and how democracies have implemented a system –the legal system- to avoid and provide answers to these outrageous crimes.

Beyond the factual elements and the attenuated degree of coercion of international law – by means and competences assigned by States, I could think of two main assets – real accomplishments- that might provide some relief to a student willing to be part of a system that is willing to embrace those most noble and human of aspirations: dignity, peace, liberty and solidarity.

Professor Fallon summarized the core structure of the idea and aspirations behinds the rule of law “All understanding of the rule of law share three purposes, or values: the rule of law serves to protect people against anarchy: to allow people to plan their affairs with confidence because they know the legal consequences of their actions; and to protect people from the arbitrary exercise of power by public officials”⁶

Of course, I have tried to avoid cynicism- still believing that most of the work is yet to be done- but we should not stop ourselves from posing the right questions about our incapacity to create the spheres of justice, human dignity and security that appear as the main goals of current international human rights law. We have not yet crafted another system beyond the rule of law, although we must acknowledge that “In truth the rule of law is a complex, fragile, and to some extent inherently unrealizable goal.”⁷

2.1 The meaning of democracy

The whole aspiration to achieve international justice for democratic states comes through the completion and implementation of the International

⁶ FALLON, R. H., *The Rule of Law, as a concept in International discourse*, 97 *Columbia Law Review*, I, 7 (1997)

⁷ STROMSETH, J. WIPPMAN, D., BROOKS, R., *Can might make rights?*, Cambridge UP, 2006, p.57.

Rule of Law. From a national perspective an international one is constructed; individuals, public and private institutions make a difference because of the values, the principles, and the goals that democratic systems supposedly try to achieve. The combination of this construction –Rule of Law and democracy- provide the philosophical and ethical aspiration of international law’s machinery. In a way, democracy acts as a gateway to the Rule of Law.

The pursuit of justice for democratic societies is framed in the construction, and reinforcement of the Rule of Law. A system based on ethical aspirations and common moral values. This system that we name Law happens to be an intellectual system -an *entelecheia*- that tries to protect spheres of liberty, dignity and security for people. The instrument in the international domain is international human rights law.

Nowadays, states remain the main actors in international relations, an international community that has developed from the creation of a political concept in Europe in the 15th century: the nation-state.

Although recognizing the different ways in which political and legal entities act, the focus here is on democratic states; identifying the main characteristics that result from an evolution of Western philosophical-political principles and systems, derived from the Roman Republic’s democracy created 2,500 years ago.⁸

⁸ See, MACHIAVELLI, N., *Discorsi sopra la prima deca di Tito Livio, Dell'arte della guerra e altre opere*, Rinaldi, UTET, Milano, 2006 . It is also very interesting to see that the current democratic pattern was thought of in the 6th century BC, during the Roman Republic. M. Sellers offers a clear and precise analysis of the characteristics of the Roman republican democracy:

“The Origins of Republican Legal Theory

The first self-consciously “republican” ideology originated in the senatorial opposition to Gaius Julius Caesar, and implies a procedural commitment to certain “republican” political and legal institutions, usually attributed to Rome’s republican constitution of 509-49 BC. The basic desiderata of republican government, as articulated in the republican legal tradition derived from Rome, secure government for the common good through the checks and balances of a mixed constitution, comprising a sovereign people, an elected executive, a deliberate senate, and a regulated popular assembly, constrained by an independent judiciary, and subject to the rule of law. Some republicans would add representation, the separation of powers, or equality of material possessions, to protect the public liberty (*libertas*) and avoid Rome’s eventual descent into popular tyranny and military despotism. Republican liberty signifies subjection to the law and to magistrates, acting for the common good, and never to the private will or domination “*dominatio*” of any private

Real democracies⁹ require the following elements:

- a) Separation of powers- ensuring checks and balances;
- b) Respect for human rights- respecting individual, collective and minority rights.
- c) Elections- free, plural and periodical.
- d) A sovereign power, represented by the people, composed of a citizens consisting of free men and women with equal rights. Those who form part of that process denote the quality of a given democracy (governance) and the cohesion and inclusiveness of the system.

Contemporarily it is important to bear in mind that the efficiency with which that community - with all actors participating- responds to the demands and needs of citizens (governability). The reduction of institutional and individual corruption remains a basic principal for democracies, as these are a major threat to national sovereignty. The transparency in the functioning and accountability of the acts performed by institutions and individuals is a fundamental aspect of the democratic system.¹⁰

- e) The existence of the Rule of Law and accountability, implying the pursuit of justice and the avoidance of impunity. The rule of law is part of system of values, attitudes and legal spectrum that create a specific culture: “The culture which institutes the rule of law to limit both private and public power consists of a combination of beliefs that law should limit the exercise of power backed up by sufficient behaviour to make it reasonable to think that law in fact does exercise such a restraining function.”¹¹

master.” See M. N. S. Sellers, *Republican Legal Theory. The History, Constitution And Purposes Of Law In A Free State*. 6 **Pallgrave Mc Millan, New York, 2003**. For information on the Republic and the Roman democratic model, see Cicero, *De Republica And De Legibus*, (On The Republic And The Laws) (1986).

⁹ See, GONZÁLEZ IBÁÑEZ, J., RAMADAN, H., and RASKIN, J., B., Universidad Alfonso X El Sabio S A B E R E S Social Studies Review, “The Arab Garden And Ground Zero”, *Revista De Estudios Jurídicos, Económicos Y Sociales*, VOLUMEN 6 ~ AÑO 2008 , Vol. 6, 2006, ISSN: 1695-631 <http://www.uax.es/publicaciones/saberes.htm>

¹⁰ See, for example the case of corruption and its impact on public policies of education by Transparency International, and the impact it creates from an individual perspective, but also from the institutional. See http://www.transparency.org/whatwedo/activity/our_work_on_education, July 2012.

¹¹ REITZ, J.C, *Transnational Law and Contemporary Problems* “Export of the Rule of Law” Vo. 13:429 Fall 2003 p.436.

Out of the almost two hundred states in the international community, around sixty can be classified as democratic, not counting states such as the Russian Federation, Morocco, Egypt, Cuba, China, etc.¹² The Rule of Law is the genuine product conquered and crafted by democracies with different levels of accomplishment “(...) the reality is that the existence of the rule of law is matter of degree, with all legal systems being on a spectrum with no rule at all at one end and a complete actualization of the rule of law at the other”.¹³ This very idea is what has lead the World Justice Project to create a system that might provide an approach of the diverse degree of compliance of 67 countries and different legal systems with the aspirations and goals of the rule of law.¹⁴ It also provides a ranking in alphabetic order and it takes into account 8 factors that help to define the description of the different work in progress of the rule of law. There are eight factors taking into consideration and they are analysed depending on the income group and geographic region: limited government powers, absence of corruption, order and security, human rights, open government, effective regulatory enforcement, access to civil justice, effective criminal justice, and informal justice.

The interpretation of this factors is done in a holistic approach where the possibility of effective and real democracy can be understood, provided the existence and display of the a rule of law culture.

2.2 The Rule of Law

The term Rule of Law refers to a system that empowers individuals and other actors in the process of putting limits on power.

¹² See C.I.A, *CIA World Fact Report* . US, Virginia, 2005. at <https://www.cia.gov/library/publications/the-world-factbook/print/us.html> This account has not vary dramatically in the last 7 years and we look with attention what kind of political system will come out of the Arab Revolution process, and if these changes will spur the activity of individuals that will become citizens as active actors in their political systems.

¹³ MCCORQUALE, R. “Business, Rule of Law and Human Rights” published in *The Rule of Law in International and Comparative Context*, British Institute of International and comparative Law, London, 2010.

¹⁴ See the Rule of Law Index produced by World Justice Project available at <http://worldjusticeproject.org/rule-of-law-index>

Law is perceived as imperative and “It seems natural to think of Laws as commands. In doing so, however, we have already begun to theorize about the nature of law(...) .”¹⁵ We have set in Law the community’s aspirations in terms of what we perceive as the principles and values necessary to provide dignity, justice, respect and security to the members of a given community. Thus, we can affirm that the Rule of Law is “a cultural achievement of universal significance” and probably “The Rule of Law is the most important political ideal today”¹⁶

The Rule of Law is a system whose objective is to put limits and restraints on governments, which limited by the Law, are understood as a formal legality containing the sovereign’s will and the aspiration of Justice. The Rule of law is the rule of law and not the rule of man, meaning that legal and political institutions provide a framework for policies throughout time, and not just personal and individual figures embodying the State.

As such, democracy is a system of rule by laws and not by individuals. In a democracy, the rule of law protects the rights of citizens, maintains order, and limits the power of government. As a consequence, all citizens are equal under the law and no one should be discriminated against on the basis of their race, religion, ethnic group, or gender.¹⁷

Highlighting the importance of the way in which we adopt Law, the method by which law enters into force is also relevant—through the representative of the sovereign, in a public, open and contested way, in other words a democratic legislative process-, there is also a qualitative “threshold” of the Law. As Anne Ramberg put it

The law must properly incorporate social values including the demand of human rights and international humanitarian law. But not even this is enough. The Rule of Law also requires a proper administration of justice. This in turn mandates a reliable and qualitative court system with well educated and honest judges, prosecutors and advocates.”¹⁸

¹⁵ LYONS, D., *Ethics and the Rule of Law*, Cambridge University Press, Cambridge, 1993, p. 37.

¹⁶ See TAMANAHA, B.Z., *On the Rule of Law*, Cambridge University Press, 2004, p.1.

¹⁷ TAMANAHA, B.Z., *On the Rule of Law*, Cambridge University Press, 2004, p.141.

¹⁸ Anne Ramberg quoted at BINGHAM, T, *The Rule of Law*, Allen Lane Penguin Books, London, 2010, p. 171.

This idea embraces the concept of the legitimacy of democratic system and the role played by the Rule of Law in that process.

The international organization created to effectively respond to situations such as the Syrian crisis, sanction perpetrators and provide relief to victims was conceived during World War II – and its treaty signed before the war's end in June 1945. The United Nations, in its Preamble, proclaims as its goal to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small

and more specifically article 3 UN Charter states as a main purpose of the organization

To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

In 2004, 15 years after the fall of the Berlin Wall, Kofi Annan, UN Secretary General placed the rule of law at the very heart of the organization's mission:

It refers to a principles of governance in 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 adjudicates, and which are consistent with international human rights norms and standards. It requires, as well, 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.¹⁹

Judge Tom Bingham in a conference at *Centre for Public Law*²⁰ at Oxford University listed eight principles that define the very existence of the concept of the rule of law

¹⁹ Secretary General Kofi Annan's Report, 23 August 2004 to the Security Council S/2004/16, 23 August 2004, para. 6.

²⁰See the The Rt. Hon Lord Bingham of Cornhill KG, House of Lords, conference of 16th November 2006, full text transcript available at (2012) J. JURIS 524

- a) The law must be accessible and, so far as possible, be intelligible, clear and predictable.
- b) Question of legal right and liability should ordinarily be resolved by application of the law and not by the exercise of discretion.
- c) The law should apply equally to all, except to the extent that objective differences justify different treatment.
- d) The law must provide the necessary human rights protection.
- e) Means must be provided for resolving, without prohibitive cost or unjustified delay, *bona fide* civil disputes, which the parties themselves are unable to resolve.
- f) Public officers and magistrates at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were granted, and without exceeding the limits of such powers.
- g) Judicial and other complementary procedures must be fair and independent
- h) States must comply with its international law obligations.

The existence of an international society assumes the existence of an international Rule of Law. The Rule of Law among nations means the regulation of the mutual intercourse of nations, and international contacts and relations of individuals, by legal concepts, standards, institutions and procedures.²¹

2.3 On legitimacy and the Rule of Law

After World War I, Italian political scientist Guglielmo Ferrero defined political legitimacy as the “invisible genius of the city.”²² According to

http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php, also published at BINGHAM, “The rule of Law”, Cambridge Law Journal 67,69, Cambridge 2007.

²¹ Charles Rhyner, Opening Statement before Boston conference on World Peace through Law, 27, March 1959, quoted in BINGHAM, T., *The Rule of Law*, Allen Lane Penguin Books, London, 2010, p. 111.

²² Guglielmo Ferrero was a disciple of Cesare Lombroso, the inventor of "criminal Anthropology," though Ferrero focused afterwards on historical studies and political theory, becoming one of the most prestigious intellectuals in Europe after World War I. President Theodore Roosevelt nominated Ferrero for a Nobel Prize in Literature for his study of the Roman Republic, a work that presents a radical change from Theodore Mommsen. After 1920, Ferrero became an ardent opponent of Mussolini and had to escape to exile in Switzerland. "The government will be far less frightened of its subjects

Ferrero, the main purpose of legitimacy is to provide explanations for the actions of government and to assure that these explanations will be accepted and recognized peacefully. Legitimacy permits governments to avoid dependence on coercion and violence in order to impose its will and command. The government relationship is founded on the citizen's recognition that certain individuals have a moral right to their obedience, while they, in return, feel a duty to give that obedience. Where ruler and ruled agree on a principle, a government will not fear its subjects. Conversely, as illegitimate governments lack credibility, trust and consent, they are always forced to rely on violence and warfare. This unique relationship of public authority and citizens in democracy is characterized by a relative absence of fear and coercion.

An appropriate illustration can be found in well-known Latin American example referring to how democratic states legitimise themselves when they pay tribute to the principles and ethical values enshrined in their legal system. It refers to the prologue written by Ernesto Sábato in 1984 in the Foreword to the *Argentine National Commission on the Disappearance of Persons Report* (C.O.N.A.D.E.P *Informe Comisión Nacional de Desaparecidos*) during the *dirty war* of the Argentinean dictatorship. Dalla Chiesa was cited as an example of the principles and values that democracies must stand for.²³

Sábato tells the story of General Carlo Alberto Dalla Chiesa, general of the Italian *carabinieri*, who was an esteemed public official well-known for campaigning against the Red Brigades terrorist group (*Brigate Rosse*) during the 1970s in Italy, and also as *prefect* for Palermo for stopping the violence of

and of their revolting, knowing that it can count on their voluntary and sincere consent. Being less frightened of its subjects, it will not have to terrorize them nearly as much; less terrorized, the subjects will obey willingly and cheerfully. The principles of legitimacy humanize and alleviate authority, because it is in accordance with their nature to be accepted sincerely, as just and reasonable, by everyone who rules and by the majority, at least, of those who obey. The acceptance of the principles is not always active, willed, and conscious of their deeper meanings. It can be - and frequently is in the masses - a habit more than a conviction, a slothful legacy from the past, a kind of resignation to the inevitable." See FERRERO, G.; *The Principles of Power. The Great Political Crises of History*. translated by Theodore R. Jaeckel. New York: G.P. Putnam's Sons, 1941, p. 40. See, the "Introduction" to the Spanish version by Eloy García López, Guillermo Ferrero, *Los genios invisibles de la ciudad*, Tecnos, Madrid, 1998.

²³See SABATO, E. at the Report of CONADEP, National Commission on the Disappearance of Persons (*Comisión Nacional de Desaparecidos*) available at 1984<<http://web.archive.org/web/20031013222809/http://nuncamas.org/english/librariy/images/linea350.gif>> and <http://www.desaparecidos.org>

the Second Mafia War in Italy. In 1982 Dalla Chiesa was killed along with his wife and their driver in Palermo just three months after taking command. When Aldo Moro, President of the Christian Democrat Party (*Democrazia Cristiana*) was kidnapped in 1978 by the Red Brigades, in a contested statement at the time, Dalla Chiesa declared in response to a suggestion that torture should be used in the investigation of a Red Brigade terrorist arrested a few days before: "Italy can survive the loss of Aldo Moro. It would not survive the introduction of torture."²⁴ His unswerving devotion to the Rule of Law was not in vain.

3. Epilogue. The work in progress

We assume that there are already clear international standards for addressing issues such as the above mentioned atrocities that have taken place in Syria and, as I write this article, they continue occurring in August of 2012. As Prof. Robert Goldman pointed out, in the worst case scenario of violations of human rights, we know that justice is a goal where the means to achieve the goals are as important as the goal itself.²⁵ This type of abuse of power as produced by states and other actors is also reshaping an atlas of discontented actors in the international arena, as Dominique Moisi has defined in *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World*.²⁶, where the International Rule of Law's presence is diminished because of an ubiquitous lack of legitimacy and justice in national and international conflicts.

No policy of democratic states would be sustainable without including the active respect for international human rights treaties and International Humanitarian Law. These principles are not to be considered "soft law" but as an integral part of law itself-. Rule of law, accountability, and human rights are the heart, the mind, and the soul of democratic systems. Because

²⁴ See *Il generale nel suo laberinto*, published in La Repubblica, Roma, Sept. 4, 1982, <http://www.repubblica.it/online/album/ottantadue/bocca/bocca.html>

²⁵ Prof. Robert Goldman at WCL-American University made a brilliant and balanced judgement referred to the breach of the rule of law by the United States because of the criminal system created ad hoc to give a response to the September 11 terrorist attacks: "Despite the fact that they call it terrorism, the law of war still applies. We didn't cease applying the law of war in World War II because the SS followed the German troops and committed terrorist acts... If we (Americans) can claim to justify this, our adversaries will say they can do this to us as well." See Sally Acharya, *Law professor defends human rights*, published at American Weekly, March 22, 2005

²⁶ Dominique Moisi, *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World*, Doubleday, New York, 2009.

the darkest episodes of humankind were produced by Europeans- the First World War, the Second World War and the Holocaust- we believe deeply that the strengthening of the democratic system depends on the recognition of International Law as a binding limit for the respect of individual dignity. This is especially true in a global period with violent threats and a worldwide contest for power and legitimacy. It is also particularly relevant when, on August 26 2012, the Syrian regime was accused of killing hundreds in Daraya and opposition groups claim to have found at least 200 bodies in a Sunni community on outskirts of Damascus, the only response to those allegations by President Bashar Al'Assad was "a promise to win at any cost".²⁷

I frequently ask myself as a citizen and a Law professor if our responsibility is always to improve human conditions and if law continues to be an effective and necessary means for that end. Progress means real enjoyment of rights, especially for the most vulnerable.

In Europe, and especially in a country such as my own (Spain) with its limited history of stable democratic periods over the last 100 years, the fight for liberties and dignity starts with the preservation of the culture, principles, rights, and duties that made progress possible in Western life. Since the Enlightenment period and the American and French Revolutions, that system has been based on the rule of law and the preservation of individual and public liberties. If we deepen our commitment to these values and principles, the democratic systems will be reassured and re-legitimized. Other courses of action put at risk the achievement of citizenship for all people and the very foundation of our political and legal systems.

Since the Enlightenment, Europeans have had an irrational feeling of optimism, and a faith in progress. Thanks to education, there has been a belief in the transformation and creation of a fairer society with fewer inequalities. That sensation of progress was acclaimed -some hundred years after the French Revolution- by some intellectuals of the Second Spanish

²⁷ See "Syrian regime accused of killing hundreds in Daraya massacre" by Julian Borger, August 26 2012 <http://www.guardian.co.uk/world/2012/aug/26/syrian-regime-accused-daraya-massacre> See also El pais "La oposición siria denuncia la peor matanza desde el inicio de la Guerra", August 26 2012 at http://internacional.elpais.com/internacional/2012/08/25/actualidad/1345931724_206892.html

Republic which existed before the Spanish Civil War of 1936. Among them, the poet Antonio Machado and his verse "Today is still the moment/Life is here and now (*Hoy es siempre todavía/ Toda la vida es ahora*)" contained the spirit of Enlightenment and self-determination.²⁸

The Rule of Law is central to the Enlightenment project. The Rule of Law is a system that provides certainty, legal enforcement, and feasibility for the application of international and domestic Law. But that system is "enlightened" by several elements that establish a radical difference between democratic and authoritarian regimes. The system is based on the pursuit of an ethical commitment surrounding the idea of Justice.

For the purpose of this article, I find adequate and dynamic the definition coined by Stromseth, Wippman and Brooks:

The rule of law describe a state of affairs in which the successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with procedurally fair, neutral and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibition on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions and extrajudicial killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes.²⁹

Nevertheless I miss a powerful commitment with the aspiration of justice and the idea of non-impunity, specially after grave violations of human rights like the ones described in this work. The idea *Fiat justitia, el pereat mundos*, "Let justice be done, though the world perish" it is not, at least in a very first moment, a feasible nor realistic situation in countries and communities immersed in process of transition.

Accountability processes clearly are having a positive impact in a number of societies, but the effects of these efforts on domestic rule

²⁸ See Antonio Machado, *Proverbios y Cantares*, Dedicated to José Ortega y Gasset, Revista de Occidente, n.º III, Sept. 1923. See also "Human Rights and the Rule of Law after Abu Ghraib and the Election of Barack Obama: A European Vision of the Past and Future of the U.S. War on Terror" in *Protección Internacional de Derechos Humanos y Estado de Derecho*, II Volumen obra homenaje a Nelson Mandela, AAVV, director y editor de la obra. Gustavo Ibáñez ediciones jurídicas, Bogotá, 2009, p. 424.

²⁹ STROMSETH, J. WIPPMAN, D., BROOKS, R., *Can might make rights? Building the Rule of Law after Military Interventions*, Cambridge UP, 2006, p.78.

of law have been mixed, complex, and often unclear, and more (...) Whether accountability process have helped to strengthen the rule of law domestically, depends... on their demonstration effects and their capacity-building impact³⁰

The current International Rule of Law contains a set of moral standards that are chosen by our conscience and reason, balancing what is right and what is considered wrong (good and evil). Because of these values and principles one of the most important ideas is to remember that law schools in democratic countries hold an important responsibility, a duty to transmit and “embed” in students the belief that the Rule of Law is one of the most important achievements of humankind. Progress in democracy means more freedom and the empowerment of individuals, especially those who are weak and in vulnerable situations.

No political and historical commitment in society is more important than the pursuit of Justice. Now, after the fall of the Berlin Wall, “those wise restrains that make mankind free” prompt us to reaffirm the inherent value of Human rights, as it appears in the United Nation Preamble.

...to reaffirm faith in fundamental human rights, (...), and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom,(...) to employ international machinery for the promotion of the economic and social advancement of all peoples.

The failure to live up to these standards has provoked part of the crisis and crimes in Syria.

History shows us that the absence of a system of Law that frames relations and provides security, accountability and a system of mutual rights and obligations instead means cycles of revenge, injustice, inequity and permanent unrest.

Governments that act in such a way so as to deny the intrinsic importance of any human life cannot do so without insulting their own dignity. As such,

³⁰ STROMSETH, J. WIPPMAN, D., BROOKS, R., *Can might make rights?*, Cambridge UP, 2006, p.307.

it is crucial that one is always aware when his or her actions show contempt for the value of other people's lives as well.

Some months before the 1945 London Conference –in which the Charter of Military Tribunals was adopted, thereby creating the legal basis for the Nuremberg Trials–, within the Truman Administration the international legalism thesis of Henry Stimson prevailed over Morgenthau's "victors' justice" vision. We agree with Henry Morgenthau's affirmation that "*The respect which the people of the world have to international law is in direct proportion to its ability to meet their needs*"³¹. That also means that those nations that do not respect International Law and consider themselves unaccountable for their deeds will obtain the rejection and disapproval of those who voluntarily submit to the limits and restraint of International Law, those who expect justice and security from its application; a system addressed to meet their needs: peace, security, human dignity, and justice.

International rule of law- specifically international human rights law- represents an attempt on the part of the international community to realise an ethical and moral aspiration reaffirming that the advancement and exercise of human rights symbolizes one of the most important forms of progress in the human condition. This is especially true because the *progress of the human condition* means access to the exercise of rights by vulnerable and excluded groups, normally women, children, indigenous peoples, poor and marginalised people, minorities, and above all, victims. Human rights are *the rights of the other* and a commitment to the cause of justice.³²

In February 1945, Primo Levi, a Jewish Italian citizen pain-stricken by hunger and illness, wrote about how he could see, from the windows of the sick bay in Auschwitz, the shadow of a rider entering the extermination camp (*verninstunlager*)³³. That rider wore a soldier's cap with the Soviet Army's red cross and was on his way to liberate the prisoners. In February 2005 heads of European governments from various nations that took part

³¹ Morgenthau to Truman, 29 May 1945, *Morgenthau Diary*, vol. 2 pp. 1544-45, cited in Gary J. Bass, *Stay the hand of vengeance*.

³² GONZALEZ-IBANEZ, Joaquín, "Legal Pedagogy, The Rule of Law and Human Rights: The Professor, The Magistrate's Robe and Miguel de Unamuno", *JOURNAL OF HUMAN RIGHTS LAW*, Volume 6 2011-2012 Number 1, November 2012, available at <http://www.americanstudents.us/journals/ijbrl/>

³³ LEVI, P., *Se questo é un uomo-La tregua (If This Is a Man – The Truce)*. (Einaudi ed., 1950).

in World War II said *Never Again!*, and expressed the need to strengthen democracy, civil society and respect for human rights.³⁴

Indeed. Now in 2012 we proclaim once more in Syria, "*Never Again!*". But is happening today? What is our international legal machinery for and what has it done for the victims in Syria? How do we hold all the actors; states, private individuals, international organizations etc. accountable?

Brian Z. Tamanaha in his work *On the Rule of Law* underlines the idea that these questions have been perennial dilemmas for human beings, and that behind injustice, there is a continuous positive process that is the refinement and efficiency in responding to the call against injustice: the answer has been to restore the Rule of Law and make it more relevant and efficient for the aspirations of human kind

Preventing government tyranny was a concern in ancient Athens, a concern throughout the Medieval Period, and continues to be a concern everywhere today. The nature of limitations will vary with the society, culture, political and economic arrangements, but the need for limitations on the government will never be obsolete. The great contribution to human existence of the rule of law in this sense is that it provides one answer to this need.³⁵

John Ruskin understood human action as an eventual generator of a legacy called civilization. This legacy is measurable in its words, its deeds and in its arts. And the law that we apply today, a law that contains the three elements mentioned by the above writer, will also be our legacy of civility or inequality. What is happening in our time, in our legal system in 2012, is definitive for our ability to interpret and assess our civilization.³⁶

But still, the Rule of Law represents a guideline for the pursuit of justice and maintains the focus on the need to address injustice and fight against

³⁴ See "Human Rights and the Rule of Law after Abu Ghraib and the Election of Barack Obama: A European Vision of the Past and Future of the U.S. War on Terror" in *Protección Internacional de Derechos Humanos y Estado de Derecho*, II Volumen obra homenaje a Nelson Mandela, AAVV, director y editor de la obra. Gustavo Ibáñez ediciones jurídicas, Bogotá, 2009, p. 405.

³⁵ TAMANAHA, B.Z., *On the Rule of Law*, Cambridge University Press, 2004, p. 139.

³⁶ GONZALEZ-IBANEZ, Joaquín, "Legal Pedagogy, The Rule of Law and Human Rights: The Professor, The Magistrate's Robe and Miguel de Unamuno", *JOURNAL OF HUMAN RIGHTS LAW*, Volume 6 2011-2012 Number 1, November 2012, available at <http://www.americanstudents.us/journals/ijbrl/>

impunity. Edmon Cahn in his work *The sense of injustice* interprets this as part of a human progression: “justice would not be a state, but a process, an action –the active process of remedying or preventing what would arouse the sense of injustice”.³⁷ When we face injustice, the response “is a biologic reaction combining both reason and empathy on the projection of one’s self onto others”.³⁸ The sense of injustice forms the basis of law. Heraclitus made this point by stating, “were there no justice, men would never have known the name of justice”. And this brings us back to the core issue. Justice and human rights are always “others peoples rights”, and empathy is the core element of this process, where the anthropocentric view of law is the inner garment of international law, at least when it comes to the most heinous crimes.

We should remind ourselves that maybe the only real reason in keeping the legitimacy of the international community alive is to strengthen our interest in the victims and the vulnerable. We shouldn’t forget that the current stage of international human rights law witnessed a dramatic change after the fall of the Berlin Wall and the UN Human Rights Vienna Declaration precisely because the victims, those who are most vulnerable and alienated, have become the epicentre of the legal universe.

The British judge Tom Bingham expressed this sentiment in a definitive manner when he wrote: “*So it seems to me that observance of the Rule of Law is the nearest we can get to a universal secular religion.*”³⁹ Rule of law, justice and commitment go hand in hand with our legal and moral obligations. The international Rule of Law has become a spiritual element of those democratic societies that aspire to be more just and inclusive; an essential element to reaching goals of development, or in other words, a space where there exists the options of rights and opportunities. It makes one think that the Rule of Law is an aspiration to dignity, not exempt from tensions, and which constitutes one of the clearest elements of the democratic system.

I still often wonder whether the rule of law is a cultural achievement of universal significance, and following judge Bingham’s metaphor regarding the rule of law as a universal secular religion, we probably have not

³⁷ CAHN, E., *The sense of injustice*, NYU Press, 1964 quoted by CLARKE, K., M., GOODALE, M., *Mirrors of Justice*, Cambridge University Press, 2010, p.322.

³⁸ CLARKE, K., M., GOODALE, M., *Mirrors of Justice*, Cambridge University Press, 2010, p. 322.

³⁹ BINGHAM, T. , *The Rule of Law*, Allen-Lane Penguin Books, London, 2010, p.174.

surpassed the “liturgical moment” that represents a simple paragraph pronounced during the second day of the Judgements at Nuremberg in 1945 by Robert H. Jackson, the American Chief prosecutor.

“The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility (...)” and spoke of the Allied “practical effort...to utilize International Law to meet the greatest menace of our times(...)”.⁴⁰ “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the **judgment of the law is one of the most significant tributes that Power has ever paid to Reason.**”⁴¹

Will it be the case that our tribute to Law is to avoid indifference in the face of injustice, to prevent the weakening of our collective memory, and to pay respect to the victims in conflicts such as that which is taking place in Syria through international legal protection? Will our tribute be the creation of the necessary policies to avoid impunity? Will that be the legal and ethical threshold of dignity?

We name as classical works those products crafted by human beings that, regardless of time, place, or cultural background, seem to be alive as part of the human experience. When it comes to victims the literature of Primo Levi and Ellie Wiesel are perennial reflexions for yesterday and tomorrow and our commitment to victims of any conflict.

Our defeat will be real if, when faced with the crimes in Syria, indifference and oblivion prevail in the coming months and years. The term *Kaputt* is frequently used to refer something that is broken, shattered and ruined. We have been in unconsciously thinking about the killed, the refugees as if we were voluntarily forgetting that *Kaputt* is a word that comes etymologically from the Hebrew term *Kopparoth*, that means VICTIM.⁴²

I hope none of us will ever forget that our concept of justice and dignity relies not only on ourselves, but especially on those victims, vulnerable and alienated from any chance of hope, and opportunity. Their plight is our

⁴⁰ Gary J. Bass, *Stay the hand of vengeance*, Princeton University Press, 2000, p. 174.

⁴¹ *Opening Statement Before the International Military Tribunal*, Nuremberg, Germany, November 21, 1945

Available at <http://www.roberthjackson.org/>

⁴² MALAPARTE, K, *Kaputt*, Adhelpi edizioni Milano, 2009, p. 280: “Lei conosce l’origine della parola *Kaputt*? È una parola che proviene dall’ebraico *kopparoth*, che vuol dire vittima.”

plight. Ellie Wiesel's words are our own:

"Our lives no longer belong to us alone; they belong to all those who need us desperately. (...) Without memory, our existence would be barren and opaque, like a prison cell into which no light penetrates; like a tomb which rejects the living. Memory saved the Besht, and if anything can, it is memory that will save humanity. For me, hope without memory is like memory without hope. (...) What all these victims need above all is to know that they are not alone; that we are not forgetting them, that when their voices are stifled we shall lend them ours, that while their freedom depends on ours, the quality of our freedom depends on theirs."⁴³

A legacy of civic commitment is built and strengthens in every corner of the world through civic acts of empathy and encounter toward "the otherness" as Ryszard Kapuscinski described it.⁴⁴ I personally have tried to adopt as my own that which the professor Abdullahi Ahmed An-Na'Im has stated, and which Alberto Moravia in his work *The Indifferent*⁴⁵ (*Gli indifferenti*) had affirmed before; that in facing injustice the only option is to say 'No', as doing otherwise is to become an accomplice to injustice itself. I think that writer Javier Cercas was right in the closing chapters of *Soldiers of Salamis*⁴⁶ when he suggests that maybe being decent "means learning to say no".

Joaquín González Ibáñez, Madrid, August 2012

⁴³ Ellie Wiesel, Speech acceptance at Nobel Peace Laureate ceremony in Oslo, 10th December 1986, available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.htm

⁴⁴ KAPUSCINKI, R., *The other*, Verso, London, 2008. For Kapuscinski an essential part of the human experience has been the encounter with the other: "(Levina's) philosophy (outlined in *Le temps et l'autre* – Time and the Other) is a framework that you have to fill in with your own experience and observations. Levinas never stops seeking ways to reach the Other, he wants to free us from the restraints of selfishness, from indifference, keep us from the temptation to be separate, to isolate ourselves and be withdrawn. He shows us a new dimension of the Self, namely that it is not just a solitary individual, but that the composition of that Self also includes the Other, and like this a new kind of person or being is created."

⁴⁵ MORAVIA, A., *Gli indifferenti*, Bompiani, Milano, 2000.

⁴⁶ CERCAS, J., *Soldiers of Salamis*, Bloomsbury, London, 2003.