The Rule of Law as a goal and principle of International Human Rights Law

Joaquín González Ibáñez

Rule of law, human rights and democracy are essential for a world of justice, opportunity and stability.

University for Peace

United Nations Secretary-General Ban Ki-Moon affirmed in 2012 that"the rule of law is like the law of gravity" in the international system. *The Rule of Law as a Goal and and Principle of International Human Rights Law* by Joaquín González Ibáñez portrays international human rights law as an effective means to promote human freedom, justice, and peace. International human rights law will become more effective when it fully incorporates the principles and objectives of the rule of law. The concept of the international rule of law must be associated with institutional effectiveness in guaranteeing rights, combating impunity, and strengthening the structural principles of international law as enshrined in the United Nations Charter. The main legal discussion presented in this book examines whether the rule of law is effectively a goal and principle of international law or merely an aspiration and a work in progress within a segment of the international community.

"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."

Preamble, Universal Declaration of Human Rights

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THE RULE OF LAW AS A GOAL AND PRINCIPLE OF INTERNATIONAL HUMAN RIGHTS LAW

Joaquín González Ibáñez[1]

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Sábete, Sancho, que no es un hombre más que otro, si no hace más que otro.

(Know, Sancho, that a man is worth no more than another unless he does more than another).

Miguel de Cervantes*, Don Quixote*

Better laws are made by people with greater hearts.

Raphael Lemkin

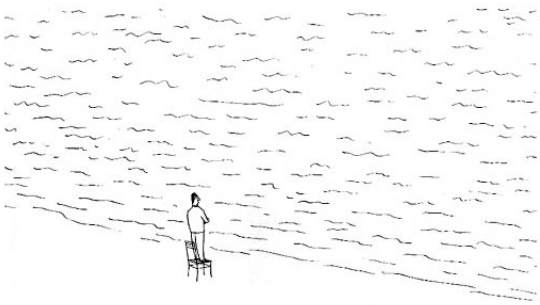
While one should always be skeptical about the law's pretensions, one should never be cynical about the law's possibilities (…) Law lives not by reason alone. Mystique is central to the legal imagination. Though concepts like the rule of law and judicial independence are all underpinned by technical legal rules, they cannot be understood simply as the aggregate of these rules. They have a global resonance and appeal that has spanned centuries and transcended continents.

Albie Sachs*, The Strange Alchemy of Life and Law*

We are like dwarfs sitting on the shoulders of giants to see more things than they do and to see further, not because our vision is keener or our stature greater, but because we can rise higher because of their giants' stature.

John of Salisbury, 1159

To my father, a giant of ethics and love who in his life showed me how to strive, to be kind to others and to have empathy and respect for every person, especially those not so fortunate as we have been in our family.



Benoît van Innis

To Jamie B Raskin, whose example has taught me that defending the truth, the rule of law and human rights can be the adventure of our lives and that intelligence and love can infuse this urgent project and our professional legacy.

To Claudio Grossman who embraced me with his exemplary humanity, humor and generosity and taught me how imagination and law are fundamentally intertwined.

To Paul Lemmens who showed me with his passion for ethics and knowledge that, while we stand for human rights in society, we can recreate here and now an achievable vision of justice, dignity and solidarity.

To Fabián Salvioli, Francisco Javier López de Goicoechea and Juan Carlo Sáinz Borgo for letting me walk alongside them and grow in wisdom, sensibility, and humanity while we foster human rights and elaborate them in an enduring and sophisticated way.

Finally, to Benoît van Innis, with whom I shared the marvelous adventure of imagining how to best portray human rights and justice through his magnificent art.

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PROLOGUE

It's a long road from law to justice.

Dar Williams

Dr. Joaquín González Ibáñez is a relentless global champion of human rights, international law and the progress of civilization. His unswerving and old-fashioned spirit belongs to the ages: to the Enlightenment that began in the 18th Century, to struggles of resistance against racism and imperialism that began in the 19th century, and to the global opposition that arose in the 20th century to fascism, Nazism, Communism, Stalinism and every kind of authoritarian oppression.

But, in truth, his visionary and deeply personal project belongs spiritually to the future: to generations of partisans for freedom who will fight to make human rights, solidarity, peace and justice the very core of the world's legal systems and political institutions even as these systems and institutions are transformed unrecognizably by artificial intelligence, climate change and political chaos.

Professor Joaquín González' method of analysis begins *internal* to the law, and thus the rule of law is indeed the foundational concept in his project. The rule of law is a system of standards and rules that governs not just relations among citizens but relations between citizens and their rulers and the state apparatus. Indeed, for the rule of law to have any meaning in the world, it must be a body of principles and constraints that binds and controls the people who wield state power either in or against the interests of everyone else. In this sense, the rule of law is a necessary condition of popular freedom and democratic self-government. In the real world of 2024, from Moscow to Mar-a-Lago, the rule of law has been —and is— reviled and opposed by tyrants and dictators of every kind.

But if the struggle for the rule of law in societies all over the world has been an uphill climb and a see-saw battle, it is even more complex

when it comes to translating the basic rule-of-law principles into the Hobbesian chaos of international relations and war. Who is the sovereign to enforce the law in the jungle of nations and peoples and by what means? Who defines the content of human rights that exist across the lines of culture, ideology and nationalism? What is necessarily universal and what is defensibly relative and parochial? Where can we find neutral and objective judges in the terrain of international law and justice?

These are tough but not hopeless questions, and Professor Joaquín González Ibáñez mobilizes all of the significant cases and principles relating to war crimes, international conflict, democratic freedom and human rights that have emerged since World War II to make an extremely compelling argument about what international law is and how it must work in a systematic and empirically sound way. He shows that what may look disorderly, contingent and incoherent actually has a strong internal logic and dynamic historical coherence to it. With Professor González Ibáñez, we are in the capable hands of a true expert who loves his field and insists that there must be a meaning to the agonies, tragedies and triumphs of human experience and the unyielding efforts across the world to decode and understand our history in law.

This book marks a major step forward for the field of international law and human rights, which means it strikes a blow for humanity, civilization and freedom. Its publication should arrive as a cause for pride in the author and great satisfaction in his readers.

Jamie Raskin, U.S. Congressman (MD-8)

PRESENTATION

International Law is currently experiencing a profound crisis, arguably the most significant since the establishment of the international system with the Versailles Treaty at the end of World War I. This crisis is undermining the very foundations of the international order, affecting political, legal, and even academic spheres. The global system, born in the aftermath of World War I and embodied in the League of Nations, eventually collapsed under the weight of geopolitical conflicts, most notably with the Nazi expansion across Europe. The onset of World War II saw various legal justifications for warfare, such as Germany's alleged defense against a Polish attack and Japan's compliance with declarations of war under contemporary war law at Pearl Harbor.

In our present era, there is a troubling trend where conflicts are denied or unacknowledged by political leaders, even as tanks and missiles are deployed in places like Ukraine, Palestine, and other less publicized regions. This denial extends to a broader failure by the global political class to recognize violations of fundamental principles of international coexistence and law. Multilateral institutions are not exempt from this ignorance. For instance, during the 78th UN General Assembly in September 2023, only four of the five permanent member states' leaders attended, reflecting a disregard for multilateral engagement.

The legal foundations of International Law, rooted in obligations from international community membership, such as adherence to international criminal justice, are often ignored. In Latin America, states condemned by the Inter-American system for human rights violations, like Nicaragua and Venezuela, have recurrently withdrawn from the organization without facing sanctions from other member states. These governments, despite their non-compliance, continue to participate in other economic or political forums out of convenience or indifference.

Perhaps the most disheartening attack on International Law comes from the academic field itself. Some scholars advocate for a departure from the established construction of international law, arguing instead for the relative nature of transnational law over a truly global legal framework. For example, in *Is International Law International?*, Professor Anthea Roberts

questions the universality of International Law, suggesting a more relativistic approach. Similarly, resistance to the International Criminal Court's mandates, as seen with issues surrounding Russia's invasion of Ukraine and the nuclear programs of Iran and North Korea, exemplifies this trend.

Professor Joaquín González Ibáñez's work makes a significant contribution to the ongoing debate, advocating for the strengthening of international law from both academic and political perspectives. His book reflects extensive deliberations on the evolution of international law, with a particular emphasis on the perspective of victims. Employing a Renaissance methodology reminiscent of 18th-century scholarship, as described by Jamie Raskin, González Ibáñez grounds his analysis in the rule of law conceptualized during the Nuremberg trials. He rejects the outdated, Eurocentric version of international law that was imposed on the colonial world and instead engages with diverse currents of mid-20th-century international law, incorporating European, American, and Russian legal traditions.

The author's approach, rooted in the principle of the rule of law, is explored through various historical and contemporary contexts, including the Nuremberg trials, the case of Augusto Pinochet, the war on terrorism, and emerging forms of transitional justice, with reflections on current events in Ukraine. González Ibáñez advocates for a robust framework of international law that adapts to evolving global challenges while maintaining a focus on victims. This approach aligns with Article 38 of the Statute of the International Court of Justice, which incorporates general principles of law common to all judicial systems.

Law, as a social construct, inherently involves political acts. It must defend victims and promote peace. Thus, the University for Peace regards this publication as highly relevant, aligning with its UN mandate to train human resources to prevent war. By fostering critical thinking and developing strong tools to protect victims, we strengthen the consensus for peace. Though this consensus is currently fractured, through debate on peace's foundations, we can rebuild and sustain it.

The University for Peace contributes to this endeavor by expanding peace studies—irenology—to a comprehensive, global vision

encompassing politics, media, sustainable development, human rights, international law, gender studies, and religion. This approach, in line with the United Nations mandate, places the Global South at the forefront of peacebuilding efforts.

Professor Joaquín González Ibáñez's work, which we are honored to present, makes a significant contribution to the legal discourse essential for achieving lasting and urgently needed peace. At a time when the need for peace is more pressing than ever, and trust in International Law's capacity to resolve disputes seems to waver, this book reaffirms the enduring principles capable of addressing historical challenges and forging lasting solutions. Prof. Joaquín González Ibáñez's reflections offer valuable insights that can guide us in this critical endeavor for both the present and the future.

Dr. Juan Carlos Sainz Borgo, Vice Rector, University for Peace

FOREWORD

His original name was Rolihlahla Mandela from the Madiba Clan. The name Nelson was given to him at the age of 9 by the principal of a Christian Mission School near Qunu. His middle name was Rolihlahla which, translated literally from the Xhosa language means "pulling the branch of a tree," but generally means "troublemaker." The clan or family name Madiba represents Mandela´s ancestry. The meaning of Madiba is used as a sign of respect and affection.

Nelson Mandela, the "troublemaker"

Years later I learnt that people who had been sent by Pretoria to destroy the leadership of the African National Congress (ANC) and sabotage its operations, were being held in ANC camps in Angola, and torture had been used against them. It turned out that the ANC leadership had instituted an enquiry and reported that ANC security had indeed used torture, defending themselves by saying that their duty had been to protect the liberation struggle from imminent threats of harm. Now Oliver Tambo was calling me in as a legal person to help the organization establish and apply appropriate standards for dealing with the situation. And in the Oliver Tambo manner, he did not use his position as President of the organization in exile to issue top-down statement decreeing what the standards should be. He asked me instead to draft a code of conduct which would then be democratically debated by the whole organization at a properly constituted conference.
The problem was to establish the rule of law for a liberation organization in exile, in a context where our host countries expected us to attend to our own legal problems. I eventually produced amounted to no less than a code of criminal law and procedure, adapted to the peculiar circumstances of an exiled and dispersed political organization. Of all the legal writings -I have done in my life, two stand out as being far more important than any of my books or judgments: the one is the tiny note I smuggled out of jail after l had been tortured by sleep deprivation, and the other this Code of Conduct.

Albie Sachs, *The Strange Alchemy of Life and Law*

Justice is an ideal that each person forges from their origins, the examples set by their parents and elders, and the innate need to discover and understand human motives and actions. The ability to discern between what is just and what is arbitrary, what is reasonable and what is vile, is a task linked to our earliest efforts to interpret the world through the intelligence and sensitivity we all possess. Each person has an authentic sense of justice, intimate and true, as it forms part of the fundamental need to understand who we are and how we relate to others.

The difficult challenge for each of us is learning how to put into practice the intellectual decision about what is unjust and knowing how to oppose it, thereby transforming reality—the capacity to resist, to say "no" to abuse and outrage. Fritz Bauer claimed that all ethics and law are built around the category of "no," the imposition of limits that uphold the idea of justice. The forging of a vision of justice and the ability to confront the abject—oppression, violence, and abuse—lead us to recognize individuals who believed their ethical response to injustice required action grounded in coherence and empathy to challenge that state of affairs from a legal perspective.

In my personal experience, it was Nelson Mandela who provided the continuous example that allowed me to understand, for the first time, that democratic systems have both the vocation and the obligation to create spaces of opportunity and justice. The only viable and cutting-edge means to achieve this is through the legal system: the rule of law. Mandela gave deeper meaning to Tom Bingham's statement that "the rule of law is the nearest we can get to a universal secular religion." The rule of law is the soul of democracies, while accountability and human rights constitute their heart, mind, and essence.[2] Later, my legal and ethical imagination was broadened by Raphael Lemkin, Benjamin Ferencz, Telford Taylor, Primo Levi, Fritz Bauer, Antonio Cassese, Joan Garcés, Albie Sachs, Jamie Raskin and Beate and Serge Klarsfeld.

In 1986, as a high school student in Madrid, I remember discussing racism and discrimination in class—not in Europe or America, but in Africa.

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[2] Bingham, The Rt. Hon. Lord, "The Rule of Law," conference at the Centre for Public Law, Oxford University, November 16, 2006. Transcript available at http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php. Also published in Bingham, Tom, "The Rule of Law," *Cambridge Law Journal* 67, 2007, p. 69.

That was when I first heard the Dutch word *apartheid*. Two years later, on 11 June 1988, I vividly recall watching the Nelson Mandela 70th Birthday Tribute concert at Wembley Stadium, where renowned pop and rock stars like Sting, Dire Straits, Eric Clapton, Peter Gabriel, and Tracy Chapman celebrated Nelson Mandela's struggle under the slogan "Free Nelson Mandela" to honor his upcoming 70th birthday on 18 July 1988.

During my law studies at Complutense University, I began to discover the fascinating life and moral and legal example of Nelson Mandela. Someone once told me, perhaps to pique my curiosity, that Nelson Mandela and Albert Einstein shared several things in common: both were rebels, both shaped their time with extraordinary emotional and intellectual intelligence in their respective fields, but neither had been the best father or husband.

Everything about Mandela fascinated me: his early life in Transkei; his athleticism; his studies—first in the Humanities and then in Law. In 1952, together with Oliver Tambo, he established the first Black-owned law firm in South Africa. His constant smile, his passion for politics and justice, and his majestic bearing—whether boxing or standing at the Rivonia Trial in traditional Transkei attire—were splendid.

During the Rivonia Trial, Mandela was accused of conspiracy and sabotage and faced the death penalty. He represented himself and, in his final oral plea on 10 April 1964, made his well-known call for peace, democracy, and diversity. Despite his eloquent defense, Mandela was sentenced to life imprisonment. He spent most of his 27 years in prison on Robben Island.

> I have fought against white domination, and I have fought against black domination. I have cherished the ideal of a democratic and free society in which all persons live together in harmony and with equal opportunities. It is an ideal which I hope to live for and to achieve. But if needs be, it is an ideal for which I am prepared to die.[3]

In response to this longing for civic and political life in his country, Mandela's defense was built on the argument that the Republic of South Africa had committed a state crime through its legal system of *apartheid*, a regime fundamentally opposed to the principles of the rule of law.

[3] The British Library, "Rescuing the Rivonia Trial Recordings," available at https://blogs.bl.uk/sound-and-vision/2013/12/rescuing-the-rivonia-trial-recordings.html

Furthermore, the structural violence of *apartheid* was enforced through educational, ethnic, economic, and legal discrimination.[4]

Nelson Mandela often read the *Universal Declaration of Human Rights*, as it represented the highest aspiration and act of faith in the human condition. It encapsulated the dignity and justice of life among men and women who were equal, without discrimination based on origin, race, religion, or color.

I imagined Mandela in his cramped cell, performing his act of "civic prayer" during his years in prison, reflecting on the words of the third paragraph of the *Preamble to the Universal Declaration of Human Rights*. He must have felt deeply connected to those words, as he was in prison precisely for exercising the legitimate right to resistance and rebellion:

> 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.

His aspirations were both legitimate and legal according to the *Universal Declaration of Human Rights*. Even so, he remained a prisoner because the political and legal regime of apartheid refused to recognize his legal capacity and his status as a subject entitled to claim and demand his rights. After 27 years of imprisonment, Mandela was finally released on 11 February 1990 and was elected President of South Africa in 1994.

In February 1995, the Constitutional Court of South Africa was inaugurated. Symbolically, it was built on the grounds of a former prison that had once held both Mahatma Gandhi (in 1908) and Nelson Mandela (in

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[4] *Ibid*, Nelson Mandela, the Rivonia Trial: "South Africa is the richest country in Africa, and could be one of the richest countries in the world. But it is a land of extremes and remarkable contrasts. The whites enjoy what may well be the highest standard of living in the world, whilst Africans live in poverty and misery.
The complaint of Africans, however, is not only that they are poor and the whites are rich, but that the laws which are made by the whites are designed to preserve this situation. (…)
Above all, we want equal political rights, because without them our disabilities will be permanent. I know this sounds revolutionary to the whites in this country, because the majority of voters will be Africans. This makes the white man fear democracy (…)
The lack of human dignity experienced by Africans is the direct result of the policy of white supremacy. White supremacy implies black inferiority. Legislation designed to preserve white supremacy entrenches this notion."

1956). The court building was constructed using bricks from the demolished awaiting-trial wing of the Old Fort prison at Constitution Hill in Johannesburg. As President of South Africa, Mandela inaugurated the Constitutional Court highlighting the deep connection between constitutional justice, democracy, and the rule of law.

> The last time I appeared in court was to hear whether or not I was going to be sentenced to death. Fortunately for myself and my colleagues, we were not. Today I rise not as an accused but, on behalf of the people of South Africa, to inaugurate a court South Africa has never had, a court on which hinges the future of our democracy.[5]

After the end of his presidential term, Mandela's belief in human action for justice as a vocation and continuous necessity remained unwavering. In 2005, he spoke out against poverty in London, demanding human action and justice to confront human unfairness:

> Like slavery and apartheid, poverty is not natural. It is man-made and it can be overcome and eradicated by the actions of human beings. And overcoming poverty is not a gesture of charity. It is an act of justice.[6]

Civil liberties and the exercise of human rights form the backbone of democratic societies. The abandonment of these principles led to the cataclysm in Europe during the 1930s with the rise of totalitarian regimes—fascism, communism, and Nazism.

The journalist Tiziano Terzani, who covered conflicts in Vietnam, Cambodia, and China for the German magazine *Der Spiegel*, reflected on the

[5] Speech by President Nelson Mandela at the inauguration of the Constitutional Court, February 14, 1995.
Available at: https://archive.nelsonmandela.org/index.php/za-com-mr-s-228

[6] Address by Nelson Mandela for the "Make Poverty History" Campaign, London, United Kingdom, February 3, 2005. Available at: http://www.mandela.gov.za/mandela_speeches/2005/050203_poverty.htm

mercilessness of most 20th-century revolutions, which often unfolded at the expense of people's suffering.[7]

Regarding revolutions, Albie Sachs, a South African member of the African National Congress like Mandela and a prominent anti-apartheid activist who was severely injured in exile by a terrorist attack, became a Constitutional Court Magistrate in 1995. Sachs referred to the arrival of democracy and human rights as *the revolutions of our time*:

> All revolutions are impossible until they happen; then they become inevitable.[8]

We have learned that human history evolves because there have always been individuals like Nelson Mandela, who could see further into the future, envision distant possibilities, and glimpse new scenarios. They created innovative spaces to reorient and reshape human action.

Human rights are not only an ethical will and a commitment to justice, but they also constitute a legal framework that recognizes rights, making them insurmountable to discrimination and legally binding.

In my personal experience, I have felt it was both my responsibility and a privilege to work with victims from Israel, Palestine, Mexico, and, in particular, Colombia, applying international human rights standards to national institutional frameworks and legal systems. The implementation of human rights obligations contained in international treaties allowed me to understand and participate in the possibility of justice and a paradigm shift, based on the creation and strengthening of human rights and the rule of law from an international law perspective.

Achieving justice is not an entelechy; the rule of law has been the most revolutionary and avant-garde formula for ensuring it. The denial of peace and the persistence of conflicts arise, as Amos Oz put it, from "the inability of the opposing parties to imagine the lives of others." Moreover, while there is only one legal system in principle, the strategies and methods we use to achieve justice differ. As John Locke suggested in *Some Thoughts Concerning Education* (1693), "Imagination is the most powerful nation on

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[7] See Tiziano Terzani; "(…) la rivoluzione era presto andata male, s´era rivolta contro la gente, ed il bambino che sul nascere era apparso cosi bello ed attraente s´era presto rivellato un mostro dal cuore di pietra." Terzani, Tiziano, *Pelle di leopardo*, Longanesi, Milan, 2000, p. IX.

[8] Sachs, Albie, *The Soft Vengeance of a Freedom Fighter*, Grafton Books–HarperCollins, London, 1990, p. 164.

earth." When considering different legal systems, with their domestic and international obligations, we must constantly employ imagination and creativity. We need both moral and legal imagination to preserve human rights, democracy, and the rule of law—ensuring that justice, and the protection and enjoyment of human rights, are not mere entelechy.

International human rights law will become more effective when it fully incorporates the principles and objectives of the rule of law. The concept of the international rule of law must be associated with institutional effectiveness in guaranteeing rights, combating impunity, and strengthening the structural principles of international law as enshrined in the United Nations Charter.

In 2025, international human rights law represents an effective means to promote human freedom, justice, and fraternity. We are still working today on the ongoing and unfinished human rights revolution, which places the individual at the center of political, legal, and social discourse—a truly revolutionary move. While State sovereignty remains central to the international legal system, the international rule of law reflects how democratic systems, through the rule of law, uphold the mandate of Article 2 of the UN charter "encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".

Eighty years have passed since the UN charter came into force, yet the defense of human rights remains at the forefront of our time, driving human development and the pursuit of true justice. However, it is still an unfinished work in progress. Our commitment to upholding both international and national rule of law is more necessary now than ever before, as many leaders—including those in allegedly democratic nations—continue to question its importance and value.

Joaquín González Ibáñez
Madrid, February 2025

THE RULE OF LAW AS A GOAL AND PRINCIPLE OF INTERNATIONAL HUMAN RIGHTS LAW

INTRODUCTION

We often choose peace over justice, to be sure, but they are not the same.

Judith Shklar

The development of legal justice systems is a fundamental component of human societies and serves as a cornerstone for the creation of cultures and civilizations. As René Girard argued, the irrational process of violence has been institutionalized by humans, initially through religion and sacred elements, and later through the rationalization of violence via the ideals of justice and humanity.[9] In the modern world, the 1648 Treaties of Münster and Osnabrück, which together constitute the Peace of Westphalia, laid the foundation for the legal and political structures that defined the principles of state sovereignty and religious neutrality. These treaties established the groundwork for an international system of sovereign states that would fully emerge in the 19th century.[10]

The current international legal system, also referred to as the International Law of the United Nations era, is primarily rooted in treaties developed in response to the two world wars of the 20th century, alongside customary international law and general principles of law. During the proceedings of the International Military Tribunal, Hermann Göring, while under cross-examination by U.S. Chief Prosecutor Robert Jackson, stated that a "treaty" and its perceived inequitable obligations as a driving force behind his actions. Göring declared, "The fight against the

[9] Girard, René, *La violence et le sacré*, Éditions Pluriel, Rennes, 2010, p. 11.
[10] Osiander, Andreas, "Sovereignty, International Relations, and the Westphalian Myth," in *International Organization*, vol. 55, no. 2, 2001, pp. 251–287. Accessed August 15, 2024. https://www.jstor.org/stable/3078632.

dictate of [the Treaty of] Versailles was for me the most decisive factor in joining the Party…."[11]

The Treaty of Versailles imposed unilateral, onerous, and demanding political and economic obligations, the burden of which ultimately led to the collapse of the newly formed German Republic and created conditions ripe for revolution. Göring, however, did not mention Articles 227 and 228 of the Treaty, which established a modern precedent for international criminal law. Since then, from the Treaty of Versailles to the Rome Statute that established the International Criminal Court, we have, in the words of William Schabas, walked a "beaten path."[12] The international law of the interwar period made it clear that the waging of aggressive war was prohibited. As the 1928 Kellogg-Briand Pact confirmed, "this was the direction taken by international law."[13]

The United Nations Charter, negotiated and signed in 1945 before the end of the Second World War,[14] remains the most important universal

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[11] Cross Examination of Hermann Goering, from "Eighty-Fourth Day, Monday, 3/18/1946, Part 16":

> MR. JUSTICE JACKSON: "And it was for that end that you and all of the other persons who became members of the Nazi Party gave to Hitler all power to make decisions for them, and agreed, in their oath of office, to give him obedience?"
> GOERING: "Again, here are several questions. Question One: The fight against the dictate of Versailles was for me the most decisive factor in joining the Party. For others, perhaps, other points of the program or of the ideology, which seemed more important, may have been more decisive…."

See *Trial of the Major War Criminals Before the International Military Tribunal*, vol. IX, Proceedings: 3/8/1946–3/23/1946, Nuremberg: IMT, 1947, pp. 11–20. Available at: https://avalon.law.yale.edu/subject_menus/imt.asp.

[12] Schabas, William, *The Trial of the Kaiser*, Oxford University Press, Oxford, 2018, p. 11. Schabas pays homage to Cherif Bassouni for his vanguard interest and approach to international criminal law.

[13] *Ibid.,* p. 11. *General Treaty for the Renunciation of War as an Instrument of National Policy, 1928,* 94 LNTS 57.

[14] During the Yalta Conference on February 11, 1945, the legal structure negotiated at Dumbarton Oaks in Washington, D.C., in 1944 was upheld, where representatives of China, the United Kingdom, the Union of Soviet Socialist Republics, and the United States agreed on the institutional framework and called for a United Nations Conference to be held in San Francisco on April 25, 1945. The UN Treaty was signed on June 25, 1945, and the UN Charter came into effect when the governments of the "Big Five" and a majority of the other signatory states ratified it on October 24, 1945. This is similar to the situation of two other important multilateral treaties: the Bretton

treaty that contains international obligations which are essential for the protection of the fundamental interest of the international community. The UN Charter legal obligations on the use of force, peace, security and human rights also encompass the elements necessary to be considered *jus cogens*.[15] Over the past 80 years, the protection of human rights has symbolized an extraordinary development in international law, introducing new legal actors[16] and establishing a legal framework rooted

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Woods Agreements, signed in New Hampshire in July 1944, and the Convention on International Civil Aviation (ICAO), signed in Chicago in December 1944.

[15] See, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens) 2022*. Adopted by the International Law Commission at its seventy-third session, in 2022, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/77/10, para. 43). Yearbook of the International Law Commission, 2022, vol. II, Part Two. See "Conclusion 4 Criteria for the identification of a peremptory norm of general international law (*jus cogens*). To identify a peremptory norm of general international law (*jus cogens*), it is necessary to establish that the norm in question meets the following criteria:
(a) it is a norm of general international law; and
(b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

[16] "The traditional inter–State outlook of international law has surely been overcome, with the expansion of international legal personality encompassing nowadays, besides States, international organizations, individuals, and peoples, as well as humankind. The conditions are thus met for keeping on advancing the construction of a new jus gentium, keeping in mind the social needs and aspirations of the international community (*civitas maxima gentium*), of humankind as a whole, so as to provide responses to fulfill them. Moreover, it is essential to acknowledge the importance of fundamental principles of international law, in light of the universal conception of the law of nations." *Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt, and United Arab Emirates v. Qatar)*, ICJ, July 14, 2020, Judgment, Separate Opinion of Judge Cançado Trindade, para. 81.
Cançado Trindade had already developed this idea in a Consultative Opinion at the Inter-American Court of Human Rights in 2003: "The great legacy of the legal thinking of the second half of the 20th century, through the emergence and evolution of international human rights law, has been, in my opinion, the rescue of the human being as a subject of both domestic and international law, endowed with international legal capacity. But this progress is accompanied by new protection needs, requiring new responses from the *corpus juris* of protection itself." *Corte IDH, Condición jurídica y derechos de los migrantes indocumentados. Opinión Consultiva OC–18/03 de 17 de septiembre de 2003*, Serie A No. 18, Voto Concurrente del Juez A. A. Cançado Trindade, p. 10.

in international humanitarian law, which began in the 19th century. This framework expanded with the emergence of international human rights law and international criminal law, which developed after the two world conflicts of the 20th century.

In 1944, as the seeds of what would become the United Nations Charter were being sown at the Dumbarton Oaks Conference, T. S. Eliot wrote a thought-provoking essay on Virgil titled *What is a Classic?* In this essay, Eliot cautioned against a danger akin to what we might now conceptualize as postmodernism in the 21st century: the risk of a provincialism not tied to a specific geography, but rather to a particular moment in time. He warned of an inability to comprehend time in its full, global breadth—encompassing past, present, and future.

> In our age, when men seem more than ever prone to confuse wisdom with knowledge, and knowledge with information, and to try to solve problems of life in terms of engineering, there is coming into existence a new kind of provincialism which perhaps deserves a new name. It is the provincialism, not of space, but of time; one for which history is merely the chronicle of human devices which have served their turn and been scrapped, one for which the world is the property solely of the living, a property in which the dead hold no shares. The menace of this kind of provincialism is, that we can all, all the peoples of the globe, be provincials together; and those who are not content to be provincials can only be hermits.[17]

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[17] Eliot, T. S., "What is a Classic?," address delivered before the Virgil Society, October 16, 1944, in *Essays on Virgil*, Faber & Faber, London, 1945, p. 30. Available at: http://bracchiumforte.com/PDFs/tseliot.pdf. Eliot had already reflected on this aspect in 1934 in *Quartet No. 1: Burnt Norton* from *The Rock*, 1934:

"Time present and time past
Are both perhaps present in time future,
And time future contained in time past.
If all time is eternally present
All time is unredeemable. . . .
Time past and time future
What might have been and what has been
Point to one end, which is always present.

As a citizen committed to an ideal of justice with a global perspective rooted in international law, human rights, and solidarity, and as a legal scholar who has had the opportunity to work with victims of serious human rights violations in Colombia, Mexico, Israel, and Palestine, I believe we bear a distinct and profound responsibility. Embracing human rights entails a clear commitment to combating impunity for international crimes. This commitment necessitates an integrated vision of international human rights law, international criminal law, and humanitarian law, in which the obligations of states to protect victims and provide reparations for international crimes have, over the past few decades, evolved into a new international legal doctrine.

Our international legal system is unique, offering multiple strategies for accessing justice. In the 21st century, one of the most significant obligations of international law is to ensure the effective protection of human beings, particularly victims and the most vulnerable. As Walter Benjamin famously stated, "For the oppressed, the state of emergency is permanent."[18]

All our knowledge brings us nearer to our ignorance,
All our ignorance brings us nearer to death,
But nearness to death, no nearer to God.
Where is the Life we have lost in living?
Where is the wisdom we have lost in knowledge?
Where is the knowledge we have lost in information?
The cycles of Heaven in twenty centuries
Bring us farther from God and nearer to the Dust."

See Eliot, T. S., *Quartet No. 1: Burnt Norton*, from *The Rock*, 1934.

[18] See Mate, Reyes, *Medianoche en la historia: Comentarios a las tesis de Walter Benjamin "Sobre el concepto de historia"*, 2006, pp. 124, 143. ("Para las víctimas el estado de excepción es permanente."). The original quote is in German: "Für die Unterdrückten und die Opfer ist der Ausnahmezustand dauerhaft" and belongs to Walter Benjamin's work. See Walter Benjamin, *Das Passagen-Werk*, ed. Rolf Tiedemann (Suhrkamp Verlag, 1982); Walter Benjamin, *The Arcades Project*, ed. Rolf Tiedemann, trans. Howard Eiland and Kevin McLaughlin, Harvard University Press, 2002. See also Freddie Rokem, "'A Real State of Exception': Walter Benjamin and the Paradox of Theatrical Representation," in *The Palgrave Handbook of Theatre and Migration*, ed. Yana Meerzon and S. E. Wilmer, Palgrave Macmillan, Cham, 2023.

Walter Benjamin was a German Jewish philosopher and friend of Theodor Adorno, who went into exile in Paris when Hitler came to power in 1933. This work is part of a diary that he passed to the writer Georges Bataille before committing suicide

In the 21st century, we are witnessing a fundamental shift in the legal paradigm regarding the interpretation and application of international humanitarian law and international human rights law.[19] The law of nations, along with the expansive sovereign power of states, has undergone a Copernican revolution, driven by a "universal juridical conscience, in conformity with the *recta ratio*."[20] This revolution in legal culture has occurred because victims—those who are most vulnerable and often forgotten—have become the epicenter of the legal universe. The Copernican shift highlighted here stems from the positioning of the individual at the center of the international human rights protection framework, particularly in the realm of international criminal law.

Perhaps the jurist who has most effectively embodied and advanced this transformation, with remarkable pedagogy and leadership, is the late Antônio Augusto Cançado Trindade. Since 1997, he had persistently advocated for the emergence and consolidation of this shift within the doctrine of international law.

> The recognition of the human being's personality and legal capacity as a subject of international law represents the greatest legacy of 20th-century juridical *jus internationalist* thought. It embodies the primacy of humanity's reason over that of the State and inspires the ongoing historical process of gradually humanizing international law.

In the 2013 case concerning the demarcation of the border between Burkina Faso and Niger at the International Court of Justice, Cançado Trindade, in his separate opinion, highlighted the importance of considering the nomadic and semi-nomadic populations in the border region. He argued that the case transcended questions of mere territorial

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in September 1940 in Portbou, Spain, after Francoist police threatened to send him back to France and into the hands of the Gestapo. See Chapter X.

[19] González Ibáñez, Joaquín, Introduction to *Los derechos humanos de los pueblos indígenas y los escenarios del conflicto armado colombiano*, by Fabio Enrique Araque Vargas, Berg Institute, Madrid, 2021, p. 14.

[20] Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt, and United Arab Emirates v. Qatar), ICJ, July 14, 2020, Judgment, Separate Opinion of Judge Cançado Trindade, para. 75.

sovereignty, encompassing broader principles of inter-state cooperation and humanity. According to Cançado Trindade, the principle of humanity aims to improve the conditions of human communities and to achieve the common good within the framework of *jus gentium*. He stated:

> Historically, states were established to care for the people within their jurisdictions and to advance the common good. Beyond the concept of state sovereignty, they have a mission to foster human solidarity.[21]

Similarly, in the context of international human rights law and international humanitarian law, the International Court of Justice, in its Advisory Opinion of May 28, 1951, on the validity of certain reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, emphasized the human person as the central axis of the normative system. The court stated that in such treaties, "the contracting states have no interests of their own; they have, above all, only one common interest: the achievement of the purposes which constitute the *raison d'être* of the Convention."[22]

International humanitarian law and international human rights law, as interpreted at the First Human Rights Conference in Tehran in 1968, are built upon a shared principle: the principle of humanity. The purpose of both legal frameworks is to protect the dignity of the human being, with the rights to which individuals are entitled recognized in various treaties. The connection between these two bodies of law is embodied in the Martens Clause.

> Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the law of

[21] Audiovisual Library of International Law, Judge A. A. Cançado Trindade (ICJ), "La persona humana en el contencioso internacional," October 27, 2017. Available at: https://legal.un.org/avl/ls/Cancado-Trindade_HR.html.

[22] Advisory Opinion of May 28, 1951, on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. Available at: https://www.icj-cij.org/en/case/12.

> nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience.

In the *Furundžija* case, the International Criminal Tribunal for the former Yugoslavia specifically referred to human dignity as the core principle of international humanitarian law:

> The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed, in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental wellbeing of a person.[23]

This legal vision of the humanization of international law, celebrated by Cançado Trindade, is grounded in the increasing application and importance of the principles of equality and humanity, the recognition of the individual as a subject of international law, and the expansion of *jus cogens*. The Copernican revolution in human rights protection has unfolded more clearly and tangibly since 1989, following the fall of the Berlin Wall, ushering in a new era of great expectations. However, the path forward was fraught with challenges, as the genocides in Rwanda and Srebrenica tragically demonstrated, alongside the rise of international terrorism and ongoing conflicts such as the Israeli-Palestinian struggle and the devastating wars in Congo, Afghanistan, and Syria. By the end of what has

[23] ICTY, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment of December 10, 1998, para. 183.

been called "the short twentieth century,"[24] many international actors were either cynical or in denial about this opportunity for freedom and human rights. Yet, as human history has shown—and as Albie Sachs reminds us—"All revolutions are impossible until they happen; then they become inevitable."[25]

Cançado Trindade speaks of the legacy we are witnessing, where the human being has been "rescued":

> The greatest legacy of legal thought in the second half of the 20th century, through the emergence and evolution of international human rights law, has been, in my opinion, the recognition and restoration of the human being as a subject of both domestic and international law, endowed with international legal capacity.[26]

The British historian Martin Gilbert observed that the development of new international institutions and legal strategies for the protection of human rights—particularly the Responsibility to Protect, approved by the United Nations General Assembly in 2005[27]—represents the most significant adjustment to state sovereignty since the Peace of Westphalia. The concept, coined in 2001 by the International Commission on Intervention and State Sovereignty (ICISS), which made meaningful efforts to include perspectives from the Global South—such as through roundtables in the BRICS countries—was unanimously adopted by heads of state and government at the 2005 UN World Summit. On this occasion, heads of state expressed their "willingness to take timely and decisive collective action" to protect populations from genocide, war crimes,

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[24] Hobsbawm, Eric, *Age of Extremes: The Short Twentieth Century, 1914–1991*, Vintage Books, London, 1996.

[25] Sachs, Albie, *The Soft Vengeance of a Freedom Fighter*, Grafton Books-HarperCollins, London, 1990, p. 164.

[26] "El gran legado del pensamiento jurídico de la segunda mitad del siglo XX, mediante la emergencia y evolución del Derecho internacional de los Derechos Humanos, ha sido, a mi juicio, el rescate del ser humano como sujeto del derecho tanto interno como internacional, dotado de capacidad jurídica internacional." *Corte IDH, Condición jurídica y derechos de los migrantes indocumentados, Advisory Opinion OC-18/03 of September 17, 2003, Series A No. 18, Concurring Opinion of Judge A. A. Cançado Trindade, para. 19.*

[27] United Nations General Assembly, September 16, 2005, A/RES/60/1.

ethnic cleansing, and crimes against humanity through the Security Council when peaceful means prove inadequate and national authorities are clearly failing to act. According to Martin Gilbert, the summit symbolized "the most significant adjustment to sovereignty in 360 years."[28]

Human Rights in Our Time: A Sophisticated Vision of Human Life and Dignity

The documentary *Darfur Now* (Ted Braun, 2007) offers an extraordinary account of how individuals become active participants in raising awareness about the crimes committed in Darfur, paralleling the initiation of proceedings before the International Criminal Court (ICC). One of the main characters in the film is Hejewa Adam, a figure otherwise unknown to much of the world. Hejewa was a victim of the Darfur conflict, attacked by Janjaweed paramilitary groups allied with the Sudanese army. During the assault, her newborn baby was fatally injured by the blows she endured. After recovering, Hejewa decided to join one of the Darfuri guerrilla groups. Some might find it unusual to view a guerrilla fighter like Hejewa Adam as both a victim and a human rights actor, yet her life and dedication to justice and the liberation of the people of Darfur evoke the moral mandate contained in the third paragraph of the Preamble to the United Nations Universal Declaration of 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.

Hejewa is both a victim and a rebel against oppression, and the documentary offers a powerful reflection on her experience—one that women and statesmen in all conflict-ridden countries should heed. In one of the final scenes, Hejewa shares her thoughts, holding not the book she would prefer, but an AK-47 Kalashnikov rifle. She observes, "Fighting

[28] Evans, Gareth, "The Responsibility to Protect in Action," in *The Stanley Foundation Courier*, no. 74, Spring 2012, p. 4.

alone will not solve the problem of Darfur. The people who go to school and educate themselves will be the ones who will solve the problem." Millions of people around the world, like Hejewa, work and struggle for a vision of justice and peace. Fortunately, many of them do not face the necessity of carrying a gun to pursue it. Instead, they aspire to a shared humanity with their fellow human beings, grounded in freedoms and responsibilities, and the right to education.

Working for human rights signifies a commitment to a vision of justice. Human rights embody the ethical capacity of humanity to safeguard, within the rule of law, the conditions necessary for human dignity, framed by a balance of rights and responsibilities.

Professor Paul Lemmens eloquently expressed the reasons why he believed it was worthwhile to dedicate his entire academic and professional life to the cause of human rights.[29]

The first reason lies in the fundamental significance of human rights, as they enable us to pursue our life projects and grow into the individuals we aspire to be. Human rights grant us the freedom to choose how we wish to think, whom and how to love, what language to speak, what religion to practice, and what ideas to profess and defend—without fear of discrimination or persecution for our uniqueness. These freedoms and rights allow our lives to be both dignified and diverse, as they empower us to live according to our own choices.

The second reason is that human rights form the core of social coexistence. A truly democratic society cannot exist without a "social contract" grounded in respect for human rights and the necessary commitment to exercising responsibility and the civic virtue of tolerance. The third reason is that this commitment obligates nations to protect and integrate the rights of minorities, a responsibility that reinforces the principle of equality for all, regardless of diversity or differences.

Every citizen who genuinely believes in and defends democratic values must recognize that, by definition, they are a human rights actor and are accountable for their actions, whether by commission or omission. Citizens also play a crucial role in holding both public and private powers

[29] See González Ibáñez, Joaquín, "Tras la senda de Antonio Cassese. Actores de Derechos Humanos," in *Antonio Cassese, Pensando en Derechos Humanos: Reflexiones desde el Derecho Internacional*, trans. Joaquín González Ibáñez, Berg Institute, Madrid, 2020, p. 315.

accountable, and their participation in common affairs—as active participants in governance—helps to define the quality of their respective democratic systems. This responsibility necessitates access to education and a comprehensive understanding of civic rights and responsibilities.

Human rights stem from an ethical commitment and a vision of justice shaped by a specific time and context, a vision that evolves with history. At the core of this vision is the principle of human dignity. The first paragraph of the Preamble to the Universal Declaration of Human Rights states:

> … whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world…

Human rights are, above all, a commitment to justice and fundamentally represent an integrated and interrelated system of rights and duties, offering a holistic vision of human dignity. As stated in the 1993 Vienna Declaration:

> Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing…. The promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.[30]

Based on these assumptions, I have continuously strived to develop a *sophisticated vision of human rights*. This approach refers to a broad, integrated, holistic, and crosscutting perspective on human rights protection. As Norberto Bobbio pointed out, the challenge for human rights lies not in their foundation or philosophical justification, but in how

[30] See section 1.3 for further details about the Vienna Declaration and Programme of Action, art. 8.

we most effectively protect them. It is not a philosophical issue, but a political and legal one.[31] From this perspective, law and the enforceability of human rights represent just one of several mechanisms to effectively recognize, promote, and protect human rights.[32]

The Era of Victims' Rights

The legal system is unique, yet the strategies for accessing justice are numerous. The foremost obligation in international human rights law, international criminal law, and international humanitarian law is to ensure the effective protection of individual and collective rights.

Jacqueline Moudeina, a lawyer representing victims in the prosecution and trial of former Chadian President Hissène Habré, expressed this idea in 2011, when Senegal had yet to initiate criminal proceedings against Habré or extradite him to Belgium, as required by the 1984 Convention Against Torture's obligation to "prosecute or extradite." Finally, on May 30, 2016, nearly 25 years after Habré was forced from power, the judges of the Extraordinary African Chambers—established by the African Union in Senegal—found him guilty of crimes against humanity, torture, and war crimes committed during his rule from 1982

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31 Bobbio, Norberto, *L'età dei diritti*, Einaudi, Torino, 1997, p. 45.

32 This sophisticated approach to human rights refers to a broad, integral, holistic, and crosscutting perspective of human rights protection, where the principle of sustainability both inspires and demarcates the effectiveness of human rights. The legal system and enforceability mechanisms for human rights represent just one of several ways to effectively promote, protect, and fulfil rights. In other words, while the legal system is unique, various diverse strategies—not necessarily judicial—can be undertaken to ensure human rights protections. Education, national public policies, development policies, and alliances with different actors are sometimes more effective in providing access to certain human rights. However, it is also important to promote the development and application of international treaties and evolving institutions like the Responsibility to Protect (R2P), as well as the most innovative and avant-garde fields of human rights protection, such as international criminal law, which, ironically, happens to be one of the least effective ways of protecting human rights. All of these are part of an integral human rights machinery. See Salvioli, Fabián, and González Ibáñez, Joaquín, "Derechos Humanos, terrorismo y políticas públicas. Parte I. Introducción. Una visión sofisticada de derechos humanos," in *Terrorismo, cuerpos de seguridad y derechos humanos*, Dirección Nacional de Escuelas de Policía de Colombia and Berg Institute, Colombia, 2012, p. 35.

to 1990, sentencing him to life imprisonment. Five years before the verdict, Moudeina had emphasized, "Everyone talks about Africa's honor, but no one is talking about the victims' honor. What the victims care about is seeing justice in their lifetime."[33]

Victims, in all their diversity and subjectivity, are at the heart of the human rights revolution.[34] Cançado Trindade emphasized the need for international law to respond to the real-time needs of victims. As referenced by Walter Benjamin, the exceptional nature of time for victims requires, particularly in cases of international crimes, overcoming the gap between the immediate needs of human beings and the delayed response of justice.

> Not only did those victims endure inhuman and degrading treatment, but they also faced the ultimate indignity of living out their ungrateful lives in a state of impunity, without reparation, and amidst manifest injustice. The time of human justice is, undeniably, not aligned with the time of human beings.[35]

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[33] Brody, Reed, *To Catch a Dictator: The Pursuit and Trial of Hissène Habré*, Columbia University Press, New York, 2024, p. 159.

[34] See Shklar, Judith N., *The Faces of Injustice*, Yale University Press, New Haven, 1988, p. 1:

"The perceptions of victims and of those who, however remotely, might be victimizers, tend to be quite different. Neither the facts nor their meaning will be experienced in the same way by the affected as by mere observers or by those who might have averted or mitigated the suffering. These people are too far apart to see things in the same way."

[35] Jurisdictional Immunities of the State (Germany v. Italy), Counterclaim, Order of July 6, 2010, pp. 374–375, paras. 116–118.

See Cançado Trindade, A. A., ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Order of July 1, 2015, *Fixing of Time-Limit: Memorials on the Question of Reparations*, Declaration of Judge Cançado Trindade, para. 6:

"Reparations, in cases involving grave breaches of the international law of human rights and of international humanitarian law, cannot simply be left over for 'negotiations' without time-limits between the States concerned, as contending parties. Reparations in such cases are to be resolved by the Court itself, within a reasonable time, bearing in mind not State susceptibilities, but rather the suffering of human beings — the surviving victims and their close relatives — prolonged in time, and the need to alleviate it. The aforementioned breaches and prompt compliance with the duty of reparation for damages are not to be separated in time: they form an indissoluble

This book aims to encourage readers to reflect on some of the current challenges in international human rights, such as how democracies respond to terrorism while upholding human rights, the role of transitional justice for victims of international crimes, and the evolving analysis and significance of the rule of law in international law.

The international rule of law, as both a goal and principle, refers to a theoretical and practical legal framework. Its principles establish the obligation for all legal actors, whether private or public, to be accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which align with international human rights norms and standards. Both domestic and international legal systems should be grounded in principles such as the 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, the avoidance of arbitrariness, accountability, and procedural and legal transparency.[36] The ultimate goal of the international rule of law is to reaffirm the inherent value of human dignity and human rights, as articulated in the Preamble to the United Nations Charter:

> … 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 …

As explained in Chapter 2, the concept of the international rule of law is controversial, and some authors consider it unattainable or unrealistic. However, the value of the international rule of law may lie in the fact that it is not a final "destination." Much like democracy, the international rule of law represents a continuous pursuit of justice through the enhancement of the rule of law in both national and international institutions. The ultimate aim is to improve the quality and value of human

whole…. The Court now knows that it is necessary to bridge the regrettable gap between the time of human justice and the time of human beings."

[36] Report of UN Secretary-General Kofi Annan to the Security Council, S/2004/16, August 23, 2004, para. 6.

lives, which, as mentioned in the Preamble of the UN Charter, is the core purpose of the international system.

The subjects examined in this academic work have local roots yet offer an international perspective. The arguments, narratives, and reasoning presented in this book are certainly shaped by geographic and historical contexts. As a European from a Mediterranean country, I have witnessed and learned from an early age the profound gifts and responsibilities that came with Spain's transformation from an isolated dictatorship to a full and vibrant democracy. Spain has become an active participant and strong believer in the European integration process, while also standing as a diverse nation rich in cultures and traditions. It has been at the forefront of human rights recognition and the implementation of innovative policies, yet it has also faced a variety of economics crises and constitutional challenges. The Western world itself is diverse in its history, political systems, and legal culture. Thus, I may have been biased in my understanding of the rule of law, public institutions, and the concept of nationalism in a distinctively European manner. As Timothy Snyder aptly observed when reflecting on the 21st century:

> Americans and Europeans were guided through the new century by a tale about "the end of history," by what I will call the politics of inevitability, a sense that the future is just more of the present, that the laws of progress are known, that there are no alternatives, and therefore nothing really to be done. In the American capitalist version of this story, nature brought the market, which brought democracy, which brought happiness—[rule of law, freedom, private entrepreneurship, and economic might]. In the European version, history brought the nation, which learned from war that peace was good, and hence chose integration and prosperity—[rule of law, freedom, European Union, and welfare state].[37]

In contemplating and writing on these subjects, I have strived to remain committed to the pursuit of truth and support for international

[37] Snyder, Timothy, *The Road to Unfreedom: Russia, Europe, America*, Crown-Penguin Random House, New York, 2018, p. 7.

law. As Tony Judt observed, I have attempted to share the analysis of legal issues and challenges facing the international community, where "*understanding* was becoming for me an increasingly central objective: harder, deeper and more enduring than merely being right."[38] Furthermore, I have considered our responsibility as citizens engaged in public affairs, remaining faithful to the values of democracy, human rights, and the pursuit of truth. Timothy Snyder expressed this eloquently in the context of a real threat in 2024:

> Thrown into a world we do not choose, we need equality so that we learn through failure but without resentment. Only collective public policy can create citizens with the confidence of individuals. As individuals, we seek to understand what we can and should do together and apart. We might join in a democracy with others who have voted before, and will vote after, and in so doing create a principle of succession and a sense of time. With this assured, we might see our country as one among others, recognize the necessity of integration, and choose its terms. The virtues reinforce one another, but not automatically; any harmony demands human virtuosity, the incessant regulation of the old by the new. Without novelty, virtues die. All of the virtues depend upon truth, and truth depends upon them all…. If there is no truth, there can be no trust, and nothing new appears in a human vacuum.[39]

In the international context, indifference can often pose the greatest threat to justice. Judith Shklar reflected on this crucial aspect, emphasizing how it can undermine the pursuit of justice for victims within both national and international legal systems:

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[38] Judt, Tony, with Snyder, Timothy, *Thinking the Twentieth Century*, Penguin Books, New York, 2012, p. 214. I was extremely happy when I read this sentence from Judt and realised it was a very intelligent and effective way of expressing what I often say to my students during lectures at the Law Faculty: "No estoy interesado en tener razón, sino en entender la razón de las cosas." Literally, it means, "I am not interested in being right; I am interested in properly understanding the ultimate reason for problems."
[39] Snyder, Timothy, *The Road to Unfreedom: Russia, Europe, America*, Crown-Penguin Random House, New York, 2018, p. 280.

> The difference between misfortune and injustice frequently involves our willingness and our capacity to act or not to act on behalf of the victims, to blame or to absolve, to help, mitigate and compensate, or to just turn away…. Accusations of injustice are often the sole resort open, not only to the victims, but to all citizens who have an interest in maintaining high standards of public service and rectitude. They can also discourage passive injustice, which is the refusal of both official and private citizens to prevent acts of wrongdoing when they could and should do so. It is a notion as old Cicero that challenges most of us, who would prefer to do nothing, by reminding us that we may, in effect, be contributing to injustices.[40]

Our reflection on victims must adopt a democratic logic centered on the victim, irrespective of the identity of the perpetrator or the motives behind the atrocities.[41] Viewing the world through the lens of the victims' pain sparks a profound ethical revolution. The silent cries of the victims resonate in our unwavering commitment to non-indifference.

The documentary *El Testigo* (The Witness, Kate Horne, 2018) chronicles the civic engagement and artistic work of photojournalist Jesús Abad Colorado during Colombia's armed conflict. In the opening scene, Abad recounts his arrival in the town of Juradó following a massacre. With corpses still lying in the village, he enters an empty school and notices that the last class taught before the violence was a religion lesson. On the blackboard, written in chalk, was the story of Abel and Cain, along with the message: "The blood of your brother calls out to me from the earth." Faced with the irrational violence of multiple actors and victims, Abad laments, "In Colombia, I have not been able to tell who is Abel and who is Cain." His response to this uncertainty is one of solidarity and human

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[40] Shklar, Judith N., *The Faces of Injustice*, Yale University Press, New Haven, 1988, pp. 3, 5.

[41] Mate, Reyes, in his work *Justicia de las víctimas*, calls for an impartial attitude that includes moral reflection before the tribunal of the victims of man's violence, regardless of their origin, sign, wealth, etc. See Mate, Reyes, *Justicia de las víctimas: Terrorismo, memoria, reconciliación / Terrorism, Memory, and Reconciliation*, Anthropos, Madrid, 2013.

commitment: "What I have always done is to put myself on the side of the victims—not only in their shoes, but in their skin."

The essence of Abad's instinctive call for justice is simple and sincere: it does not matter who plays the role of Cain or Abel. What matters is standing with the victim, regardless of their name, ethnicity, nationality, or origin.

The rule of law is a result of the proper functioning of institutions, norms, and democratic values, where truth is embedded in the principles, actions, and goals of the legal system. As Marcus Raskin stated, "Democracy and its operative principle, the rule of law, require a ground on which to stand. *That ground is the truth*. When the government lies, or is structured like our national security state to promote lies and self-deception, then our official structures have broken faith with the essential precondition for constitutional government in democracy."

In the 21st century, states remain the most relevant legal actors, regardless of their political regime or respect for democratic values and institutions. However, they are bound by their international obligations, which arise from the commitments they have freely adopted under international law. As Antonio Cassese insightfully observed, states self-impose limits and controls on their own sovereignty. Cassese, citing Baron d'Holbach, reflects on the effort to incorporate the protection of human rights into international law, premised on the will and commitment of states. He likens the law regulating relations between states to "the morality of madmen, who set limits to their own madness," and describes international law as "a system of ethical principles addressed to madmen, that is, to states, in an attempt to curb their folly."[42]

Today, as a result of self-imposed limitations by states and the actions of various legal actors, we are witnessing the evolution of an international human rights law system. This system is built on the presumption that the rule of law is a fundamental principle of international law and an essential foundation for making international obligations effective.

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[42] See Salvioli, Fabián, and González Ibáñez, Joaquín, "Antonio Cassese: maestro, geógrafo y explorador," in *Pensando en derechos humanos: Reflexiones desde el Derecho Internacional*, by Antonio Cassese, Berg Institute, Madrid, 2020, p. 16. Translation by Joaquín González Ibáñez. Originally published as *L'esperienza del male*, by Antonio Cassese, Il Mulino, Bologna, 2011.

Tony Judt observed that democracies are the product of a complex historical process. Long before the establishment of democratic regimes, there were democratic values, reliable institutions, and public officials who strengthened the legal system over time, paving the way for effective democratic governance.[43] As Claudio Grossman noted, the virtuous triangle of human rights, the rule of law, and democracy must be authentic and effective. Their existence and proper functioning are vital for the genuine recognition, enjoyment, and protection of human rights in any legal system, whether domestic or international.

International law has played a crucial role in encouraging states to fulfil and honor their international obligations, as enshrined in treaties designed to protect the dignity and quality of life of all human beings.

It is undoubtedly an imperfect and ongoing process, but never before in human history has there been such widespread awareness and recognition of international law as a tool for freedom and a safeguard for human security. Similarly, this legal system has never provided protection to so many millions of people. Despite its flaws, it remains a demanding yet essential work in progress.

[43] "If you look at the history of nations that maximized the virtues that we associate with democracy, you notice that what came first was constitutionality, rule of law, and the separation of powers. Democracy almost always came last. If by democracy we mean the right of all adults to take part in the choice of government that's going to rule over them, that came very late—in my lifetime in some countries that we now think of as great democracies, like Switzerland, and certainly in my father's lifetime for other European countries like France. So we should not tell ourselves that democracy is the starting point. Democracy bears the same relationship to a well-ordered liberal society as an excessively free market does to a successful, well-regulated capitalism." Judt, Tony, and Snyder, Timothy, *Thinking the Twentieth Century*, Penguin Books, New York, 2012, p. 305.

PART I. THE CONCEPT OF THE RULE OF LAW AND ITS DEVELOPMENT AS AN INTERNATIONAL LAW PRINCIPLE

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.

Preamble, *Universal Declarations of Human Rights,* 1948

So it seems to me that observance of the rule of law is the nearest we can get to a universal secular religion.

Tom Bingham, *The Rule of Law*, 2010

CHAPTER 1

The Principle of the Rule of Law and the Origins of International Criminal Law

> *The protection and promotion of the universal values of the rule of law, human rights, and democracy are ends in themselves. They are also essential for a world of justice, opportunity, and stability.*
>
> Ban Ki-moon, United Nations Secretary-General, *Freedom to Live in Dignity*, 2005

1.1. Introduction

The American initiative to hold a criminal trial for those most responsible for starting the Second World War—despite their eventual victory—aligned with the objectives and principles of the UN Charter. Adopted just two months before the London Statute of August 6, 1945, which established the jurisdiction and functioning of the International Military Tribunal at Nuremberg, the charter marked a foundational moment in the United Nations era. The Nuremberg Statute, one of the earliest international agreements of this period, classified the acts to be prosecuted as international crimes. This institutional project, endowed with criminal jurisdiction, was deeply rooted in American liberal and democratic traditions, particularly its aspiration to create a criminal process grounded in the standards and principles of the rule of law. U.S. Chief Prosecutor Robert H. Jackson's statements, both before and during the Nuremberg trials, as well as his resistance to certain Soviet prosecutorial actions, serve as clear evidence of his steadfast commitment to these principles.

Jackson's steadfast dedication to the rule of law was further exemplified in his address to the American International Law Association, delivered just days before the end of the war. In this address, Jackson stated:

> Any United Nations tribunal trying, for example, Hitler or Goebbels, would face the same diatribe. That is one of the risks you run when you start a trial. The ultimate principle is that no man should be tried by a judicial process if you are not willing to see him go free if he is found not guilty.[44]

In addition to the interpretation of the rule of law in the context of international criminal proceedings at Nuremberg, another meaning of the rule of law emerged—one tied to the national constitutional framework and the post-war strengthening of democratic systems, particularly in Europe from the 1960s onward. These democratic models evolved into social and democratic rule-of-law frameworks, grounded in legal principles derived from the recognition and protection of human rights. In chapters 2, 3, and 4, we will explore how the original concept of the rule of law in democratic systems has been integrated into the legal principles and aspirations of international organizations.

The term "rule of law" encompasses a complex framework for democratic governance. It adds a qualitative dimension to the principle of legality by presupposing the legitimacy of legal norms approved by representatives of the sovereign—the citizenry—within a system of institutional checks and balances. These legal norms must adhere to and respect international human rights standards and obligations. In turn, the legal system has the essential role of preventing impunity, particularly in relation to human rights violations.

[44] Jackson, Robert H., "The Rule of Law Among Nations," *American Bar Association Journal* 31, no. 6, June 1945, pp. 290–294. Available at: https://www.roberthjackson.org/speech-and-writing/rule-of-law-among-nations/.

1.2. The Rule of Law at the International Military Tribunal at Nuremberg: Robert H. Jackson's Leadership

In *The Iliad*, Homer frequently employs symbolism and ambiguity, hinting at the future direction of the narrative. After Paris abducts Helen, sparking the war against Troy, Hector and Paris await the arrival of the Greek warriors—referred to as the Achaeans—who are preparing for the assault. Ulysses and Achilles are the last to join the Hellenic contingent. When they are ready, they set sail, though they do not know the precise course of their voyage. Homer suggests that justice will guide them, rendering navigational charts unnecessary.

Similarly, when Robert H. Jackson accepted President Truman's appointment to lead the prosecution at the International Military Tribunal, he recognized that he was embarking on a process without precedent in international law. This was not only due to the *sui generis* nature of the charges—targeting those responsible for the German Third Reich—but also because of the stark contrast between the legal principles of the Soviet Union and those of the liberal democracies in the United States, France, and the United Kingdom.[45] Like Homer's heroes, Jackson and Telford Taylor, Chief Prosecutor of the twelve subsequent Nuremberg trials, had no exact map, but they understood that the only sustainable path forward was through the creation of a process grounded in the guarantees of the rule of law.

The method of conducting the trials became an end in itself, as the legal system—guided by the principles of the rule of law—enabled the application of due process guarantees. These included *de jure* protections for the accused, such as equality of arms, publicity, transparency, the presumption of innocence, and the opportunity for both prosecution and defense to present evidence and witnesses. These guarantees would serve as the foundation of legitimacy for the emerging international order—one built on justice rather than vengeance. Paradoxically, in following this path, Jackson departed from the legacy of Secretary of State Robert Lansing and President Woodrow Wilson, who had effectively worked to strip Articles 227 and 228 of the Treaty of Versailles of their operative content. These articles had originally been designed to hold Kaiser

[45] Bass, Gary, *Stay the Hand of Vengeance*, Princeton University Press, Princeton, 2008, p. 149.

Wilhelm II and other military leaders personally accountable for war crimes under the Hague and Geneva Conventions.[46]

1.2.1. Robert H. Jackson: Conceptual Reflections on the Rule of Law and its Application Before Nuremberg. Jackson and the Havana Conference of 1941

Robert H. Jackson served as Attorney General of the United States before his appointment to the U.S. Supreme Court, where he served as a justice from July 1941 to April 1945. Following Roosevelt's death, Jackson accepted President Truman's appointment as Chief U.S. Prosecutor for the International Military Tribunal at Nuremberg, a judicial body created by the victorious nations of World War II: the United States, France, Great Britain, and the Soviet Union.[47]

Eight months before the Japanese attack on Pearl Harbor and the U.S. declaration of war on Japan and Germany, Jackson presented a paper titled *International Order* at the Inter-American Bar Association conference on March 27, 1941.[48] In the fourth paragraph of the paper, Jackson identified what he considered the greatest challenge facing the

[46] It is surprising today to read the minutes of the adoption process for the Treaty of Versailles, where Germany was given no negotiating space. This justified the subsequent German resentment and the term "Versailles Diktat" (Das Versailles Diktat). Count Brockdorff-Rantzau, chairman of the German delegation, responded with a legal and moralistic statement, offering an unheeded counter-proposal to the Peace Treaty. He argued that the penal sanctions in Articles 227 and 228 of the Treaty of Versailles lacked a legal basis, and that Germany's honour required their rejection. On June 16, 1919, the Allies replied with the well-known letter from Georges Clemenceau, President of the Peace Conference, to the German delegation chairman. Clemenceau's letter could also apply to the devastation caused by the Second World War. Clemenceau's letter is available at: https://www.diplomatie.gouv.fr/en/the-ministry-and-its-network/the-diplomatic-archives/documents-from-the-diplomatic-archives/article/diplomatic-archives-the-peace-conference-paris-18-01-1919.

[47] At the conclusion of the International Military Tribunal proceedings on October 1, 1946, Jackson rejoined the U.S. Supreme Court as a Justice, where he served until his death on October 9, 1954.

[48] Jackson, Robert H., "International Order," lecture delivered on March 27, 1941, at the Inter-American Bar Association, *American Bar Association Journal* 27, 1941: p. 275; *American Journal of International Law* , 1941, p. 348 et seq. Available at: https://www.roberthjackson.org/speech-and-writing/international-order/.

international community: establishing the rule of law as the foundation for a just and peaceful global order.[49]

> We are haunted by the greatest unfinished task of civilization, which is to create a just and peaceful international order. If such a relationship between states is to be realized, we know its foundations will be laid in law, because legal process is the only practical alternative to force.[50]

Jackson's analysis offered a legal justification for U.S. support of Great Britain during the Battle of Britain, despite actions that might have been seen as belligerent toward the Axis powers. To mitigate this interpretation, Jackson called for a revised understanding of international law. He reflected:

> I think it was Henry Adams who complained that he was educated in one century and was living in another. All of us, even some of our international lawyers, suffer the same dislocation of ideas. The difference is that Henry Adams recognized it. Some of our scholarship has not caught up with this century, which, through the League of Nations Covenant with sanctions against aggressors, the Kellogg-Briand Treaty for the renunciation of war as an instrument of policy, and the Argentine Anti-War Treaty, has swept away the nineteenth-century basis for contending that all

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[49] *Ibid.*, p. 349. Jackson effectively presents his arguments not as an intellectual diatribe but to show that international law can influence national policies, which would later lead to the creation of war tribunals:
"The state of international law and of progressive juridical thought on the problems of states not actually participating in hostilities is of more than academic interest in a world at war. The United States feels obliged to make far-reaching decisions of policy. I want the legal profession of this hemisphere to know that they are being made in the conviction that the structure of international law, however apparently shaken, is one of the most valuable assets of our civilization. There may be differences of opinion as to some of its particular rules, but we have made conscientious effort to square our national policy with enlightened concepts of the law of nations viewed in its entirety."
[50] *Ibid.*, p. 349.

> wars are alike and that all warriors are entitled to like treatment. The adoption in our time of a discriminating attitude toward warring states is really a return to earlier and healthier precepts.
> To me, such an interpretation of international law is not only proper but necessary if it is not to be a boon to the lawless and the aggressive.[51]

Jackson recognized the institutional weaknesses of international law, particularly due to the League of Nations' failure to enforce compliance and the absence of legally recognized bodies with the authority to declare violations of international obligations.[52] Yet, as if foreseeing the future jurisdiction of the International Military Tribunal at Nuremberg and the London Charter of August 1945, Jackson asserted, "Today's wars of aggression are civil wars against the international community (…) The principle of the proscription of war as an instrument of national policy must be the starting point of any international reconstruction plan."[53]

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[51] *Ibid.*, p. 350.

[52] *Ibid.*, p. 353. There are compelling reasons why we must not await a judicial or other formal determination of aggression today. In the evolution of law, we advance more rapidly with our concepts of substantive rights than with our machinery for their determination. Rough justice is done by communities long before they are able to set up formal governments. And where there is a legal obligation not to resort to armed force, it can be effectuated as legal obligations have always been effectuated on the frontiers of civilization before courts and machinery of enforcement became established. (…) The state of international law and of progressive juridical thought on the problems of states not actually participating in hostilities is of more than academic interest in a world at war. The United States feels obliged to make far-reaching decisions of policy. I want the legal profession of this hemisphere to know that they are being made in the conviction that the structure of international law, however apparently shaken, is one of the most valuable assets of our civilization. There may be differences of opinion as to some of its particular rules, but we have made a conscientious effort to square our national policy with enlightened concepts of the law of nations viewed in its entirety."

[53] *Ibid.*, p. 353. "Present aggressive wars are civil wars against the international community. Accordingly, as responsible members of that community, we can treat victims of aggression in the same way we treat legitimate governments when there is civil strife and a state of insurgency—that is to say, we are permitted to give to defending governments all the aid we choose.

The Briand-Kellogg Pact, Jackson argued, provided the legal framework that defined the acts of aggression by Germany, Italy, and Japan, thus marking the onset of World War II:

> That right to resort to war as an instrument of national policy was renounced by Germany, Italy, and Japan along with practically all the nations of the world, in a solemn treaty to which the United States helped bring into being and has become a party. The U.S. has proclaimed its intention to make this treaty the cornerstone of its foreign policy and has invoked its provisions on numerous occasions as expressing a fully binding international obligation. The present hostilities are the result of, and have been accompanied by, repeated violations of that treaty by Germany, Italy, and Japan. It may be noted in this connection that Italy was the first state to adhere to the Argentine Anti-War Treaty, after the original signatories.[54]

With these reflections, Jackson expressed both a prognosis and a personal and institutional commitment in which the law was the legitimizing element of military victory. It represented the response to the moral and legal demands against those who initiated a war of aggression. The solution, Jackson argued, could only come from the law:

> The only sanction that seems available in our time is the freedom of the right-thinking states of the world, particularly the states of the Western Hemisphere, to give material implementation to their moral and nationally official judgments as to the justice of a war. The American

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The principle that war as an instrument of national policy is outlawed must be the starting point in any plan of international reconstruction. And one of the promising directions for legal development is to supply whatever we may of sanction to make renunciation of war a living principle of our society."

[54] *Ibid.*, p. 354.

> states have done this officially with respect to the invasion of Belgium, Holland, and Luxembourg.[55]
>
> He continued, explaining that:
>
> The Pact of Paris and the Argentine Anti-War Treaty completed the outlawry of war. Signatory nations may now express their discriminating judgment and moral convictions in their policies. It is upon these considerations that I have advised my government in the hope that its course may strengthen the sanction against aggression and contribute to the realization of our aspiration for an international order under law.[56]

Jackson's argument for military non-intervention in Europe, which Roosevelt had formalized during his first re-election campaign, laid the groundwork for the paradigm shift in favor of military intervention. This shift was symbolically remembered on the day Roosevelt declared to the U.S. Congress that the Japanese attack on Pearl Harbor was "a date which will live in infamy," compelling the United States to respond with a formal declaration of war against Japan.

1.2.2. The American Society of International Law and the Day After Roosevelt's Death

On April 13, 1945, the day after President Roosevelt's death, Supreme Court Justice Robert H. Jackson delivered a lecture titled *The Rule of Law Among Nations* at the annual meeting of the American Society of International Law in Washington, D.C. In his address, Jackson

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[55] Jackson refers to the joint declaration adopted by a group of American states, promoted by Uruguay, protesting the military attacks on Belgium, Holland, and Luxembourg:
"The American Republics, in accord with the principles of international law and in application of the resolutions adopted in their inter-American conferences, consider unjustifiable the ruthless violation by Germany of the neutrality and sovereignty of Belgium, Holland, and Luxembourg." (*Department of State Bulletin*, May 25, 1940, p. 568).
[56] *Ibid.,* pp. 358–359.

emphasized that post-war war crimes trials must be authentic—rooted in due process and the rule of law—rather than manipulated for political purposes.[57] His first point underscored the limited role of international law in legal practice at the time:

> This leads me again to quote President Wilson's words to the International Law Society in 1919. 'International law,' he said, 'has perhaps sometimes been a little too much thought out in the closet. International law has—may I say it without offense?—been handled too exclusively by lawyers.' If I were to add to his statement, I should say, 'It has been handled—and not from any fault of their own—by a too exclusive group of lawyers.'

Jackson continued by criticizing the exclusivity of the society's membership:

> Our membership list, which I take to be some index of interest in the subject, indicating at least those who keep informed through our excellent journal, leads to the conclusion that our society is a rather exclusive group. Some perhaps think it is a society of Brahmins, but it would be nearer the truth to say that a few judges of our high courts, a small proportion of our lawyers, a good representation of schoolmen, and a sprinkling of laity comprise the group that gives sustained attention to developments in the international law field. In some degree, this is inevitable. But certainly far too many think of international law as a speculative avocation, completely forgetting that from the beginning the Supreme Court has held customary international law to be part of the law of the land, as treaties are declared to be by the Constitution.[58]

[57] Jackson, Robert H., *The Rule of Law Among Nations*, *American Bar Association Journal* 31, no. 6, June 1945, pp. 290–294.
[58] *Ibid.*, p. 291.

As Telford Taylor notes in *Anatomy of the Nuremberg Trials*, this lecture marked the first time Jackson publicly shared his opinions on the upcoming trials and the role of law during such a pivotal moment in history. Jackson's views on the necessity of impartial legal proceedings are expressed clearly:

> I have no purpose to enter into any controversy as to what shall be done with war criminals, either high or humble. If it is considered good policy for the future peace of the world, if it is believed that the example will outweigh the tendency to create among their own countrymen a myth of martyrdom, then let them be executed. But in that case, let the decision to execute them be made as a military or political decision.
>
> Of course, if good faith trials are sought, that is another matter. I am not troubled, as some seem to be, over problems of the jurisdiction of war criminals or of finding existing and recognized law by which standards of guilt may be determined. But all experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts try cases, but cases also try courts.
>
> Any United Nations tribunal trying, for example, Hitler or Goebbels, would face the same diatribe. That is one of the risks you run when you start a trial. The ultimate principle is that no man should be tried by a judicial process if you are not willing to see him go free if he is found not guilty. If you are determined to execute a man in any case, there is no occasion for a trial.[59]

[59] Taylor, Telford, *Anatomy of the Nuremberg Trials: Memoirs*, pp. 101–102.

1.2.3. The Principles of the Rule of Law in Jackson's Opening Statement at the Nuremberg Trial on November 21, 1945

Telford Taylor highlighted the brilliance of Robert H. Jackson's prose,[60] particularly its blend of legal discourse and ethical and historical significance. Taylor noted that Jackson was able to "cement a legal bulwark in which the House of Justice was inspired by compliance with the rule of law." This is especially evident in Jackson's successive speeches, most notably his opening statement at the Nuremberg Trial before the International Military Tribunal on November 21, 1945.

In this defining moment, the articulation of due process became central, embodying the *de iure* rights of the accused—such as equality of arms, publicity, transparency, presumption of innocence, and the presentation of evidence and witnesses by both the prosecution and the defense. The presentation of these principles was as critical as the principles themselves, and Jackson's legal argumentation marked a milestone in the development of the process. As Taylor reflected in his memoirs:

> The Nuremberg trials began with Jackson's opening statement, and in my opinion, nothing said at Nuremberg thereafter matched its force, perception, and eloquence. Indeed, I know of nothing else in modern juristic literature that equally projects the controlled passion and moral intensity of many passages.[61]

Most international jurists are familiar with at least the first three paragraphs of Jackson's opening statement, which, over nearly 60 pages,

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[60] *Ibid.*, p. 91. In his description of Jackson's qualities as a jurist, Taylor mentions his excellent use of language: "Robert H. Jackson was not one of the typical legal brahmins of the Stimson group. He had a rural upbringing in western New York State, did not go to college, and his higher education consisted of a year's apprenticeship at Albany Law School. He was probably the last nationally prominent lawyer to be admitted to the bar by apprenticeship, rather than by an undergraduate degree from a law school. Despite these academic shortcomings, Jackson developed in the small town of Jamestown a successful regional law practice and, more importantly for present purposes, an excellent command of the English language."

[61] *Ibid.*, p. 369.

outlined the key elements of the U.S. prosecution's case. The opening paragraphs highlight the innovative nature of the process, the unimaginable crimes committed, and the necessity for civilization's survival to be defined by the pursuit of justice rather than indifference.

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility.
> The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.[62]

What is particularly striking is Jackson's reflection on why revenge—historically the go-to formula for victors in war—must be replaced by the pursuit of justice through law:

> 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.[63]

This paragraph encapsulates the axiological foundation of International Criminal Law in the United Nations era. Historically, in the context of international relations and conflict resolution, post-war frameworks were often defined by revenge and the unilateral decisions of victorious powers. The significance of Jackson's statement becomes even clearer when we interpret power as symbolizing Politics and reason as symbolizing Law.

Before examining the facts that constituted the international crimes under the tribunal's jurisdiction as outlined in the London Statute, Jackson addressed the question of the tribunal's legitimacy. He explained

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[62] Jackson, Robert H., *Opening Statement at the International Military Tribunal, Nuremberg, 21 November 1945*, in *Nuremberg Trial Proceedings*, vol. 2, Second Day, Wednesday, November 21, 1945, Morning Session. Available at: https://avalon.law.yale.edu/imt/11-21-45.asp.
[63] *Ibid*., 1, para. 2.

that this first international criminal tribunal would transcend "victors' justice" by developing a process rooted in justice—a concept symbolized by the now-recognized metaphor of the process as a chalice:

> Before I discuss particulars of evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters, in being fair and temperate. Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished, or we must leave the defeated to judge themselves. After the first World War, we learned the futility of the latter course. The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two. We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.[64]

The final paragraph of Jackson's opening speech at the Nuremberg Trial on November 21 continues to encapsulate our challenges as a civilization, especially in light of the Russian invasion of Ukraine in 2022:

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[64] *Ibid*., p. 3, para. 9.

> Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, its precepts, its prohibitions, and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have 'leave to live by no man's leave, underneath the law.'[65]

Eight months later, as he concluded his role at Nuremberg, Jackson delivered a powerful statement to the tribunal on July 26, 1946. His words, less rhetorical and more akin to those of a conventional criminal trial, marked a significant moment in the closing stages of the international proceedings:

> It is against such a background that these defendants now ask this tribunal to say that they are not guilty of planning, executing, or conspiring to commit this long list of crimes and wrongs. They stand before the record of this trial as bloodstained Gloucester stood by the body of his slain king. He begged of the widow, as they beg of you: 'Say I slew them not.' And the Queen replied, 'Then say they were not slain. But dead they are…' If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.[66]

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[65] *Ibid.*, p. 50, para. 193.

[66] See records of the 187th day of the Nuremberg trial, July 26, 1946. Available at: https://avalon.law.yale.edu/imt/07-26-46.asp.

Prior to these words, on the same day, July 26, 1946, in a style not "necessarily" exquisite, Jackson dispatched with a "vulgar" photograph describing the criminal, vulgar, and cynical nature of all the defendants:

"Nobody knew anything about what was going on. Time after time we have heard the chorus from the dock: 'I only heard about these things here for the first time.' (…) If we combine only the stories of the front bench, this is the ridiculous composite picture of Hitler's Government that emerges. It was composed of:

1.2.4. Jackson's Epitaph

A year before his death, on November 2, 1953, Robert H. Jackson delivered an inspiring and didactic address titled *A Testimony of Our Faith in the Rule of Law*.[67] In this speech, he expanded on the core elements of the rule of law, emphasizing the defense of public freedoms and democracy within the Cold War context. He framed these ideals against the backdrop of the legacy of the two world wars of the 20th century. Jackson's central argument was that international law serves as a crucial mechanism for achieving peace and ensuring coexistence in a world now characterized by bipolar power dynamics and the threat of atomic warfare.

A Number 2 man who knew nothing of the excesses of the Gestapo which he created, and never suspected the Jewish extermination program although he was the signer of over a score of decrees which instituted the persecutions of that race;
A Number 3 man who was merely an innocent middleman transmitting Hitler's orders without even reading them, like a postman or delivery boy;
A foreign minister who knew little of foreign affairs and nothing of foreign policy;
A field marshal who issued orders to the Armed Forces but had no idea of the results they would have in practice;
A security chief who was of the impression that the policing functions of his Gestapo and SD were somewhat on the order of directing traffic;
A Party philosopher who was interested in historical research and had no idea of the violence which his philosophy was inciting in the twentieth century;
A governor-general of Poland who reigned but did not rule;
A Gauleiter of Franconia whose occupation was to pour forth filthy writings about the Jews, but who had no idea that anybody would read them;
A minister of interior who knew not even what went on in the interior of his own office, much less the interior of his own department, and nothing at all about the interior of Germany;
A Reichsbank president who was totally ignorant of what went in and out of the vaults of his bank;
And a plenipotentiary for the war economy who secretly marshaled the entire economy for armament, but had no idea it had anything to do with war."

Subsequently, both the British prosecutor Shawcross on July 27, 1946, and the Soviet prosecutor Rudenko in his speech of July 30, 1946, to everyone's surprise, continued with this direct, brusque, and unpredictable style, given their previous actions during the nine months of the trial in court.

[67] Jackson, Robert H., conference at the American Bar Center, titled "A Testimony to Our Faith in the Rule of Law," *American Bar Center Cornerstone Laying*, Chicago, IL, November 2, 1953, published in *American Bar Association Journal*, vol. 40, January 1954, p. 19.

> We believe that the great purpose of achieving a peaceful world is best approached through a strengthening and extending of international law and international legal institutions.[68]

Jackson emphasizes the paramount importance of the rule of law as the cornerstone for achieving justice and preserving the moral superiority of democratic systems.[69] He asserts that international law, when firmly rooted in the rule of law, serves a singular purpose—to constrain abuses of power:

> And if a peaceful and stable international order ever is reached, it is not rash to predict that it will result from acceptance by the professions of all nations of an international rule of law as a curb on lawless power in control of great states. Power always resists the restraints of law. It is the nature of power always to resist and evade restraints by law, just as it is the essential nature of law, as we know it, always to turn power. Our Bill of Rights signifies the victory of law over power. Perhaps the decisive difference between Communist legal philosophy and that of the West is that our law puts rational restraints upon the

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[68] *Ibid.*, p. 22.

[69] *Ibid.*, p. 20. "Faith in the law is our last hope. The question we face today is whether the profession we envision as centering here will have any saving faith to offer to an anxious and bewildered people. I think it has. As a matter-of-fact and practical profession, it has the courage and idealism to assert its belief in law and in the rule of law as the last best hope for any orderly and tranquil nation and for a peaceful world. When we speak thus of law, we are not concerned with the merits or defects of any particular statutes, regulations, decisions, or procedures. We are speaking of a reasoned and intelligible system of thought about the adjustment of life's relationships between man and his neighbor growing out of his family, his state, his land, his personality, his contracts, his injuries. (…) This Western law rejects the teachings of fatalism and presupposes that normal men have free wills and, since they may choose, that they may be held responsible for the results of their choice. It has always been fundamentally irreconcilable with any theory of determinism, economic or otherwise. The concepts of free will and responsibility are the premises on which we have built our entire doctrine of duties and liabilities, of law and its sanctions."

> use of coercive power by those in authority, while, as Vyshinsky points out, Soviet law is only 'expressing the will of the dominant class,' to be enforced by the 'compulsive force of the state.' Thus, their law, instead of controlling the prevailing authority, is merely another implement—mainly, we may believe, a propaganda implement—in the hands of the authorities. We believe in law as an intellectual discipline capable of directing the thought and action of law-trained men and, through their leadership, of guiding men and masses away from violence, vengeance, and force and toward submission of all grievances to settlement by fair legal procedures. We believe in law as a growing and progressive science of civilized life, not as a closed doctrine like the law of the Medes and the Persians.[70]

Jackson's use of legal language and his metaphor of law present it as a system grounded in freedom and security, driven by intelligence—the capacity to adapt to change and address real human challenges through ideas and intellectual ingenuity. His vision underscores that principles, legal norms, and institutions must always strive to expand human freedom, fostering a sense of duty and responsibility that transcends revenge, violence, and force. For Jackson, law reflects the society it serves, and it is the responsibility of each political community, in every era, to continue constructing the "cathedral of law"—a concept he often referenced in his writings.

[70] *Ibid*., pp. 21-22. Jackson concludes the text with an inspiring metaphor: "A story that I have often told seems especially apt today. A visitor at a cathedral under construction questioned three workmen as to what they thought they were doing. The first muttered, 'I am making a living.' The second gave the uninspired reply, 'I am laying this stone.' The third one looked up toward the sky, and his face was lighted up by his faith as he said, 'I am building a cathedral.' What are we doing today? We are building a cathedral to testify to our faith in the rule of law."

1.3. The Prosecutor Telford Taylor and His Commitment to the Rule of Law in the Nuremberg Trials

Telford Taylor's legacy as a champion of the rule of law and his commitment to its application as both a measure of justice and moral superiority is evident in two pivotal moments during the Nuremberg Trials. The first instance occurred during the trial before the International Military Tribunal, where Taylor reflected on the Soviet manipulation of the proceedings, particularly regarding the false attribution of the Katyn massacre to the Germans. The second defining moment was Taylor's opening statement in Nuremberg Trial No. 3, known as the Judges' Trial (*United States v. Josef Altstoetter, et al.*, February 13, 1947).

1.3.1. The Rule of Law and the Soviet Perspective: Manipulation of Institutions and Contempt for the Rule of Law in the Katyn Massacre Controversy

During the negotiations in London and the subsequent efforts to organize the prosecution teams from France, Britain, the United States, and the Soviet Union in Berlin, London, and Nuremberg, clear controversies surfaced. These disputes were particularly evident regarding the principles of due process and the trial's objective of determining responsibility based on factual evidence and legal arguments. The Soviet representatives, Nikitchenko and Trainin, aligned with Moscow's doctrine that law serves political leadership, held a narrow view of the trial's purpose. The Soviets approached the proceedings with a teleological legal framework typical of a totalitarian state: Nazi power structures had already been condemned as criminal by the Big Three at Yalta. Nikitchenko's legal theory reflected the Soviet belief that law existed to serve the Communist Party and operated under the authority of Stalin.

> We are dealing here with the chief war criminals who have already been convicted and whose conviction has already been announced by both the Moscow and Crimea declarations by the heads of the governments… The tribunal's task, he later declared, was only to determine the

> measure of guilt of each particular person and mete out the necessary punishment—the sentences.[71]

Finally, the trial was conducted under liberal democratic standards of due process,[72] although Jackson frequently threatened to resort to a "Plan B"—the prosecution of Nazi perpetrators by each victorious power. Jackson's motives were twofold: to avoid contaminating the trial with Soviet legal standards, and because most of the 22 defendants (with

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[71] Taylor, *Anatomy*, p. 111.

[72] The organization of the Nuremberg trial stemmed from a political decision that, from 1943 onwards, was influenced by the grave crimes committed by German armies. As they retreated from conquered territories, they left behind clear evidence of their atrocities. At the Yalta Conference in February 1945, Churchill, Stalin, and Roosevelt agreed on establishing an international judicial process to investigate and punish Germany's war crimes. However, the Soviet Union held a different view of the trial's nature and objectives compared to the liberal democracies. For Stalin, drawing from the precedent of the Moscow purges and trials of the 1930s, the Yalta Conference agreement was perceived as a decree of German guilt. The judicial process would merely formalize the punishment of those already presumed guilty.

On the other hand, for the United Kingdom and the United States, the trial had to be conducted with full due process guarantees—equality of arms, transparency, presumption of innocence, and the right of both the prosecution and defense to present evidence and witnesses—principles inspired by the rule of law. These legal guarantees were seen as the foundation for the legitimacy of the new international order.

It is paradoxical, considering the victims—especially the Jewish people—that it was U.S. Secretary of War Henry L. Stimson who pushed for criminal prosecution over the plan proposed by Treasury Secretary Henry Morgenthau Jr., who was of Jewish descent. Morgenthau's plan, presented at the Quebec Conference in September 1944, advocated for swift justice and a policy to reduce Germany to an agrarian state. Stimson's plan, which emphasized legal guarantees and due process, ultimately prevailed.

Nevertheless, as Gary Bass notes, this episode illustrates the political maneuvering of the Roosevelt Administration: "The chief promoter of Nuremberg, Henry L. Stimson, was a temperate and refined anti-Semite, no better or worse than most of the American establishment in the 1930s and 1940s." See the text of Telford Taylor's *Anatomy of the Nuremberg Trials* and Joaquín González Ibáñez, "The Nuremberg Trial and the Application of International Criminal Law from Civic Values and the Rule of Law: Telford Taylor's 'Legal and Moral Auctoritas'," p. 11 *et seq*.

Robert Ley committing suicide in his cell before the trial began) were in U.S. custody.[73]

However, it was the Soviet insistence on accusing the German army of the Katyn massacre that most clearly demonstrated their attempt to manipulate the truth, and thus instrumentalize the Nuremberg trial to serve their own political ends, undermining the rule of law. Historian Francine Hirsch, in her book *Soviet Judgment at Nuremberg*, recounts how in 1945 and 1946, Stalin directed Andrey Vyshinsky, the chief legal officer of the Soviet delegation, to instruct chief prosecutor Roman Rudenko to include charges against the Germans for the Katyn Forest massacre—despite it being well-documented that the massacre had been perpetrated by the Soviet NKVD in April 1940.[74]

Immediately after the war, intellectuals like George Orwell and Arthur Koestler led efforts to expose the truth, confronting the official narrative that had concealed Soviet responsibility. They, along with others, denounced the conspiracy of silence surrounding the execution of nearly 22,000 Polish officers, discovered by the Germans in Katyn. The decision for these executions had been made on the recommendation of Lavrenti Beria, head of the NKVD.

On March 5, 1940, the Political Bureau of the Central Committee of the Communist Party of the USSR decided to entrust the NKVD with handling the cases of prisoners in the war camps, including former Polish army officers, government officials, aristocrats, landowners, policemen, intelligence agents, military police, and prison guards. Additionally, the NKVD was tasked with managing those held in prisons in the western districts of Ukraine and Belarus, including members of various counterrevolutionary espionage and sabotage organizations, former landowners, factory owners, Polish officers, government officials, artists, and intellectuals, subjecting them to a special procedure.

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[73] *Ibid.*, Taylor, p. 115. Of the twenty-two defendants transferred to Nuremberg in 1945 before the International Military Tribunal, the French had only one person in custody, Constantin von Neurath, the former Foreign Minister. The Soviets had two, with Hans Fritzsche, an aide to Goebbels, being the most notable. Five were in British custody, including Hess and Ribbentrop, and the Americans controlled ten of the future defendants, among them Göring.

[74] *Ibid.*, *Anatomy*, author's note, Spanish edition, note p. 613. See also the documentary collection available from the Katyn Museum (in Polish). Available at: http://www.muzeumkatynskie.pl.

Beria's memorandum, presented to Stalin, was ratified and signed by Stalin himself, along with Kliment Voroshilov, Anastas Mikoyan, Vyacheslav Molotov, Mikhail Kalinin, and Lazar Kaganovich. A full reproduction of the original order is on display at the Katyn Museum, which opened in 2015 in Warsaw.

The murders took place in April and May 1940. Prisoners from the Kozelsk camp were killed near Smolensk, in the Katyn Forest; those from the Starobelsk camp were shot in the NKVD prison in Kharkov, with their bodies buried near the village of Pyatikhatki; and the police officers from Ostashkov were executed in the Kalinin prison (now Tver) and buried in Miednoje. On March 3, 1959, Alexander Shelepin, chairman of the KGB, proposed to Nikita Khrushchev, General Secretary of the Communist Party of the USSR, that the documents concerning the execution of Polish prisoners of war be destroyed. The remaining documents were placed in a special archive, accessible only to the General Secretary of the Communist Party of the USSR.

The Soviet Union never officially acknowledged its guilt until the final years of *perestroika*. On April 13, 1990, Mikhail Gorbachev met with Polish President Wojciech Jaruzelski and handed him copies of documents from the Soviet archives related to the Katyn massacre. In December 1991, Gorbachev personally passed the archive containing Beria's letter to Stalin to his successor, Boris Yeltsin. In 1993, Yeltsin publicly apologized to the Polish people in Warsaw and promoted the erection of memorials to honor the victims.

From a political and legal perspective, the Russian parliament formally recognized in November 2010 that the Katyn massacre had been ordered by Stalin. This painful chapter in history resurfaced tragically on April 10, 2010, when a plane carrying Polish President Lech Kaczyński and nearly 100 officials crashed in dense fog while attempting to land near Smolensk, just ten kilometers from Katyn. The crash, which killed everyone on board, occurred as the delegation was traveling to commemorate the 70th anniversary of the Katyn massacre, adding yet another tragic layer to the fraught history of Polish-Russian relations and the enduring memory of Katyn.[75]

[75] As part of the historical memory, it is worth mentioning the 2007 film *Katyn*, directed by Andrzej Wajda in memory of his father, Captain Jakub Wajda, who was murdered in Katyn. Also notable is the moving story of Józef Czapski, one of the few prisoners to

Telford Taylor, in *Anatomy of the Nuremberg Trials*, provided an insightful analysis of Soviet intentions, aided by Russian magistrate Nikitchenko.[76] The American and British prosecutors warned that their Soviet counterparts were more focused on exonerating the Soviets from guilt for Katyn than on finding the German defendants responsible. Their argument rested on the "Soviet belief" in the incontestability of state documentary evidence. When the Tribunal was about to vote on whether to challenge the validity of the Soviet document, General Nikitchenko refused to participate and requested that his reasons for abstaining be formally recorded.

> I cannot participate in this vote as the discussion and putting to vote by the Tribunal of a question as to whether an official Government act may be contested is a flagrant contradiction of Article 12 of the Charter.[77]

Taylor points out that Nikitchenko's angry complaint was that Article 12[78] should be interpreted as giving binding and definitive weight to such documents, meaning the defendants had no standing to challenge the adequacy of the Soviet state-endorsed document, which determined that the killings had taken place in May 1942, not in April 1940, when they

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survive the transfer from Starobelsk to the Griazowietz camp in the Soviet Union, a journey he recounted in his book *Proust contre la déchéance*, in which he describes how Polish prisoners in Griazowietz spent their time organizing lectures and discussions on Marcel Proust's *In Search of Lost Time*. See Czapski, Józef, *Proust contre la déchéance*, Libretto, Paris, 2012.

[76] "The legal situation surrounding the Katyn massacre was unusual. All but a few of the defendants (Hess, Streicher, Schacht, and Papen) and each of the indicted organizations had been charged with war crimes under Count Three, which included the indictment for the Katyn massacre. However, the Soviet Prosecution—being the only party supporting the Katyn indictment—had not presented any evidence on Katyn against any of the defendants. It was clear that the Soviet prosecutors were more focused on having the Tribunal exonerate the Soviets of guilt for Katyn than on assigning responsibility to specific individuals." *Anatomy of the Nuremberg Trials*, p. 466.

[77] *Ibid.*, p. 759.

[78] Article 12: "The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interest of justice, to conduct the hearing in his absence."

actually occurred. The British, French, and American prosecutors urged Soviet prosecutor Rudenko to abandon the Katyn prosecution, as it would grant the German defense counsel the right to refute it, regardless of what had happened.

Taylor, aligning with Jackson's principles, highlighted the importance of the rule of law throughout the trial. In his words:

> If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law. Realistically, the Charter of this Tribunal, which gives them a hearing, is also the source of their only hope.[79]

Here, Taylor echoes Jackson's commitment to justice, presenting a profound reflection on the rule of law. As Justice Tom Bingham later articulated, the rule of law is "the soul of democracies," serving as the final safeguard not only for the defendants but also for upholding the moral standard of democracies and the recognition of human rights.

1.3.2. Chief Prosecutor Taylor in the *Altstoetter* Nuremberg Trial

Undoubtedly, the most direct intervention at Nuremberg vindicating the value of the rule of law came from Telford Taylor during Nuremberg Trial No. 3, the *Alstoetter* Case—the trial of Nazi judges and high-ranking officials of the Ministry of Justice. As chief prosecutor, Taylor began by emphasizing the particular gravity of the case, given the defendants' training, dedication, and responsibility as judges within the German state.

> This case is unusual in that the defendants are charged with crimes committed in the name of the law. These men, together with their deceased or fugitive colleagues, were the embodiment of what passed for justice in the Third Reich. Most of the defendants have served, at various times, as

[79] *Ibid.*, p. 282.

judges, as state prosecutors, and as officials of the Reich Ministry of Justice. All but one are professional jurists; they are well-accustomed to courts and courtrooms, though their present role may be new to them. But a court is far more than a courtroom; it is a process and a spirit. It is the House of Law. This the defendants know, or must have known in times past. I doubt that they ever forgot it. Indeed, the root of the accusation here is that these men, leaders of the German judicial system, consciously and deliberately suppressed the law, engaged in an unholy masquerade of brutish tyranny disguised as justice, and converted the German judicial system into an engine of despotism, conquest, pillage, and slaughter.

Many of the laws of the Weimar era, which were enacted for the protection of human rights, have never been repealed. Many acts constituting war crimes or crimes against humanity as defined in C.C. Law 10 were committed or permitted in direct violation of German criminal law as well. It is true that this Tribunal can try no defendant merely for violating the German penal code, but it is equally true that the rule against retrospective legislation, as a rule of justice and fair play, should be no defense if the act he committed in violation of C.C. Law 10 was also known to him to be a punishable crime under his own domestic law.

The methods by which these crimes were committed may be novel in some respects, but the crimes themselves are not. They are as old as mankind, and their names are murder, torture, plunder, and others equally familiar. The victims of these crimes are countless and include nationals of practically every country in Europe.

But because these crimes were committed in the guise of legal process, it is important at the outset to set forth certain things that are not, here and now, charged as crimes.

The defendants and their colleagues distorted, perverted, and finally accomplished the complete overthrow of justice

> and law in Germany. They made the system of courts an integral part of the dictatorship.[80]

Taylor raises the tone in the final reflections of the first part of his opening address, as he focuses on the crime committed by the Nazi jurists: their fundamental denial of the rule of law. In her work *Reconsecrating the Temple of Justice: Invocations of Civilization and Humanity in the Nuremberg Justice Case*, Professor Christiane Wilke observes that Taylor's speech at the *Altstoetter* trial framed civilization and law as mutually dependent—one cannot develop without the other. The Tribunal portrayed Germany as an inherently civilized nation that descended into barbarism, succumbing to violence in the absence of law. This framing allowed the Tribunal to assign responsibility to the defendants, attributing Nazi violence to lawlessness and bolstering its own authority in the process.[81]

> The true purpose of this proceeding, therefore, are broader that the mere visiting of retribution on a few men for the death and suffering of many thousands. I have said that the defendants know, you should know, that a court is the House of Law. But it is, I fear, many years since any of the defendants have dwelt therein. Great as was their crime against Germany was even more shameful. They defiled the German temple of justice and delivered Germany into the dictatorship of the Third Reich, "with all its methods of terror, and its cynical and omen denial of the rule of law." The temple must be reconsecrated.
> This cannot be done in the twinkling of on eye or by any mere ritual. It cannot be done in any single proceeding or

[80] Nuremberg Military Tribunal III, *United States v. Josef Altstoetter, et al.*, February 13, 1947. Available at https://nuremberg.law.harvard.edu/transcripts/3-transcript-for-nmt-3-justice-case?seq=1&q=+type:transcripts

[81] Wilke, Christiane, "Reconsecrating the Temple of Justice: Invocations of Civilization and Humanity in the Nuremberg Justice Case," *Canadian Journal of Law and Society / La Revue Canadienne Droit et Société*, Cambridge University Press, 2014. Available at: https://www.cambridge.org/core/journals/canadian-journal-of-law-and-society-la-revue-canadienne-droit-et-societe/article/abs/reconsecrating-the-temple-of-justice-invocations-of-civilization-and-humanity-in-the-nuremberg-justice-case/865FEBF1F9D76FE79F78D1590C0CD837.

> at any one place. It certainly cannot be done at Nurnberg alone. But we have here, I think, a special opportunity and grave responsibility to help achieve this goal. We have here the men who delayed a leading part in the destruction of law in Germany. They are about to be judged in accordance with the law. It is more than fitting that those men be judged under that which they, as jurists, denied to others. Judgment under law is the only just fate for the defendants; the prosecution asks no other.[82]

In his nearly three-hour address, Taylor meticulously outlined the structure of the German judicial system during the Weimar Republic, detailing the modifications and repeal of its legislation under the Nazi regime. He described the creation of a new legal framework that was effectively built around special courts and the *Führerprinzip* (Leader Principle), which led to the expulsion of officials who refused to align themselves with Nazi ideology or swear allegiance to the swastika flag adopted by the Reich.[83]

For the establishment of the Nazi totalitarian state, controlling the judiciary was essential, alongside the state security services. This control was achieved through a system of circulars and directives, known as *Richterbriefe*, which remained secret until 1942. These directives, devised by the Minister of Justice, Otto Georg Thierack, became the most effective tool in repressing opposition and denying rights.[84] Later, *Rechtsanwaltbriefe*,

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[82] *Alstoetter* p. 37.

[83] In a very revealing analysis in his work *Black Earth*, historian Timothy Snyder describes how, during the Nazi takeover, an unprecedented event in history occurred: the symbol of a private organization, such as the Nazi Party, became the official emblem of the state, in addition to incorporating its private SS militia as part of the public security apparatuses of the German state. See Snyder, Timothy, *Black Earth: The Holocaust as History and Warning*, Penguin Random House, 2015.

[84] Taylor explained in the opening statement on March 5, 1947, how this process was articulated through the control of the judiciary via secret circulars that directed judges on how to act. A more effective mechanism, however, was the series of confidential circulars known as "Letters from the Judges" (*Richterbriefe*), which Thierack sent under his own signature as Minister of Justice to judges and prosecutors throughout the German judicial system. According to Taylor: "Among those in the Ministry of Justice who participated in the constant pressure on judges for harsher or more discriminatory rulings were Thierack, Schlegelberger, Klemm, Ottenkrüger, and Joel. The threat of

or "Lawyers' Directives," were also implemented, requiring specific interpretations depending on the proceedings.

Erik Wolf, a specialist in criminal law, defined the *Führerprinzip* as a new source of law, rejecting the validity of international law.[85] He contrasted law as a positive norm with law as "a historical-spiritual state of affairs that can only be truly understood and experienced on the basis of an existential belonging to the community."[86] He further identified political resistance as the most dangerous form of criminality, effectively criminalizing those who opposed the regime.

> In the totalitarian National Socialist State, crime appears in the first place in the form of disobedience and rebellion, and this criminal is the enemy of the State (…). The ambition of the National Socialist State comprehends the terrestrial existence of man in a global way. This ambition finds its limits neither in historical traditions nor in some fundamental rights or rights of man. As Ernst Forshoff has luminously demonstrated, this conception of the total state

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removal or occasional oversight of criminal justice was not sufficient to meet the Ministry's demands. As the defendant Rothaug stated, 'only in 1942, after Thierack assumed control of the Ministry, did the 'guidance' of justice begin in earnest. There was an attempt to uniformly direct the administration of justice from above."' In September 1942, Thierack began distributing the *Richterbriefe* to German judges. The first letter, dated October 1, 1942, reminded them that Hitler was the supreme judge, asserting that "leadership and judgeship have related characters." One such letter stated: "A corps of judges like this will not slavishly use the crutches of law. It will not anxiously search for support by the law but will find within the limits of the law the decision which is most satisfactory for the life of the community."
In these letters, Thierack criticized court rulings that failed to conform to National Socialist ideology. For example, in a letter dated October 1, 1942, Thierack discussed a case from November 24, 1941, in which a special coffee ration was distributed in a certain town. A number of Jews applied for the ration but were excluded, being "excluded from the distribution per se." *Alstoetter*, p. 64.

[85] See Garcés, Joan, prologue to *Detén la mano de la venganza*, by Gary Bass, Berg Institute, Madrid, 2020, p. 32.
Wolff, E., *Das Rechtsideal des nationalsozialistischen Staates*, *Archiv für Rechts- und Sozialphilosophie*, vol. XXVIII (1934/1935), pp. 353, 360.

[86] Wolff, Erich, "Richtiges Recht und evangelischer Glaube," in *Die Nation vor Gott: Zur Botschaft der Kirche im Dritten Reich*, edited by W. Künneth and H. Schreiner, Im Wirchen, Berlin, 1937, pp. 241–265.

> must not be understood in a mechanistic way, as if from now on it were necessary to organize and schematize, with the help of the apparatus of state authorities, all the domains of existence. The total State is not a mechanical, but an organic unity; it does not schematize, it structures. Through this structured being, it has an aristocratic order of domination, which culminates in the person of the Führer, and which is built on a series of hierarchies and functions.[87]

The most infamous Nazi judicial institution was the so-called "People's Court" (*Volksgerichtshof*), established by a decree on April 24, 1934, after the Reich Supreme Court acquitted the defendants in the Reichstag fire trial. The People's Court replaced the Supreme Court as the court of first and last instance for the majority of treason cases.

The highest-ranking judicial figure of the Nazi regime was not among the defendants, as he was killed in the bombing of Berlin on February 3, 1945. However, he is mentioned three times in Taylor's text. Roland Freisler, as President of the *Volksgerichtshof*, epitomized the ultimate perversion of justice. This was due not only to the inherently political nature of the court but also to Freisler's own disgraceful conduct, which rendered him a caricature of justice. Nuremberg defense counsel Otto Kranzbühler described the trials presided over by Freisler as both unacceptable and detestable.[88]

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[87] Wolff, Erich, *Richtiges Recht im nationalsozialistischen Staate*, *Freiburger Universitätsreden*, Heft 13, Freiburg im Breisgau, 1934, pp. 23–24. Translated by Faye (Emmanuel) in *Heidegger and Nazism*, cit., pp. 301–302.

[88] Otto Kranzbühler's comment is particularly relevant. In Marcel Ophuls' documentary *The Memory of Justice* (1976), Kranzbühler, a brilliant yet cynical jurist, is interviewed. He was the first defense counsel to recognize the importance of the Nuremberg trials for Germany. However, after the International Military Tribunal concluded and the subsequent trials began, Kranzbühler radically altered his defense strategy. He proposed a new thesis, adopted and presented in the I.G. Farben case by Professor Eduard Wahl, and later reiterated in the Krupp case, where Kranzbühler defended Alfred Krupp von Bohlen.

In *The Memory of Justice*, the interview with Kranzbühler (1H.49m.46ff.), alternating with footage from the 1946 trial in Nuremberg's Room 600 and reflections by Telford Taylor, showcases Kranzbühler's intelligent, structured, yet deeply cynical responses:

In February 1943, Freisler presided over the trial of the young Munich students involved in the group known as the "White Rose." Freisler summarily ordered the maximum penalty against the siblings Sophie and Hans Scholl, who were sentenced to death by decapitation with an axe. As recorded in legal documents and film footage, the most grotesque and brutal portrayal of Nazi justice occurred during the trials of those responsible for the failed assassination attempt and *coup d'état* led by Colonel Claus von Stauffenberg on July 20, 1944. The recordings show Freisler rudely interrupting defendants, hurling a barrage of insults, and humiliating them in various ways. For instance, General Hoepner was denied his military uniform and appeared in a torn jacket, while his dentures were removed during the trial. Similarly, Field Marshal Witzleben was not allowed to wear suspenders, forcing him to hold up his pants with his hands in his pockets, to which Freisler mockingly shouted, "You dirty old man, stop fumbling with your trousers."[89]

The regime's goal was the systematic destruction of the legal system, effectively "deconstructing" the rule of law. José María Ridao, in his work *Weimar entre nosotros,*[90] describes this as a blueprint adopted by certain early 21st-century democracies to dismantle democratic systems and erode checks and balances. This is achieved primarily through the deliberate cultivation of fear among the citizenry—a process that Taylor examines in detail.

Marcel Ophuls: "Do you often discuss Nuremberg with your children?"
Dr. Otto Kranzbühler: "I used to do it a lot when the children, now all over 30, were about 20. We discussed matters a great deal. And, of course, they raised the questions again and again: 'Why did you take on such a defense?' 'What did you yourself do in the war?' 'What did you actually know of what went on?' After endless discussion I finally found a formula that satisfied them. I told them: 'Either I knew nothing about all the crimes that went on then, in which case I was an idiot. Or I knew something and either participated, in which case I was a criminal, or did nothing to stop it, in which case I was a coward. So you can choose whether your father was an idiot, a coward, or a criminal.' That satisfied them."
Marcel Ophuls: "A moment's thought, if you don't mind. Why would you suppose your children could be satisfied with such an answer, assuming that they trust their father?"
Dr. Otto Kranzbühler: "Because from what they know of me they must have thought that none of these three alternatives was very likely."

[89] See documentary *Hitler's Henchmen: Roland Freisler, The Hanging Judge*, MPI Home Video, 2001.

[90] Ridao, José María, *Weimar entre nosotros*, Galaxia-Gutemberg, Madrid, 2004.

The destruction of the legal system in Germany was central to the establishment of the Third Reich dictatorship. Initially, this dictatorship emerged from decrees issued in early 1933, which suspended constitutional guarantees of freedom and granted Hitler's cabinet unchecked legislative power. These decrees signaled the end of law as it is understood in a democracy. However, achieving the full extent of the dictatorship envisioned by the architects of the Third Reich required far more. The freedom of the ballot had to be suppressed to lend a veneer of electoral legitimacy to the Nazi regime. Dissident officials were purged from the civil service, a pervasive and ruthless police system was created, and countless other measures were enacted. Above all, the concepts of law and justice had to be entirely eradicated.[91]

The regime's most tireless and forceful spokesman, Joseph Goebbels, articulated the idea of state control through the rejection of law in 1934, shortly after the Nazis seized power: "We were not legal in order to be legal, but in order to rise to power. We rose to power legally in order to gain the possibility of acting illegally."[92]

As Taylor concluded the reading of the indictment, he highlighted the ultimate perversion of the Nazi legal regime, where cruelty was both a means and an end, and the full denial of rights was inflicted on those whom the Nazi hierarchy subjectively deemed enemies of the state.

The perversion and brutality of the Nazi penal system might suggest aimless cruelty, but this was far from the case. Fanatical, ruthless, and even unbalanced as the German leaders were, they always acted with purpose. Law and justice were systematically dismantled because, by their very nature, they obstructed the conquest, destruction, and extermination that the rulers of the Third Reich were determined to pursue. The Nazi Special Courts, the practice of double jeopardy, and the blatant disregard for both the letter and the spirit of the law were not ends in themselves; they were calculated methods designed to enable death, torture, and enslavement.

Taylor highlighted the teleological nature of the legal system under the German Third Reich. From their ascent to power in 1933, the regime's foundation was built upon the deliberate destruction of the Weimar Constitution. On its ruins, they constructed a national legal framework

[91] *Altstoetter*, p. 45.
[92] *Alstoetter*, p. 48.

explicitly designed to function as a "weapon of destruction." This systematic application of the new legal regime allowed the Third Reich to extend its control over countless victims, enabling the unprecedented scale and magnitude of its crimes.[93]

1.3.3. The Legacy of Jackson and Taylor

The legacy of Jackson and Taylor, exemplified through their dedication and advocacy for strengthening the rule of law, encapsulates the legal principles that underpin the liberal democracies they defended both before and after the Nuremberg trials. They championed the principles of due process in criminal trials, emphasizing that the process itself was not merely a means to an end but an end in itself. The legal and axiological system inspired by the rule of law established a direct correlation with due process guarantees, ensuring *de iure* protections for defendants—such as equality of arms, transparency, publicity, the presumption of innocence, and the right for both prosecution and defense to present evidence and witnesses. However, unlike the concept of the rule of law as developed in Western democracies after World War II, these principles did not explicitly address the rulemaking process itself or the legal standards of human rights that such processes would need to satisfy from an international perspective.

This may have been unattainable in the 1940s and 1950s, but it underscored a fundamental issue of legitimacy within the system, particularly regarding sovereignty within a democratic framework. Along with the need to comply with international human rights standards, the full recognition of democratic governance—which affirms all individuals as subjects of rights—was essential. In his autobiography, *Totally Unofficial*, Raphael Lemkin reflects on this issue, highlighting the political and sociological context that led the U.S. government to delay ratification of the Convention on the Prevention and Punishment of the Crime of

[93] "Two basic principles controlled conduct within the Ministry of Justice. The first concerned the absolute power of Hitler, in person or by delegated authority, to enact, enforce, and adjudicate law. The second concerned the incontestability of such law. Both principles were expounded by the learned Professor Jahrreiss, a witness for all of the defendants." *Altstoetter*, p. 57.

Genocide. He notes that, at the time, certain regions of the United States, particularly the southern states that had once been part of the Confederacy, were still plagued by exclusion, discrimination, physical violence, and the denial of rights—circumstances that the law failed to adequately address.[94]

Martin Luther King addressed this issue a decade after the Genocide Convention came into effect. On April 16, 1963, while imprisoned in Birmingham, King penned a letter to several white clergymen who had accused him of inciting violence through his political speeches during marches protesting segregation in Alabama. King emphasized the need to confront institutional violence and unjust laws. Specifically, he referred to the legal system in Alabama, which lacked legitimacy because it did not represent the voices of all its citizens. The state's legal system was built on racial segregation, preventing black citizens, who made up the majority of Alabama's population, from registering to vote. Likewise, the institutional framework was rooted in impunity, as it refused to investigate or punish acts of terrorism directed at homes and churches belonging to black communities.[95]

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[94] "The train stopped at Lynchburg, Virginia, and here I saw for the first time, in the restrooms of the station, the inscriptions 'For Whites' and 'For Colored.' These intrigued me, and I innocently asked the Negro porter if there were indeed special toilets for Negroes. He gave me a puzzled look, mixed with hostility, and did not answer. After seventeen years in the United States, I understand now that he must have thought I was making fun of him." Lemkin, Raphael, *Totally Unofficial*, Berg Institute, Madrid, 2018, p. 163.

[95] Martin Luther King, Jr., *Letter from Birmingham Jail*: "(…) Birmingham is probably the most thoroughly segregated city in the United States. Its ugly record of police brutality is known in every section of this country. Its unjust treatment of Negroes in the courts is a notorious reality. There have been more unsolved bombings of Negro homes and churches in Birmingham than in any other city in this nation. (…) We must come to see with the distinguished jurist of yesterday that 'justice too long delayed is justice denied.' We have waited for more than three hundred and forty years for our God-given and constitutional rights. The nations of Asia and Africa are moving with jetlike speed toward the goal of political independence, and we still creep at horse-and-buggy pace toward the gaining of a cup of coffee at a lunch counter. (…) Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. To use the words of Martin Buber, the great Jewish philosopher, segregation substitutes an 'I – it' relationship for the 'I – thou' relationship and ends up relegating persons to the status of things. So

segregation is not only politically, economically, and sociologically unsound, but it is morally wrong and sinful. (…) An unjust law is a code inflicted upon a minority which that minority had no part in enacting or creating because it did not have the unhampered right to vote. Who can say that the legislature of Alabama which set up the segregation laws was democratically elected? Throughout the state of Alabama, all types of conniving methods are used to prevent Negroes from becoming registered voters, and there are some counties without a single Negro registered to vote, despite the fact that the Negroes constitute a majority of the population. Can any law set up in such a state be considered democratically structured? (…)" In *American Political Rhetoric*, edited by Peter A. Lawler and Robert M. Schaefer, 6th ed., Rowman & Littlefield Publishers, 2010, p. 223.

CHAPTER 2*

International Rule of Law and Human Rights: The Aspiration of a Work in Progress

> *"Poi mi domandava perché il popolo italiano, prima della Guerra, non avesse fatto la rivoluzione* per *cacciar Mussolini. Io rispondevo: «Per non dare un dispiacere a Roosvelt 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: «È uno Stato dove tutto ciò che non è proibito, è obligatorio."*
>
> Curzio Malaparte, *La pelle*[96]

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[96] "Later, he asked me why the Italian people, before the war, had not started a revolution to overthrow Mussolini. I replied: 'They did not start one in order not to annoy Roosevelt and Churchill, who, before the war, were both great friends of Mussolini.' Everyone looked at me in wonder, saying, 'Funny.' Then he asked what a totalitarian state was. I replied: 'It is a state where everything that is not forbidden is compulsory.'" Malaparte, Curzio, *La pelle*, 1949, author's translation.

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 the freedom, security, and opportunity of our own citizens can be assured by good domestic laws alone. Forces originating outside 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 a 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 a 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 an opportunity, but a 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 be faced with the same choice. That is one of the risks that is taken whenever trials are begun. 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

2.1. Introduction

The history of the 20th century—and, to a large extent, the century we are currently shaping—can be understood through the lens of the rule of law and the enduring aspirations for freedom, development, and democracy.

A closer examination of human rights across different countries reveals a stark dichotomy. On one side are totalitarian regimes—fascist, communist, and pseudo-democratic—that have dismantled the rule of law and democratic systems, systematically violating fundamental freedoms. On the other side are democracies that, with varying degrees of success, have worked to strengthen their institutions, providing a framework of opportunities for their citizens while safeguarding genuine public liberties.

Today, we are once again witnessing the systematic destruction of human lives. This tragedy is unfolding not only in the absence of an adequate and immediate response to halt these atrocities but also without a realistic means of holding those responsible for these international crimes accountable, thereby perpetuating impunity.

On February 4, 2012, during an anti-regime demonstration in the city of al-Qsair, southwest of Homs, the UN confirmed that Syrian forces had killed more than 200 people, including children and the elderly. Among the demonstrators, a 12-year-old child held a placard with handwritten letters, desperately attempting to draw the media's attention to their plight. It read: "*If you do not help us, we will be killed*." Hours later, dozens of civilians were massacred. It was as if we had ignored that cry for help—as though our disbelief was the natural response. This reaction mirrors the haunting story Elie Wiesel recounts in *Night,* when he describes a Jewish citizen of his small Romanian village who escaped from a *Vernichtungslager* (extermination camp), only for his warnings to be dismissed—until it was too late for those sent to Auschwitz.[97]

[97] See Wiesel, Elie, *Night*, Hill and Wang, New York, 1985, p. 23. Wiesel recounts: "I told him that I did not believe that they could burn people in our age, that humanity would never tolerate it (…)." Later, as a survivor of Auschwitz, Wiesel often reflected on the survivors' responsibility as witnesses and keepers of 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

There was no room for action under Chapter VII of the UN Charter regarding threats to peace, breaches of peace, or acts of aggression, as Russia and China vetoed the UN Security Council resolution.[98]

Similar grievances could have been voiced by civilian victims—non-combatants—who were attacked by sovereign states such as Russia, Israel, or others in 2024.

We cannot help but feel—or perhaps shudder at the thought—that in 2024, we are once again witnessing the faint echoes of the Cold War.

International law scholars, researchers, and observers of violations of the Rules of War over the past 40 years are often metaphorically burdened by the Greek myth of Cassandra. Once these observers believe they can foresee the future occurrence of a catastrophic event—having witnessed it repeatedly in prior conflicts or even experienced it firsthand—

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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."

This edition of *Night* includes a copy of Wiesel's Nobel Peace Prize acceptance speech, delivered in Oslo on December 10, 1986, appended to the end of the book. The speech is also available online at http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html. Wiesel's remarks resonate deeply: "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 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."

[98] Syrian resolution vetoed by Russia and China at the United Nations on Saturday, February 4, 2012. Paul Harris in New York, Martin Chulov, David Batty, and Damien Pearse. *The Guardian,* February 4, 2012. Accessed [date]. https://www.theguardian.com/world/2012/feb/04/assad-obama-resign-un-resolution. The harrowing photo of the child holding the poster is credited to Alessio Romenzi/AFP/Getty Images.

they may feel a sense of futility. They fear not only that such events are inevitable but also that their warnings will go unheeded.[99]

The evolution of international law, from grappling with the dilemma of the doctrine of humanitarian intervention in the aftermath of Kosovo[100] to embracing the more recent principle of Responsibility to Protect,[101] has demonstrated a troubling incapacity to address grave human rights violations effectively. Rather than empowering decisive action, international law has once again revealed its dependence on the political will of Security Council members.

2.2. The Rule of Law in Democratic Societies

In the aftermath of the violent deaths of thousands of innocent people in Syria, Israel, Ukraine, Gaza, and Lebanon, lecturers and researchers of international law worldwide have often struggled to articulate convincing arguments about its purpose in the face of such atrocities. They have endeavored to explain how democracies have sought to establish a legal framework capable of preventing and addressing these egregious crimes.

Beyond the factual elements and the limited coercive power inherent in international law—constrained as it is by the means and competencies assigned by states—I can identify two principal achievements that may offer solace to a student aspiring to engage with a system rooted in the most noble and human aspirations: dignity, peace, liberty, and solidarity.

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[99] See Homer, *The Iliad,* trans. E. V. Rieu, rev. ed., *Penguin Classics*, Penguin Books, London, 1991. Cassandra, the daughter of King Priam, was a prophetess cursed to be disbelieved. She warned her father of the future consequences of accepting the gift of the Trojan horse, which ultimately led to the fall of Troy.

[100] Bajoria, Jayshree, "The Dilemma of Humanitarian Intervention," *Council on Foreign Relations*, March 24, 2011, https://www.cfr.org/human-rights/dilemma-humanitarian-intervention/p16524.

[101] United Nations, "Secretary-General Ban Ki-moon Defends, Clarifies 'Responsibility to Protect' at Berlin Event on 'Responsible Sovereignty: International Cooperation for a Changed World,'" UN Press Release SG/SM/11701, July 15, 2008, https://www.un.org/press/en/2008/sgsm11701.doc.htm.

Professor Fallon succinctly encapsulated the core structure and aspirations underlying the rule of law, stating:

> All understanding of the rule of law shares 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.[102]

Of course, I have endeavored to avoid cynicism—holding on to the belief that most of the work still lies ahead—but we must not shy away from asking critical questions about our inability to establish the spheres of justice, human dignity, and security that remain the primary objectives of contemporary international human rights law. While we have yet to conceive of an alternative system beyond the rule of law, we must also recognize that, as aptly noted, "In truth, the rule of law is a complex, fragile, and to some extent inherently unrealizable goal."[103]

2.2.1. The Concept of Democracy: Technical Requirements for a Democratic Legal and Political System

The pursuit of international justice for democratic states hinges on the realization and implementation of the international rule of law. From the foundation of national systems, an international framework is built. Individuals, along with public and private institutions, play a vital role in shaping this framework by embodying the values, principles, and goals that democratic systems are designed to uphold.

This interplay between democracy and the rule of law forms the philosophical and ethical foundation of international law's mechanisms. In essence, democracy serves as a gateway to the rule of law, ensuring that

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[102] Fallon, R. H., "The Rule of Law as a Concept in International Discourse," *Columbia Law Review* 97, no. 1, 1997, p. 7.

[103] Stromseth, Jane, Wippman, David, and Brooks, Rosa, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, Cambridge University Press, Cambridge, 2006, p. 57.

legal and political systems operate in alignment with the ideals of justice, equality, and accountability.

The pursuit of justice in democratic societies is rooted in the establishment and reinforcement of the rule of law—a system grounded in ethical aspirations and shared moral values. This system, which we call "law," is fundamentally an intellectual construct, an *entelecheia*, designed to protect the spheres of liberty, dignity, and security for individuals. Its primary instrument in the international arena is international human rights law.

Today, states remain the principal actors in international relations, shaping an international community that has its origins in a political concept developed in Europe during the 15th century: the nation-state.

While acknowledging the varied ways in which political and legal entities operate, this discussion focuses on democratic states, identifying the key characteristics shaped by the evolution of Western philosophical and political principles. These systems trace their origins back to the democracy of the Roman Republic, established over 2,500 years ago.[104]

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[104] See Machiavelli, Niccolò, *Discorsi sopra la prima deca di Tito Livio, Dell'arte della guerra e altre opere*, edited by Rinaldi, UTET, Milan, 2006. It is interesting to note that the democratic pattern recognized today was conceived as early as the 6th century BC, during the Roman Republic. M. N. S. Sellers provides a clear and precise analysis of the characteristics of Roman republican democracy in *Republican Legal Theory: The History, Constitution, and Purposes of Law in a Free State*, Palgrave Macmillan, New York, 2003:

> "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 a republican government, as articulated in the republican legal tradition derived from Rome, secures a government for the common good through the checks and balances of a mixed constitution, comprising a sovereign people, an elected executive, a deliberative 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 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 master."

For further details on the Roman Republic and its democratic model, see Cicero, *De Republica and De Legibus* (*On the Republic and the Laws*), 1986.

Democracies[105] require the following elements:
a) Separation of powers – Ensuring checks and balances within the government.
b) Respect for human rights – Protecting individual, collective, and minority rights.
c) Elections – Free, pluralistic, and periodic electoral processes.
d) Sovereign power – Represented by the people and composed of citizens, including free men and women with equal rights. The quality of a democracy (its governance) depends on the participation of its citizens and the degree of cohesion and inclusiveness within the system.
In contemporary democracies, it is crucial to consider the efficiency with which the community—through the participation of all actors—responds to the demands and needs of its citizens (governability). Reducing institutional and individual corruption is a fundamental principle, as corruption poses a significant threat to national sovereignty. Transparency in governance and the accountability of institutions and individuals are essential to the proper functioning of a democratic system.[106]
e) The rule of law and accountability – This requires the pursuit of justice and the avoidance of impunity. The rule of law is not merely a technical or procedural mechanism but part of a broader system of values, attitudes, and legal norms that establish a distinct 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 behavior to make it reasonable to think that law in fact does exercise such a restraining function."[107]

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[105] González Ibáñez, Joaquín, Ramadan, Hisham, and Raskin, J. B., "The Arab Garden and Ground Zero," in *Revista de Estudios Jurídicos, Económicos y Sociales* 6, Universidad Alfonso X el Sabio, 2008. Available at: http://www.uax.es/publicaciones/saberes.htm.
[106] See, for example, Transparency International's analysis of corruption and its impact on public education policies. This examination highlights the effects of corruption not only from an institutional perspective but also at the individual level. For more details, see Transparency International, "Our Work on Education." Accessed July 2012, http://www.transparency.org/whatwedo/activity/our_work_on_education.
[107] Reitz, John C., "Export of the Rule of Law," *Transnational Law and Contemporary Problems* 13, Fall 2003, pp. 429–36.

2.2.1.1. The New Concept of Democracy and Human Rights for China and Russia

Of the nearly two hundred states in the international community, only about seventy can be classified as democratic. This classification excludes states such as the Russian Federation, Morocco, Egypt, Cuba, and China.[108]

The rule of law is a cornerstone of democratic systems, though its implementation varies significantly. As observed, "the reality is that the existence of the rule of law is a 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."[109] This concept has inspired the World Justice Project to create a framework for evaluating the degree of adherence to the rule of law across 67 countries and various legal systems.[110] The project ranks countries—organized alphabetically, by income group, and by geographic region—based on eight key factors: 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 these factors takes a holistic approach, providing insight into the possibility of achieving effective and genuine democracy when a culture of the rule of law is actively cultivated and upheld.

Though not fully evident at the time, just two weeks before Russia's renewed aggression against Ukraine in 2022, Vladimir Putin and Xi Jinping declared that their nations had formed an "alliance of

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[108] See Central Intelligence Agency, *CIA World Factbook*, Virginia: CIA, 2014, https://www.cia.gov/library/publications/the-world-factbook/print/us.html. This account has not varied dramatically over the last seven years. Attention must be paid to the outcomes of the Arab Revolution process and whether these changes will inspire individuals to become active participants in their political systems.

[109] McCorquodale, Robert, "Business, Rule of Law and Human Rights," in *The Rule of Law in International and Comparative Context*, British Institute of International and Comparative Law, London, 2010.

[110] See the *Rule of Law Index*, produced by the World Justice Project, accessed at http://worldjusticeproject.org/rule-of-law-index.

autocracies." *The Washington Post* described this "new Axis"[111] as "a bid to make the world safe for dictatorship."[112]

According to Steven Lee Myers, *The Times*'s Beijing bureau chief, Russia and China avoid referring to themselves as "autocracies" and instead assert that they are democracies. Their joint statement declared: "Democracy is a universal human value, rather than a privilege of a limited number of states. It is only up to the people of the country to decide whether their state is a democratic one."[113]

At the core of their political message is a strategic assertion: China and Russia will not demand accountability or require their states or partners to respect human rights or uphold the rule of law as part of their political and legal systems. This approach provides an alternative model that reassures their allies. Kenneth Roth, former executive director of Human Rights Watch, argues that their main purpose is "to threaten the world's system for defending human rights"[114] and exemplifies the dangers of unchecked state power.

Xi Jinping and Vladimir Putin, by surrounding themselves with sycophants, suppressing dissent, and either invading or threatening neighboring countries, exemplify the perils of unchecked power. However, less attention has been paid to the significant threat both leaders pose to the global human rights system. For both, undermining this system's capacity to condemn their domestic crackdowns is seen as essential to maintaining their legitimacy.

> Each autocrat responds to public dissatisfaction—be it Putin's disastrous war in Ukraine or Xi's relentless zero-COVID lockdowns—by intensifying repression. Putin has jailed participants in protests that have erupted across

[111] Leonhardt, David, "A New Axis," *The New York Times*, February 9, 2022, https://www.nytimes.com/2022/02/09/briefing/china-russia-alliance.html.
[112] "Russia and China Announce a Bid to Make the World Safe for Dictatorship," *The Washington Post*, February 7, 2022, https://www.washingtonpost.com/opinions/2022/02/07/putin-xi-the-dictators-meet-at-olympics/.
[113] Leonhardt, David, "A New Axis," *The New York Times*, February 9, 2022.
[114] Roth, Kenneth, "How Putin and Xi Are Trying to Break Global Human Rights," *Foreign Policy*, October 27, 2022, https://foreignpolicy.com/2022/10/27/putin-xi-russia-china-human-rights-united-nations/.

> dozens of cities in Russia. Xi has silenced public critics nationwide while detaining over a million Uyghurs and other Turkic Muslims in Xinjiang, forcing them to abandon their religion, language, and culture. Facing mounting international condemnation, both leaders have mounted defenses. Though their approaches differ, each undermines the global human rights system through a combination of alternative narratives and direct attacks.[115]

According to Kenneth Roth, China and Russia pursue distinct strategies tailored to their national contexts and ongoing policies to address security and political issues. In China, Xi Jinping's approach focuses on two primary aspects: creating a unique definition of human rights specific to China and enforcing this through relentless control mechanisms. Xi argues that China faces a historical responsibility that necessitates a drastic reduction in the government's human rights obligations, as these might hinder its ability to improve living standards.

Under this framework, the nation and its collective goals take precedence over the individual, subordinating liberal concepts of individual rights to public objectives defined by the Communist Party. The notion of a police state becomes literal when considering the increasingly intrusive "Big Brother State" China is constructing. Politically, the prevailing narrative suggests that Chinese citizens accept the party's dictatorship as the price of stability and economic growth. In this system, the ends justify the means, even at the expense of denying social and cultural rights to minority groups such as the Uyghurs, Tibetans, Mongolians, and impoverished Han Chinese, as Roth highlights.

The lack of judicial remedies further underscores the dominance of the central government, which positions itself as both legislator and enforcer of human rights. At the same time, China's persistent efforts to undermine the United Nations Human Rights Council are evident, as the government consistently votes against initiatives aimed at monitoring or condemning human rights abuses.

In Putin's Russia, the transitional period following the fall of the Berlin Wall and the dismantling of the Soviet Union has moved the

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115 *Ibid.*

country further away from democratic institutions and a citizenry capable of exercising sovereign powers. Over the past decade, Putin's policies have revived a Cold War-era system of confrontation—not merely as rhetoric but as the practical realization of his vision for domestic order and control. Internationally, his strategies echo the imperial ambitions of the bipolar world of the 20th century, long believed to be relics of the past.

The instrumentalization of international law and the principles of the rule of law began anew with Russia's invasion of Ukrainian territory on February 22, 2022, mirroring the acts of aggression in 2014 and the subsequent annexation of the Crimean Peninsula.[116]

Putin's decisions regarding war and aggression over the past decade evoke a cartography of longed-for empires, built on the deliberate denial and disregard of victims. While his actions are often interpreted as an attempt to revisit the history of the 20th century, it may be more accurate to view this period as a return not to the Cold War but to the era immediately following World War I and the adoption of the Treaty of Versailles in 1919. That time of hardship and instability preceded the construction of the "spirit of Locarno" in 1925 and the pivotal 1929 Briand-Kellogg Pact, which sought to renounce war as an instrument of national policy—a vision referenced by Robert H. Jackson in his writings before and during the Nuremberg trials.[117]

Perhaps Russian historian Stephen Kotkin is correct in observing that Putin's behavior echoes 19th-century Russia, defined by the same conditions that characterized the Tsarist government of the time: autocratic leadership, repression, militarism, mistrust of Western interference, expansionist wars, and ambitious projects that exceed its own capabilities.[118]

Following the 2014 and 2022 invasions of Ukraine, Russia's stance on human rights and the rule of law has become unequivocally clear to

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[116] See Chapter 9, "Epilogue: The War in Ukraine and International Law."
[117] González Ibáñez, Joaquín, "Putin, el derecho internacional y la penicilina de Stalin," *El País*, April 7, 2022, https://elpais.com/babelia/2022-04-07/putin-el-derecho-internacional-y-la-penicilina-de-stalin.html.
[118] "Russia's Murky Future: A Conversation with Stephen Kotkin," *Foreign Affairs*, May 2, 2024, https://www.foreignaffairs.com/podcasts/russias-murky-future-stephen-kotkin.

most of the world, as reflected in the United Nations General Assembly Resolution adopted on October 12, 2022.[119]

> Putin has a harder time presenting a positive vision for his rule in U.N. circles and elsewhere outside Russia. Few people around the world wake up in the morning wishing they could live under a Russian kleptocratic autocracy. Putin trumpets supposedly traditional values by emphasizing family and religion, glorifying the nation, and attacking the cosmopolitanism and tolerance of Western elites. His nostalgic veneration of the supposed halcyon days of Russia's glorious past resonates with autocrats and their ilk, from former U.S. President Donald Trump to Hungarian Prime Minister Viktor Orban, who find Putin's narratives useful for attacking the status quo without detailing an alternative concrete political program. But what Putin stands for is unconvincing for people who value human rights and personal freedoms.[120]

The repression of the media and freedom of expression, combined with propaganda policies aimed at fostering divisiveness in the West,[121] reflects Russia's deliberate effort to craft its own version of the "truth" about the war in Ukraine.[122] The response from the United Nations

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[119] United Nations General Assembly, "Territorial Integrity of Ukraine: Defending the Principles of the Charter of the United Nations," A/RES/ES-11/4, October 12, 2022. Adopted with 143 votes in favor and 5 against, the resolution condemned the Russian Federation's annexation of four eastern Ukrainian regions.

[120] *Ibid.*, Roth.

[121] McCarthy, Tom, "How Russia Used Social Media to Divide Americans," *The Guardian*, October 14, 2017, https://www.theguardian.com/us-news/2017/oct/14/russia-us-politics-social-media-facebook.

[122] *Ibid.* Kenneth Roth comments on Bucha: "According to Russian state media, documented Russian war crimes in Bucha, Ukraine, were supposedly carried out by Ukrainian forces against their own people. The Kremlin would have us believe that there are no facts, just contestable opinions.

This information war undermines the idea that human rights violations can be discovered, documented, and condemned—which requires facts. But if there are no facts and everyone is bad, as the Kremlin's narrative implies, there should be no reason to bother with assessments under international human rights standards, let alone to

General Assembly has been resolute. Beyond adopting Resolution A/RES/ES-11/4 on October 12, 2022, the General Assembly also suspended Russia from the U.N. Human Rights Council[123] and established two distinct monitoring mechanisms: one to investigate war crimes in Ukraine[124] and another to address domestic repression within Russia.[125]

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direct special criticism at the Kremlin. Instead, we should just throw up our hands at the entire effort to uphold human rights.

The ploy may not be terribly persuasive to an objective observer, but it helps provide a rationale for pro-Kremlin partisans to maintain their loyalty. It is particularly useful for rallying votes in U.N. forums, where many governments benefit from Russian arms or military support, remember past Soviet support for their anticolonial fights, or embrace the Kremlin's view that the defense of human rights is Western imperial imposition."

[123] On April 7, 2022, the UN General Assembly adopted Resolution ES-11/3, suspending the Russian Federation's membership rights in the Human Rights Council. The resolution received a two-thirds majority of those voting, minus abstentions, in the 193-member Assembly, with 93 nations voting in favor and 24 against.

[124] A/HRC/RES/S-34/1, Resolution adopted by the Human Rights Council on May 12, 2022, *The Deteriorating Human Rights Situation in Ukraine Stemming from the Russian Aggression.*

The Office of the High Commissioner for Human Rights published the report "Human Rights Situation During the Russian Occupation of Territory of Ukraine and Its Aftermath, February 24, 2022 - December 24, 2023," on March 20, 2024. The report documented:

A systematic dismantling of fundamental rights and freedoms; cross-sector measures to stifle dissent; the subversion of Ukrainian systems of governance, administration, justice, and education; the imposition of Russian systems and legal frameworks; and the suppression of expressions of Ukrainian culture and identity, affecting every aspect of daily life for residents. The report then describes the human rights consequences of occupation in areas of Kharkov, Kherson, and Mykolaiv regions over which Ukraine regained control in late 2022, as well as the impact of prosecutions for "collaboration activities" by Ukraine.

During the first months of the occupation of Ukrainian territory in 2022, Russian armed forces carried out widespread arbitrary detention of civilians, often accompanied by torture and ill-treatment. Many cases also amounted to enforced disappearances. While Russian armed forces initially targeted individuals perceived as posing a security threat, over time a wider net was cast to include any person perceived to oppose the occupation. (*Human Rights Situation During the Russian Occupation of Territory of Ukraine and Its Aftermath*, p. 2). Available at: https://ukraine.ohchr.org/en/human-rights-situation-during-russian-occupation-territory-ukraine-and-its-aftermath-EN.

[125] A/HRC/RES/51/25, *Resolution Adopted by the Human Rights Council on 7 October 2022: Situation of Human Rights in the Russian Federation*.

Additionally, the International Criminal Court launched an investigation and subsequently indicted President Putin for allegedly committing acts of genocide.[126]

2.2.2. The Technical Concept of the Rule of Law

The concept of the rule of law is both specific and technical, yet its ultimate goal is straightforward: to create a legal system that empowers individuals and other actors by establishing limits on power. Law is perceived as imperative, as noted: "It seems natural to think of laws as commands. In doing so, however, we have already begun to theorize about the nature of law (…)."[127] Through the rule of law, societies codify their aspirations, embedding principles and values that uphold dignity, justice, respect, and security for all members of the community.

As such, the rule of law has been aptly described as "a cultural achievement of universal significance" and, perhaps, "the most important political ideal today."[128]

The rule of law is a system designed to impose limits and restraints on governments, ensuring they operate within the framework of the law.

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[126] On February 22, 2023, the Office of the Prosecutor submitted applications to Pre-Trial Chamber II of the International Criminal Court (ICC) for arrest warrants in the context of the situation in Ukraine. On March 17, 2023, the Pre-Trial Chamber issued arrest warrants for Mr. Vladimir Putin, President of the Russian Federation, and Ms. Maria Lvova-Belova, Commissioner for Children's Rights in the Office of the President of the Russian Federation.

Based on evidence collected and analyzed by the Office of the Prosecutor, the Pre-Trial Chamber confirmed reasonable grounds to believe that President Putin and Ms. Lvova-Belova bear criminal responsibility for the unlawful deportation and transfer of Ukrainian children from occupied areas of Ukraine to the Russian Federation. These actions are contrary to Article 8(2)(a)(vii) and Article 8(2)(b)(viii) of the Rome Statute. See "Situation in Ukraine: ICC Judges Issue Arrest Warrants Against Vladimir Vladimirovich Putin and Maria Lvova-Belova," International Criminal Court, https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[127] Lyons, David, *Ethics and the Rule of Law*, Cambridge University Press, Cambridge, 1993, p. 37.

[128] Tamanaha, B. Z., *On the Rule of Law*, Cambridge University Press, Cambridge, 2004, p. 1.

This framework embodies formal legality, reflecting both the sovereign's will and the aspiration for justice. The rule of law signifies governance by laws rather than by individuals, meaning that legal and political institutions provide a stable framework for policies over time, independent of personal or individual figures embodying the state.

Democracy, in this context, is a system of governance by laws rather than by individuals. In a democracy, the rule of law safeguards citizens' rights, maintains order, and limits governmental power. Consequently, all citizens are equal under the law, with no discrimination permitted on the basis of race, religion, ethnicity, or gender.[129]

Highlighting the importance of how we adopt law, the method by which it enters into force is equally significant—through the representation of the sovereign in a public, open, and contested manner; in other words, a democratic legislative process. Additionally, the law must meet a qualitative "threshold." As Anne Ramberg aptly observes:

> 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.[130]

This idea underscores the legitimacy of the democratic system and the pivotal role of the rule of law in that process. The international organization tasked with addressing crises such as the Syrian conflict, sanctioning perpetrators, and providing relief to victims was conceived during World War II, with its foundational treaty signed in June 1945, before the war's end. The United Nations, in its Preamble, declares its mission:

> … to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to

[129] *Ibid*., p. 141.

[130] Anne Ramberg, as quoted in T. Bingham, *The Rule of Law,* Allen Lane, Penguin Books, London, 2010, p. 171.

> 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.

More specifically, Article 3 of the UN Charter identifies as a principal 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, fifteen years after the fall of the Berlin Wall, Kofi Annan, then UN Secretary-General, placed the rule of law at the core of the organization's mission. He defined it as follows:

> It refers to 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 adjudicated, 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.[131]

Judge Tom Bingham, in a conference at the Centre for Public Law[132] at Oxford University, outlined eight principles that form the foundation of the concept of the rule of law:

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131 Secretary-General Kofi Annan, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, August 23, 2004, para. 6.

132 The Rt. Hon. Lord Bingham of Cornhill KG, *The Rule of Law*, presented at the House of Lords conference, November 16, 2006, full text transcript available at:

a) The law must be accessible and, as far as possible, intelligible, clear, and predictable.
b) Questions of legal right and liability should generally be resolved by application of the law, rather than by the exercise of discretion.
c) The law should apply equally to all, except where objective differences justify differential treatment.
d) The law must ensure adequate protection of fundamental human rights.
e) Effective means must be available to resolve *bona fide* civil disputes without prohibitive cost or unjustified delay.
f) Public officials and magistrates at all levels must exercise their powers reasonably, in good faith, for the purposes for which they were conferred, and within the limits of those powers.
g) Judicial and complementary procedures must be fair and independent.
h) States must comply with their international law obligations.

The rule of law describes a state of affairs in which the State successfully monopolizes the means of violence and where most people, most of the time, resolve disputes in a manner consistent with procedurally fair, neutral, and universally applicable rules. This process also adheres to fundamental human rights norms, such as the prohibition of racial, ethnic, religious, and gender discrimination, as well as the prohibition of torture, slavery, prolonged arbitrary detentions, and extrajudicial killings.

In today's globally interconnected world, the rule of law requires modern and effective legal institutions and codes. Equally, it demands a widely shared cultural and political commitment to the values underlying these institutions and codes.[133] The existence of an international society presupposes the existence of an international rule of law, which regulates

http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php. The paper was also published in T. Bingham, *The Rule of Law*, *Cambridge Law Journal* 67, 2007, p. 69.

133 Stromseth, Jane, Wippman, David, and Brooks, Rosa, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, Cambridge University Press, Cambridge, 2006, p. 78.

the mutual interactions of nations and the international contacts and relations of individuals through legal concepts, standards, institutions, and procedures.[134]

2.2.3. On Legitimacy and the Rule of Law

After World War I, Italian political scientist Guglielmo Ferrero described political legitimacy as the "invisible genius of the city."[135] According to Ferrero, the primary purpose of legitimacy is to provide justifications for government actions and to ensure that these justifications are peacefully accepted and recognized by the populace. Legitimacy allows governments to avoid reliance on coercion and violence to enforce their authority and directives.

This relationship between governments and citizens is founded on the recognition that certain individuals have a moral right to govern, while citizens, in turn, have a duty to obey. When rulers and the ruled agree on the principles underpinning this relationship, governments need not fear their subjects. Conversely, illegitimate governments—deprived of credibility, trust, and consent—must rely on violence and oppression to maintain control.

In democracies, this unique dynamic between public authority and citizens is distinguished by a relative absence of fear and coercion, fostering a system of governance based on trust and mutual recognition.

An apt illustration of how democratic states legitimize themselves by upholding the principles and ethical values enshrined in their legal

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134 Rhyner, Charles, opening statement before the Boston Conference on World Peace through Law, March 27, 1959, as quoted in Bingham, T., *The Rule of Law*, Allen Lane, Penguin Books, London, 2010, p. 111.

135 Ferrero, Guglielmo, *The Principles of Power: The Great Political Crises of History*, trans. Theodore R. Jaeckel, G.P. Putnam's Sons, New York, 1941, p. 40. Ferrero, a disciple of Cesare Lombroso, initially studied criminal anthropology before transitioning to historical and political theory. His works, such as his study of the Roman Republic, earned him recognition as one of Europe's leading intellectuals after World War I. President Theodore Roosevelt nominated Ferrero for the Nobel Prize in Literature. Ferrero's opposition to Mussolini forced him into exile in Switzerland. For additional context, see García López, Eloy, introduction to *Guillermo Ferrero, Los genios invisibles de la ciudad*, Tecnos, Madrid, 1998.

systems can be found in a well-known Latin American example. Ernesto Sábato's 1984 foreword to the Argentine National Commission on the Disappearance of Persons (C.O.N.A.D.E.P) report serves as a poignant reminder of this. Written in the aftermath of the Argentine dictatorship and its "Dirty War," the prologue reflects on the moral and legal imperatives of democratic governance. In this context, Dalla Chiesa is cited as an embodiment of the principles and values that democracies must steadfastly defend.[136]

Sábato recounts the story of General Carlo Alberto Dalla Chiesa, an esteemed public official of the Italian carabinieri, renowned for his campaign against the Red Brigades terrorist group (*Brigate Rosse*) during the 1970s in Italy. He also served as prefect of Palermo, tasked with quelling the violence of the Second Mafia War. In 1982, just three months after assuming command in Palermo, Dalla Chiesa was assassinated along with his wife and driver.

When Aldo Moro, President of the Christian Democrat Party (*Democrazia Cristiana*), was kidnapped in 1978 by the Red Brigades, Dalla Chiesa made a controversial yet principled statement. In response to a suggestion that torture should be used on a recently arrested Red Brigade terrorist, he declared: "Italy can survive the loss of Aldo Moro. It would not survive the introduction of torture."[137] His unwavering commitment to the rule of law left a lasting legacy.

2.3. The Debated Definition of International Rule of Law

At the United Nations World Summit in 2005, Member States unanimously recognized the importance of "universal adherence to and implementation of the rule of law at both the national and international levels" and reaffirmed their commitment to "an international order based on the rule of law and international law."

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[136] Sábato, Ernesto, prologue to *Nunca Más: Report of the Argentine National Commission on the Disappearance of Persons* (CONADEP), 1984. Available at: http://web.archive.org/web/20031013222809/http://nuncamas.org/english/library/images/linea350.gif and http://www.desaparecidos.org.

[137] See *Il generale nel suo laberinto*, *La Repubblica*, Rome, September 4, 1982. Available at: http://www.repubblica.it/online/album/ottantadue/bocca/bocca.html

In 2008, Simon Chesterman observed that "it would not be very difficult to show that the phrase 'the rule of law' has become meaningless thanks to ideological abuse and general over-use."[138] He further argued that "[a]t the international level anything resembling even this limited idea of the rule of law remains an aspiration."[139] Chesterman highlights the ambiguity inherent in the term *international rule of law*, describing it as "a blanket term … that appears to be overused, of limited analytic or descriptive value, and potentially distorting."[140]

Professor Martti Koskenniemi provided an interpretation of the role of the rule of law as an operational instrument, portraying it as a framework that accounts for the "gentle civilizers" of our time—jurists who "took it upon themselves to explain international affairs in the image of the domestic State, governed by the rule of law."[141]
He elaborates:

> That law is an effect of lawyers' imagination is nowhere clearer than in the development of international law from

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[138] Chesterman, Simon, "An International Rule of Law?", *New York University School of Law, Public Law & Legal Theory Research Paper Series*, working paper no. 08-11, April 2008, p. 2, http://ssrn.com/abstract=1081738.
[139] Chesterman, Simon, "An International Rule of Law?", in *American Journal of Comparative Law* 56, no. 2, 2008, p. 361, cited in Arajärvi, Noora, "The Core Requirements of the International Rule of Law in the Practice of States," *Hague Journal on the Rule of Law* 13, 2021, p. 174.
[140] *Ibid*., p. 361.
[141] Koskenniemi, Martti, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2001, pp. 3, 361. Koskenniemi notes, "Many of the political objectives of the first modern international lawyers—the men who set up the *Institut de droit international* in 1873—were sooner or later realized in their domestic societies: general suffrage, social welfare legislation, rule of law. Support for international institutions and advancing the international rule of law became defining attributes of a new multilateral diplomacy, however much 'idealist' and 'realist' accounts might have disagreed about their centrality to the conduct of foreign policy. But many large objectives proved to be unrealizable—global federalism, peace, universal human rights—while some turned out to have consequences that were the exact opposite of the lawyers' expectations: the projection of Western sovereignty in the colonies is the most conspicuous example. What was distinctive about the internationalist sensibility was not only its reformist political bent but its conviction that international reform could be derived from deep insights about society, history, human nature or developmental laws of an international and institutional modernity."

> isolated diplomatic practices of the nineteenth century into a legal order some time early in the twentieth. Professional jurists took upon themselves to explain international affairs in the image of the domestic State, governed by the rule of law. For that purpose, they interpreted diplomatic treaties as legislation, developed a wide and elastic doctrine of customary law, and described the State as an order of competences, allocated to the State by a legal order.[142]

Koskenniemi identified jurists and academics, such as Hersch Lauterpacht, as interpreters and catalysts of this new interpretation of international law:

> Lauterpacht is able to attack voluntarist positivism on its own terrain of scientific factuality without having to resort to the moralizing rhetoric of naturalism or the formalism of the pure theory of law. The same terrain enables him to set up a "progressive" political program that puts the individual into the center and views the State as a pure instrumentality. Behind nationalism and diplomacy, the world remains a community of individuals, and the rule of law is nothing else than the state of peace among them: "Peace is pre-eminently a legal postulate. Juridically, it is a metaphor for the postulate of the unity of the legal system."[143]

According to this narrative, Richard Collins argues that the rule of law is embedded within a decentralized institutional architecture of international law, shaped by "the realities of an international system in which power and strategic interest" frequently undermine international obligations.[144] Over the past two decades, the United Nations has reaffirmed its commitment to "an international order based on the rule of

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[142] *Ibid.*, p. 361.
[143] *Ibid., p. 365. See Lauterpacht, Hersch, The Function of Law in the International Community, Oxford: Clarendon, 1933, p. 438*.
[144] Collins, Richard, "Two Idea(l)s of the International Rule of Law," *Global Constitutionalism* 8, no. 2, Cambridge University Press, 2019, p. 192.

law," recognizing it as one of the "indispensable foundations for a more peaceful, prosperous and just world."[145]

In democracies, as Marcus Raskin put it, we take for granted that the rule of law is "the operational system of democracies," or, as Tom Bingham described, "the soul of democracy." However, "even in its domestic application, the rule of law is a notoriously imprecise and somewhat amorphous concept, and such malleability is only likely further compounded by the uncertainty as to how the concept adapts to the international environment."[146] As Noora Arajärvi has emphasized, the international rule of law finds its normative foundation in the UN framework:

> The Preamble of the Charter expresses the determination of the founding Members of the Organization 'to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'. In the UN instruments, the term 'rule of law' first appeared in the Universal Declaration of Human Rights of 1948, the preamble recognising '… human rights should be protected by the rule of law …'.[147]

Professor Araceli Mangas Martín identifies the concept of the "international rule of law" as a "concept of synthesis." It is grounded in the binding nature of the fundamental rules of coexistence and corresponds with the principle of *pacta sunt servanda* at the international level—a universal obligation to respect general and conventional international law, and, in particular, the norms of *jus cogens*, which align with the same idea found in domestic legal systems: they establish legal obligations independent of the will of the parties. While there are dispositive voluntary obligations, which depend on the will of the

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145 UN General Assembly, Res. 67/1, "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels," November 30, 2012, para. 1, https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf.
146 *Ibid.*, Collins, p. 193.
147 Arajärvi, Noora, "The Core Requirements of the International Rule of Law in the Practice of States," *Hague Journal on the Rule of Law* 13, 2021, p. 179.

contracting parties, *jus cogens* norms are peremptory obligations imposed externally.

A shared notion of international public policy underpins this framework, ensuring that *jus cogens* rules cannot be derogated by agreements between subjects of international law.

The structural principles of international law outlined in Article 2 serve as an essential guide for any state governed by the rule of law. These principles include respect for the sovereign equality of all states, territorial integrity, and political independence; refraining from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations; settlement of disputes by peaceful means; the right to self-determination for peoples under colonial domination or foreign occupation; non-interference in internal affairs; respect for human rights and fundamental freedoms; equality without distinction based on race, sex, language, or religion; international cooperation to address economic, social, cultural, or humanitarian issues; and the fulfillment in good faith of obligations assumed under the UN Charter.[148]

> The recognition of the existence of obligations between States beyond the bonds born of international conventions is the great contribution of the second half of the 20th century to international relations. This makes possible a principle of submission to international law, as advocated by Francisco de Vitoria, with an international community entitled to rights and obligations outside the specific conventional bonds. The recognition of obligations *erga omnes* and the existence of obligations outside treaty or international custom provides the basis for a consistent concept of the ´rule of international law´. It must be recognized that by being part of international law the

[148] Mangas Martín, Araceli, and Muñoz Machado, Santiago, *Humanización, democracia y estado de derecho en el ordenamiento internacional: Discurso de recepción de la académica de número Araceli Mangas Martín; y contestación por el académico de número Santiago Muñoz Machado*, Real Academia de Ciencias Morales y Políticas, Madrid, 2014. Available at: https://racmyp.es/academicos/araceli-mangas-martin/, p. 167.

> notion of *jus cogens* has clearly contributed to the idea of subjection to international law of the contemporary State.[149]

Jus cogens norms impose obligations *erga omnes* on states, addressing the international community as a whole, as emphasized by the International Court of Justice in the Barcelona Traction case.[150] International law is not solely founded on the will of states; rather, it includes norms that prevail unconditionally.[151] The ultimate objective is to ensure security and stability while reducing the scope of discretionary action beyond the *erga omnes* obligations applicable to all international legal actors.

Robert McCorquodale succinctly outlines the objectives of the international rule of law: "to uphold legal order and stability, to provide equality of application of the law, to enable access to justice for human rights, and to settle disputes before an independent legal body."[152]

A joint reading of the purposes and principles set forth in Articles 1 and 2 of the Charter of San Francisco, in conjunction with General Assembly Resolution 2625 (XXV)—*Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* (1970)—emphasizes that the principles

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[149] *Ibid.*, p. 173.

[150] International Court of Justice, *The Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain), Judgment of February 5, 1970, paras. 33–34. Available at: https://www.icj-cij.org/sites/default/files/case-related/50/050-19700205-JUD-01-00-EN.pdf. Notably, the ICJ highlights: "In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character."

[151] *Ibid.*, p. 177.

[152] McCorquodale, R., "Defining the International Rule of Law: Defying Gravity," *International and Comparative Law Quarterly* 65, no. 2, 2016, pp. 277, 303–304.

contained therein constitute fundamental tenets of international law that States are obligated to observe in their conduct. At the heart of the United Nations' mission is the core principle that the power of States must be subject to the rule of law as a means of guaranteeing the organization's purposes.[153]

At the United Nations, the international rule of law operates within a hierarchical system established by the United Nations Charter. Article 103 states: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." This provision underscores the supremacy of the Charter over other international agreements among Member States, specifically concerning treaty norms, without affecting customary international law.[154]

Contemporarily, UN institutions such as the Security Council and the International Court of Justice, along with all other organs, agencies, and bodies, are bound by the limited scope of competences, remedies, and jurisdiction set forth in the Charter, as part of the rule of law governing the organization.[155]

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153 Villegas Delgado, César A., "El Estado de derecho en el ámbito internacional y el imperio de la ley en las relaciones internacionales: tendencias, retos y desafíos" (The Rule of Law at International Level and the International Rule of Law: Trends and Challenges), *Revista Electrónica de Estudios Internacionales* 33, 2017, p. 5. Available at: http://www.reei.org/index.php/revista/num33/articulos/estado-derecho-ambito-internacional-imperio-ley-relaciones-internacionales-tendencias-retos-desafios.

154 Lamm, Vanda, "Some Thoughts on the Rule of Law in the International Law," *Kyiv-Mohyla Law and Politics Journal*, 2010, p. 297. Available at: http://dspace.nbuv.gov.ua/bitstream/handle/123456789/23516/74-Lamm.pdf.

155 See the separate opinion of Judge ad hoc Elihu Lauterpacht submitted in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice (ICJ).

Lauterpacht argued that while the ICJ possesses judicial review authority, it lacks the capacity to substitute its discretion for that of the Security Council in determining threats to peace or acts of aggression. However, as the principal judicial organ of the United Nations, the ICJ is bound to ensure adherence to the rule of law within the UN system.

See Lauterpacht, Hersch, *The Function of Law in the International Community*, Oxford: Clarendon Press, 1933, pp. 399–400, cited by Lamm, Vanda, p. 41.

The international rule of law pursues objectives that extend beyond merely limiting the arbitrary use of power; it seeks "to regulate relations—whether or not consisting of the exercise of authority—between actors."[156]

The debate surrounding the rule of law as both a legal concept and a political idea was reflected in discussions at the United Nations, which highlighted "the pendulum between the 'thin' and the 'thick' definitions." The legal concept emphasizes non-arbitrariness, a core element of the international rule of law, along with procedural and legal transparency.[157]

Paradoxically, as Professor Juan Antonio Carrillo Salcedo observed, the greatest challenge to the rule of law in international relations—and even to peace and security—does not stem from radical terrorist organizations themselves but rather from the responses of certain states to the acts committed by such organizations. These responses, which often adopt the terrorists' own logic, undermine the principles of law and deny the very existence of the rule of law. A practical illustration of this disregard for the rule of law can be seen in the Russian Federation's acts of aggression against Chechnya in 1994 and Ukraine in 2022, as well as in accusations of war crimes and genocide against Israel in 2023 and 2024, stemming from military operations carried out as a legitimate and legal response to the heinous terrorist attacks of October 7, 2023, and subsequent Hezbollah attacks from Lebanese territory.[158]

As mentioned in Chapter 1, from a political and institutional perspective, UN Secretary-General Kofi Annan, in 2004, defined the rule of law as a principle of governance under 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, in a manner consistent with international human rights norms and standards. The rule of law also requires measures to ensure adherence to its fundamental principles: supremacy of law,

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See also Koskenniemi, Martti, *The Gentle Civilizer of Nations*, Cambridge University Press, Cambridge, 2001, pp. 353–411.

156 Arajärvi, Noora, "The Core Requirements of the International Rule of Law in the Practice of States," *Hague Journal on the Rule of Law* 13, 2021, p. 177.

157 *Ibid.*, p. 179.

158 Carrillo Salcedo, José Antonio, "Terrorism and General Principles of International Law," in *International Legal Dimension of Terrorism*, edited by P. A. Fernández Sánchez, Martinus Nijhoff, Leiden, 2009, p. 11.

equality before the law, accountability to the law, fairness in its application, separation of powers, participation in decision-making, and legal certainty.[159]

Yu Reminskaya highlights the absence of a unified approach to the concept of the international rule of law, observing that it is "more easily invoked than understood." While its fundamental importance is widely acknowledged and often taken for granted, it lacks a clear and universally identifiable definition.[160]

Kenneth J. Keith, a judge of the International Court of Justice, has identified three essential elements of the international rule of law, derived from international legal practice:

1. The need for clarity and certainty;
2. The principle of equality before the law;
3. Compliance with the law and the availability of independent and impartial courts and tribunals with compulsory jurisdiction to resolve disputes and ensure adherence to international law.[161]

The effectiveness of the international rule of law hinges on its core requirements: non-arbitrariness, consistency, and predictability. Chesterman highlights the importance of maintaining clarity, noting that

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[159] Report of UN Secretary-General Kofi Annan to the Security Council, S/2004/16, August 23, 2004, para. 6.

[160] Reminskaya, Yu, "Reconceptualization of the International Rule of Law," *Taras Shevchenko National University of Kyiv, Theory of Law and State Department*, 2017, pp. 29–32. According to Reminskaya, the international rule of law "as a legal phenomenon could be described as:
a) a characteristic of the relations between States as members of the international community;
b) a founding principle of most international organizations;
c) a powerful tool not only for human rights protection but also for their effective promotion;
d) an international standard;
e) a development strategy; and
f) a tool of interpretation of international sources of law." p. 32. Available at: https://constitutionalist.com.ua/wp-content/uploads/2020/10/RECONCEPTUALIZATION_OF_THE_INTERNATIONAL.pdf.

[161] Keith, Kenneth J., "The International Rule of Law," *Leiden Journal of International Law* 28, no. 3, 2015, p. 408.

"the price of clarity is abandoning the additional role that the rule of law sometimes plays as a Trojan horse to import other political goals such as democracy, human rights, and specific economic policies."[162]

The international rule of law can also be associated with a legal system that acts as a *guardian of justice*[163] and establishes the legal conditions necessary to "avoid injustice."[164] The Millennium Declaration, adopted by the UN General Assembly at the level of heads of state and government on September 8, 2000, identified new fundamental values essential to international relations in the twenty-first century and translated them into actionable goals.[165]

Goal V, *Human Rights, Democracy, and Good Governance*, and Goal VIII, *Strengthening the United Nations*, outline specific actions to "promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development," and to "strengthen the International Court of Justice in order to ensure justice and the rule of law in international affairs." The Declaration further underscores that "the United Nations is the indispensable common house of the entire human

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[162] Chesterman, Simon, "An International Rule of Law?", p. 38.

[163] Garcia-Salmones, Mónica, "The Ethos of the Rule of Law in the International Legal Discourse: Portrait of an Outsider," *International Community Law Review* 10, 2008, p. 36. Available at: www.brill.nl/icdr.

[164] Palombella, Gianluigi, "The Rule of Law in Global Governance: Its Normative Construction, Function and Import," *Institute for International Law and Justice Colloquium*, New York University School of Law, 2010, p. 104. Palombella writes: "Thus, returning to the Rule of Law ideal, it might be understood from the foregoing that it does not suggest one conception of some 'perfect justice' but entails legal conditions for 'avoiding injustice,' or preventing a single idea of the 'good' from being imposed without scrutiny at the expense of the right: a relevant issue where at stake are a plurality of concerns, inter-legalities confrontations, different peoples, regimes, agents, constituencies, addressees. Beyond accountability for a defined task, avoiding injustice from one-sidedness and domination includes considering as far as possible that there are 'wholes' beyond fragments, and in principle this has to do with the notion of responsibility." Available at: https://ssrn.com/abstract=1561289.

[165] Corell, Hans, "Towards the Rule of Law in International Relations," *American Society of International Law*, 2001, p. 265. Available at: https://www.un.org/law/counsel/english/asil_6apr01_final.pdf.

family, through which we will seek to realize our universal aspirations for peace, cooperation, and development."[166]

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[166] See A/RES/55/2, *United Nations Millennium Declaration Goals*, September 18, 2000. Goal V: Human Rights, Democracy, and Good Governance states:

24. We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.

25. We resolve therefore:

- To respect fully and uphold the Universal Declaration of Human Rights.
- To strive for the full protection and promotion in all our countries of civil, political, economic, social, and cultural rights for all.
- To strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights.
- To combat all forms of violence against women and to implement the Convention on the Elimination of All Forms of Discrimination against Women.
- To take measures to ensure respect for and protection of the human rights of migrants, migrant workers, and their families, to eliminate the increasing acts of racism and xenophobia in many societies and to promote greater harmony and tolerance in all societies.
- To work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries.
- To ensure the freedom of the media to perform their essential role and the right of the public to have access to information."

Goal VIII: Strengthening the United Nations reads:

"29. We will spare no effort to make the United Nations a more effective instrument for pursuing all of these priorities: the fight for development for all the peoples of the world, the fight against poverty, ignorance, and disease; the fight against injustice; the fight against violence, terror, and crime; and the fight against the degradation and destruction of our common environment.

30. We resolve therefore:

- To reaffirm the central position of the General Assembly as the chief deliberative, policy-making, and representative organ of the United Nations, and to enable it to play that role effectively.
- To intensify our efforts to achieve a comprehensive reform of the Security Council in all its aspects.
- To strengthen further the Economic and Social Council, building on its recent achievements, to help it fulfill the role ascribed to it in the Charter.
- To strengthen the International Court of Justice in order to ensure justice and the rule of law in international affairs.
- To encourage regular consultations and coordination among the principal organs of the United Nations in pursuit of their functions.
- To ensure that the Organization is provided on a timely and predictable basis with the resources it needs to carry out its mandates.

In 2015, the UN General Assembly approved a revised framework for addressing the challenges and needs of the international community, replacing the Millennium Development Goals with the United Nations Sustainable Development Goals (Agenda 2030).[167] Goal 16, *Peace, Justice, and Strong Institutions*, underscores the instrumental role of the rule of law in achieving peaceful and sustainable communities.

As described in the 2016 UNDP *Annual Report on The Rule of Law and Human Rights*, Sustainable Development Goal 16 (SDG 16)—focused on peaceful, just, and inclusive societies—"ushers in a new kind of development: one where people could influence the decisions that affect

- To urge the Secretariat to make the best use of those resources, in accordance with clear rules and procedures agreed by the General Assembly, in the interests of all Member States, by adopting the best management practices and technologies available and by concentrating on those tasks that reflect the agreed priorities of Member States.
- To promote adherence to the Convention on the Safety of United Nations and Associated Personnel.
- To ensure greater policy coherence and better cooperation between the United Nations, its agencies, the Bretton Woods Institutions, and the World Trade Organization, as well as other multilateral bodies, with a view to achieving a fully coordinated approach to the problems of peace and development.
- To strengthen further cooperation between the United Nations and national parliaments through their world organization, the Inter-Parliamentary Union, in various fields, including peace and security, economic and social development, international law and human rights, and democracy and gender issues.
- To give greater opportunities to the private sector, non-governmental organizations, and civil society in general, to contribute to the realization of the Organization's goals and programs.

31. We request the General Assembly to review on a regular basis the progress made in implementing the provisions of this Declaration, and ask the Secretary-General to issue periodic reports for consideration by the General Assembly and as a basis for further action.

32. We solemnly reaffirm, on this historic occasion, that the United Nations is the indispensable common house of the entire human family, through which we will seek to realize our universal aspirations for peace, cooperation, and development. We therefore pledge our unstinting support for these common objectives and our determination to achieve them.

For further details, see https://www.un.org/en/development/devagenda/millennium.shtml.

[167] A/RES/70/1, *Transforming Our World: The 2030 Agenda for Sustainable Development*, September 25, 2015.

their lives and create communities that thrive."[168] SDG 16 highlights the critical role of governance and the rule of law in fostering peaceful, just, and inclusive societies and ensuring sustainable development.

2.3.1. International Rule of Law: A Work in Progress

It is often assumed that clear international standards already exist for addressing atrocities such as those committed in Syria, Myanmar, Ukraine, and other conflict zones around the globe. However, as Professor Robert Goldman has observed, in cases of the gravest human rights violations, achieving justice requires not only focusing on the ultimate goal but also ensuring that the means employed to achieve it carry equal significance.[169] Such abuses of power—whether by states or non-state actors—are reshaping the global landscape of discontent, as Dominique Moïsi describes in *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope Are Reshaping the World*.[170] According to Moïsi, the legitimacy and justice of the international rule of law are being undermined by a pervasive lack of credibility in addressing both national and international conflicts.

No democratic policy can be sustainable without an active commitment to international human rights treaties and International Humanitarian Law. These principles should not be dismissed as mere "soft law" but rather embraced as integral components of binding legal

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[168] United Nations Development Programme (UNDP), *Global Programme on Strengthening the Rule of Law and Human Rights for Sustaining Peace and Fostering Development: 2016 Annual Report,* UNDP, New York, 2017. Available at: https://www.undp.org/publications/rule-law-annual-report-2016.

[169] Prof. Robert Goldman of WCL-American University commented on the United States' breach of the rule of law through the ad hoc criminal system created in 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 Acharya, Sally, "Law Professor Defends Human Rights," *American Weekly*, March 22, 2005.

[170] Moisi, Dominique, *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope Are Reshaping the World*, Doubleday, New York, 2009.

frameworks. The rule of law, accountability, and human rights constitute the heart, mind, and soul of democratic systems.

Given that some of the most heinous episodes in modern history—colonialism, the First World War, the Second World War, and the Holocaust—originated in Europe, it is imperative to recognize that strengthening democratic systems depends on upholding international law as a binding limit to safeguard individual dignity.

I often wonder, both as a citizen and as a professor of law, whether our responsibility is always to strive for the improvement of the human condition and whether law remains an effective and necessary means to achieve that end. True progress is reflected in the real and meaningful enjoyment of rights, particularly for the most vulnerable.

In Europe—and especially in my own country, Spain, with its limited history of stable democratic periods over the past 100 years—the fight for liberty and dignity begins with preserving the culture, principles, rights, and duties that have enabled progress in Western society. Since the Enlightenment and the American and French Revolutions, this system has been grounded in the rule of law and the protection of individual and public liberties.

By deepening our commitment to these values and principles, we can reinforce and legitimize democratic systems. Similarly, international cooperation can be strengthened through the effective implementation of a more consistent international rule of law. Any deviation from this course threatens not only the realization of citizenship for all but also the very foundations of our political and legal systems.

Since the Enlightenment, Europeans have harbored an irrational sense of optimism and a steadfast faith in progress. Education fostered a belief in the possibility of transforming society and creating a fairer world with fewer inequalities. This sense of progress was celebrated—roughly a century after the French Revolution—by intellectuals of the Second Spanish Republic, which existed prior to the Spanish Civil War of 1936. Among these thinkers was the poet Antonio Machado, whose verse *Hoy es siempre todavía* encapsulated the spirit of Enlightenment ideals and self-determination.[171]

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[171] Machado, Antonio, *Proverbios y Cantares*, dedicated to José Ortega y Gasset, *Revista de Occidente*, no. III, September 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

The rule of law is central to the Enlightenment project, serving as a system that ensures certainty, legal enforcement, and the practical application of both international and domestic law. However, this system is "enlightened" by several elements that fundamentally distinguish democratic regimes from authoritarian ones. At its core, the rule of law is rooted in an ethical commitment to the pursuit of justice.

2.3.2. International Rule of Law, Accountability, and Victims of International Crimes

Nevertheless, I feel the absence of a strong commitment to the aspiration of justice and the principle of non-impunity, particularly in the aftermath of grave human rights violations, such as those referenced earlier in various regions of the world. The maxim *Fiat justitia, et pereat mundus* ("Let justice be done, though the world perish") is not, at least initially, a feasible or realistic approach for countries and communities undergoing transitional processes.

> Accountability processes clearly are having a positive impact in a number of societies, but the effects of these efforts on domestic rule of law have been mixed, complex, and often unclear, and more (…) Whether accountability processes have helped to strengthen the rule of law domestically, depends… on their demonstration effects and their capacity-building impact.[172]

The current international rule of law encompasses a set of moral standards guided by conscience and reason, striving to balance justice with injustice—what is right against what is wrong. These values and principles underscore the critical role of law schools in democratic countries, which

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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*, edited by Gustavo Ibáñez, Gustavo Ibáñez Ediciones Jurídicas, Bogotá, 2009, p. 424.

[172] Stromseth, Jane, Wippman, David, and Brooks, Rosa, *Can Might Make Rights? Building the Rule of Law After Military Interventions*, Cambridge University Press, Cambridge, 2006, p. 307.

bear the responsibility of instilling in students the conviction that the rule of law is one of humanity's greatest achievements. Progress in democracy reflects the expansion of freedom and the empowerment of individuals, particularly those who are weak or vulnerable.

No political or historical commitment in society holds greater significance than the pursuit of justice. In the aftermath of the fall of the Berlin Wall, "those wise restraints that make mankind free" compel us to reaffirm the inherent value of human rights, as articulated in the Preamble to the United Nations Charter:

> …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 uphold these standards has contributed to the humanitarian crises and war crimes in Syria and Ukraine. History demonstrates that, in the absence of a legal system to govern relations and ensure security, accountability, and mutual rights and obligations, cycles of revenge, injustice, inequality, and persistent unrest prevail.

Governments that disregard the intrinsic value of human life inevitably undermine their own dignity. It is essential to remain vigilant, ensuring that one's actions reflect respect for the value of others' lives rather than contempt.

Several months before the 1945 London Conference—where the Charter of the Military Tribunals was adopted, establishing the legal framework for the Nuremberg Trials—the international legalist approach advocated by Henry Stimson prevailed within the Truman Administration over Henry Morgenthau's vision of "victors' justice." Morgenthau aptly observed that "the respect which the people of the world have for international law is in direct proportion to its ability to meet their needs."[173] This principle underscores the idea that nations which fail to

[173] Morgenthau to Truman, May 29, 1945, Morgenthau Diary, vol. 2, pp. 1544–45, cited in Bass, Gary J., *Stay the Hand of Vengeance*.

respect international law and view themselves as unaccountable will face rejection and disapproval from those who voluntarily adhere to the constraints of international law. Such adherence reflects an expectation that the law will provide justice, security, and dignity—a system designed to address the fundamental needs of peace, security, and human rights.

The international rule of law—specifically international human rights law—represents the international community's effort to realize an ethical and moral aspiration. It reaffirms that the advancement and exercise of human rights symbolize one of the most significant forms of progress in the human condition. This is particularly true because progress in the human condition requires ensuring access to rights for vulnerable and excluded groups, including women, children, indigenous peoples, the poor and marginalized, minorities, and, above all, victims. Human rights are fundamentally *the rights of others* and embody a profound commitment to the cause of justice.[174]

In February 1945, Primo Levi, a Jewish Italian citizen, stricken by hunger and illness, described seeing from the windows of the sick bay in Auschwitz the shadow of a rider entering the extermination camp (*Vernichtungslager*).[175] The rider, wearing a soldier's cap adorned with the Soviet Army's red cross, was on his way to liberate the prisoners. Sixty years later, in February 2005, the heads of European governments from nations involved in World War II proclaimed "Never Again!" and emphasized the need to strengthen democracy, civil society, and respect for human rights.[176]

Yet here we are in 2025, once again proclaiming "Never Again!"—this time in Syria, Ukraine, the Gaza strip and other conflict zones. But what is happening today? What purpose does our international legal

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[174] González Ibáñez, Joaquín, "Legal Pedagogy, the Rule of Law and Human Rights: The Professor, the Magistrate's Robe and Miguel de Unamuno," in *Journal of Human Rights Law* 6, no. 1, November 2012. Available at: http://www.americanstudents.us/journals/ijhrl/.

[175] Levi, Primo, *Se questo è un uomo–La tregua* (If This Is a Man–The Truce), Einaudi, 1950.

[176] 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, edited by Gustavo Ibáñez, Gustavo Ibáñez Ediciones Jurídicas, Bogota, 2009, p. 405.

machinery serve, and what has it achieved for the victims? How do we hold all actors—states, private individuals, international organizations, and others—accountable?

Brian Z. Tamanaha, in his work *On the Rule of Law*, emphasizes that these questions have been perennial dilemmas for humanity. He argues that, behind injustice, there exists a continuous and positive process of refining and enhancing the effectiveness of responses to injustice: the answer lies in restoring the rule of law and making it more relevant and efficient in meeting humanity's aspirations.

Preventing government tyranny has been a persistent concern since ancient Athens, throughout the Medieval Period, and remains a universal issue today. While the nature of these limitations varies across societies, cultures, and political and economic systems, the necessity of imposing limits on government authority remains timeless. The rule of law, in this context, represents a significant contribution to human progress, offering a fundamental solution to this enduring need.[177]

John Ruskin perceived human action as a generator of a legacy known as civilization—a legacy measurable through its words, deeds, and arts. The law we apply today, embodying these three elements, will likewise serve as our legacy, reflecting either civility or inequality. The state of our legal system in 2024 is pivotal in shaping how future generations will interpret and evaluate our civilization.[178]

However, the rule of law remains a guiding principle in the pursuit of justice, emphasizing the need to address injustice and combat impunity. Edmond Cahn, in his work *The Sense of Injustice*, interprets this as an essential aspect of human progress: "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."[179] When confronted with injustice, the response "is a biological reaction combining both reason and empathy

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[177] Tamanaha, B. Z., *On the Rule of Law*, Cambridge University Press, Cambridge, 2004, p. 139.

[178] González Ibáñez, 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* 6, no. 1, November 2012. Available at: http://www.americanstudents.us/journals/ijhrl/.

[179] Cahn, Edmond, *The Sense of Injustice*, New York: NYU Press, 1964, quoted in Clarke, Kamari M., and Goodale, Mark, *Mirrors of Justice*, Cambridge University Press, Cambridge, 2010, p. 322.

on the projection of one's self onto others."[180] The sense of injustice thus forms the foundation of law. Heraclitus encapsulated this idea, stating, "Were there no justice, men would never have known the name of justice."

This brings us back to a fundamental issue: justice and human rights are always about *the rights of others*. Empathy, therefore, lies at the heart of this process, where the anthropocentric view of law serves as the inner framework of international law—especially in addressing the most heinous crimes.

We must remind ourselves that perhaps the most compelling justification for maintaining the legitimacy of the international community lies in its commitment to prioritizing the interests of victims and the vulnerable. It is important to recall that the current era of international human rights law underwent a profound transformation following the fall of the Berlin Wall and the adoption of the Vienna Declaration and Programme of Action by the United Nations. This shift occurred precisely because victims—those most vulnerable and marginalized—have become the focal point of the legal framework.

The British judge Tom Bingham articulated this idea succinctly when he wrote: "it seems to me that observance of the rule of law is the nearest we can get to a universal secular religion."[181] The rule of law, justice, and commitment are inextricably linked to our legal and moral obligations. The international rule of law has become a cornerstone for democratic societies striving to build a more just and inclusive global community. It plays an essential role in achieving development goals, creating a framework where rights and opportunities can coexist. The rule of law symbolizes a pursuit of dignity, despite its inherent tensions, and remains one of the foundational pillars of democracy.

I often wonder whether the international rule of law will ultimately become a cultural achievement of universal significance. Reflecting on Judge Bingham's metaphor of the rule of law as a "universal secular religion," it seems we have not yet surpassed the "liturgical moment" embodied in a simple yet profound statement delivered during the second

[180] Clarke, Kamari M., and Goodale, Mark, *Mirrors of Justice*, Cambridge University Press, Cambridge, 2010, p. 322.
[181] Bingham, Tom, *The Rule of Law*, Allen Lane Penguin Books, London, 2010, p. 174.

day of the Nuremberg Trials in 1945. Robert H. Jackson, the American Chief Prosecutor, expressed the gravity of the occasion with these words:

> 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 (…)".[182] "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.[183]

Will our tribute to Law be expressed through a refusal to remain indifferent in the face of injustice, by preserving our collective memory, and by honoring the victims of conflicts through robust international legal protection? Will it be reflected in our commitment to strengthening the international rule of law and developing the necessary policies to combat impunity? Could this become the legal and ethical threshold of dignity?

Classical works are defined as creations by human beings that transcend time, place, or cultural background, remaining ever relevant as part of the human experience. In the context of victims, the literature of Primo Levi and Elie Wiesel serves as perennial echoes—resonating with both the past and the future—and reminding us of our enduring commitment to the victims of all conflicts.

Our defeat will become reality if, in the face of crimes in Syria, Ukraine, Gaza, Lebanon, and elsewhere, indifference and oblivion prevail in the months and years to come. The term *Kaputt* is often used to describe something broken, shattered, or ruined. Yet, we unconsciously regard the

[182] Bass, Gary J., *Stay the Hand of Vengeance*, Princeton University Press, Princeton, 2000, p. 174.
[183] "Opening Statement Before the International Military Tribunal," Nuremberg, Germany, November 21, 1945. Available at: http://www.roberthjackson.org/.

dead and the displaced as if we were voluntarily forgetting the etymology of *Kaputt*, derived from the Hebrew term *Kapparot*, meaning victim.[184]

I hope none of us will ever forget that our concept of justice and dignity depends not only on ourselves but also, and most importantly, on the victims—those who are vulnerable and alienated from any chance of hope or opportunity. Their plight is our plight. Elie Wiesel's words resonate deeply as 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.[185]

A legacy of civic commitment is cultivated and strengthened across the globe through acts of empathy and engagement with "otherness," as

[184] Malaparte, Curzio, *Kaputt*, Adhelpi Edizioni, Milan, 2009, p. 280: "Lei conosce l'origine della parola Kaputt? È una parola che proviene dall'ebraico kopparoth, che vuol dire vittima."

[185] Wiesel, Elie, Nobel Peace Prize acceptance speech, Oslo, December 10, 1986. Available at: http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html.

Ryszard Kapuściński described it.[186] Alberto Moravia, in *The Indifferent*[187] (*Gli Indifferenti*), asserted that, when confronted with injustice, the only ethical response is to say "No," as failing to do so risks becoming complicit in the injustice. Similarly, writer Javier Cercas, in the closing chapters of *Soldiers of Salamis*,[188] suggests that perhaps being decent "means learning to say no."

In this sense, the national and international rule of law compels citizens, international institutions, and states to oppose abuses of power that violate obligations and disregard the *erga omnes* principles integral to the international rule of law. The first meaningful response must reflect the international community's determination to advance the ongoing project of realizing the international rule of law in the 21st century.

[186] Kapuściński, Ryszard, *The Other*, Verso, London, 2008. Kapuściński emphasizes that an essential part of the human experience is the encounter with the Other: "(Levinas'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, to 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."

[187] Moravia, Alberto, *Gli indifferenti*, Bompiani, Milan, 2000.

[188] Cercas, Javier, *Soldiers of Salamis*, Bloomsbury, London, 2003.

CHAPTER 3

The Rule of Law and International Organizations

3.1. Introduction

In 2006, during Ban Ki-Moon's tenure as Secretary-General of the United Nations, the General Assembly requested[189] that the organization prioritize the rule of law as a fundamental objective. Responding to this call, Ban Ki-Moon initiated a process to implement this goal, which included the adoption of various resolutions by the United Nations General Assembly.[190] He famously described the rule of law as "the law of gravity" for the international system.[191]

Under the guidance of the Secretariat, these General Assembly resolutions emphasize that the rule of law is not merely a system but a principle of governance. This principle requires that legal processes, institutions, and substantive norms align with human rights standards, incorporating fundamental tenets such as equality before the law, accountability to the law, and fairness in the protection and exercise of rights.

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189 United Nations General Assembly, *The Rule of Law at the National and International Levels*, A/61/39, December 4, 2006, based on the report of the Sixth Committee (A/61/456).

190 United Nations General Assembly, *Strengthening and Coordinating United Nations Rule of Law Activities: Report of the Secretary-General*, A/69/181, July 24, 2014; and *The Rule of Law at the National and International Levels: Strengthening and Coordinating United Nations Rule of Law Activities: Report of the Secretary-General*, A/70/206, July 27, 2015.

191 Ban Ki-Moon, "The Rule of Law is Like the Law of Gravity," GA/11290, *World Leaders Adopt Declaration Reaffirming Rule of Law as Foundation for Building Equitable State Relations, Just Societies*, September 24, 2012.

The proper functioning of the rule of law is essential to international peace, security, and political stability. It plays a critical role in achieving economic and social progress, fostering development, and safeguarding the fundamental rights and freedoms of individuals.[192] Access to efficient public services and a robust rule of law help reduce corruption and legitimize the relationship between the state and individuals, grounding it in the principle of respect for human freedoms. In practice, the mandate to strengthen the rule of law serves as a cornerstone of the 2030 Agenda and the Sustainable Development Goals (SDGs).

The term "rule of law," when considered within three distinct yet intrinsically related legal and institutional contexts, raises a conceptual legal issue that extends beyond semantics, ultimately posing an epistemological challenge. Epistemology examines how knowledge is produced, evaluates the truth or falsity of theories, and considers how concepts—and their application in predicting phenomena—provide meaningful explanations.

In light of these discordant perspectives, this work draws inspiration from Professor Ruti Teitel's phrase, "the paradoxes of the revolution of the rule of law,"[193] which originates from a ruling of the Hungarian Constitutional Court in the context of transitional justice.

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[192] United Nations General Assembly, Resolution 60/251, *Human Rights Council*, March 15, 2006:

> 1. Decides to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly; the Assembly shall review the status of the Council within five years.
> 2. Decides that the Council shall be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner.
> 3. Decides also that the Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system.
> 4. Decides further that the work of the Council shall be guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development.

[193] Teitel, Ruti, "Judiciary Panel Paradoxes in the Revolution of the Rule of Law," *Yale Journal of International Law* 19 (1994).

Building on this, it examines different interpretations of the rule of law. The first is presented by Robert H. Jackson and Telford Taylor at the Nuremberg Trials, while the second views the rule of law as a legal framework underpinning the constitutional systems of democratic Western states.

Additionally, this analysis highlights the institutional policies developed by the Council of Europe and the United Nations, which now incorporate the rule of law as a structural element integral to the functioning and objectives of both international organizations.

3.2. The Rule of Law in Its Axiological and Functional Consideration in Democratic Constitutional Regimes of the Post-War Era

The rule of law, as developed in states with liberal democratic traditions, was reinforced at the European level through international institutional structures. Following the end of the Second World War, several democratic Western states established the Council of Europe in 1949 with the signing of the Treaty of St. James in London. The primary aim of this organization was to promote the values and institutions of democracy, the rule of law, and human rights. It became the first international organization whose *raison d'être* was the advancement of the conditions necessary for the rule of law.

Particularly after the fall of the Berlin Wall, the Council of Europe intensified its efforts by creating a commission in 1990 to strengthen the "European constitutional heritage," encompassing democracy, human rights, and the rule of law. In 2002, the Council adopted a new statute for the Venice Commission, formally known as the European Commission for Democracy through Law.[194] The Venice Commission currently

[194] European Commission for Democracy Through Law (Venice Commission), *Resolution Res, 2002, 3: Adopting the Revised Statute of the European Commission for Democracy Through Law*, Strasbourg, February 27, 2002, CDL, 2002. Or in English, available at: https://www.venice.coe.int/WebForms/documents/?pdf=CDL(2002)027-e.

comprises 60 members, including the 46 member states of the Council of Europe and 14 additional countries.[195]

In 2011, the Venice Commission published its *Report on the Rule of Law*,[196] which aimed to establish a framework for a consensual definition of the rule of law to assist international organizations, as well as national and international courts, in interpreting and applying this foundational value. However, the report's conclusion (Section VI) highlighted the absence of a universally agreed-upon definition:

> The notion of rule of law has not been developed in legal texts and practice as much as the other pillars of the Council of Europe, human rights and democracy. (…) Legal provisions referring to the rule of law, both at national and at international level, are of a very general character and do not define the concept in much detail.

In March 2016, in the absence of a universally agreed-upon definition of the rule of law, a report was issued providing a practical and accessible tool for verifying its constituent elements. This tool was designed for use by a wide range of entities, including national authorities, international organizations, NGOs, citizens, and academia. The report introduced a checklist that translates five key principles of the rule of law—legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and access to justice—into concrete criteria. The checklist aims to assess and evaluate the specific circumstances within each member state by applying these principles systematically.

According to Professor Rafael Bustos, a member of the Venice Commission, judicial independence is an existential prerequisite for

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[195] In accordance with the competencies granted to the Venice Commission, its activities are focused on the strengthening of the rule of law in three areas: (a) democratic institutions and fundamental rights, (b) constitutional justice and ordinary justice, and (c) elections, referendums, and political parties.

[196] Venice Commission, *Report on the Rule of Law*, adopted at the 86th plenary session, Venice, March 25–26, 2011, CDL-AD(2011)003rev-spa. Available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2011)003rev-spa.

European integration and simultaneously serves as both a promoter and defender of the rule of law:

> Judicial independence has thus become a cornerstone of European integration, where the principle plays a more prominent role than it does in the individual member states. It is not only that integration (both through the EU and the Council of Europe), to which the principle of judicial independence is inseparably connected, rests on the defence of the rule of law as an essential element of coexistence and as a value to be upheld in all circumstances. It is also that both avenues of integration require an independent judiciary for execution.[197]

With the adoption of the *Rule of Law Checklist* in March 2016, the Venice Commission established one of the few widely accepted conceptual frameworks for the rule of law in Europe. The Commission concluded that the rule of law encompasses essential elements defining the concepts of *Rechtsstaat* and *État de droit*, both in their formal and substantive or material dimensions (*materieller Rechtsstaatsbegriff*). These expanded constituent elements include:

> a) Legality, which entails a transparent democratic process and a legislative system exercised by political representatives elected by the citizenry;
> b) Legal certainty;
> c) Prohibition of arbitrariness;
> d) Access to justice before independent and impartial courts, including the ability to judicially challenge administrative acts;
> e) Respect for human rights; and
> f) Non-arbitrary discrimination and equality before the law.[198]

[197] Bustos Gisbert, Rafael, "Judicial Independence in European Constitutional Law," *European Constitutional Law Review* 18, no. 4, 2022, p. 598.
[198] European Commission for Democracy through Law (Venice Commission), *Council of Europe, Rule of Law Verification Criteria*, adopted at the 106th plenary session, Venice, March 11–12, 2016.

More recently, in 2019, the European Union launched the *Initiative to Strengthen the Rule of Law in the EU*. This initiative introduced a system of annual reports,[199] which are particularly significant for preventing public policies that could emerge within national and regional governments in response to the rise of populism and the infiltration of such movements into the institutions of European democratic systems.[200]

3.3. The Rule of Law Objective in the United Nations: A Legal Innovation?

The United Nations was established at the end of World War II to address crises and threats to peace, punish perpetrators, and provide assistance to victims.[201] The preamble of its Charter proclaims its overarching goal:

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[199] European Commission, *2022 Rule of Law Report*, Luxembourg, 13 July 2022, COM(2022) 500 final. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions. Available at: https://eur-lex.europa.eu/legal-content/ES/TXT/HTML/?uri=CELEX:52022DC0500&from=ES.

[200] European Parliament, *Resolution of 21 October 2021 on the Rule of Law Crisis in Poland and the Primacy of Union Law* (2021/2935(RSP)); and *Resolution of 8 July 2021 on the Violation of Union Law and of the Rights of LGBTIQ Citizens in Hungary as a Result of Legal Amendments Passed by the Hungarian Parliament* (2021/2780(RSP)). European Parliament, *Resolution of 21 October 2021 on the Rule of Law Crisis in Poland and the Primacy of Union Law* (2021/2935(RSP)); and *Resolution of 8 July 2021 on the Violation of Union Law and of the Rights of LGBTIQ Citizens in Hungary as a Result of Legal Amendments Passed by the Hungarian Parliament* (2021/2780(RSP)).

[201] Telford Taylor discusses the creation of the Allied forces, or United Nations alliance, in *Anatomy of the Nuremberg Trials: Memoirs*. He notes that this alliance was formed after the Japanese attack on Pearl Harbor on December 7, 1941, and officially established with the Joint Declaration of January 1, 1942. The alliance included Great Britain, the United States, the Soviet Union, China, and twenty-two other nations, opposing the Tripartite Pact powers—Germany, Italy, and Japan. Taylor also recounts how Churchill remarked to Roosevelt that the term "United Nations" had been used by Lord Byron in his poem *Childe Harold's Pilgrimage*, canto 3, stanza XXXV, to describe the Allies who defeated Napoleon at Waterloo. See Taylor, Telford, *Anatomy of the Nuremberg Trials: Memoirs*, Knopf, New York, 1992, p. 26.

> 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.

More specifically, paragraph 3 of Article 1 identifies one of the primary objectives of the organization: to promote international cooperation in solving economic, social, cultural, or humanitarian problems and to foster and encourage respect for human rights and fundamental freedoms for all, without distinction based on race, sex, language, or religion.

Perhaps the most forceful and inspiring statement about the rule of law as a guarantor and articulator of community life is found in the third paragraph of the United Nations *Universal Declaration of Human Rights*, adopted on December 10, 1948:

> 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.

In practice, the United Nations has embraced the essence of this provision of the *Universal Declaration of Human Rights*, which, in conjunction with the other articles, underscores the role of the rule of law in establishing a system that promotes the rights, responsibilities, and full development of the individual. For more than 70 years, the United Nations has endeavored to fulfill the mandate of its Charter and the Universal Declaration of Human Rights.

Today, the rule of law is inextricably linked to the United Nations' strategic and vital objectives, including the promotion of transitional justice, the peaceful resolution of conflicts, the advancement and protection of human rights, the promotion of economic development, and the establishment of responsible governance. These efforts remain fundamental to the work of the international community.

3.4. The Vienna Declaration on Human Rights and the Rule of Law

The Vienna Declaration of 1993 serves as a symbolic Rosetta Stone, enabling a deeper understanding of the concept, effects, and dimensions of human rights in the aftermath of the fall of the Berlin Wall.[202]

In this context, the 1993 *Vienna Declaration and Programme of Action* marked the culmination of a comprehensive review of the state of human rights worldwide, a process profoundly influenced by the historic fall of the Berlin Wall. Since its adoption, the declaration has acted as a catalyst for the strengthening and implementation of human rights instruments that had existed for decades. These instruments, initiated with the formation of the United Nations and the adoption of the *Universal Declaration of Human Rights* in 1948, have continued to evolve and expand.

The ninth preambular paragraph of the *Vienna Declaration and Programme of Action*, adopted by the Conference on June 25, 1993, states:

> Considering the major changes taking place on the international scene and the aspirations of all the peoples for an international order based on the principles enshrined in the Charter of the United Nations.

The text further asserts that these principles should include respect for equal rights and the self-determination of peoples, grounded in conditions of peace, democracy, justice, equality, the rule of law, pluralism, development, higher standards of living, and solidarity. Collectively, these elements constitute the teleological objective of the rule of law.

Paragraph 4 of the *Vienna Declaration and Programme of Action* states:

> The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of

[202] Salvioli, Fabián, and González Ibáñez, Joaquín, "Derechos humanos, terrorismo y políticas públicas," in *Terrorismo, cuerpos de seguridad y derechos humanos*, Policía Nacional Colombiana and Berg Institute, Bogotá, 2013, p. 40.

> international cooperation" and "the promotion and protection of all human rights is a legitimate concern of the international community.

In the author's view, this indicates that, since the adoption of the Vienna Programme by the UN General Assembly, the international community should, under no circumstances, interpret the condemnation, investigation, or prosecution of gross human rights violations under international law as interference in the internal affairs of a state. This represents a departure from the arguments made during the Cold War, which were often justified under Article 2.7 of the UN Charter.

The Vienna Declaration also underscores the indivisibility of human rights and reaffirms the commitment of UN member states to promote and protect all human rights, irrespective of their political, economic, or cultural systems. It states:

> All human rights are universal, indivisible, and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural, and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms.[203]

The Declaration highlights the inherent dignity and worth of the human person as the foundation of all human rights and fundamental freedoms. It emphasizes that the human person is not only the primary beneficiary of these rights but must also actively participate in their realization.

Additionally, the Vienna Declaration reaffirms the commitment to the purposes and principles enshrined in the Charter of the United Nations and the Universal Declaration of Human Rights. It specifically

[203] United Nations General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, para. 5.

underscores the obligations in Article 56 of the Charter of the United Nations, which call for joint and individual action to develop effective international cooperation. This cooperation aims to achieve the purposes outlined in Article 55, including universal respect for, and observance of, human rights and fundamental freedoms for all.

3.5. Secretary-General Ban Ki-Moon's Rule of Law Initiative as a Principle of Governance

In 2004, Kofi Annan, then Secretary-General of the United Nations, highlighted the centrality of the rule of law to the mission of the Organization. He described the rule of law as:

> A concept at the very heart of the Organization's mission. It refers to a principle 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 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.[204]

In 2005, the Secretary-General, in his follow-up report to the outcome of the Millennium Summit, titled *In Larger Freedom: Towards Development, Security, and Human Rights for All*, reaffirmed the rule of law as a cornerstone of development and security. He emphasized that the ultimate goal of freedom is to live in dignity, stating:

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[204] United Nations Secretary-General, *Report to the Security Council*, S/2004/16, August 23, 2004, para. 6.

> The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves. They are also essential for a world of justice, opportunity and stability.[205]

To this end, the report proposed the establishment of a specialized Rule of Law Assistance Unit to improve the coordination of rule of law activities within the organization.

The celebration of the 70th anniversary of the signing of the UN Charter in 2015 marked an opportunity to commemorate a historical and legal milestone of universal institutionality. Through the founding treaty of the United Nations, political, economic, and legal relations were systematically structured.[206] However, the passage of time and the geopolitical changes brought about by the end of the Cold War have created a new legal, economic, and geopolitical context. This evolving context has transformed the objectives of the Charter, introducing new priorities not explicitly outlined in Articles 1 and 2.

UN Secretary-General Ban Ki-Moon emphasized that, alongside the enduring goals of peace, security, the promotion of dialogue and international cooperation, the prohibition of the use of force, and the peaceful resolution of international conflicts, the United Nations had identified two additional priority objectives. These objectives, rooted in and practically derived from Articles 1 and 2 of the Charter, are the Millennium Development Goals[207]—reformulated in 2015 as the

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[205] United Nations Secretary-General Ban Ki-Moon, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report to the General Assembly, March 21, 2005, A/59/2005. Available at: https://www.un.org/spanish/largerfreedom/contents.htm.

[206] United Nations, *Charter of the United Nations*, October 24, 1945, 1 UNTS XVI.

[207] United Nations, *Millennium Development Goals: 2015 Report,* United Nations, New York, 2015. Available at https://www.undp.org/publications/millennium-development-goals-report-2015.

Sustainable Development Goals[208]—and the promotion of the international rule of law.[209]

The German diplomat Thomas Fitschen, a delegate of the Ministry of Foreign Affairs (*Deutsches Auswärtiges Amt*) to the United Nations for the Promotion of the Rule of Law and Global Issues of International Law, published an article in 2008 titled "Inventing the Rule of Law for the United Nations." In this article, he identified the development of the rule of law as a new objective for the United Nations, emphasizing its importance for achieving respect for human rights, strengthening national institutions related to the administration of justice, and enhancing interstate capacities to prevent transnational crimes.[210]

From this perspective, the institutional framework of the United Nations combines these elements to achieve international justice through the effective implementation of the rule of law, which is inherently linked to democracy. This integration represents the core and ethical foundation of the machinery of international law. In a sense, democracy serves as the gateway to the rule of law.[211]

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[208] United Nations General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, September 25, 2015, A/Res/70/1.

[209] United Nations Secretary-General, *The Rule of Law at the National and International Levels: Strengthening and Coordinating United Nations Activities Directed Towards the Promotion of the Rule of Law*, Report to the General Assembly, A/70/206, July 27, 2015.

[210] Fitschen, Thomas, "Inventing the Rule of Law for the United Nations," in *Max Planck Yearbook of United Nations Law*, vol. 12, edited by A. von Bogdandy and R. Wolfrum, Koninklijke Brill N.V., Leiden, 2008, pp. 347–380.

[211] Part of the references were studied in Joaquín González Ibáñez, "International Rule of Law and Human Rights: The Aspirations of a Work in Progress," in *The Journal Jurisprudence* 15, 2013. The author describes the rule of law as a system empowering individuals and other actors to place limits on power, where law is perceived as imperative: "It seems natural to think of laws as commands. In doing so, however, we have already begun to theorize about the nature of law […]" Lyons, D., *Ethics and the Rule of Law,* Cambridge University Press, Cambridge, 1993, p. 37.

The rule of law embodies the community's aspirations for principles and values necessary to ensure dignity, justice, respect, and security. Democracy, in this context, is defined as a system in which laws, not individuals, rule. It protects citizens' rights, maintains order, and limits government power, ensuring equality before the law and non-discrimination based on race, religion, ethnicity, or sex. See, Tamanaha, B. Z., *On the Rule of Law,* Cambridge University Press, Cambridge, 2004, p. 141.

PART II. THE RULE OF LAW AND VICTIMS OF INTERNATIONAL HUMAN RIGHTS VIOLATIONS

Chapter 4: The subjects of the law of nations, the function of international law, and the rights of man.

> *(…) What have been the reasons which have prompted the changes in the matter of subjects of international law, with regard both to international rights and to international duties? These causes have been numerous and manifold. They have included, with reference to the recognition of the individual as a subject of international rights, the acknowledgment of the worth of human personality as the ultimate unit of all law; the realization of the dangers besetting international peace as the result of the denial of fundamental human rights; and the increased attention paid to those already substantial developments in international law in which, notwithstanding the traditional dogma, the individual is in fact treated as a subject of international rights. Similarly, in the sphere of international duties there has been an enhanced realization of the fact that the direct subjection of the individual to the rule of international law is an essential condition of the strengthening of the ethical basis of international law and of its effectiveness in a period of history in which the destructive potentialities of science and the power of the machinery of the State threaten the very existence of civilised life.*
>
> Hersch Lauterpacht, *International Law and Human Rights*, 1950

"I emphasized the seriousness of the alleged violations of ancient principles of international humanitarian law now codified in the Geneva Conventions, and accepted as part of customary international law, which the Constitution called on us to apply. I then set out in detail the manner in which grave crimes against the laws of war were implicated. Having made these points, however, my judgment stressed that the seriousness of the charges should in no way attenuate Dr Basson's right to a fair trial. If anything; I said, the horrendous nature of the charges against him highlighted the importance of a fair trial (...)

It was precisely when alleged crimes threaten principles of legality and international law, that the standards associated with the rule of law needed most to be maintained. In this way you do more than just hold an individual to account for breaching the law. You affirm the very principles that the individual is said to have placed under attack. You then defend the rule of law, not by abandoning its principles, but by applying them."

The Strange Alchemy of Life and Law, Albie Sachs

CHAPTER 4*

Rule of Law, Human Rights, and Transitional Justice: International Law Setting the Path for Democratic Standards in Transitional Justice Processes

4.1. Introduction

The genesis of the 21st-century international legal order, along with its structure and objectives, originates in the aftermath of World War II and reflects the need for a stable security framework, peace, and an institutional structure for effective international cooperation and development to promote human welfare.

These objectives have evolved in response to the political, legal, social, and economic impacts of the fall of the Berlin Wall and the subsequent process of globalization. Timothy Snyder has noted that we are now part of an unfolding "second globalization," which suggests that we remain subject to a specific historical condition.[212]

In 2015, the 70th anniversary of the signing of the United Nations Charter was celebrated. A new social, legal, economic, and geopolitical context has reshaped the Charter's objectives, introducing goals not explicitly outlined in Articles 1 and 2. According to then-UN Secretary-

* The first version of this chapter was originally published as "Rule of Law, Human Rights and Transitional Justice: International Law Setting the Path for Democratic Standards in Transitional Justice Processes" in *Liber Amicorum Guðmundur Eiríksson,* United Nations University for Peace, San José; O.P. Jindal Global University, Universal Law Publishing, Sonepat Gurgaon, 2016, pp. 432–451. The content has been updated and expanded for integration into this book.

[212] Snyder, Timothy, *Black Earth: The Holocaust as History and Warning*, Tim Duggan Books, New York, 2015, p. 326.

General Ban Ki-moon, two additional priorities have emerged alongside peace, security, the promotion of dialogue and international cooperation, the prohibition of force or its threat, and the peaceful resolution of international disputes. Rooted in both the origins and application of Articles 1 and 2, these priorities are the Millennium Development Goals[213]—revised in 2015 as the Sustainable Development Goals[214]—and the promotion of the international rule of law.[215]

A clear indicator and assurance of successful democratization and the recognition of the rule of law—as opposed to other forms of social organization—lies in the continual expansion and acknowledgment of international human rights law, along with the progressive incorporation of the legal *acquis* contained in international treaties. The shared interests enshrined in human rights treaties reflect, in practice, the willingness of states to embrace a common framework for mutual oversight, collective goals, shared constraints, and guiding principles.[216]

Today, we recognize that the international community's commitment to upholding both international law and the rule of law represents a pathway to dignity. Conversely, the rejection of a unified international legal system leads towards barbarism. Historically, however, this perspective was not universally accepted, as evidenced by debates among and within Allied governments in the months preceding the 1945 London Conference, where the Charter of the International Military Tribunal was adopted.[217]

History shows that the absence of a legal framework governing relations and ensuring security, accountability, and mutual rights and

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213 United Nations, *The Millennium Development Goals Report 2015*. New York. Available at: www.undp.org/content/dam/undp/library/MDG/english/UNDP_MDG_Report_2015.pdf.

214 UN General Assembly, *Transforming Our World: The 2030 Agenda for Sustainable Development*, September 25, 2015, UN Doc A/Res/70/1.

215 UN General Assembly, *The Rule of Law at the National and International Levels: Strengthening and Coordinating United Nations Rule of Law Activities*, Report of the Secretary-General, July 27, 2015, UN Doc A/70/206.

216 Villarroel, D., *El derecho convencional en los sistemas constitucionales de América Latina*, Porrúa, Mexico, 2005.

217 Morgenthau to Truman, May 29, 1945, *Morgenthau Diary*, vol. 2, 1544–45, cited in Bass, Gary J., *Stay the Hand of Vengeance*, Princeton University Press, Princeton, 2000.

obligations inevitably leads to cycles of revenge, injustice, inequality, and civil unrest. Humanity has learned bitter lessons from instances where contempt for international law has driven the world toward the breakdown of coexistence and continuous aggression.[218] Governments that deny the intrinsic value of human life not only compromise their own dignity but also inflict lasting harm on others.

The absence of a cohesive legal strategy and a lack of consideration for the consequences of World War I in shaping the international legal order initially led member states to exclude the defeated nations and Russia from the League of Nations. Shortly thereafter, the Locarno Conferences of the 1920s fostered the "spirit of Locarno,"[219] a new consensus that enabled Germany to join the League—a membership it later renounced in 1933.[220]

The international rule of law regarding human rights reflects the international community's effort to fulfill an ethical and moral aspiration, reaffirming that advancing human rights is one of the most significant forms of progress in the human condition. This is especially true because such progress enables vulnerable and marginalized groups—including women, children, indigenous peoples, impoverished and excluded populations, minorities, and, above all, victims—to exercise their rights. Human rights are fundamentally *the rights of others* and embody a commitment to justice.[221] As Primo Levi wrote, "A country's level of civilization can be measured by how effectively its laws prevent the weak from becoming weaker and the powerful from becoming too powerful."[222]

In this chapter, I aim to provide an introductory overview of the guidance and framework that international law offers to alternative conflict resolution mechanisms known as transitional justice. These mechanisms have become essential for analyzing and providing legal, social, and historical responses in countries that have experienced serious human rights abuses in violation of both domestic and international law.

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218 Carrillo Salcedo, J. A., *Dignidad frente a barbarie*, Trotta Ediciones, Madrid, 1999.
219 Duroselle, J. B., "The Spirit of Locarno: Illusions of Pactomania," *Foreign Affairs*, July 1972.
220 Carrillo Salcedo, J. A., *Dignidad frente a Barbarie*, Trotta, Madrid, 1999, p. 5.
221 González Ibáñez, Joaquín, "Legal Pedagogy, The Rule of Law and Human Rights: The Professor, The Magistrate's Robe and Miguel de Unamuno," in *Journal of Human Rights Law* 6, no. 1, November 2012.
222 Levi, Primo, *Se questo è un uomo*, Einaudi, Milan, 1997, p. 147. Translation by author.

The concept of transitional justice arises from the need to offer a legal response to serious human rights violations, paving the way for new peace scenarios in societies experiencing collective grief. It seeks to uphold the rule of law, prevent impunity, and, most importantly, address the concerns of victims, particularly their access to truth and reparations.

As the UN General Assembly has affirmed, the UN Charter, the Universal Declaration of Human Rights (UDHR), international human rights treaties, and the Vienna Declaration and Program of Action collectively serve as a guide and legal framework to prevent impunity and provide essential support to victims.[223] In my view, the 1993 Vienna Declaration represents a "Rosetta Stone" that enables us to accurately interpret the concept, effects, and scope of human rights in the post-Berlin Wall era.[224]

Tzvetan Todorov argues that history is not merely a chronology of events but the interpretation we assign to them, shaping a specific narrative of human experience.[225] In this light, following Todorov's reasoning, the fall of the Berlin Wall was not only the dramatic removal of a divisive barrier, the dismantling of the Cold War's bipolar system, and the defeat of authoritarian communist regimes; it also marked a profound transformation in people's lives. It created a new global context characterized by the widespread acceptance—whether rhetorical or genuine—of values associated with liberal democracies, where the rule of law and human rights lie at the center of political and legal discourse.

Article 2.7 of the United Nations Charter states that while international law recognizes the principles of sovereignty, the non-use of force, legal equality among states, and respect for human rights, it also underscores the obligation to refrain from interfering in the internal affairs of states:

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223 UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law*, Resolution A/60/147, December 16, 2005.

224 Salvioli, Fabián, and González Ibáñez, Joaquín, "Derechos humanos, terrorismo y políticas públicas," in *Terrorismo, cuerpos de seguridad y derechos humanos*, Colombian National Police and Berg Institute, Bogotá, 2013, p. 40.

225 Todorov, Tzvetan, *Hope and Memory: Lessons from the Twentieth Century*, Princeton University Press, Princeton, 2003.

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or require the Members to submit such matters for settlement under the present Charter; however, this principle shall not prejudice the application of enforcement measures under Chapter VII. (United Nations, 1945, Article 2, Section 7).

In this regard, the 1993 Vienna Declaration and Program of Action marked the culmination of a global review of the status of human rights, shaped by the historic fall of the Berlin Wall. Since its adoption, it has acted as a catalyst for strengthening and advancing the implementation of longstanding human rights instruments, which have continued to evolve since 1948, building upon the foundations of the United Nations and the Universal Declaration of Human Rights.

Paragraph 4 of the Vienna Declaration states that "The promotion and protection of all human rights and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation." It continues with the following affirmation, which is relevant to our purposes: "In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community."

In our view, this means that, since the UN General Assembly approved the Vienna Programme, the international community should never regard the condemnation, investigation, or initiation of criminal proceedings for gross human rights violations under international law as interference. Any such violations occurring in Syria, China, Myanmar, Colombia, or elsewhere are not merely internal matters but legitimate concerns and responsibilities of the international community.

To avoid confusion, paragraph 5 of the Declaration provides an important reaffirmation of the indivisibility of human rights and the commitment of UN member states to promote and protect all human rights, regardless of their political, economic, or cultural systems:

> All human rights are universal, indivisible, interdependent, and interrelated. The international community must treat

> human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural, and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic, and cultural systems, to promote and protect all human rights and fundamental freedoms. (United Nations, 1993, para. 5).

The legal reasoning behind these significant paragraphs suggests that, regardless of country, geography, culture, or civilization, every state has an obligation to promote, protect, and investigate any human rights violation in accordance with international law. If a country is unwilling or unable to carry out the necessary investigations to bring alleged perpetrators before a national court, the principle of complementarity permits the international community—including states, international organizations, and other actors—to pursue alternative strategies recognized under international law, such as proceedings through the International Criminal Court, the exercise of universal jurisdiction, or other legal measures.

4.2. The Rule of Law at the Core of Transitional Justice

The achievement of justice for democratic states is rooted in the implementation of the international rule of law. This framework, which combines the effective application of the rule of law with its intrinsic connection to democracy, provides the philosophical and ethical foundation for the mechanisms of international law. In this sense, democracy serves as a gateway to the rule of law.[226]

[226] González Ibáñez, Joaquín, "International Rule of Law and Human Rights: The Aspiration of a Work in Progress," *The Journal Jurisprudence* 15, 2013. The author conceptualizes the rule of law as a system empowering individuals by limiting power. Law is imperative: "It seems natural to think of laws as commands. In doing so, however, we have already begun to theorize about the nature of law (…)." Lyons, D., *Ethics and the Rule of Law*, Cambridge University Press, Cambridge, 1993, p. 37. Democracy is a system governed by laws that protect citizens' rights and limit governmental power.

The United Nations, established during World War II to address crises and threats to peace, sanction perpetrators, and provide relief to victims, was founded with a commitment to humanity's welfare. The Preamble to its Charter declares its mission "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." Article 1, paragraph 3, further outlines one of its main purposes: fostering international cooperation to solve economic, social, cultural, and humanitarian issues, and promoting respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion.

In 2004, fifteen years after the fall of the Berlin Wall, Kofi Annan, then UN Secretary-General, placed the rule of law at the center of the organization's mission:

> It refers to 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 adjudicated, and which are consistent with international human rights norms and standards. It also requires 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.[227]

These principles are not to be regarded as "soft law" but as integral components of law itself. Rule of law, accountability, and human rights constitute the heart, mind, and soul of democratic systems.[228] Given that

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Tamanaha, Brian Z., *On the Rule of Law*, Cambridge University Press, Cambridge, 2004, p. 141.

[227] Annan, Kofi, Report to the Security Council, August 23, 2004, S/2004/16, para. 6.

[228] The Rt. Hon Lord Bingham of Cornhill KG, "The Rule of Law," conference at the Centre for Public Law, Oxford University, November 16, 2006. Transcript available at: http://www.cpl.law.cam.ac.uk/past_activities/the_rule_of_law_text_transcript.php.

some of history's most dreadful and abominable episodes—colonialism, World War I, and World War II with the Holocaust—were perpetrated by Europeans, I firmly believe that the strength of democratic systems depends on recognizing international law as a binding framework of rules, customs, jurisprudence, and principles essential for respecting individual dignity. By deepening our commitment to these values and principles, democratic systems can be strengthened and re-legitimized.

The rule of law is "a cultural achievement of universal significance" and is arguably "the most important political ideal today."[229] Rule of law, justice, and civic commitment align closely with our legal and moral obligations. The international rule of law has become a spiritual cornerstone for democratic societies that strive to be more just and inclusive; it is essential for achieving developmental goals and creating a space where rights and opportunities coexist. This perspective suggests that the rule of law represents an aspiration to dignity—albeit one marked by tensions—that forms one of the defining elements of the democratic system.

The pursuit of justice in democratic societies is rooted in the construction and reinforcement of the rule of law. Fallon summarized the core structure and aspirations behind the rule of law as follows:

> All understanding of the rule of law shares 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.[230]

Also published in Bingham, Tom, "The Rule of Law," in *Cambridge Law Journal* 67, 2007, p. 69.

[229] Tamanaha, Brian Z., *On the Rule of Law*, Cambridge University Press, Cambridge, 2004.

[230] Fallon, Richard H., "The Rule of Law as a Concept in International Discourse," *Columbia Law Review* 97, no. 1, 1997, p. 7; Stromseth, Jane, Wippman, David, and Brooks, Rosa, *Can Might Make Rights? Building the Rule of Law after Military Interventions*, Cambridge University Press, Cambridge, 2006, p. 57; González Ibáñez, Joaquín, "International Rule of Law and Human Rights."

The pursuit of justice in such societies holds greater importance than any other political or historical commitment. Now, in the era following the fall of the Berlin Wall, "those wise restraints that make mankind free"[231] urge us to reaffirm the intrinsic value of human rights, as emphasized in the Preamble to the UN Charter.

Since the proclamation of the UN Charter and the International Bill of Human Rights, international law has served as a crucial catalyst for change, establishing principles and goals to be implemented within domestic legal systems.

The current international rule of law encompasses a set of moral standards chosen through conscience and reason, balancing notions of right and wrong, or good and evil. Democratic progress enhances freedom and empowers individuals, particularly those who are weak and vulnerable. The rule of law serves to limit and restrain governments, positioning them as institutions bound by law to serve the will of the sovereign and the aspiration for justice.[232] This principle underscores that the rule of law, rather than the rule of individuals, should govern—ensuring that legal and political institutions, rather than personal figures embodying the state, provide a stable framework for policy over time. Ultimately, the rule of law is a guiding principle in the pursuit of justice, emphasizing the need to address injustice and combat impunity.

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231 These words were pronounced by Harvard Law School graduates in early 20th-century Massachusetts: "Now you are ready to shape and defend those wise restraints that make mankind free." From the declaration used for conferring law degrees at Harvard Law School, composed by John McArthur Maguire, LLB, Harvard 1911. Engraved at the Harvard Law School Library, Langdell Hall, Cambridge, Massachusetts.

232 I would like to highlight the importance of the manner in which we adopt law. The process by which law is enacted is equally relevant—it should occur through the representation of the sovereign, in a public, open, and contested manner; in other words, through a democratic legislative process. This process implies a qualitative "threshold" for the law. As Anne Ramberg observes, "The law must properly incorporate social values, including the demand for 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." Anne Ramberg, quoted in Bingham, *The Rule of Law*, 171. This perspective embraces the concept of legitimacy within the democratic system and highlights the essential role of the rule of law in that process.

However, international law remains a work in progress, with both positive and negative impacts in its application.[233] One example of the paradoxical effects that imperfect implementation can have on lives and rights is the doctrine of Responsibility to Protect (R2P). This doctrine emerged in response to the unauthorized humanitarian intervention in Kosovo in 1999, where action was taken without Security Council consent.[234] Since its inception, R2P has been met with controversy and opposition. A notable instance is the application of UN Security Council Resolution 1973 (2011) in Libya, adopted despite opposition from the African Union.[235] Although the resolution aimed to ensure security and human rights, it ultimately led to regime change without fully implementing R2P's comprehensive framework of prevention, intervention, and reconstruction. As a result, Libya has become a failed state, fragmented by factions engaged in a destructive civil war with no foreseeable resolution.

International public law and the aspiration to promote the international rule of law establish an important principle in transitional justice processes. Article IV of the *Convention on the Non-Applicability of*

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233 González Ibáñez, Joaquín, "International Rule of Law and Human Rights."

234 Remiro Brotons, Antonio, "Un nuevo orden contra el derecho internacional: El caso de Kosovo," in *Revista Jurídica Universidad Autónoma de Madrid* 4, Madrid, 2001, pp. 89–104.

235 On March 10, 2011, six days before the adoption of UN Security Council Resolution 1973 (2011), the African Union Peace and Security Council (PSC), at its 265th meeting in Addis Ababa, expressed solidarity with Libya and rejected "any foreign military intervention, whatever its form." The following day, the Arab League and the Gulf Cooperation Council (GCC) called for the imposition of a no-fly zone over Libya, with Gulf Arab countries affirming that Gaddafi's government was no longer legitimate. See "The Implications of the Current Events in Libya and the Arab Position, Council of the League of Arab States," 12 March 2011, Cairo, Egypt. Available at: http://www.au.int/en/sites/default/files/pressreleases/24210-pr-communique_en_10_march_2011_psd_the_265th_meeting_of_the_peace_and_security_council_adopted_following_decision_situation_libya.pdf and http://responsibilitytoprotect.org/Arab%20League%20Ministerial%20level%20statement%2012%20march%202011%20-%20english(1).pdf. See also Alex De Waal, "The African Union and the Libya Conflict of 2011," *World Peace Foundation, Fletcher School at Tufts University*, December 19, 2012. Available at: https://sites.tufts.edu/reinventingpeace/2012/12/19/the-african-union-and-the-libya-conflict-of-2011/.

Statutory Limitations to War Crimes and Crimes against Humanity[236] seeks to prevent impunity by requiring state parties to take measures ensuring that statutory or other limitations do not apply to the prosecution and punishment of crimes outlined in the Convention. Additionally, Article III encourages cooperation among states to facilitate the extradition of individuals involved in such crimes, in accordance with international law.

The existence of an international society presupposes an international rule of law, encompassing the regulation of mutual relations among nations and the international interactions of individuals through established legal concepts, standards, institutions, and procedures.[237]

The rule of law provides certainty, legal enforcement, and feasibility for the application of both international and domestic law. However, it is "enlightened" by elements that distinctly separate democratic from authoritarian regimes. This system is grounded in an ethical commitment to justice—a commitment that transitional justice strives to fulfill. Transitional justice, as an alternative legal mechanism, offers a human yet imperfect response to severe human rights violations. It operates on the assumption that true justice is unattainable without the rule of law, as it seeks to address victims' concerns and establish a shared historical narrative of the events leading to human rights violations.

4.3. Transitional Justice as an Extraordinary and Realistic Response to Massive Human Rights Violations

The establishment of legal justice systems holds foundational significance in human societies, serving as a cornerstone for the development of cultures and civilizations. René Girard observed that the irrational process of violence initially becomes institutionalized within human societies, often through religion and sacred elements. This process eventually evolves, incorporating ideals of justice and humanity to

[236] *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, adopted by General Assembly Resolution 2391 (XXIII), November 26, 1968.
[237] Rhyner, C., opening statement before the Boston Conference on World Peace through Law, March 27, 1959, quoted in Bingham, Tom, *The Rule of Law*, Allen Lane Penguin Books, London, 2010, p. 111.

legitimize violence within legal and institutional structures, thereby ensuring its continued existence.[238]

In Western civilization, it is no coincidence that the Greek myth of the goddess of justice—first *Themis* and later *Dikê*—emerged as a divine response to chaos, violence, and terror, embodying order, custom, and law. This myth was later incorporated and reinterpreted in the Roman figure of *Iustitia*.

Professor Françesc de Carreras highlights that the Western legal tradition, culturally rooted in Greek and Roman antiquity, originated "when we could identify the principal resources that we use to understand the world (philosophy and science) and to structure it according to a set of values (ethics, law, and politics)."[239]

In this process of rationalizing violence through the creation of legal systems that aspire to justice, humanity, and fairness, societies reach a foundational moment in their efforts to establish democratic spaces where justice also embodies ethical and civil commitments. This vision incorporates a system rooted in equity and mutual recognition, emphasizing justice as understood "by the other." In the early 20th century, U.S. Supreme Court Justice Oliver Wendell Holmes remarked, "[t]he degree of civilization which a people has reached, no doubt, is marked by their anxiety to do as they would be done by."[240]

Sari Nusseibeh, a Palestinian professor and member of the negotiating team for the 1991 Madrid Conference peace process between Palestinians and Israelis, grappled with corruption within the Palestinian Authority. Driven by a desire to establish public policies that could lay the foundation for new legal institutions and principles to serve his fellow Palestinians, he posed a profound question: Where is the majesty of justice in the future Palestinian state—one that will protect Palestinian society,

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238 Girard, René, *La violence et le sacré*, Editions Pluriel, Rennes, 2010, p. 11.

239 Carreras, Francesc de, "El tronco común," *El País*, Madrid, May 30, 2016. Translation by author.
"Un primer elemento lo podemos situar en los orígenes de nuestra cultura: la antigüedad clásica griega y romana. Ahí encontramos los principales instrumentos que hoy utilizamos para comprender el mundo (la filosofía y la ciencia) y para ordenarlo conforme a una jerarquía de valores (la ética, el derecho y la política)."

240 Holmes, Oliver Wendell, *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions*, NJ: Transaction Publishers, New Brunswick, 1989, p. 59.

particularly its most vulnerable members, who currently lack such safeguards?

Nusseibeh, born in Jerusalem, lived alongside his Jewish neighbor Amos Oz, who wrote the poignant autobiography *A Tale of Love and Darkness*. Reading it led Nusseibeh to realize his responsibility to share his Palestinian story as a complement to that of his Jewish neighbor. This inspired his deeply personal literary work, *Once Upon a Country: A Palestinian Life*.[241] The question of *where the majesty of justice lies* is not rhetorical; it forms part of a powerful narrative of complementary and interconnected stories.

Transitional justice provides a way to address Nusseibeh's question in societies recovering from conflict and trauma caused by serious human rights violations. The premise of my reflection in this text is straightforward: if we recognize law as both an intellectual and legal system grounded in principles that embody our vision of freedom, respect, and security, we can actively contribute to the remarkable human creation that is the law. How can we nurture this system to improve living conditions, expand opportunities, and deliver justice—not only for individuals subject to it but also for our communities, both national and international?

If doctors must research and develop new protocols, medications, and biotechnology to alleviate disease, save lives, and improve their patients' quality of life, and if engineers must innovate structures, perform mathematical calculations, and test new materials in their designs, then what should legal practitioners do to meet the demand for justice from victims of serious human rights violations? What system of freedom and security can effectively and genuinely address the needs of our time—here and now, in the 21st century?

Perhaps these should be the first words and commitments imparted to our law students, aiming to inspire them to recognize their potential and aspire to be not merely pettifoggers, but true jurists. They must understand that—among other responsibilities—they face the challenge of devising, envisioning, and implementing legal principles that create more space for opportunity, dignity, and progress within their communities.

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[241] Nusseibeh, Sari, *Once Upon a Country: A Palestinian Life*, Picador, London, 2008.

Transitional justice—a human justice, albeit an inevitably *imperfect justice*[242]—serves as one of the legal strategies to address serious human rights violations. It is a pathway to justice designed to uphold and enforce the rule of law. However, each transitional justice process worldwide—whether deemed successful or not—is unique and cannot be fully replicated in other contexts. Each process must carefully determine the roles of truth commissions, public policies, criminal law, and other institutions within this *sui generis* framework. The challenge of transferring transitional justice from one conflict to another lies in the deep reflection required to address the specific circumstances of each case.

Uniquely, for Western countries, the requirement is especially high, as our approach must align with the legal principles and political values of democracy, operating within a specific legal framework. This framework is the rule of law—a system that affirms the supremacy of law and enforces its obligatory nature for all individuals and entities, whether natural or legal, public or private. It demands respect for and adherence to the law at both national and international levels.[243]

The rule of law presupposes a system that opposes arbitrariness, resolves conflicts through legal means rather than force, and uses law as a tool to enhance cohesion and social justice. In this way, the rule of law helps preserve and strengthen the values of freedom and human dignity for individuals.[244]

In addressing complex legal issues—such as transitional justice—that require the ability to navigate various situations simultaneously, Eloy García López aptly calls upon jurists "to think generously," emphasizing the paradox that "those who consider only norms and statutes do not understand the legal system."[245] The legal system comprises not only written norms and statutes but also principles, customs, and decisions from judicial authorities and administrative institutions.

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242 Eizenstat, Stuart E., *Imperfect Justice*, Public Affairs, Perseus Books Group, New York, 2003.

243 Annan, Kofi, United Nations Secretary-General, S/2004/16, para. 6.

244 Bishop, William, "The International Rule of Law," in *Michigan Law Review* 59, 1961, p. 553.

245 López, E. G., conference presentation at the doctorate in law program, Alfonso X University, Madrid, February 2004.

Transitional justice aims to uphold, for a defined period following gross human rights violations, the values and principles that reflect the teleological purpose of the legal system in democratic states. In essence, transitional justice seeks to promote the rule of law, which—as Judge Bingham observed—embodies "the universal secular religion of democratic states."[246] The Greeks coined the concept of *isonomy* (*iso*, meaning "same," and *nomos*, meaning "usage, custom, law") as a principle guiding public political life. *Isonomy* signifies equality in civil and political rights for all citizens, standing as a synonym for democracy and as the antithesis of arbitrary power wielded by tyranny. This concept even predates the generic use of the term democracy.

Professor Fabian Salvioli has asserted that "human rights came to annoy, and also to stay."[247] In a sense, history and the ongoing pursuit of human rights recognition over the past centuries reveal that this goal remains perpetually out of full reach. In this regard, the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras*[248] affirmed the basic obligations of states within the human rights framework. These obligations laid the groundwork for the international legal framework of transitional justice that subsequent judgments, such as *La Cantuta v. Peru* and *Barrios Altos v. Peru*,[249] further established, particularly regarding the limits on and prohibitions of immunity in transitional justice processes. In both cases, Peru's legal obligations were outlined in four key actions: to take reasonable steps to prevent human rights violations; to conduct thorough investigations when violations occur; to impose appropriate sanctions on those responsible; and to prohibit impunity and amnesty laws for the most serious human rights crimes while ensuring reparations for victims.

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246 Bingham, Tom, *The Rule of Law*, Allen Lane Penguin Books, London, 2010, p. 174. "So it seems to me that observance of the rule of law is the nearest we can get to a universal secular religion."

247 Salvioli, Fabián, conference presentation at the European Academy of Otzenhausen, Germany, July 2013. Translation by author. "Los derechos humanos vinieron para molestar, y también para quedarse."

248 *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988.

249 *Barrios Altos v. Perú*, Inter-American Court of Human Rights, Judgment of March 14, 2001; *La Cantuta v. Perú*, Judgment of November 29, 2006.

The *Velásquez Rodríguez* case found continuity in the 1993 Vienna Declaration,[250] which established that states can no longer invoke—as was often the case during the Cold War—the principle of unlimited sovereignty in Article 2 of the UN Charter or the argument of non-interference in internal affairs when human rights violations occur. This stance was affirmed by International Court of Justice Judge C.G. Weeramantry:

> The enormous developments in the field of human rights in the post-war years, beginning with the Universal Declaration of Human Rights in 1948, must necessarily impact assessments of concepts such as "considerations of humanity" and "dictates of public conscience." This evolution in human rights—both in formulation and universal acceptance—has been more profound than the advancements made in previous centuries. The public conscience of the global community has been significantly strengthened and sensitized to "considerations of humanity" and "dictates of public conscience." Since the vast framework of internationally accepted human rights norms and standards has entered the global consciousness in an unprecedented way since World War II, its principles are now invoked almost instinctively whenever questions of humanitarian standards arise.[251]

Xabier Agirre Aranburu, Senior Analyst at the Office of the Prosecutor of the International Criminal Court (ICC), has stated that "the obligatory opening of criminal investigations when there is decisive evidence and proof should be the principle of reference when serious crimes are committed, as opposed to the principle of discretion, given the severity and harm caused by such criminal behavior."[252] He further

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250 *Vienna Declaration and Programme of Action*, June 25, 1993, para. 4.

251 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, Dissenting Opinion of Judge Weeramantry, p. 433.

252 United States Institute of Peace, *Large-Scale Victimization and Small-Scale Trials: Selection Criteria and the Use of Sampling Technique in the Investigation of International Crimes*, 4. Available at: http://www.usip.org/sites/default/files/missing-

emphasizes that impunity must be addressed through national judicial mechanisms, and, as a complementary *ultima ratio*, international criminal courts must act *proprio motu* wherever they have effective jurisdiction and competence. The ICC must initiate criminal proceedings whenever there have been no genuine investigations or processes at the national level to determine individual criminal responsibility; otherwise, a failure to act would create spaces of consented impunity.

In a similar vein, Héctor Olásolo Alonso, former Officer of the ICC Office of the Prosecutor, has argued that the failure to criminally prosecute those responsible for the most serious crimes has not only created a space for impunity but also that excessive procedural formalism—both at the national level and within regional international human rights protections—undermines justice. Rather than addressing the substantive illegality as required by the principles of accessibility and predictability, this formalism leads to outcomes contrary to the *pro homine* principle regarding the application of law. This principle requires an effective judicial remedy for those in vulnerable situations who have suffered systematic or widespread violence, often inflicted by actors operating under the direct or indirect protection of public institutions.[253]

In the context of serious human rights violations, such as those committed in Latin America during the late 20th century, judicial investigations and accountability were hampered not only by challenges in investigating the facts and determining responsibility, leading to rampant impunity, but also by the absence of provisions for crimes against humanity in nearly all national legal systems across the Americas. This gap persisted until the first decade of the 21st century with the entry into force of the Rome Statute. Compounding this issue was the continued application of limitation periods established for ordinary crimes, which

peace/Xabier%20Agirre.pdf. "Compulsory prosecution should be the guiding principle for particularly serious crimes as opposed to mere opportunity, because of the very gravity and offensiveness of the criminal conduct. Nevertheless, international crimes entail the paradox of deserving compulsory prosecution due to their seriousness, while being handled typically with a high sense of opportunity as a result of legal lacunae, resource limitations, plurality of competent fora, and political interference."

[253] Olásolo Alonso, Héctor, "El principio nullum crimen sine iure en derecho internacional contemporáneo," in *Anuario Iberoamericano de Derecho Internacional Penal* 1, 2013, p. 21. Translation by author.

obstructed access to justice for "hundreds of thousands of victims subject to this kind of violence in the 1960s, 1970s, 1980s, and 1990s."[254]

Additionally, the region faced a state of legal inequality and limited judicial awareness regarding serious human rights violations, particularly when considering that crimes against humanity, as recognized by the majority of international doctrine, entered customary international law in 1950, when the International Law Commission presented its Draft Code of Crimes against Peace and Security of Mankind to the United Nations General Assembly (UNGA). The statutory limitations on these crimes were removed following the adoption (1968) and entry into force (1970) of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*.

In Latin America, this environment of inequality, political indifference, and lack of national judicial awareness regarding such significant crimes effectively hindered their investigation and sanction until the final decade of the 20th century.

A similar debate persists in Europe regarding the obligation to investigate and prosecute serious human rights violations, such as enforced disappearances. Javier Chinchón Álvarez highlights that the European Court of Human Rights (ECHR) has developed a line of cases, beginning with *Varnava and Others v. Turkey*.[255] In this case, the Strasbourg Court questioned "whether there was a continuing procedural obligation to investigate," while also emphasizing the need to protect authorities from prolonged uncertainty, as reflected in *Husnu Saydam Baybora et al. v. Cyprus*. Chinchón notes that the Court reaffirmed its role in establishing a legal system for the protection of human rights, as highlighted in the *Varnava* case.[256]

At this stage, it can be asserted that transitional justice principles remain underdeveloped in Europe as a response to grave human rights

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254 Olásolo Alonso, Héctor, "El principio *nullum crimen sine iure* en derecho internacional contemporáneo," p. 35. Translation by author.

255 *Varnava and Others v. Turkey* (Grand Chamber), Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90, Judgment of September 18, 2009, para. 150.

256 Chinchón Álvarez, Javier, "La competencia ratione temporis del Tribunal Europeo de Derechos Humanos sobre la obligación de investigar (art. 2. Derecho a la vida). Teoría y práctica: de *de Becker* c. Bélgica a *Canales Bermejo* c. España," *Revista Española de Derecho Internacional* 66, no. 1, 2014, p. 156.

violations committed during the Spanish Civil War and in the aftermath of World War II, as evidenced by the frequent denial of admissibility in cases involving enforced disappearances.[257]

Seeking to uncover the truth of what occurred, honoring the aspirations for freedom and dignity of those involved in the conflict and of society as a whole, and focusing especially on victims are central objectives of transitional justice. Martha Minow's reflections on reparations[258] remind us that for victims—those who have endured harassment and the suppression of their basic freedoms and rights—"compensatory and remedial measures can hardly compensate the victim." Such measures may alleviate suffering, provide recognition, and offer relief, but they cannot fully compensate for the loss. Compensation, defined as "something that counterbalances or makes up for an undesirable or unwelcome state of affairs,"[259] ultimately falls short. The loss of a son, husband, wife, or the *desaparecidos* (the forcibly disappeared) can never truly be "counterbalanced."

In the context of human rights violations and bereaved victims, transitional justice may be an imperfect legal strategy, but it remains the most pragmatic, realistic, and effective response to the needs and expectations of victims following serious human rights violations.

Under international law, transitional justice imposes on states a responsibility to investigate and prosecute, not only to serve the cause of justice in individual cases and address victims' needs but also to provide the most effective means of preventing future crimes. The UN *Basic Principles and Guidelines on the Right to a Remedy*[260] establish a general obligation to prevent impunity for crimes of international concern. International law[261] underscores the obligation to investigate and ensure

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257 *Antonio Gutierrez Dorado and Carmen Dorado Ortiz v. Spain*, ECtHR, Application no. 30141/09, Decision of March 27, 2012, concerning enforced disappearances during the Spanish Civil War, ruled inadmissible by the European Court of Human Rights.

258 Minow, Martha, *Between Vengeance and Forgiveness*, Beacon Press, Waldford, 1999, p. 91.

259 *Oxford English Dictionary*, s.v. "compensation," accessed at http://www.oxforddictionaries.com/definition/english/compensation.

260 UN General Assembly, Resolution 60/147, 2005.

261 "Transitional justice has been defined, in its normative hard core, by international human rights and international humanitarian law standards and principles." See Rincón,

access to justice as a means to combat impunity, as emphasized in several treaties.[262]

The preamble of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* presents this direct link:

> Convinced that the effective punishment of war crimes and crimes against humanity is an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of cooperation among peoples and the promotion of international peace and security.

The failure of judicial authorities to conduct genuine investigations, or the existence of national laws permitting amnesty processes, violates victims' right to justice and constitutes a breach of the state's international obligations, thereby giving rise to international responsibility.[263] Since 1945, the establishment of international criminal tribunals has laid the foundations for human coexistence and delineated the limits of responsibility for actors under international law, including states, international organizations, multinational corporations, national liberation movements, and individuals.[264]

Tania, *Verdad, justicia y reparación: La justicia de la justicia transicional,* Editorial Universidad del Rosario, Bogotá, 2010, p. 28. Translation by author.

[262] See, e.g., UDHR, Article 8; ICCPR, Articles 2(1, 2), 2, and 3; CERD, Article 6; CAT, Articles 14:1 and 14:2; CRC, Article 3; *Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land*, The Hague, October 18, 1907, Article 3; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, Article 9; *Protection of Victims of International Armed Conflicts (Protocol I)* of June 8, 1977; *Rome Statute*, Articles 68 and 75.

[263] Morales, Ernesto C., "Restricciones del universalismo. Generalidades en torno al derecho a la justicia," in *Justicia Transicional en Colombia: Formulación de propuestas desde un análisis comparado,* Universidad Nacional, Bogotá, 2008, p. 36.

[264] Carrasquilla, J. F., *Relaciones del derecho penal con la moral y la justicia: Concepto y límites del derecho penal,* Editorial Temis, Bogotá, 2014, p. 168.

This trend places victims at the center of international human rights law, affirming their rights to truth, justice, and reparation.[265] States are bound by international obligations to implement legislative, administrative, and other necessary measures aimed at preventing violations and conducting effective, prompt, thorough, and impartial investigations when they occur. Where appropriate, states must also take legal action against those allegedly responsible, in accordance with both domestic and international law.[266]

The delay in bringing those responsible for serious human rights violations to justice can, in some cases, create a perception of legal uncertainty. Eduardo Luis Duhalde, former Human Rights Deputy Secretary of the Republic of Argentina, reflecting on the crimes committed during the Junta period and the Dirty War—as well as the criminal proceedings initiated two decades later—remarked on the national judicial actions that embody a universal aspiration for justice:

> The question is not whether it is too late to achieve justice, but rather: *Was it too late to prosecute Eichmann for the crimes of the Holocaust, or to prosecute Klaus Barbie for similar atrocities?* I believe it was not too late. However, from the perspective of each victim's personal story and the families who sought justice, it may have felt like an unbearably long time. Historically, the mistake would be to regard this merely as "delayed justice" without acknowledging that these legal proceedings ultimately *prevented an eternal injustice*.[267]

This perspective is reflected in the judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of

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[265] Ramírez, L. M., "La obligación internacional de investigar, juzgar y sancionar graves violaciones a los derechos humanos en contextos de justicia transicional," *Estudios Socio Jurídicos* 16, no. 2, 2014, p. 29.
[266] UN General Assembly, Resolution 60/147, 2005, II. Scope of the obligation, para. 3.
[267] Duhalde, Eduardo Luis, interview by Informe Semanal, Human Rights Deputy Secretary, Republic of Argentina, 2 July 2005, RTVE. Available at: http://www.rtve.es/alacarta/videos/informe-semanal/informe-semanal-punto-final-impunidad/848259/. Translation by author.

Radovan Karadžić.[268] Twenty-two years after the events, the ICTY sentenced Karadžić to forty years' imprisonment for genocide and war crimes committed in Srebrenica, Sarajevo, and other locations in Bosnia and Herzegovina.

4.4. Truth Commissions, History, and Transitional Justice

Whenever the legal, economic, and social actors in a given country decide to implement a transitional justice system, they must determine which institutions to include in their national framework. Based on the experience of more than 120 states that completed or partially completed transitional justice processes between 1948 and 2010,[269] the current conceptual framework may occasionally incorporate a combination of elements—prosecution by national and/or international courts, truth commissions, reparation programs, gender justice, institutional reform, and commemoration initiatives. All these mechanisms aim to prevent impunity and affirm the validity of the rule of law.

Nevertheless, each country develops a unique "profile" or design for its transitional justice system, and not all of the mechanisms mentioned above are always included. In my own country, Spain, the transition from dictatorship to democracy in the 1970s achieved significant political and historical milestones. However, we failed to establish a common narrative about the past due to the absence of a truth commission and the passage of the 1977 Amnesty Law, which created a legal foundation for impunity and left victims' concerns unaddressed. Spain, second only to Cambodia, still faces the ongoing tragedy of numerous *desaparecidos*, with countless mass graves and unmarked burial sites remaining undiscovered, leaving victims without a proper and conclusive narrative of their existence. Javier Cercas has argued that Spain's political transition, though successful in many respects, has been hindered by the absence of an honest system of transitional justice.[270]

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[268] *Prosecutor v. Karadžić* (IT-95-5/18), International Criminal Tribunal for the Former Yugoslavia (ICTY).

[269] Olsen, D., Payne, L. A., and Reiter, A. G., *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy*, U.S. Institute of Peace Press, Washington, DC, 2010, p. 181.

[270] Cercas, Javier, "La izquierda y la transición," *El País*, Madrid, March 4, 2012.

When the truth and specifics of historical events are known, the question arises: What should be done next? How should one act within a framework of legal and moral obligations to achieve justice? Truth commissions, from the legal perspective of transitional justice, are crucial for fostering sustainable peace, informing legal decisions, and creating sound policies that enable a shared narrative about a country's past during a specific historical period. They represent the legitimate choice of a state to incorporate a national perspective into a unique format for each country, facilitating an agreed-upon narrative and discourse about what happened—to know, to understand, and to act.

Professor Javier López de Goicoechea has argued that the term "truth commissions" is presumptuous and excessive, as truth, he suggests, is the domain of philosophers rather than historians, jurists, and political scientists. However, following Goicoechea's perspective, if the *raison d'être* of philosophy is truth, then the *raison d'être* of law is justice. Genuine transitional justice cannot exist without a profound, objective, and accurate understanding of what occurred during specific historical periods—times when not only were constitutional order and basic freedoms undermined, but also when the principles of democracy and fundamental justice were abandoned.[271]

History and law are products of human interaction; authentic human narratives require historical facts, interpretation, and the law that reflects the specific context of its time, all embedded within a discourse: the quest for truth. A lack of knowledge, along with the intentional promotion of ignorance regarding certain historical episodes of human rights violations and the impunity of perpetrators, can lead not only to undesirable outcomes but also to absurd and troubling episodes, such as the scandal over former United Nations Secretary-General Kurt Waldheim's Nazi military service.[272]

History serves as a powerful didactic force for our sense of justice, reminding us that our vision of justice and commitment to truth are

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[271] Truth commissions around the world often recommend the implementation of public policies to address victims' needs, as listed in UN General Assembly Resolution 60/147, 2005, paras. 19–23. See Ibáñez Najar, J. E., *Justicia transicional y comisiones de la verdad*, Berg Institute, Madrid, 2014.

[272] Rosenbaum, E. M., and Hoffer, W., *Betrayal*, Thomas Dunne Books, New York, 1993, p. 465.

human efforts born from the repeated process of bearing witness and recognizing our responsibilities as citizens, actors, and legal institutions dedicated to upholding justice. As Claudio Magris asserts, "the method is the construction of experience."[273] Through our awareness of history, we become conscious of our legal, civic, and ethical responsibilities.

A well-known Arab fable illustrates the didactic value of facts over the rhetoric of words. The story recounts how a mother takes her son to the theatre for the first time and teaches him to appreciate what he observes. The scene depicts a forest where a hunter captures a hare and kills it with his knife; though moved by the animal's nobility, he weeps for it. The child points out the hunter's tears, and his mother responds, "My son, do not look at the tears on the face of the hunter, but rather at what his blood-stained hands are doing."

This story underscores the essential legacy of truth commissions: focusing on the interpretation and understanding of past events. Truth commissions adopt *a victim-centered perspective*, preventing indifference and compelling society to side with those who are aggrieved, vulnerable, and broken—in short, the defeated. In his literary work *Kaputt*,[274] Curzio Malaparte reflects on the shared etymology of *Kaputt* and *victim* with the Hebrew word *kopparoth* (כפרה) or *Kapparah*, meaning defeated, broken, shattered; the victim is indeed the epicenter of the work of truth commissions.[275]

Historical memory, collective consciousness, and the moral obligation to make informed decisions form part of the legacy created by truth commissions, enabling them to counteract one of the most damaging effects: *indifference* to the truth.[276]

International law establishes the thresholds, principles, and legal framework within which transitional justice continues to evolve. Its aim is

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273 Magris, Claudio, *Danubio*, Garzanti, Milano, 1999, p. 12.

274 Malaparte, Curzio, *Kaputt*, Adelphi Edizioni, Milano, 2009, p. 280. "Lei conosce l'origine della parola Kaputt? È una parola che proviene dall'ebraico kopparoth, che vuol dire vittima." ["Do you know the origin of the word Kaputt? It is a word that comes from Hebrew and means victim."] Translation by author.

275 In Hebrew, the singular of *kapparot* means "atonement" and derives from the Hebrew root k-p-r, which means "to atone." The author expresses his gratitude for this insight into the Hebrew language provided by his friend Guy Harpaz and his father, Jonathan Goldberg.

276 González Ibáñez, Joaquín, "International Rule of Law and Human Rights."

to develop a justice system that upholds the rule of law in response to serious human rights violations, focusing on identifying victims and preventing impunity.

Truth commissions not only provide access to comprehensive narratives from turbulent periods in a society's history but also offer opportunities to learn how to interpret and respond to similar situations in the future. Giorgio Perlasca, an Italian merchant, saved thousands of lives during the final months of World War II by creating safe havens for Jews within the Spanish consular offices in Budapest. With imagination and courage, Perlasca continued the work of Spanish Ambassador Sanz Briz and Swedish diplomat Raoul Wallenberg, providing consular assistance to Jewish Hungarians with Spanish accreditations and passports. His heroic actions went unrecognized for more than forty years, until some of those he saved chose to share his story of extraordinary human courage.

When asked about the significance of his deeds, Perlasca replied humbly: "I would like young people to take an interest in this story, simply—how can I put it—to think not only about what happened but about what could happen in the future, and thereby to learn to oppose violence."[277]

Truth commissions should serve as a lighthouse, guiding us to understand our past actions and helping us develop responses that prevent injustice and exclusion. As Mark Twain observed, "History does not repeat itself, but it often rhymes." Recognizing the "rhythm and tempo" of our own history is essential for understanding the dangers that lie ahead and for creating just responses to the demands of victims.

4.5. Conclusion

The rule of law is a normative achievement of universal significance. Drawing on Judge Bingham's metaphor, which likens the rule of law to a universal secular religion, we may view the "liturgical moment" as symbolized by the second day of the Opening Session at the International Military Tribunal at Nuremberg: "That four great nations,

[277] Perlasca, Giorgio, interview by Giovanni Minoli, *The Mixer*, RAI TV, 1990. See also Enaglio, E., *La banalità del bene*, Feltrinelli, Roma, 1993. Translation by author.

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."[278] Forty-four years after this declaration, this legal rhetoric has been reinvigorated through state responses to gross violations of international human rights law and serious breaches of international humanitarian law, applying these principles with a renewed sense of realism.

For the first time in history, international law and transitional justice have adopted a holistic perspective on victims. The transitional justice goals of truth, justice, reparation, and comprehensive transformation, as supported by the current UN framework, address victimhood by recognizing both the crime suffered and its impact on the victim's humanity. Two centuries ago, in his Italian classic *The Betrothed* (*I promessi sposi*), Alessandro Manzoni articulated the essence of this narrative: "Those who provoke and subjugate, all those who injure others are guilty not only of the evils they commit but also of the effects produced by these evils on the characters of the injured persons."[279]

Serge Klarsfeld, in his lifelong commitment to life and justice alongside his wife Beate, embodies the goals of transitional justice under international law. In the Epilogue of their *Mémoires*, they explain:

> This is a human drama that opens terrible perspectives on the infinite capacity of "civilized" man to cause harm. The universe of the Nazi concentration camps which caused such massive suffering and crimes did not admit any "why." Its cruelty knew no limits, exceeding anything that might have been feared until then, weakening man's confidence in himself, and revealing the bestiality embedded deep in him… The Holocaust should not represent only the millions of victims, but one victim, one more victim, and another victim, so as to restore to each of them his civil status, his itinerary, his dignity; so that these victims be

[278] Jackson, Robert H., American Chief Prosecutor, statement at the Nuremberg Trials, November 21, 1945, quoted in Bass, Gary J., *Stay the Hand of Vengeance*, Princeton University Press, Princeton, 2000.

[279] Manzoni, Alessandro, *I promessi sposi*, Einaudi, Milan, 1985, p. 34. Translation by author.

> spared from oblivion and from anonymity, so that as objects of History, these names become once again subjects of History.
> … I have searched intensely for Justice; for historical Truth. As a lawyer, my role was rather that of an investigator and a prosecutor in matters of crimes against humanity. As a militant lawyer, I defended only one cause: that of each victim, of all the victims of the Holocaust and of their successors to see the condemnation of their butchers, hitherto protected by the political societies in which they evolved, and I campaigned for international penal justice.[280]

In many ways, the comprehensive strategies of international law and transitional justice seek to prevent impunity by introducing a new interpretation of human action and responsibility. Historians like Timothy Snyder, in his work *Bloodlands*, apply this perspective to a fresh analysis of the crimes of World War II, emphasizing that responsibility lies in our commitment to crafting a narrative that unfolds "not from the political geography of empires, but from the human geography of victims."[281]

[280] Klarsfeld, Serge, and Klarsfeld, Beate, *Mémoires*, Fayard, Paris, 2015, pp. 670–73. Translation by author.
[281] Snyder, Timothy, *Bloodlands: Europe Between Hitler and Stalin*, Vintage, London, 2010, p. xviii.

CHAPTER 5*

Rule of Law, Universal Jurisdiction, and the Paradox of the Magistrate Who Ordered the Detention of Augusto Pinochet in London

On November 25, 1998, my mother and I watched live on television the dramatic decision by the House of Lords in London regarding Pinochet's immunity as part of an extradition request by the Spanish judicial authorities. I tried to explain to my mother, Teresa, the importance of this historic legal judgment for the victims and their pursuit of justice. We embraced each other in tears, moved by the pain and the new hope it brought for justice.

> *The application of the principle of universal jurisdiction in the Pinochet case has provided us with an important lesson in civic pedagogy. It has demonstrated that the legal system of democracies—the rule of law—enjoys moral primacy over the political and legal systems of authoritarian regimes, such as the dictatorship of the Military Junta in Chile, presided over by General Pinochet. The process in which the former head of state of Chile, Mr. Augusto Pinochet Ugarte, will stand trial before the Audiencia Nacional in Madrid for crimes against humanity will allow him to enjoy the very human rights he denied his victims—the disappeared (desaparecidos) and the tortured. Notably, Pinochet will benefit from the guarantees of due process, including the presumption of*

* The first version of this chapter was originally published as "Legal Pedagogy, The Rule of Law and Human Rights: The Professor, The Magistrate's Robe, and Miguel de Unamuno" in *Interdisciplinary Journal of Human Rights Law*, Volume 6, 2013-2014, Number 1. The content has since been updated and expanded for inclusion in this book.

innocence and respect for his physical and moral integrity, in a trial guided by the principles of humanity and justice.

Joaquín González Ibáñez, 1998

5.1. Introduction

The history of the 20th century—and to a large extent, the century we are currently shaping—can be understood through the lens of the rule of law and the global aspirations for freedom, development, and democracy. Within this context, an in-depth analysis of human rights across various countries provides valuable insights. These range from the oppressive systems of totalitarianism, fascism, and communism to the pseudo-democratic regimes that have systematically dismantled the rule of law and democracy, depriving people of their fundamental freedoms. Equally significant are the democracies that, despite varying degrees of success, have sought to fortify democratic institutions. These systems aim to provide their citizens with a framework of choices, opportunities, and the foundation for genuine public liberties.

From a legal perspective, it could be argued that universities in democratic countries still struggle to effectively convey foundational principles such as the aspiration for justice and the significance of the rule of law, democracy, and human rights. What is lacking is the development of an effective didactic approach, akin to the methodology presented in Paulo Freire's classic work, *Pedagogy of the Oppressed* (*Pedagogía del oprimido*).[282] The rule of law, in this context, is not merely the foundation of the legal order in a democratic state but also a framework for aspiring to civility and reflecting an ethical commitment to public life.

These introductory remarks aim to foster a deeper understanding of the rule of law and international human rights standards, free from

[282] Freire, Paulo, *Pedagogy of the Oppressed*, Continuum, 2000, (originally published in 1968). See also *Celebrating the 40th Anniversary of Paulo Freire's Pedagogy of the Oppressed*. Available at: www.pedagogyoftheoppressed.com (last accessed December 1, 2012).

accusatory interpretations and ideological biases. Such an approach has become necessary given the evolving narrative surrounding Baltasar Garzón and his investigation into crimes against humanity—an endeavor that faced harsh criticism but is not the primary focus of this chapter. It is important to acknowledge that these observations may contain errors.

This chapter is grounded in three core premises. The first is doubt, a cornerstone of research, writing, and classroom debate. To debate, reflect, doubt, and identify or correct errors are indispensable components of the intellectual process. Without these elements, dialogue becomes impossible, as true dialogue requires the convergence of diverse perspectives and reasoning.

The second premise is the concept of law, understood as an aspiration propelled by a commitment to justice and the rejection of indifference. This commitment is especially significant when it extends beyond individual citizens to encompass a broader responsibility within the framework of what we call Law—a system that reflects our vision of liberty and accountability. British Judge Tom Bingham captured this sentiment poignantly 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."[283] The rule of law, justice, and commitment are inherently intertwined with our legal and moral obligations. In this context, the international rule of law has emerged as a spiritual cornerstone for democratic societies that aspire to be more just and inclusive.

The third premise views the law as an encounter with "the other," embodying a meeting with diversity and "otherness," as expressed by Ryszard Kapuściński.[284] This perspective is especially relevant when considering the most vulnerable—those who have been denied the opportunity to choose and exercise their rights. Among them, we find the victims, whose experiences underscore the profound significance of this encounter.

These reflections may trace their origin to an autumn afternoon in October 2010 in Washington, D.C., a time when charges were being formally considered in the disciplinary proceedings against Judge Baltasar Garzón for his investigation into the mass graves of the Francoist era. On

[283] Bingham, Tom, *The Rule of Law*, Penguin Books, 2010, p. 174.
[284] Kapuscinski, Ryszard, *The Other*, Verso, 2008.

that day, along Massachusetts Avenue, Professor Claudio Grossman, with his characteristic intelligent humor, remarked:

> It seems that you Spaniards, throughout history, haven't had the intention to address your own victims and assist them, and the proof of this lies in the actions of the judges of the [Spanish] Supreme Court.

I responded, seeking to strike a balance between deference to my friend and professor, my role as a human rights advocate, and my commitment to the rule of law:

> Without a doubt, there may be non-legal intentions involved, but as a citizen, I believe in the overall integrity of the judicial system. As such, I would like to trust in the capacity, dignity, and respect for the rule of law demonstrated by the magistrates of the highest jurisdiction in Spain. For that reason, I hope the law prevails and that Magistrate Baltasar Garzón is afforded the full guarantees of due process.

At that moment, I had not yet encountered the words of my friend, Professor Javier López de Goicoechea, who insightfully addressed a crucial aspect of the situation:

> The real issue is likely the virtual persona surrounding Garzón—a persona he has both cultivated and fallen victim to. It is perhaps for this reason that readers in Spain, as well as in Colombia, interpret your article not as a defense of the rule of law but as a defense of this virtual persona.[285]

I wish to express gratitude to my dear friend, Professor Darío Villarroel, as well as my esteemed academic colleagues and friends, including Professors and Senators Jamie B. Raskin from Maryland, U.S.A., and Jorge Eduardo Londoño from Boyacá, Colombia. Their examples

[285] Personal conversation with Professor Javier López de Goicoechea, Co-Director, Berg Institute, in Washington, D.C. October 2011.

inspired me to strive for coherence and respect in defending the rule of law. Through their influence, they encouraged openness to the possibility of error in writing this text, avoiding the embellishment of being right at all costs.

It is my hope that these reflections will serve, at the very least, as a legal-civic exercise grounded in the humanist legacy. As Svetan Todorov reminds us in *The Imperfect Garden (Jardin imparfait)*, this legacy is deeply rooted in the tradition of enlightenment thought:

> By confronting the past… we can gain access more easily and more directly to the world around us. To understand the thought of yesterday allows us to change the thought of today, which in turn influences future acts.[286]

Because rejecting the impunity of past crimes aligns with the objectives of contemporary international law, this chapter argues that Judge Baltasar Garzón initiated proceedings in Spain based on international obligations enshrined in treaties. Moreover, the principle of universal jurisdiction served as the legal foundation for indictments in similar cases. The universal jurisdiction proceedings initiated by Judge Garzón adhered to the law and sought to provide a legal and judicial response for victims of crimes committed outside Spain. In doing so, they reflected a routine affirmation of the international rule of law: Spain, through its institutions and magistrates, fulfilling its human rights obligations under international standards.

This chapter will explain why Judge Garzón's actions were consistent with the international rule of law, despite accusations by the Supreme Court that his investigation into Franco-era crimes violated the 1977 Amnesty Law. Finally, I will provide a personal account of the events surrounding the Supreme Court hearing of this case in February 2012.

In his final collection of essays, *Arguably*,[287] Christopher Hitchens reflects on the meaning of maturity. He suggests that maturity arises when we stop interpreting life solely through the principles we hold and instead come to understand it as the experiences that bring those principles to life,

[286] Todorov, Tzvetan, *The Imperfect Garden*, 2002, p. 228.
[287] Hitchens, Christopher, *Arguably*, 2011.

rendering them vivid and meaningful in the world.[288] For professors engaged in the study and teaching of international law and human rights, the ongoing interplay between principles and experiences forms the core of our professional lives. However challenging the lessons derived from these experiences may be, they continually shape and transform our principles.

Much of this intellectual and existential growth occurs in Spain and Latin America—regions we visit regularly to collaborate with magistrates, prosecutors, police officers, and armed forces, as well as to engage in postgraduate discussions with university professors. These efforts aim to advance the consolidation of international human rights standards and uphold the rule of law.

The primary tool of our work is an intellectual system—an *entelecheia*—designed to safeguard the spheres of liberty, dignity, and security for individuals. This tool is the law, specifically international human rights law. Over the past few decades, a particular procedural mechanism—universal jurisdiction—has emerged as an effective means to provide victims with a final recourse for vindication, embodying both the demand for justice and the rejection of impunity.

5.2. Universal Jurisdiction: Concept and Origins

The principle of universal jurisdiction is traditionally defined as "a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes, irrespective of the territory where the crime was committed and the nationality of the perpetrator or the victim."[289] Underlying this principle is the maxim *aut dedere aut judicare* (to extradite or to prosecute).[290] As noted, "Jurisdiction is the means of making law

[288] *Id.* at pp. XVII–XVIII ("For me, this was yet another round in a long historic dispute. Briefly stated, this ongoing polemic takes place between the anti-imperialist Left, and the anti-totalitarian Left… (This may not seem much of a claim, but some things need to be found out by experience and not merely derived from principle).").

[289] See Randall, Kenneth C., *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 788, 1988.

[290] The Latin motto *aut dedere aut judicare* means "extradite or prosecute" and is used to designate the alternative obligation concerning the treatment of an alleged offender "which is contained in a number of multilateral treaties aimed at securing international

functional"—the mechanism through which the objectives and purposes enshrined in the law are achieved.[291]

Whenever a crime is committed, states are obligated to exercise jurisdiction to prosecute the responsible party before a court of law. This legitimate process is typically based on the principles of territoriality or nationality, and sometimes on passive personality—the nationality of the victim—or the protective principle, when national interests are at stake.[292] Through the principle of universal jurisdiction, however, national and international courts have been able to prosecute defendants even in the absence of traditional jurisdictional grounds.

This represents a significant evolution in international law, enabling states to apply their laws to certain offenses even without territorial, national, or other legal connections to the offender or the victims. The principle of universality recognizes that certain crimes are so heinous and appalling that all states share a responsibility—or at least a legitimate interest—in taking action to prevent impunity. Nevertheless, the exercise of universal jurisdiction remains controversial, as jurisdiction is fundamentally an expression of state sovereignty.[293]

The principle of universal jurisdiction deviates from the ordinary rules of criminal jurisdiction, which typically require a territorial or personal connection to the crime, the perpetrator, or the victim. As Mary Robinson explains:

> It is based on the notion that certain crimes are so harmful to international interests that states are entitled—and even

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cooperation in the suppression of certain kinds of criminal conduct." Bassiouni, M. Cherif & Wise, Edward M., *The Duty to Extradite or Prosecute in International Law* 3, 1995.

[291] Blakesley, Christopher, *Extraterritorial Jurisdiction*, in *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms*, vol. 2, edited by Bassiouni, M. Cherif, p. 85, 3rd ed., 2008.

[292] See Kraytman, Yana Shy, *Universal Jurisdiction – Historical Roots and Modern Implications*, 2 B.S.I.S. J. Int'l Stud. 94, 2005, http://www.kent.ac.uk/brussels/journal.html.

[293] Bassiouni, M. Cherif expresses the notion that universal jurisdiction implicitly transcends national sovereignty and imposes an active obligation on States: "The obligation to extradite or prosecute is 'alternative' in the sense a state subject to this obligation is bound to adopt one of two possible courses of action: it must extradite if it does not prosecute, and prosecute if it does not extradite." Bassiouni & Wise, supra note 9, at p. 2.

> obliged—to bring proceedings against the perpetrator, regardless of the location of the crime and the nationality of the perpetrator or the victim.[294]

Universal jurisdiction permits the trial of individuals for international crimes, irrespective of the authority—private or public—they held at the time of the offense, and regardless of where the crime was committed.

Historically, the concept of universal jurisdiction can be traced back to the writings of early scholars, such as Grotius, and to the prosecution and punishment of piracy. The first state actions under this principle dates to the seventeenth century, specifically targeting acts of piracy. There are also occasional precedents from the nineteenth century involving the suppression of the slave trade on the high seas. Pirates, universally reviled and recognized as *hostis humani generis*— "enemies of all humankind"—were considered "punishable by the tribunals of all nations."[295]

Because piracy impacted all states, they were eager to prosecute pirates, making universal jurisdiction a practical compromise to resolve the "potentially innumerable… conflicts of jurisdiction."[296] Any state that apprehended a pirate could try them in its courts. This principle has been recognized as customary international law and later codified in conventions such as the 1958 Convention on the High Seas and the 1982 Convention on the Law of the Sea.[297]

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294 See Robinson, Mary, *Foreword to The Princeton Principles on Universal Jurisdiction*, 15 , 2001. http://lapa.princeton.edu/hosteddocs/unive_jur.pdf.

295 *United States v. Smith*, 18 U.S. 153, 156 (1820). This is the case in which the United States Supreme Court upheld the exercise of universal jurisdiction by U.S. courts over piracy, which was declared to be "an offence against the universal law of society." Id. at 161. The notion of pirates being *hostis humani generis* is often credited to Cicero. See Bassiouni, M. Cherif, *Crimes Against Humanity in International Criminal Law* 293, 1999; Kraytman, supra note 11 (quoting Bassiouni).

296 Bassiouni, M. Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 Va. J. Int'l L. 81, 83, 2001. See, e.g., Brownlie, Ian, *Principles of Public International Law* 304–05, 4th ed. 1990.

297 *Convention on the High Seas, art. 19, adopted April 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 11; United Nations Convention on the Law of the Sea, art. 105, adopted December 10, 1982, 1833 U.N.T.S. 396. Available at:*

However, the trials at Nuremberg are widely regarded as the foundation of the modern application of universal jurisdiction. The legal outcomes following the Second World War included the London Conference, where, a month after Nazi Germany's defeat, the victors established the Nuremberg Principles and drafted the Geneva Conventions. These developments were followed by the creation of multilateral human rights instruments and the Eichmann Trial in 1966. Together, these events form the standard narrative explaining the evolution of universal jurisdiction, from its origins in addressing piracy to its modern application in *jus cogens* crimes, particularly those committed during the Second World War by the Nazis:

> The Axis' offenses, like piracy, thus became crimes of international concern. Moreover, war crimes and crimes against humanity are analogous to piracy in that they are typically committed in locations where they will not be prevented or punished easily; this parallel suggests the necessity of extending universal jurisdiction to the Axis' crimes.[298]

The first precedent of universal jurisdiction in the 20th century within an international treaty was the encouragement of states to enact judicial cooperation. This is evident in the aforementioned London Agreement of 1945, which established the jurisdiction of the Tribunal over crimes lacking a specific geographical location and also provided national courts with jurisdiction over other war criminals.[299] Similarly, the

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http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm.

[298] Randall, Kenneth C., *Universal Jurisdiction Under International Law*, 66 Tex. L. Rev. 785, 788, 1988.

[299] See *Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution of the Major War Criminals of the European Axis*, August 8, 1945, 82 U.N.T.S. 280 [hereinafter *London Agreement*], http://avalon.law.yale.edu/imt/imtchart.asp. See *London Agreement* art. 1: "There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity

International Humanitarian Law that emerged after World War II, particularly through the Geneva Conventions of 1949, exemplifies the application of universal jurisdiction to grave breaches of these Conventions.

Historical cases, such as the 1960 kidnapping of Adolf Eichmann— a high-ranking officer in the Third Reich's SS organization— by Mossad agents in Argentina, demonstrated the practical expansion of customary international law. Eichmann's trial in 1961 confirmed that international crimes could no longer go unpunished. In effect, this case underscored that, under specific circumstances, state sovereignty could be limited in response to heinous crimes. This principle, though applied selectively, became widely accepted as a general norm in such exceptional cases.[300]

Former U.S. Secretary of State Henry Kissinger remarked that the Eichmann case should be regarded as the first precedent for the application of universal jurisdiction. However, he also asserted that the drafters of the Helsinki Accords—basic human rights principles initiated by Willy Brandt and his Ostpolitik,[301] adopted in 1975 by the Conference on Security and Cooperation in Europe—and the United Nations' 1948 Universal Declaration of Human Rights did not intend to authorize universal jurisdiction.

The improper application of criminal jurisdiction, including universal jurisdiction, can sometimes be misused to harass political opponents or pursue objectives unrelated to criminal justice. Furthermore, the imprudent or untimely exercise of universal jurisdiction risks disrupting efforts toward peace and national reconciliation in countries

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as members of the organizations or groups or in both capacities." See also *London Agreement* art. 6: "Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals."

300 We may refer to the Eichmann case in 1961 as the first case. See *Israel v. Eichmann*, 36 I.L.R. 277, 298–300 (Isr. Sup. Ct. 1962); *R. v. Finta*, 104 I.L.R. 285, 305 n.12 (Can. Sup. Ct. March 24, 1994); *Demanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), cert. denied, 457 U.S. 1016 (1986); *R. v. Bartle and the Comm'r of Police for the Metropolis and Others Ex parte Pinochet*, [1999] 2 W.L.R. 827 (H.L.); *The Four from Butare Case*, Cour d'Assises de Bruxelles, June 7–8, 2001 (Belg.).

301 See Craig, Gordon A., *Did Ostpolitik Work?*, 73 *Foreign Affairs* 1625, 1994. http://www.foreignaffairs.com/articles/49450/gordon-a-craig/did-ostpolitik-work.

emerging from violent conflict or political oppression. Prudence and sound judgment are therefore essential in navigating these complex legal and political terrains.[302] As Kenneth Roth observes,[303] Henry Kissinger, a former U.S. Secretary of State, exemplifies the controversies surrounding the application of universal jurisdiction, as he himself could potentially face its implications if he were to travel to certain European countries.[304]

One notable example of prosecutorial discretion in this context is South Africa's post-apartheid compromise, negotiated by Nelson Mandela, who was widely recognized as the legitimate representative of apartheid's victims. Mandela agreed to grant immunity from prosecution to perpetrators who provided detailed testimony about their crimes. This agreement was an essential component of South Africa's reconciliation process, and no prosecutor has challenged it, nor is any government likely to do so.[305]

Many Spaniards might draw a similar comparison, with the critical difference being that Spain did not have a figure like Mandela. In Spain, neither the victims—whether exiled abroad or "exiled" within the country—nor those who suffered reprisals after the Spanish Civil War were afforded the opportunity to have their voices heard or to testify in court, as was the case in South Africa.

5.2.1. Universal Jurisdiction and the Principle of Complementarity

Universal jurisdiction operates effectively only when the principle of complementarity, also referred to as the principle of subsidiarity, is fulfilled. This principle functions as a mechanism that grants jurisdiction to a third country's court or an international tribunal when domestic

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302 See *Princeton Principles*, *supra* note 16, at p. 25.
303 Roth, Kenneth, *The Pitfalls of Universal Jurisdiction*, 80 *Foreign Affairs* 86–96, 2001. See also Roth, Kenneth, *The Case for Universal Jurisdiction*, 80 *Foreign Affairs* 150–154, 2001 [hereinafter *Roth, Case*], www.foreignaffairs.com/articles/57245/kenneth-roth/the-case-for-universal-jurisdiction.
304 See Hitchens, Christopher, *The Trial of Henry Kissinger*, Faber&Faber, New York, 2002. Christopher Hitchens gathered part of the legal background and the development of the principle of international jurisdiction with the assistance of professors Michel Tigar and Jamie B. Raskin from Washington College of Law–American University.
305 *Roth, Pitfalls*, *supra* note 25. See also *Roth, Case*, *supra* note 25.

institutions fail to exercise their primary jurisdiction. In essence, it ensures that courts outside the national territory can intervene subsidiarily to address violations of international law. When domestic judicial systems are unable or unwilling to act, these external mechanisms step in to prevent perpetrators from escaping justice.

Mohamed M. El Zeidy highlights that the principle of complementarity assumes a sophisticated system within international criminal law, one that necessitates the coexistence of both functioning national and international criminal justice mechanisms.[306] This principle strikes a balance between respecting state sovereignty and upholding universal jurisdiction. The absence of a genuine national investigation or prosecution serves as the central criterion for the application of universal jurisdiction. Specifically, this absence arises when national courts are either unwilling or unable to conduct thorough investigations and prosecutions to hold alleged perpetrators accountable.[307]

5.2.2. The Princeton Principles on Universal Jurisdiction

Universal jurisdiction is founded on the premise that certain crimes are so heinous and detrimental to the international community—such as crimes against humanity, genocide, war crimes, torture, and forced disappearances—that states are both authorized and obligated to investigate and prosecute alleged perpetrators. This applies regardless of where the crimes were committed, the nationality of the victims, or whether the offenses directly impacted the prosecuting state's interests.

As a complementary instrument in the fight against impunity, universal jurisdiction serves as a mechanism to ensure accountability and prevent perpetrators from evading justice under international law. It underscores the responsibility of states that are party to international human rights treaties to either prosecute offenders or extradite them to jurisdictions where they can face trial in national or international courts.

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306 El Zeidy, Mohamed M., *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 *Mich. J. Int'l L.* 870, 2002.

307 See Brown, Bartram S., *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 *Yale J. Int'l L.* 386, 1998.

Since the Nuremberg and Tokyo trials, international law has developed legal frameworks for the exercise of universal justice. Examples include the *ad hoc* Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Courts for Sierra Leone, East Timor, and Cambodia, and the International Criminal Court. As Olga Martin-Ortega and Jordi Palou-Loverdos have observed: "Each of these mechanisms, acting in tandem with domestic courts, serves as an instrument for the enforcement of human rights and international humanitarian law. Universal jurisdiction is only one of the tools available in the fight against impunity for severe human rights violations."[308]

The *Princeton Principles on Universal Jurisdiction*,[309] composed in 2001, were designed to contribute to the ongoing development of universal jurisdiction. This project, sponsored by several institutions affiliated with Princeton University,[310] was led by Professor Stephen Macedo and resulted in a document aimed at assisting legislators in ensuring that national laws align with international law.[311]

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[308] Martin-Ortega, Olga, et al., *Preserving Spain's Universal Jurisdiction Law in the Common Interest*, *JURIST*, June 29, 2009.

[309] See Philippe, Xavier, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, *Int'l Rev. Red Cross*, Vol. 88, No. 862, June 2006. Available at: https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/irrc_862_philippe.pdf.

[310] The program was sponsored by Princeton University's Program in Law and Public Affairs and the Woodrow Wilson School of Public and International Affairs, the International Commission of Jurists, the American Association for the International Commission of Jurists, the Urban Morgan Institute for Human Rights, and the Netherlands Institute of Human Rights. The Project convened at Princeton University in January 2001, bringing together an assembly of scholars and jurists from around the world, serving in their personal capacities, to develop consensus principles on universal jurisdiction. See https://www.icj.org/resource/princeton-principles-on-universal-jurisdiction/.

[311] *The Princeton Principles on Universal Jurisdiction,* Princeton, 2001.
Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction, 2001.
The participants in the Princeton Project on Universal Jurisdiction propose the following principles for the purposes of advancing the continued evolution of international law and the application of international law in national legal systems:
Principle 1 -- Fundamentals of Universal Jurisdiction
1. For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed,

the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.
3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.
4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").
5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.
Principle 2 -- Serious Crimes Under International Law
1. For purposes of these Principles, serious crimes under international law include: (1) piracy; (2) slavery; (3) war crimes; (4) crimes against peace; (5) crimes against humanity; (6) genocide; and (7) torture.
2. The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.
Principle 3 -- Reliance on Universal Jurisdiction in the Absence of
National Legislation
With respect to serious crimes under international law as specified in Principle 2(1), national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it.
Principle 4 -- Obligation to Support Accountability
1. A state shall comply with all international obligations that are applicable to: prosecuting or extraditing persons accused or convicted of crimes under international law in accordance with a legal process that complies with international due process norms, providing other states
investigating or prosecuting such crimes with all available means of administrative and judicial assistance, and under-taking such other necessary and appropriate measures as are consistent with international norms and standards.
2. A state, in the exercise of universal jurisdiction, may, for purposes of prosecution, seek judicial assistance to obtain evidence from another state, provided that the requesting state has a good faith basis and that the evidence sought will be used in accordance with international due process norms.
Principle 5 -- Immunities

With respect to serious crimes under international law as specified in Principle 2(1), the official position of any accused person, whether as head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Principle 6 -- Statutes of Limitations

Statutes of limitations or other forms of prescription shall not apply to aerious crimes under international law as specified in Principle 2(1).

Principle 7 -- Amnesties

1. Amnesties are generally inconsistent with the obligation of states to provide accountability for serious crimes under international law as specified in Principle in 2(1).

2. The exercise of universal jurisdiction with respect to serious crimes under international law as specified in Principle 2(1) shall not be precluded by amnesties which are incompatible with the international legal obligations of the granting state.

Principle 8 -- Resolution of Competing National Jurisdictions

Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:

(a) multilateral or bilateral treaty obligations;
(b) the place of commission of the crime;
(c) the nationality connection of the alleged perpetrator to the requesting state;
(d) the nationality connection of the victim to the requesting state;
(e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
(f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
(g) the fairness and impartiality of the proceedings in the requesting state;
(h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and in the interests of justice.

Principle 9 -- Non Bis In Idem/ Double Jeopardy

1. In the exercise of universal jurisdiction, a state or its judicial organs shall ensure that a person who is subject to criminal proceedings shall not be exposed to multiple prosecutions or punishment for the same criminal conduct where the prior criminal proceedings or other accountability proceedings have been conducted in good faith and in accordance with international norms and standards. Sham prosecutions or derisory punishment resulting from a conviction or other accountability proceedings shall not be recognized as falling within the scope of this Principle.

2. A state shall recognize the validity of a proper exercise of universal jurisdiction by another state and shall recognize the final judgment of a competent and ordinary national judicial body or a competent international judicial body exercising such jurisdiction in accordance with international due process norms.

3. Any person tried or convicted by a state exercising universal jurisdiction for serious crimes under international law as specified in Principle 2(1) shall have the right and legal standing to raise before any national or international judicial body the claim of non bis in idem in opposition to any further criminal proceedings.

Principle 10 -- Grounds for Refusal of Extradition

1. A state or its judicial organs shall refuse to entertain a request for extradition based on universal jurisdiction if the person sought is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment or treatment, or if it is likely that the person sought will be subjected to sham proceedings in which international due process norms will be violated and no satisfactory assurances to the contrary are provided.

2. A state which refuses to extradite on the basis of this Principle shall, when permitted by international law, prosecute the individual accused of a serious crime under international law as specified in Principle 2(1) or extradite such person to another state where this can be done without exposing him or her to the risks referred to in paragraph 1.

Principle 11 -- Adoption of National Legislation

A state shall, where necessary, enact national legislation to enable the exercise of universal jurisdiction and the enforcement of these Principles.

Principle 12 -- Inclusion of Universal Jurisdiction in Future Treaties

In all future treaties, and in protocols to existing treaties, concerned with serious crimes under international law as specified in Principle 2(1), states shall include provisions for universal jurisdiction.

Principle 13 -- Strengthening Accountability and Universal Jurisdiction

1. National judicial organs shall construe national law in a manner that is consistent with these Principles.

2. Nothing in these Principles shall be construed to limit the rights and obligations of a state to prevent or punish, by lawful means recognized under international law, the commission of crimes under international law.

3. These Principles shall not be construed as limiting the continued development of universal jurisdiction in international law.

Principle 14 -- Settlement of Disputes

1. Consistent with international law and the Charter of the United Nations, states should settle their disputes arising out of the exercise of universal jurisdiction by all available means of peaceful settlement of disputes and in particular by submitting the dispute to the International Court of Justice.

2. Pending the determination of the issue in dispute, a state seeking to exercise universal jurisdiction shall not detain the accused person nor seek to have that person detained by another state unless there is a reasonable risk of flight and no other reasonable means can be found to ensure that person's eventual appearance before the judicial organs of the state seeking to exercise its jurisdiction.

See full text at https://www.icj.org/wp-content/uploads/2001/01/Princeton-Principles-Universal-Jurisdiction-report-2001-eng.pdf

In practice, these principles evoke mixed reactions. For some states that strongly emphasize sovereign national jurisdiction, they are perceived as a threat and a violation of the traditional territorial principle of criminal jurisdiction. Conversely, progressive and liberal states see them as an opportunity to combat impunity and a powerful legal strategy to protect victims of international crimes. A historic 2022 ruling in Germany, which upheld the principle of universal jurisdiction, exemplifies this commitment to combating impunity.

At the beginning of 2022, the Koblenz Higher Regional Court sentenced Syrian national Anwar R. to life imprisonment for crimes against humanity. The court determined that Anwar R. had committed these crimes in 2011 and 2012 during the early stages of the Syrian civil war. After fleeing to Germany as a refugee in 2014, he was recognized by some of his victims, which led to his arrest in February 2019. He remained in detention in Germany from the time of his arrest until his conviction.

The Higher Regional Court, in its decision, found that the Syrian central government had instructed the secret service to suppress protests against President Bashar al-Assad's regime, resulting in the arrest, torture, and killing of opposition members (BGH decision, paras. 3–9). The court also determined that Anwar R. played a key role aligned with the Syrian state, with his status, income, and privileges closely tied to the regime's success. He was deemed a co-perpetrator of the regime's crimes (BGH decision, paras. 9–11).[312]

The 58-year-old was found responsible for the torture of at least 4,000 people during his tenure as head of interrogation at a general security service prison in the Syrian capital, Damascus. Since its introduction in Germany in 2002, the *Code of Crimes against International Law* (*Völkerstrafgesetzbuch* – VStGB)[313] has defined genocide, crimes against

[312] Library of Congress, *Germany: Federal Court of Justice Confirms Life Sentence of Syrian Official for Crimes Against Humanity*, *Law Library of Congress*, August 27, 2024. Available at: https://www.loc.gov/item/global-legal-monitor/2024-08-26/germany-federal-court-of-justice-confirms-life-sentence-of-syrian-official-for-crimes-against-humanity/.

[313] Code of Crimes against International Law (*CCAIL*) of June 26, 2002 (Federal Law Gazette I, p. 2254), as last amended by Article 1 of the Act of July 30, 2024 (Federal Law Gazette 2024 I, no. 255).
"Section 1
Scope of application
This Act applies to all criminal offences against international law designated herein; for

humanity, and war crimes as criminal offenses that can be prosecuted even if they were not committed within Germany's territory.
After the ruling, German Federal Minister of Justice Marco Buschmann stated:

> Crimes against humanity must not remain unpunished. No matter where they are committed, no matter by whom. That is the profound and powerful principle on which international criminal law is based. Appalling injustices were committed in the torture prisons of the Assad regime. Answering this in the language of the law is the responsibility of the whole international community.

Buschmann added:

> Anyone who has committed crimes against humanity must not be allowed to find safe refuge anywhere.[314]

On August 5, 2024, Germany's Federal Court of Justice (Bundesgerichtshof, BGH) upheld the 2022 sentence handed down by the Higher Regional Court of Koblenz, confirming the conviction of Anwar R. to life imprisonment for multiple crimes against humanity, including

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offences under sections 6 to 12, it applies even when the offence was committed abroad and bears no relation to Germany. For offences under section 13 that were committed abroad, this Act applies independently of the law of the place of commission if the perpetrator is German or if the offence is directed against the Federal Republic of Germany."
The *CCAIL* acknowledges German jurisdiction over the following crimes: Section 6 Genocide; Section 7 Crimes against humanity; Chapter 2 War crimes: Section 8 War crimes against persons; Section 9 War crimes against property and other rights; Section 10 War crimes against humanitarian operations and emblems; Section 11 War crimes consisting in the use of prohibited methods of warfare; Section 12 War crimes consisting in employment of prohibited means of warfare; Section 13 Crime of aggression. Chapter 4 Other crimes: Section 14 Violation of the duty of supervision and Section 15 Failure to report a crime. Available at: https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html.

314 *Verdict Based on Principle of Universal Jurisdiction*, January 14, 2022. Available at: https://www.deutschland.de/en/topic/politics/universal-jurisdiction-in-germany-trial-on-state-sponsored-torture-in-syria.

torture, murder, severe deprivation of liberty, and sexual assault. This trial stemmed from a series of criminal complaints regarding torture in Syria, filed by various NGOs, institutions, and nearly 100 Syrian torture survivors, relatives, activists, and lawyers between 2016 and 2024 in Germany, Austria, Sweden, and Norway.[315]

5.3. Spanish Law, Universal Jurisdiction, and Judge Baltasar Garzón

In Spain, international jurisdiction in criminal matters is governed by the 1985 Judiciary Act, known as *La Ley Orgánica del Poder Judicial* (LOPJ). This Act establishes the primary rules for determining the jurisdiction of national and international courts. Article 23.4 of the LOPJ explicitly provided that, under the principle of universal jurisdiction, Spanish courts could try certain serious offenses, including genocide, terrorism, slavery, piracy, child prostitution and abuse, currency forgery, and drug trafficking. The article also extended jurisdiction to any other crimes Spain is obligated to prosecute under international treaties, even if the offense was committed outside Spanish territory and regardless of the offender's nationality. According to the LOPJ, the only court authorized to exercise universal jurisdiction is the National High Court (*Audiencia Nacional*).[316] Unfortunately, Article 23.4 has been amended by two Acts of Parliament, proposed by both conservative and socialist governments in Spain, limiting its original scope.[317]

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315 European Center for Constitutional and Human Rights, *First Criminal Trial Worldwide on Torture in Syria Before a German Court*, January 13, 2022, Berlin. Available at: https://www.ecchr.eu/en/case/first-criminal-trial-worldwide-on-torture-in-syria-before-a-german-court/.

316 Bachmaier, B., et al., *Criminal Law in Spain*, 2010, p.409.

317 For more than two decades, the provision of reference, Article 23.4 of the Ley Orgánica del Poder Judicial (LOPJ), stated: "Likewise, Spanish jurisdiction shall have jurisdiction over acts committed by Spaniards or foreigners outside the national territory that may be classified, according to Spanish criminal law, as any of the following crimes: a) Genocide. b) Terrorism. c) Piracy and unlawful seizure of aircraft. d) Counterfeiting of foreign currency. e) Crimes related to prostitution and corruption of minors or incapable persons. f) Illegal trafficking of psychotropic, toxic and narcotic drugs. g) Illegal trafficking or clandestine immigration of persons, whether or not they are workers. h) Those related to female genital mutilation, provided that those

responsible are in Spain. i) And any other that, according to international treaties or conventions, must be prosecuted in Spain."

This situation changed substantially in October-November 2009, when a new paragraph of Article 23.4 was approved and published in the *Boletín Oficial del Estado (BOE)* with the following wording: "Likewise, Spanish jurisdiction will be competent to hear acts committed by Spaniards or foreigners outside the national territory that may be typified, according to Spanish law, as any of the following crimes: a) Genocide and crimes against humanity. b) Terrorism. c) Piracy and unlawful seizure of aircraft. d) Crime related to prostitution and corruption of minors and incapable persons. e) Illegal trafficking of psychotropic, toxic and narcotic drugs. f) Illegal trafficking or clandestine immigration of persons, whether or not they are workers. g) Those related to female genital mutilation, provided that those responsible are in Spain. h) Any other that, according to international treaties and conventions, in particular the Conventions on international humanitarian law and the protection of human rights, must be prosecuted in Spain.

Without prejudice to the provisions of international treaties and conventions signed by Spain, in order for the Spanish courts to hear the above crimes, it must be proven that the alleged perpetrators are in Spain or that there are victims of Spanish nationality, or that there is some relevant connection with Spain and, in any case, that in another competent country or within an international court no proceedings have been initiated involving an investigation and effective prosecution, where appropriate, of such punishable acts. The criminal proceeding initiated before the Spanish jurisdiction shall be provisionally dismissed when there is evidence of the commencement of another proceeding on the facts denounced in the country or by the court referred to in the preceding paragraph."

Finally, after the approval of a new reform in 2014, the current Article 23.4 of the LOPJ provides the following regarding the three most serious and indisputable international crimes: "Likewise, the Spanish jurisdiction will be competent to hear the facts committed by Spaniards or foreigners outside the national territory susceptible of being typified, according to Spanish law, as any of the following crimes when the expressed conditions are met: a) Genocide, against humanity or against persons and property protected in case of armed conflict, provided that the procedure is directed against a Spaniard or against a foreign citizen who habitually resides in Spain, or against a foreigner who was in Spain and whose extradition had been denied by the Spanish authorities."

For further discussion on the reform of the universal jurisdiction system in Spain, see Javier Chinchón Álvarez, *"Del intento por acabar con la jurisdicción universal para el bien de las víctimas y del Derecho Internacional. Examen crítico de la Ley Orgánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial, relativa a la justicia universal"*, *Revista de Derecho Penal y Criminología*, Argentina, ISSN 0034-7914, No. 5, 2014, pp. 161-176. Available at: https://dialnet.unirioja.es/servlet/articulo?codigo=5014074.

Spanish courts have been exercising universal jurisdiction for more than two decades, making an extraordinary contribution to the development of international criminal law and the global fight against impunity. Initially, in the late 1980s, Spanish courts began applying universal jurisdiction to cases involving crimes such as the forgery of Spanish peseta banknotes and drug trafficking. However, it was in 1998 that the principle gained international prominence, when the *Audiencia Nacional* and Judge Baltasar Garzón indicted several Argentinean and Chilean officials for their alleged involvement in human rights abuses carried out under Operation Condor.

The Spanish Supreme Court (*Tribunal Supremo*), in the Guatemala case, ruled that to prevent the abuse of jurisdiction and the excessive extension of extraterritorial jurisdiction, Article 23.4 of the LOPJ should be applied within the framework of contemporary international law and the principle of the real effectiveness of the sentence.[318] This decision aligned with the 2001 Princeton Principles on Universal Jurisdiction, which have been instrumental in clarifying and organizing an increasingly significant area of international criminal law: the prosecution of serious crimes under international law in national courts, even in the absence of traditional jurisdictional links to the victims or perpetrators. According to Stephen Macedo, the primary aim of these principles was to produce a document that defines universal jurisdiction and outlines how its reasonable and responsible application by national courts can advance justice for victims of serious international crimes.

The Supreme Court's ruling in the Guatemala case established that Spanish courts could only prosecute a crime if there was a connection to Spanish territory, citizens, or "interests." Furthermore, the Court argued that prosecution would not be permissible if it risked causing international political conflict or if implementing the sentence would, in practice, be ineffective or impossible. However, in a landmark decision two years later, the Spanish Constitutional Court overturned the Supreme Court's judgment. In 2005, the Constitutional Court ruled that the Supreme Court's interpretation of Article 23.4 was overly restrictive and inconsistent with the fundamental right of access to courts. It held that the law neither required a specific connection to Spanish territory nor

[318] See Spanish Supreme Court (STC), September 26, 2005 (237/2005), http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/5497.

imposed limitations on the application of the principle of international jurisdiction.[319]

The Spanish Constitution, in Article 96.1, affirms that international treaties, once validly signed, ratified, and officially published, become part of the country's domestic legal order. As a result, the Constitutional Court's 2005 ruling in the Guatemala case asserted that the scope of universal jurisdiction is absolute and is not contingent upon national interests. Additionally, the Scilingo case—the only judgment issued by the *Audiencia Nacional* under the principle of universal jurisdiction—upheld the prosecution of certain international crimes as obligatory and enforceable against third parties (*jus cogens* and *erga omnes*). In this context, Spain emerged as a national pioneer in the exercise of universal jurisdiction, providing a vital avenue for victims of crimes under international law to pursue justice, truth, and reparation when no national remedies are available.

The final limitation on the exercise of universal jurisdiction by judges at the *Audiencia Nacional* did not arise from court rulings but from legislative action by the Spanish Parliament. In 2009, Parliament amended the 1985 Judiciary Act, restricting the jurisdiction of Spanish courts to cases with a "national connection."[320] In practical terms, this amendment meant that, from December 2009 onward, international criminals could only be prosecuted in Spain if they were physically present in the country, if their crimes involved Spanish victims, or if they had some "relevant connection" to Spain—although the law does not clearly define what constitutes such a connection. Furthermore, cases could not proceed if an international court or another "competent court" had already opened an investigation into the matter. This amendment represented a significant departure from the original conception of universal jurisdiction, which was primarily intended to combat impunity and eliminate safe havens for perpetrators of the most serious crimes.

In May 2009, as both a Spanish citizen and an international law professor, I signed the *Manifesto Against Impunity: In Favour of Universal*

[319] See STC, *supra* note 32.
[320] See *Ley Orgánica* 1/2009, November 3, 2009.

Jurisdiction.[321] The manifesto aimed to mobilize public opinion and influence policymakers to oppose a proposed act of Parliament that sought to restrict the authority of Spanish national courts to initiate criminal proceedings under the principle of universal jurisdiction.

5.3.1. Judge Baltasar Garzón and the Exercise of Universal Jurisdiction

In the 1990s, Judge Baltasar Garzón, a Spanish magistrate born in 1955 in Andalusia, initiated an investigation into Argentina's Dirty War during the *Junta Militar*, a period marked by the disappearance and murder of numerous individuals, including Spanish nationals and other foreign citizens. Acting under Spain's principle of universal jurisdiction, Garzón's inquiry into the Argentine dictatorship ultimately led him to investigate the role of Augusto Pinochet in Operation Condor. This covert program coordinated South American security services, including those of Chile and Argentina, to target and eliminate left-wing opponents. One prominent victim of Operation Condor was Orlando Letelier, a former Chilean ambassador to the United States, who was assassinated in Washington, D.C., in 1976.

Judge Garzón gained worldwide attention in the late 1990s when former Chilean military ruler and notorious human rights violator Augusto Pinochet was arrested in London at Garzón's request while seeking medical treatment.[322] The legal strategy that led to Pinochet's detention had been conceived years earlier by Spanish jurist Joan Garcés, the victims' attorney in the Pinochet case. Garcés,[323] a steadfast advocate of justice,

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321 Manifesto Against Impunity - In Favour of Universal Jurisdiction, *NODO50.ORG*, http://www.nodo50.org/csca/agenda09/palestina/pdf/MANIFESTOUNIVERSALJURISDICTION.pdf

322 See *Profile: Judge Baltasar Garzón*, BBC News, February 9, 2012. http://www.bbc.co.uk/news/world-europe-16591284

323 I would like to pay tribute and show public admiration to Joan Garcés for his humanity, competence, and dedication to the fight against impunity. I have had the privilege of meeting Joan Garcés personally and spending many moments over the years discussing law, history, and culture, always admiring his sensitivity and inquisitive mind. This journalistic article provides a glimpse of his extraordinary legacy: "The lawyer who wouldn't forget," *The Guardian*, February 2, 1999.

When Salvador Allende was overthrown by Pinochet, he ordered adviser Joan Garcés to escape and tell the world. Adela Gooch meets the man many believe is responsible for bringing the general to court. On September 11, 1973, just before La Moneda, the presidential palace, was bombed by General Pinochet, President Salvador Allende ordered one of his young political aides to leave. "Someone has to recount what happened here, and only you can do it," he told Joan Garcés, a Spanish economist, lawyer, and political scientist who had joined the Allende team in 1970 when the president first came to power in Chile.

Garcés has spent the last 25 years doing just that, with books, articles, and lectures analyzing the Allende government and the circumstances of its fall. "The massacre at the Moneda palace and the assassination of the political leaders that followed made me the sole survivor among President Allende's personal political advisers," Garcés recalls. "I had a very strong sense of duty to contribute to the understanding of the period that came to an end on September 11." Since 1996, Garcés has gone a critical step further. He is one of the lead lawyers seeking justice for victims of Pinochet's regime. And, according to those who have followed the legal proceedings closely, if Pinochet does eventually face trial, it will be largely due to Joan Garcés. "He has been the hammer that knocked away at the anvil," says John Muller, a Chilean journalist based in Madrid.

According to Oscar Soto, one of the president's doctors, the relationship between Garcés and Allende was particularly close—a personal friendship based on strong political sympathy. When Allende urged him to leave the palace, Garcés argued forcefully to stay. Eventually, he was literally pushed out, his briefcase wrested from his hand to prevent incriminating documents from falling into the Pinochet forces' possession. Garcés fled to the house of fellow Spaniard Joaquin Leguina, a UN demographer who later became a prominent socialist politician in Spain after General Franco's death. Later, he was granted protection and safe passage home by the Spanish Embassy in Santiago. However, he chose to return to academic life in Paris—where he had earned his doctorate at the Sorbonne—rather than live in Franco's Spain.

Garcés emphasizes, "I abstained from all political activity against General Pinochet's regime. I was not a member of any political party in Chile." However, he was active on the Spanish left after General Franco's death in 1975. In 1982, when a socialist government was elected, he returned to Spain and established a law office in Madrid. "He was a member of the Socialist party when most of the Franco opposition was concentrated in the Communists," says a fellow Franco opponent. "He is absolutely right when he says he was never a Communist." A bespectacled, mild-mannered man dressed in tweed and flannel, Garcés looks more like a university professor than a criminal lawyer. He left politics long ago (although his brother is a socialist MP) and has avoided the publicity eagerly courted by investigating magistrate Baltasar Garzón, who in October 1998 requested Britain detain Pinochet.

Born in Valencia in 1944, Garcés met Allende while preparing his doctoral thesis in Chile—a study predicting that Allende would rise to power if the electorate divided into three groups: center, right, and left. When Allende became president, he invited Garcés to join his team.

had served as a political advisor to Salvador Allende during his presidency. Twenty-five years later, in 1996, Garcés played a pivotal role in initiating the criminal proceedings against Pinochet before the *Audiencia Nacional*, cementing his legacy as a leading figure in the fight against impunity.[324]

Garzón seized this opportunity by issuing an international arrest warrant and a request for extradition. This initiated an eighteen-month-long legal drama during which Pinochet was held under house arrest in

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Garcés describes the period from June 1970 to September 1973 as one of "friendship, political understanding, and important political responsibility." His academic detachment and philosophical temperament may be a response to the brutality that ended that period.
It is hard to get him to talk about Allende. "It's all in my book," he says. Allende and the Chilean Experience was first published in France in 1975 and later translated into Spanish, Japanese, Italian, and Portuguese—but not English. The book offers a rigorously dispassionate account of Salvador Allende's three years in power, ending abruptly as Garcés leaves the Moneda Palace.
"I had been there the night before, at what was to turn into the last supper," he recalls wryly. "I stayed late with the interior and defense ministers and the director of national television, helping the president prepare a message for the nation."
The next morning, as troops guarding the palace were withdrawn, Allende urged him to leave, saying, "No one is better placed to tell the story of what happened."
Contrary to the image Pinochet's supporters have painted of Garcés as vengeful, he insists, "There is no question of revenge. What we are involved in is a thoroughly honorable enterprise to create a precedent for judging crimes against humanity through international cooperation."
According to Spanish investigations, some 200,000 people were tortured during Pinochet's regime in Chile from 1973 to 1990. Around 3,000 were assassinated, 1,000 disappeared, and 5,000 to 6,000 victims may be buried in unmarked graves.
Spain's 1985 law, which authorized the National Court to try breaches of international law regardless of where they were committed, allowed victims and their families to seek justice. In 1996, when the legal battle against Pinochet began, the plaintiffs asked Garcés to represent them.
"It was an honor to do so—free of charge, of course," he says. "Many are people of modest means who have suffered enough."
After two and a half years of investigation, international cooperation began, with the U.S., Britain, France, Switzerland, and Belgium involved. Garcés described Pinochet's arrest as a moment of "great professional responsibility for the victims."
Full article available at:
https://www.theguardian.com/world/1999/feb/02/law.theguardian.

[324] See criminal proceedings, "Caso Pinochet. España. Querella inicial del 5 de julio de 1996 al Juzgado Central de Instrucción de Guardia de la Audiencia Nacional." Full text available at: https://www.elclarin.cl/fpa/pdf/p_050796.pdf.

Britain while his fate was debated in the courts. Ultimately, the case reached the House of Lords, which ruled that Pinochet could indeed be extradited to Spain, as there was an obligation to extradite under international law. However, as is customary in extradition cases, the British government held the final decision. The then-Minister for Home Affairs, Jack Straw, acknowledged his belief that "universal jurisdiction against persons charged with international crimes should be effective." Nevertheless, he concluded that Pinochet was medically unfit to stand trial and ordered his release.[325] Some commentators, such as Lee A. Casey and David B. Rivkin, have questioned whether universal jurisdiction was appropriately applied in the proceedings against Pinochet.[326]

Judge Garzón also served as the investigative judge (*juez instructor*) in the Spanish trial of former Argentine naval officer Adolfo Scilingo. Scilingo was convicted of crimes against humanity and sentenced to 640 years in prison in April 2005. Following this landmark case, other notable proceedings were initiated, including one led by Nobel Peace Prize laureate Rigoberta Menchú. This case addressed allegations of genocide, torture, terrorism, assassinations, and illegal detention in Guatemala.

It is not only Baltasar Garzón but also many other magistrates at the *Audiencia Nacional* who have addressed serious human rights violations in regions where no alternative jurisdiction or effective court was available. These efforts include a case against officials of the Rwandan Patriotic Army (RPA) and the Rwandan Patriotic Front (RPF) for crimes allegedly committed against Hutu Rwandans, Congolese individuals, and nine Spanish victims in the context of the Rwandan genocide (1990–2002). As part of this initiative, Spanish courts have issued several international arrest warrants for senior political and military officials in Rwanda accused of genocide, crimes against humanity, and war crimes. In line with these principles, the *Audiencia Nacional* has also addressed other significant

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[325] See Statement of Secretary of State for the Home Department to the House of Commons, 345 Parl. Deb. H.C. (6th ser.) 571, 574 (2000). Available at: http://www.publications.parliament.uk/pa/cm199900/cmhansrd/vo000302/debtext/00302-10.htm-00302-10_spmin0.

[326] Casey, Lee A., and Rivkin Jr., David B., *The Dangerous Myth of Universal Jurisdiction*, in *A Country I Do Not Recognize: The Legal Assault on American Values*, Robert H. Bork, ed., 156, 2005. Available at: http://media.hoover.org/sites/default/files/documents/0817946020_135.pdf.

human rights issues, including alleged Chinese abuses in Tibet and the torture of detainees at Guantanamo Bay by United States authorities.[327]

Paradoxically, although Garzón's investigation into crimes against humanity during the Francoist regime was inspired by the same international obligations and principles underpinning universal jurisdiction, it was not technically based on that principle. This was because Garzón, as a Spanish judge, was exercising jurisdiction over crimes committed within Spanish territory during the 1930s and 1940s, rather than crimes committed in a third country. For the first time, Judge Garzón interpreted the 1977 Amnesty Law as being contrary to Spain's international obligations. He concluded that he had a duty to reject impunity for crimes against humanity committed during this period and to initiate judicial inquiries.

The United Nations Human Rights Committee has repeatedly called on Spain to repeal the 1977 Amnesty Law, citing its incompatibility with the obligations outlined in the International Covenant on Civil and Political Rights (ICCPR), to which Spain is a signatory. In an October 2008 report, the Committee explicitly addressed Spain, stating:

> While taking note of the recent decision of the National High Court (*Audiencia Nacional)* to consider the question of the disappeared, the Committee is concerned at the continuing applicability of the 1977 Amnesty Law. It recalls that crimes against humanity are not subject to a statute of limitations and draws the State party's attention to its general comment No. 20 (1992), on article 7, according to which amnesties for serious violations of human rights are incompatible with the Covenant, and its general comment No. 31 (2004), on the nature of the general legal obligation imposed on States parties to the Covenant.
> While noting with satisfaction the State party's assurance that the Historical Memory Act (*Ley de Memoria Histórica*) provides for light to be shed on the fate of the disappeared,

[327] See Chinchón Álvarez, Javier, and González Ibáñez, Joaquín, *El principio de jurisdicción universal en el ordenamiento jurídico español: Una conquista bajo amenaza*, in *Protección Internacional de Derechos Humanos y Estado de Derecho: Studia in Honorem Nelson Mandela*, Joaquín González Ibáñez, ed., 889, 2009.

> the Committee takes note with concern of the reports on the obstacles encountered by families in the judicial and administrative formalities they must undertake to obtain the exhumation of the remains and the identification of the disappeared persons. The State party should: (a) consider repealing the 1977 Amnesty Law; (b) take the necessary legislative measures to guarantee recognition by the domestic courts of the non-applicability of a statute of limitations to crimes against humanity; (c) consider setting up a commission of independent experts to establish the historical truth about human rights violations committed during the civil war and dictatorship; and (d) allow families to exhume and identify victims' bodies, and provide them with compensation where appropriate.[328]

This paragraph served as an exceptional foundation for legitimizing Judge Baltasar Garzón's legal reasoning when he initiated investigations and criminal proceedings into crimes against humanity committed during the Franco regime. Citing the principles of good faith, *pacta sunt servanda*, and Article 40 of the ICCPR, Spain was obligated to implement the recommendations outlined in the Committee's report.

As former Spanish Supreme Court Justice Martín Pallín stated, the model of the contemporary judge must be "aware that the rule of law is not just the principle of legality," as the essence of the rule of law includes statutes "plus the values and principles enshrined in the Constitution, which must be interpreted through a human rights vision."[329]

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[328] United Nations Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant*, ¶ 9, U.N. Doc. CCPR/C/ESP/CO/5, January 5, 2009.

[329] Vicente Márquez, Lydia, and Moreno, Alicia, *Derechos Humanos e Independencia Judicial*, *El País*, February 1, 2012, http://elpais.com/diario/2011/02/01/opinion/1296514812_850215.html. *Id.* The original text in Spanish reads as follows: *"El modelo de juez contemporáneo, como aboga Martín Pallín, tiene que ser 'consciente de que el Estado de derecho no es el Estado de las leyes', pues aquel consiste efectivamente en la ley 'más los valores y los principios que contiene la Constitución y, además, nos dice claramente que tenemos que interpretarla a través de los derechos humanos'."*

5.3.2. Truth, International Rule of Law, and the Reinforcement of Democratic National Institutions: Judge Garzón's Fading Light

In May 2009, Judge Garzón was charged with violating the Franco-era Amnesty Law for actions he initiated in October 2008, when he launched an unprecedented inquiry into "crimes against humanity" committed during the Franco era, pledging to investigate the disappearance of tens of thousands of individuals and ordering the excavation of mass graves. A right-wing civil servants' union accused him of overstepping his judicial authority by breaching the 1977 amnesty, which had drawn a line under the Franco era.

On February 27, 2012, the Supreme Court acquitted Judge Garzón of breaching the amnesty in connection with his investigation of Franco-era crimes, including the disappearances of antigovernment dissidents. However, he was suspended from the bench for eleven years after being found guilty in a separate criminal proceeding.[330]

With melancholic reservations, Spanish citizens must renew their efforts to weave a fabric of tolerance regarding certain aspects of the *res publica* and its institutions. Some may criticize these words—either for offering a lukewarm defense of Garzón or for lacking sufficient respect for the Supreme Court's decisions and their legal consistency. However, these words simply seek to uphold what makes us more civil, impartial, and competent as a democratic country—what is otherwise known as the rule of law. The argument presented here aims to vindicate the actions of a public servant in prosecuting alleged crimes against humanity committed during the Francoist dictatorship. It is an argument rooted in the belief that Judge Garzón's investigation demonstrated a coherent, truthful, and legally defensible interpretation of the rule of law within the existing legal framework.

There are significant challenges in the understanding and perception of human rights, particularly regarding the polarization of

[330] Nevertheless, on the same day, February 27, 2012, the Spanish Supreme Court cleared Baltasar Garzón of violating a 1977 amnesty law with his investigation of Franco-era crimes. He was suspended from the bench for eleven years after being found guilty of illegal phone-tapping in the investigation of a political corruption scandal—the Gurtel Case. See *Spain Judge Baltasar Garzón Cleared on Franco Probe*, *BBC News*, February 27, 2012, http://www.bbc.co.uk/news/world-europe-17176638.

public opinion in the case against Baltasar Garzón. On one side stands the ideology of human rights, and on the other, the use of these rights as tools for demagoguery. One major issue is the tendency to associate human rights with a particular ideological sensibility, creating assumptions that undermine the broader commitment to justice. Just as art, sensibility, and other facets of the human condition transcend the boundaries of Left and Right, it is a fallacy to believe that human rights are exclusively the domain of the traditional Left, identified with liberals or progressives, and not of the Right, associated with conservatives and traditionalists. Fundamentally, human rights belong to all who affirm the principles of democracy, dignity, and respect.

Another challenge lies in the ideological differences regarding the implementation, recognition, and transcendence of public policies designed to ensure citizens' access to their rights. Undoubtedly, the media has played a pivotal role in shaping public opinion about Judge Garzón in one of the cases against him, often portraying him unfavorably. This portrayal largely stems from his public image as a progressive magistrate, which appears at odds with the procedural details of his examination. It is as though both the law and the judge are presumed incapable of upholding human rights and the rule of law simultaneously.

Furthermore, the demagogic misuse of human rights has eroded their legitimacy and undermined efforts to protect fundamental rights and liberties. This misuse often stems from fear-driven and ignorant prejudices, which not only act as catalysts for injustice but also hinder critical and balanced analyses of human rights abuses. Human rights, along with the rule of law and democracy, form what has been described as a "magical triangle," enabling a vision of human dignity—the *imago hominis* of our time. Treating human rights as a blank check or assuming that their just cause can justify a metaphorical trial by ordeal does a profound disservice to democracy and the rule of law.

5.3.3. Spain and Transitional Justice

The judicial actions of Baltasar Garzón in prosecuting crimes against humanity are intrinsically connected to well-studied processes within judicial systems, ideologically grounded in democratic principles

that emerge during political transitions from dictatorships or authoritarian regimes to democracies.[331]

During such transitions, higher courts often engage in what can be described as "jurisprudential hyperactivity," driven by the need to address gaps in public policies or legislation and to ensure the fulfillment of constitutional principles in democratic states governed by the rule of law—what the Greeks referred to as *isonomia* (equality before the law). This phenomenon occurs when courts assume a proactive role in crystallizing legal and political objectives essential to the establishment of a democratic regime.

A pertinent example can be found in Colombia, where the 1991 Constitution declared the nation a "Welfare Social State" governed by the rule of law. However, the lack of sufficient budgetary resources and public policy measures to realize this vision compelled the Constitutional Court of Colombia to construct, through the constitutional *tutela* system, a sophisticated framework to support the social state. This judicial creativity, grounded in intellectual resources and imaginative jurisprudence, has garnered respect and admiration across the Americas, showcasing the judiciary's potential to uphold democratic principles in the absence of robust legislative action.

In the case of Spain, the writer Javier Cercas, in a balanced article titled *The Left and the Transition* (*La izquierda y la transición*), argued that while the political transition was successful in many respects, it was overshadowed by the absence of a genuine process of transitional justice. Cercas states:

> Thus, instead of doing [in 2012] what needed to be done to resolve the scandal of still having ditches filled with the dead—that is, simply paying with public funds so that the dead could be exhumed, identified, and buried with honor—we came up with a superficial law that has so far achieved very little and might leave us forever with thousands of dead hidden away (and, incidentally, with Garzón prosecuted for trying to do what the State should have done). Being right does not come from having been

[331] See Teitel, Ruti G., *Transitional Justice,* Oxford University Press, 2000.

> right before: in 1978, perhaps it was unreasonable (or simply impossible) to exhume the dead; in 2012, it is appalling that they remain buried.[332]

In the distant future, it is likely that the Constitutional Court will be called upon to define the meaning of truth, justice, and reparation, as well as the role of judicial bodies in light of Spain's international obligations, conventional law, and other sources of legal authority. Spain's recent legal and judicial history has shown that law is an act of interpretation and contextualization, shaped by time and space, while adhering to norms, practices, principles, and international commitments.

As a professor, part of the pedagogical effort in teaching law students involves fostering an understanding of the principal characteristics of a democratic legal system. For this reason, professors consistently emphasize to students that merely examining statutes is insufficient for achieving a comprehensive understanding of the law. This principle is illustrated by numerous Supreme Court rulings regarding the scope of Spanish jurisdiction under the principle of universal jurisdiction, including cases involving crimes committed in Chile, Argentina, and Guatemala. Notably, the Constitutional Court overturned the Supreme Court's 2005 ruling on the Guatemala case, reaffirming the competency of Spanish jurisdiction in prosecuting crimes of genocide, terrorism, and torture committed there.

5.4. Conclusion

Victims at the Spanish Supreme Court

In February 2012, in an effort that went beyond rhetorical or intellectual exercise, I sought to give meaning to the title of this chapter by attending a hearing at the Supreme Court of Spain. Driven by the aspiration for justice, the rule of law, and the legal and civic fight against impunity, I chose to sit beside Judge Baltasar Garzón during his final hearing. Judge Garzón, accused of violating the 1977 Spanish Amnesty

[332] Cercas, Javier, "La Izquierda y la Transición," *El País*, March 4, 2012.

Law, faced charges for his interpretation of Spain's international obligations and the mandate to investigate crimes against humanity committed during the Francoist regime. These crimes, perpetrated on Spanish soil, had long evaded judicial scrutiny.

On a cold and clear winter day in Madrid, February 7, 2012, the criminal trial against Baltasar Garzón began, focusing on his investigation into crimes against humanity committed during the Franco dictatorship. After seventeen years as a university professor, I decided, for the first time, to don my attorney's robe and sit beside Garzón in the dock at the Supreme Court. Sitting alongside Professor and lawyer Manuel Ollé Sesé, I reflected on my collaboration with Garzón on a book concerning the protection of human rights.[333]

I firmly believe that the legal proceedings initiated by Magistrate Garzón, as well as the subsequent writs he issued regarding crimes against humanity committed by the Francoist regime during the civil war and post-war period, are fully in accordance with domestic law and principles of the international rule of law. These proceedings address crimes against humanity and the enduring obligation to recognize and compensate victims—regardless of how much time has passed, who committed the crimes, or where they occurred. Since 1993, international human rights law has been unequivocal in its jurisprudence, reinforced by the resolutions of human rights bodies such as the United Nations Human Rights Committee. Spanish courts have also demonstrated their commitment to this principle by exercising jurisdiction in cases involving crimes against humanity and genocide in countries such as Chile, Guatemala, and Argentina.

A state governed by the rule of law, such as the Spanish legal system, is founded on principles of justice, ethics, and civility. On that Tuesday, during the testimony of four witnesses, the presiding magistrate required them to respond comprehensively to questions posed by both defense and prosecution lawyers. As the witnesses began to speak, I realized this was not simply Case A, B, or C, nor any other abstract designation. It was, unmistakably, the case of *the victims*—each and every one of them. Reflecting on the gravity of their testimonies, I wrote in my

[333] See Álvarez & Ibáñez, *supra* note 40.

notebook a persistent thought, encapsulated by a quote from Walter Benjamin: "For the victims, the state of emergency is permanent."[334]

I noted phrases and expressions that echoed previous hearings on mass human rights violations in Chile, Argentina, Colombia, Peru, Guatemala, and El Salvador. The syntax was indistinguishable, the subject and actions nearly identical; only the names of the places and people involved had changed. Listening in person to the testimony of a woman from Navarra, a man from Córdoba, a Catalan, and a man from Valladolid, I realized that while the accents and settings of the crimes differed, the narrative remained hauntingly consistent—a terrifying account and sequence of criminal events that have unfolded on both sides of the Atlantic.

I recall the long-suppressed demands for civic and human spaces that surfaced in my memory, particularly when one of the witnesses—a man my father's age, born during the Civil War—declared in a steadfast voice, "I am the son of a missing person, and all my life I have been conditioned by this fact." Paradoxically, Spain had become an international reference point for the recognition and commemoration of victims of human rights abuses through the exercise of universal jurisdiction by the Spanish High Court—a beacon for victims in Chile, Argentina, Guatemala, and beyond.

For instance, in my work in Colombia with professors, magistrates, and judges, a recurring "legal mantra" emerges, centered on democracy, human rights, and, most notably, the rule of law. This rule of law has evolved into a spiritual cornerstone for democratic societies aspiring to be more just and inclusive—an essential component in achieving

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334 Mate, Reyes, *Medianoche en la Historia: Comentarios a las Tesis de Walter Benjamin "Sobre el Concepto de Historia"*, 2006, pp. 124, 143. ("Para las víctimas el estado de excepción es permanente."). The original quote is in German: "Für die Unterdrückten und die Opfer ist der Ausnahmezustand dauerhaft," and belongs to Walter Benjamin's work. See Benjamin, Walter, *Das Passagen-Werk*, Rolf Tiedemann ed., Suhrkamp Verlag, 1982; Benjamin, Walter, *The Arcades Project* (Rolf Tiedemann ed., Howard Eiland & Kevin McLaughlin trans.), Harvard University Press, 2002. Walter Benjamin was a German Jewish philosopher and friend of Theodor Adorno, who went into exile in Paris when Hitler came to power in 1933. This work is part of a diary that he passed to the writer George Bataille before committing suicide in September 1940 in Portbou, Spain, after the Francoist police threatened to send him back to France and into the hands of the Gestapo.

developmental goals and creating spaces where rights and opportunities are accessible to all. As Tom Bingham argued, excluding human rights from the foundation of the rule of law reflects an impoverished or "thin" definition, contrasting with his own preference for a "thick" definition. Bingham aptly described the rule of law as "the nearest we are likely to approach to a universal secular religion."[335]

The international rule of law, particularly international human rights law, represents the international community's effort to fulfill an ethical and moral aspiration. It affirms that the promotion and protection of human rights constitute one of the most significant advancements in the human condition. This progress is especially meaningful as it ensures access to rights for vulnerable and marginalized groups—women, children, indigenous peoples, the poor, minorities, and, above all, victims. Human rights symbolize the rights of others and reflect a profound commitment to the pursuit of justice.

I reflected, much like Isaac Newton reciting John of Salisbury, that the vision of human rights and advocacy for victims is made possible by standing on the shoulders of giants—those who have illuminated new horizons of understanding and progress. Among these figures are individuals like Baltasar Garzón, whose commitments and actions have profoundly shaped this vision. I also stand on the shoulders of the men and women of Spain's High Courts, the Supreme Court, and the Constitutional Court. Through their rulings, resolutions, and judgments, these jurists have transcended the practice of law to become champions of justice, establishing a new legal framework that offers victims a renewed opportunity for recognition and redress.

John Ruskin viewed human action as the eventual creator of a legacy called civilization. This legacy, he argued, is measurable through its words, deeds, and arts. The law we apply today—encompassing these three elements—will form our legacy, reflecting either civility or inequality. What unfolds in our time is crucial to how we interpret and evaluate our civilization. In our daily lives, we observe that human rights and democracy share a similarity with religion: they must be renewed constantly. Belief in them strengthens their foundation, while neglect diminishes their intensity and impact.

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[335] See Bingham, *supra* note 2, at p. 174.

It is for this reason that Miguel de Unamuno and his novel *Saint Manuel Bueno, Martyr (San Manuel Bueno, Mártir)* come to mind.[336] The story tells of a priest who, having lost his faith and become agnostic, could not reveal this truth to his parishioners because his actions had provided them with relief, hope, and Christian faith. The professor who writes these lines hopes that his country will rise to the challenge of upholding a vision of dignity and support for the victims defended by international law and human rights—principles enshrined in Spanish domestic law. Unlike Unamuno's eponymous hero, who lost faith in the values he represented due to the obstinacy of injustice surrounding him, Spain must remain steadfast in its commitment. For the sake of responsibility, the nation must enact the humanity inherent in the rule of law, aspiring to reach that magical and profoundly human threshold of justice.

The Copernican Turn in Favor of Victims

As an avid reader of literature, I have learned to focus not on the biography of the writer but rather on the quality and transcendence of their work. In Spain—a generous and caring country, yet one where fraternal hatred can persist—a critical understanding must arise. In this land, where some celebrate publicly while others feel humiliated and grievously wronged by the Supreme Court's resolution, it is vital to recognize what truly matters: the anonymous and silent efforts of civil servants who, through their dedication, lend legitimacy and practical meaning to the legal system.

From the Trial Courts (*Juzgados de Instrucción*) to the Supreme Court, these civil servants carry out unfinished tasks. Chief among them is the imperative to guarantee due process and access to justice for all—not merely the right to a trial in which citizens' expectations are diluted and the significance of events is obscured.

Real justice demands serious attention, particularly for citizens who are victims. Primo Levi underscored the necessity of a public space for the commemoration of victims, emphasizing that the contempt shown toward them is twofold: first in their murder, and again in their oblivion.

[336] Unamuno, Miguel de, *San Manuel Bueno, Mártir*, Cátedra, Madrid, 2009.

It is a somber paradox that the case against Judge Baltasar Garzón has been the sole occasion on which our democracy has granted victims a voice within a judicial setting. We must not forget that the so-called Copernican revolution in legal culture has emerged precisely because victims—the most vulnerable and marginalized—have become the focal point of the legal universe.

The United Nations Human Rights Committee

On January 31, 2016, Baltasar Garzón submitted a communication to the United Nations Human Rights Committee (UNHRC) regarding the criminal proceedings against him in the Spanish Supreme Court. Garzón argued that "the courts that tried him lacked impartiality, in violation of article 14 (1) of the Covenant; that his right to the presumption of innocence under article 14 (2) of the Covenant was violated because he was suspended as a result of the charges brought against him in the Franco regime case before his guilt had been established." In its Opinion of May 23, 2023, the Committee highlighted several concerns, noting:

> 5.11 In the light of all the above information and of the doubts about the possible bias of some of the judges involved, the Committee cannot conclude that the author had access to an independent and impartial tribunal in the proceedings against him in the Franco regime and Gürtel cases, which resulted in his criminal conviction and his being permanently removed from his post. Accordingly, the Committee considers that the author's rights under article 14 (1) of the Covenant have been violated.
> 5.12 As for the author's claim under article 14 (5) of the Covenant that he was convicted by the Supreme Court in the Gürtel case without possibility of appeal, the Committee recalls that article 14 (5) of the Covenant establishes that everyone convicted of a crime has the right to have his or her conviction and sentence reviewed by a higher tribunal according to law. The Committee recalls that the phrase "according to law" is not intended to mean

> that the very existence of a right to review should be left to the discretion of States parties.[337]

The UNHRC ordered Spain to make full reparations to Garzón. This entails, in accordance with international law, the judge's restitution to his position, compensation, the expungement of his criminal record, and guarantees of non-repetition.[338]

The Spanish Constitutional Court, in its *Sentencia* 61/2024 of April 9 (published in *BOE* No. 118 on May 15, 2024), ruled that opinions issued by United Nations committees do not constitute enforceable titles that automatically generate a right to compensation. However, the Court also acknowledged the State's obligation to respect international mechanisms established to guarantee the human rights treaties ratified and incorporated into the Spanish legal system. Despite this ruling, no action has yet been taken by the Spanish State to provide the reparations indicated by the Committee.[339]

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[337] Human Rights Committee, CCPR/C/132/D/2844/2016, *International Covenant on Civil and Political Rights*, May 23, 2023, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2844/2016*, **, ***.

[338] I agree with the concept of reparation alleged by Helen Duffy, Baltasar Garzón's attorney in the proceedings before the Committee. See Duffy, Helen, "La justicia en el banquillo: Pinochet, Garzón y la independencia judicial," *El País*, October 15, 2024.

[339] *Ibid.,* "5.11 In the light of all the above information and of the doubts about the possible bias of some of the judges involved, the Committee cannot conclude that the author had access to an independent and impartial tribunal in the proceedings against him in the Franco regime and Gürtel cases, which resulted in his criminal conviction and his being permanently removed from his post. Accordingly, the Committee considers that the author's rights under article 14 (1) of the Covenant have been violated.

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Magistrate Baltasar Garzón and the Spanish victims of crimes against humanity continue to await the enforcement of the United Nations Human Rights Committee's decision. As Dar Williams sings, "*It's a long road from law to justice*"—a sentiment that profoundly captures the challenges of addressing human rights obligations under international law.

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tried by the supreme tribunal of the State party concerned; rather, such a system is incompatible with the Covenant, unless the State party concerned has made a reservation to this effect. Bearing in mind that the author was criminally convicted by the Supreme Court without any possibility of review of the conviction and sentence, the Committee concludes that his right under article 14 (5) of the Covenant was violated.

5.17 Having considered the author's conduct in the Gürtel case in the light of all this information, the Committee is unable to conclude that his interpretation of domestic law constituted serious misconduct or incompetence such as would justify his criminal conviction and his being permanently removed from his post. Furthermore, the Committee considers that the author's conviction was arbitrary and unforeseeable, as it was not based on sufficiently explicit, clear, and precise provisions that define unequivocally the prohibited conduct, in violation of article 15 (1) of the Covenant.

7. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires that full reparation be made to individuals whose rights have been violated. Accordingly, the State party is obligated to, inter alia, expunge the author's criminal record and to provide him with adequate compensation for the damage suffered. The State party is also under an obligation to take steps to prevent similar violations from occurring in the future."

CHAPTER 6*

Rule of Law, International Human Rights Law Values, and the Fight Against Terrorism

The Abu Ghraib Case and the European Vision of the U.S. War on Terror: A Vision of Human Rights and the Rule of Law After Abu Ghraib

"While this law is first applied against German aggressors," said Jackson in his address to the Nuremberg tribunal (November 21, 1946), "if it is to serve any useful purpose, it must condemn aggression by any other nation, including those which sit here now in judgment.". As he spoke those words, many eyes in the courtroom shifted to the faces of the two Soviet members of the court, the judicial representatives of a country that had invaded Poland in 1939 and Finland in 1940 and was widely responsible in 1941 for the slaughter of thousands of Polish prisoners-of-war in the Katyn Forest. That Jackson's admonition went unheeded by the Russians in later years—Hungary

* This chapter was originally written and published to honor the human and academic legacy of my professor and friend, Paul Lemmens at "International Human Rights values and the fight against terrorism: The Abu Ghraib Case and the European Vison of the US War on Terror", *Human Rights with a Human Touch*, *Paul Lemmens*, INTERSENTIA Cambridge, 2019, pp. 395-436. I would also like to express my gratitude to Professor Jamie B. Raskin, who read the first draft of this essay and provided valuable observations and comments on its content and form, as well as to Guy Harpaz, from the Hebrew University of Jerusalem, and Juan Carlos Sáinz Borgo, from the United Nations Peace University of Costa Rica, for their insights and constructive critiques of the ideas presented in this chapter. Its content has been updated and extended in order to be integrated into this book.

in 1956, Czechoslovakia in 1968—has been the general opinion of the United States…

What are the Nuremberg legal principles, and what is their meaning today as applied to American involvement in Vietnam?

When we sent hundreds of thousands of troops to South Vietnam, bombed North Vietnam, and moved into Cambodia, were our national leaders as guilty of launching a war of aggression as were Hitler and his generals when they invaded Poland, or Belgium, or Greece, or other countries that were way-stations on the Nazi march of conquest? Will Son My (My Lai) go down in the history of man's inhumanity bracketed with Katyn, Lidice, Oradour, Malmedy, and other names that still ring sadly in the ears of those old enough to have heard the sound? More generally, are the people of the United States able to face the proposition that Jackson put forth in their name, and examine their own conduct under the same principles that they applied to the Germans and Japanese at the Nuremberg and other war crimes trials?

Telford Taylor, *Nuremberg and Vietnam: an American Tragedy*, 1970

Once you open that door to diminishing respect for the rule of law, you close the door to the rule of law, to habeas corpus, to standards of fair interrogation, to the right to a fair trial, the opening or the closing is never enough for the security people. Under pressure to get results, they always want more, and so they ask for 90 days, then 180 days, and eventually for endless.

Albie Sachs *The Strange Alchemy of Life and Law*, 2009

6.1. Introduction

More than two decades have passed since the events at the Abu Ghraib detention center in Iraq. By 2025, a retrospective view provides greater insight into the differing approaches adopted by American and European Union democracies in their fight against terrorism following the September 11, 2001, terrorist attacks.

Two presidential terms of Barack Obama and the ongoing presidency of Donald Trump have provided little opportunity for a

positive or realistic interpretation of the reinforcement of the international rule of law and multilateralism. The lessons drawn from the closure of Abu Ghraib and the continued inability to close Guantanamo Bay as a detention facility highlight outcomes that remain legally and ethically troubling.

With the passage of time, a broader perspective allows us to conclude that democracies have neither demonstrated imagination nor fully internalized the lessons needed to protect their principles and strengthen democratic institutions while combating international terrorism.

One of Fernando Botero's paintings depicting the events at Abu Ghraib prison portrays a black-hooded figure standing on a box.[340] Beneath the black robe, the individual is naked, with outstretched arms connected by wires to an unseen electrical source. This haunting image reflects one of the atrocities that became public in April 2004, mere hours after a U.S. government attorney assured the Supreme Court that no detainee had been subjected to torture by U.S. personnel.[341]

When CBS's *60 Minutes* aired the photograph upon which Botero's painting is based, the words that appeared on the screen starkly stated: "Americans did this to an Iraqi prisoner."[342]

Botero follows in the footsteps of other artists who have sought to bear witness to the brutality of war. Francisco de Goya's *Disasters of War* (1812–1815) is among the most graphic depictions of the ruthless guerrilla war in the Iberian Peninsula. Through powerful black-and-white drawings, Goya aimed to preserve the memory of the atrocities, portraying disturbing scenes of horror, brutality, torture, and the savagery of war.[343]

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340 Fernando Botero's *Abu Ghraib* series was presented for the first time to the American public at American University, Washington, November 2007. Available at: www1.american.edu/cas/katzen/museum/2007nov_botero.cfm.

341 *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004); *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). Yaser Hamdi, an American citizen, was released after three years in custody. See Amann, Diane Marie, "Abu Ghraib," *University of Pennsylvania Law Review*, Vol. 153, p. 2085, 2005. Available at: http://ssrn.com/abstract=951874.

342 CBS News, "60 Minutes," broadcast on April 28, 2004. Available at: www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml.

343 In Francisco Goya's *Los Desastres de la Guerra* (Disasters of War), Plate 74 features a wolf with the inscription "¡Mísera humanidad. La culpa es tuya!" ("Miserable humanity. The fault is thine!"), reflecting the artist's critique of humanity during Spain's

Similarly, Pablo Picasso's renowned 1937 painting *Guernica* serves as a silent yet striking cry of anguish over the senseless suffering inflicted upon civilian victims during times of conflict.

Art and memory are deeply intertwined. The hooded figure of Abu Ghraib, a dark symbol of the American presence in Iraq, will undoubtedly be etched permanently into history. In the coming decades, the invasion of Iraq and the numerous accompanying failures of the Bush Administration may fade from collective memory. Yet, art—such as Fernando Botero's evocative paintings—will endure, prompting future observers to reflect on how the oldest and greatest democracy on Earth could betray its most profound legacy to humankind: the rejection of torture and cruelty in favor of human rights.

Professor Diane Marie Amann recalls that during the April 2004 oral arguments in the *Hamdi* case, Justice John Paul Stevens posed a pointed question to Deputy Solicitor General Paul D. Clement: "But do you think there is anything in the law that curtails the method of interrogation that may be employed?" Clement responded firmly: "I think that the United States is signatory to conventions that prohibit torture and that sort of thing. And the United States is going to honor its treaty obligations." He later clarified, however, that he could see no "basis for bringing a private cause of action against the United States."[344]

This chapter on the rule of law, human rights, and terrorism does not aim to address which international or national laws—including the U.S. Constitution, various federal statutes, judicial interpretations, military regulations, rules regarding detention in customary international law, and treaties ratified by the United States, such as the Geneva Conventions, the Convention Against Torture, and the International Covenant on Civil and Political Rights—may have been violated during the post-9/11 War on Terror conducted by the Bush Administration. Nor does it delve into what we believe to be wrongful or unlawful policies implemented in both

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Independence War and Ferdinand VII's absolutist reaction, which undermined the progress of the Spanish 1812 Constitution.

[344] See Amann, Diane Marie, "Abu Ghraib," *University of Pennsylvania Law Review*, Vol. 153, 2005, and note 15, Id., at p. 49. Clement mentioned only the Torture Victims Protection Act of 1991, Pub. L. No. 102–256, 106 Stat. 73 (codified at 28 U.S.C.A §1350 note), which allows private lawsuits by persons tortured by agents of a foreign nation. *Transcript of Oral Argument*, at 49, *Hamdi* (No. 03–6696).

international and domestic contexts, including Guantanamo Bay, the Iraq War, secret detention facilities in Afghanistan, warrantless surveillance programs, extraordinary rendition, torture memos, and executive orders that exceeded constitutional limits.

The goal is to determine whether the legal practices and the political and historical legacy following the 9/11 terrorist attacks and the 2003 invasion of Iraq truly represented a new paradigm for the United States and European democracies in combating terrorism, or whether, conversely, they signified a weakening of international human rights standards and a "merger" of American and European perspectives.

It is assumed that clear international standards already exist for addressing issues such as the treatment of "non-combatants" who commit atrocities, as Professor Robert Goldman has noted:

> 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.[345]

The United States undoubtedly maintains the most extensive military presence in the world, with approximately 300,000 military personnel stationed overseas. Regardless of whether prisoners under U.S. custody at Abu Ghraib or Guantanamo Bay are classified as prisoners of war, civilians, or unprivileged combatants who may have engaged in terrorist violence, they remain both legally responsible for their actions and protected under the law of war and human rights law. As Goldman observes, "It makes no difference how you classify them, (…) No one can be subjected to torture or inhumane treatment."[346]

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[345] See Acharya, Sally, "Law Professor Defends Human Rights," *American Weekly*, March 22, 2005.

[346] See Goldman, Robert K., *Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, Note by the United Nations High Commissioner for Human Rights, 2004, p. 10, GE.05–10694 (E) 150205 E/CN.4/2005/103:

> C. The applicability and relevance of international humanitarian law when confronting terrorism involves armed conflict:

Historically, the U.S. legal system and the Army Manual of 1992 clearly stated that international conventions ratified by the United States, along with U.S. policy, "expressly prohibit acts of violence or intimidation, including physical or mental torture, threats, insults, or exposure to inhumane treatment as a means of or aid in interrogation." Furthermore, it was acknowledged that the use of torture methods by U.S. personnel "will bring discredit upon the U.S. and its armed forces while undermining domestic and international support for the war effort."[347]

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16. A key issue affecting the protection of human rights in the struggle against terrorism concerns the divergent views of States regarding the nature of the struggle and the measures they have employed in responding to it. Since September 11, 2001, some States, while recognizing the need for international cooperation, perceive this struggle as a new kind of war against a global terrorist network, requiring primarily a military response. Other States, while acknowledging the use of military force in certain circumstances, view this struggle not as a new phenomenon but as one that necessitates enhanced international cooperation in areas such as law enforcement, intelligence gathering and sharing, extradition, and similar measures.

17. However States may conceive of the struggle against terrorism, it is both legally and conceptually important not to conflate acts of terrorism with acts of war. For example, attacks against civilians, hostage-taking, and the seizure and destruction of civilian aircraft are widely recognized by the international community as forms of terrorism. These acts may occur during peacetime, emergency situations, or armed conflict. If committed during an armed conflict, such acts may constitute war crimes. However, when these acts occur during peacetime or emergencies not involving hostilities, as is frequently the case, they do not constitute war crimes, and their perpetrators should not be classified, tried, or targeted as combatants. Such situations are governed not by international humanitarian law but by international human rights law, domestic law, and potentially international criminal law. […] Because denial of POW status to combatants potentially entails life-or-death consequences for the persons concerned, such status determinations must be made in strict conformity with applicable laws and procedures. In this regard, Article 5 of the Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) creates a presumption that a person who commits a hostile act is a POW unless a competent tribunal determines otherwise on an individualized basis.

18. Human rights law does not cease to apply when the struggle against terrorism involves armed conflict. Rather, it applies cumulatively with international humanitarian law…

[347] See Fisher, Louis, *The Constitution and 9/11: Recurring Threat to America's Freedoms*, University Press of Kansas, Lawrence, 2008, p. 213; U.S. Department of the Army, *FM34–52 Intelligence Interrogation*, September 28, 1992, at 1–7.

In April 2009, Eric Holder, the U.S. Attorney General under the Obama Administration, speaking at the West Point Academy, declared: "We will not sacrifice our values or trample on our Constitution under the false premise that it is the only way to protect our national security."[348]

Months earlier, in a similar vein, some U.S. Army leaders during the Bush Administration, such as Major General Stone—who successfully shut down Abu Ghraib as a detention and torture facility in 2006—demonstrated their commitment to the rule of law. They emphasized that America could only win the War on Terror, and the hearts and minds of people worldwide, by upholding the respect and strength of American ideals. Even in detention facilities like Abu Ghraib, those ideals must prevail. Ultimately, only policies rooted in and guided by American values can legitimize the U.S. effort in Iraq.

May 2007 marked one of the most violent periods in Iraq, characterized by indiscriminate attacks against the Iraqi population and the highest number of American soldiers killed that year, with 904 U.S. fatalities.[349] During this time, General Petraeus, who had appointed Major General Stone, delivered a reassuring message to American troops, the American people, and U.S. allies from Baghdad:

> Our values and the laws governing warfare teach us to respect human dignity, maintain our integrity, and do what is right. Adherence to our values distinguishes us from our enemy […].
> What sets us apart from our enemies in this fight […] is how we behave. In everything we do, we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect. While we are warriors, we are also human beings.[350]

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[348] See Fitzgerald, Jim, *Eric Holder tells West Point: The law was not always followed in U.S. war against terror*, Associated Press, April 15, 2009. Available at: www.therightreasons.net/index.php?showtopic=14141.

[349] See *Iraq Coalition Casualty Count*. Available at: http://icasualties.org/Iraq/index.aspx, May 1, 2009.

[350] Communication from Commander General Petraeus, Headquarters, Multi-National Force-Iraq, Baghdad, Iraq, APO AE 09342–1400. This paragraph was quoted in the Senate Armed Services Committee Inquiry into the Treatment of Detainees in U.S. Custody, Executive Summary, January 2008, p. XII of the report. This Senate report

International law scholars, researchers, and observers of violations of the laws of war over the past 40 years often find themselves trapped in the Greek myth of Cassandra (Κασσάνδρα). Like the ill-fated prophetess, who foresaw future catastrophes but was cursed never to be believed, these observers—having witnessed repeated violations in prior conflicts or even experienced them firsthand—are left convinced that catastrophic events will recur, that they are powerless to prevent them, and that their warnings will go unheeded.

A cinematic example of a Cassandra-like warning can be found in the powerful 1974 documentary on the Vietnam War, *Hearts and Minds*, directed by Peter Davis. The themes explored in this work are echoed in the 2004 documentary *Control Room*, directed by Jehane Noujaim, which examines the Iraq War and the role of Al Jazeera. In certain scenes, the narratives of these two films are strikingly similar. Although the characters have different names and the settings occur in distinct time periods and countries, the imagery remains hauntingly the same: grieving mothers and fathers clutching the lifeless bodies of their children and crying, "This is the freedom the U.S. is bringing us […]."

Both films expose a persistent lack of empathy and understanding toward other cultures. This insensitivity is epitomized in *Hearts and Minds* by a chilling scene in which General Westmoreland comments after an image of two children weeping at their father's grave: "The Oriental doesn't put the same high price on life as does the Westerner.

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highlighted detailed evidence showing that the military's use of harsh interrogation methods on terrorism suspects was approved at the highest levels of the Bush Administration. It refuted claims by former Defense Secretary Rumsfeld and others that Pentagon policies played no role in the harsh treatment of prisoners at Abu Ghraib prison in Iraq or other military facilities.

The Senate report explained how some of the techniques used by the military at prisons in Afghanistan, Guantánamo Bay, Cuba, and Iraq—including stripping detainees, placing them in "stress positions," or depriving them of sleep—were originally derived from a military program known as Survival Evasion Resistance and Escape (SERE). This program was intended to train American troops to resist abusive enemy interrogations.

The report further revealed that Mr. Rumsfeld's authorization was cited by a United States military special-operations lawyer in Afghanistan as "an analogy and basis for use of these techniques." See Brian Knowlton, "Report Gives New Detail on Approval of Brutal Techniques," *The New York Times,* April 22, 2009.

Life is plentiful, life is cheap in the Orient, and as the philosophy of the Orient expresses it, life is not important."

The Abu Ghraib torture scandal profoundly shocked the American public, leaving many in disbelief that their nation could be implicated in such atrocities. The episode inflicted deep humiliation on the United States, both at home and on the international stage.[351]

6.2. The European Vision of the War on Terror. The United States as Guardian or Violator of the Rule of Law: Europe's Perspective on America in the Post-9/11 World. Democratic Values and European Reasons

The post-9/11 era presents significant challenges to the concept of law as a system that guarantees both liberty and security while providing an effective response to terrorism. From a European perspective, the Executive Orders issued by President George W. Bush, which permitted U.S. officials to employ "enhanced techniques of interrogation"—amounting to torture—have severely undermined the United States' reputation for respecting and upholding the rule of law. These actions have also dramatically diminished its political influence on the global stage.[352]

By employing torture, the United States has inflicted damage on itself, both morally and strategically, while inadvertently aiding its enemies in what is fundamentally a political conflict—one where the ultimate goal is to win the allegiances and shape the attitudes of young Muslims. Torturing prisoners, even those implicated in serious crimes against Americans, has made it impossible to deliver justice in these cases. Instead

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[351] See Jong, Erica, *Botero Sees the World's True Heavies at Abu Ghraib*, *The Washington Post*, November 4, 2007. Jong writes, "But American torture is different from other tortures because of the high opinion we have of our country and ourselves. Torture is something others do. We are above that. We are reasonable people governed by a great Enlightenment document we call The Constitution. We help, not hurt, people all over the world. It is the incongruity of our image of ourselves versus the reality of our behavior that stings most."

[352] See Daugherty Miles, A., *Perspectives on Enhanced Interrogation Techniques*, Congressional Research Services, January 8, 2016, p. 1. Available at: https://fas.org/sgp/crs/intel/R43906.pdf.

of offering due process under the rule of law, the United States has consigned detainees to an "endless limbo of injustice."[353]

The reaction to such abuses of power is reshaping what Dominique Moïsi, in *The Geopolitics of Emotion: How Cultures of Fear, Humiliation, and Hope are Reshaping the World*, describes as an "atlas of upset actors" in the international arena.[354]

The foreign policy of the United States in the decades following the 9/11 terrorist attacks has been defined and justified by its self-proclaimed role as a protector of the rule of law and democracy. However, in its efforts to promote these principles globally, the U.S. has, in many instances, severely undermined its own commitment to these ideals. As a result, perceptions of the U.S. have become, at best, confused and, at worst, deeply distorted due to its contradictory stance on democratic norms and freedoms.

Professor Claudio Grossman[355] has long championed the idea of law as a system that creates spheres of liberty and responsibility and serves as one of humanity's most vital tools for securing freedom and justice, and I, for one, share these beliefs regarding the rule of law and the pursuit of justice. Perhaps it is this shared vision that explains Europe's uneasy and critical perspective of the United States—both as a leading nation and as the most important partner for Western allies, whose commitment to these principles must remain under constant scrutiny.

The twenty-first century, shaped by the aftermath of the horrific terrorist attacks in New York City and Washington, D.C., in 2001, as well as subsequent attacks in Madrid (2004, train bombings), London (2005, Underground and bus bombings), and Paris (2015, Saint-Denis Stadium and Bataclan Theatre), represents a new and complex period in history. While predicting the direction of history remains inherently challenging, the principles of democracy, respect for human rights, and market freedom are likely to remain central to the international community's aspirations.

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353 See Danner, Mark, *The Red Cross Torture Report: What It Means*, *The New York Review of Books*, vol. 56, no. 7, April 30, 2009, p. 79.

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

355 Grossman, Claudio, Dean of American University Washington College of Law and Chair of the United Nations Committee Against Torture.

Historically, the United States has taken the lead in promoting democracy and market freedom. However, in the wake of 9/11, this framework was significantly reconfigured, as the U.S. appears to have sacrificed part of its commitment to human rights and the rule of law in exchange for the perceived safety and security of its citizens.

Primo Levi, in his book *La chiave a stella (The Wrench)*,[356] observed that "bridges are the opposite to frontiers." Bridges aim to unify different realities, while frontiers often destroy shared and continuous ones. In today's world, bridges are desperately needed in politics, international law, diplomacy, multilateralism, and morality. As Levi suggested, we must continuously work to construct "bridges" among nations, cultures, and civilizations, while resisting the creation of new frontiers that divide and separate us.

As Europeans, we critically observe U.S. foreign actions while simultaneously respecting and admiring the nation for its strong rule of law, functioning political institutions, and its avoidance of authoritarian or undemocratic periods in recent history. These elements represent "active bridges"—the shared language of any democratic regime striving to strengthen its leadership among democratic allies.

Since the end of World War II—and even more so following the fall of the Berlin Wall—the rule of law and respect for human rights have become the common language and tradition of Western democratic states. This analysis aims to underscore this shared legal tradition and highlight the profound concerns that arise when the robust guarantee of the rule of law is absent, even in the face of terrorism threats.

The aspiration to strengthen institutions and the rule of law has become a central goal of the United Nations, alongside Articles 1 and 2 of the UN Charter and the Sustainable Development Goals adopted by the General Assembly in 2015.[357] In 2004, Kofi Annan, then Secretary-General of the United Nations, placed the international rule of law at the very heart of the organization's mission:

> (The rule of law) refers to principles of governance in which all persons, institutions and entities, public and private,

[356] Levi, Primo, *La chiave a stella* (*The Wrench*), Einaudi Editori, Torino, 1978.
[357] A/RES/70/1, September 18, 2015, *Transforming Our World: The 2030 Agenda for Sustainable Development*.

> 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, 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.[358]

Historically, concepts such as *raison d'état*, "national interest," and, during the Cold War, "national security" were widely understood within their historical contexts and justifications. However, by 2019, no public policy in any Western state can remain sustainable without active respect for international human rights treaties and International Humanitarian Law. These principles should no longer be regarded as "soft law" but as integral components of the legal framework itself. The rule of law, accountability, and human rights represent the heart, mind, and soul of democratic systems.

The darkest episodes of the last century—colonialism, the First and Second World Wars, and the Holocaust—originated in Europe. For this reason, we firmly believe that strengthening democratic systems depends on recognizing international law as a binding framework for upholding individual dignity. This principle is especially relevant in a global context defined by violent threats and a persistent struggle for power and legitimacy.

As a citizen and a professor of law, I often ask myself whether our responsibilities are always aligned with improving the human condition and whether law remains an effective and necessary means to that end. Progress must mean the genuine enjoyment of rights, particularly for the most vulnerable.

The year 1989 witnessed two pivotal events: the fall of the Berlin Wall and the student uprising in Tiananmen Square. The latter resulted in the massacre of approximately 3,000 people in a single night, a number eerily similar to the victims who were killed or forcibly disappeared (*los desaparecidos*) during Augusto Pinochet's *coup d'état* and subsequent

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

dictatorship in Chile. Despite its totalitarian nature, China's leaders faced no domestic or international accountability for the crimes committed during this period. As a superpower during the Cold War and the early years of the post-Cold War era, China shielded itself by invoking Article 2.7 of the UN Charter, which prohibits interference in the "domestic affairs" of member states, and by framing human rights violations as an "internal affair."

However, since the fall of the Berlin Wall, human rights violations are no longer widely accepted as merely internal matters. This shift in legal philosophy is exemplified by milestones such as the establishment of the International Criminal Court (ICC) in Rome in 1998, the detention of former dictator Augusto Pinochet at the request of Spanish judicial authorities, and subsequent rulings by Spain's *Audiencia Nacional* and *Tribunal Constitucional* asserting universal jurisdiction over gross human rights violations.

I do not believe that the legal and political reasoning offered by the Chinese government—that human rights are an "internal affair"—would ever be invoked by a great power like the United States. As the oldest and strongest democracy on Earth, founded during the Enlightenment, such reasoning would be fundamentally at odds with America's core values. Nevertheless, in these times of transition, international terrorism, and a Manichean approach to politics, a robust domestic and international system grounded in the rule of law and respect for human rights is more essential than ever.

The fight for liberty and dignity begins with the preservation of the culture, principles, rights, and duties that have fostered progress in Western society. Since the Enlightenment and the American and French Revolutions, this system has been built on the rule of law and the protection of individual and public liberties. The same challenge has been amplified by the threat of international terrorism in the aftermath of September 11.

By deepening our commitment to these values and principles, democratic systems can be strengthened and re-legitimized. Conversely, abandoning these ideals jeopardizes not only the realization of citizenship for all people but also the very foundations of our political and legal systems.

American history and the American legal system contain formidable examples of legal principles inspired by the Western democratic tradition. Among these is the opening statement by Justice Robert H. Jackson, delivered before the International Military Tribunal at Nuremberg on November 21, 1945:

> 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.[359]

However, regrettably, American legal history also includes abhorrent actions committed by its public authorities, such as the abuses at Abu Ghraib, the illegal invasion of Iraq in 2003, the Guantanamo detention center, and, during the Cold War, support for another violent September 11: General Pinochet's bloody military coup in Chile in 1973.

That said, for European states, the United States has remained a benchmark and reference point for liberty and security over the past 73 years, since the liberation of Europe. Nonetheless, we must acknowledge the significant shift in political dynamics prompted by President Trump, particularly the new U.S. stance toward NATO and European states, the recognition of Jerusalem as Israel's capital, and the withdrawal from several key treaties: the 2013 UN Arms Trade Treaty, the 1987 Intermediate-Range Nuclear Forces (INF) Treaty, and the 2015 Paris Agreement on climate change mitigation.

After more than a decade of shocking revelations about certain U.S. policies during the War on Terror—such as Abu Ghraib, Guantanamo, and extraordinary rendition programs—the United States remains, for most Europeans, a strong and admirable democratic system in 2019. Notably, the response of the U.S. judicial system to claims of unchecked executive authority has been particularly reassuring, as exemplified by the landmark Supreme Court case *Hamdan v. Rumsfeld* (2006).

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[359] Opening Statement Before the International Military Tribunal, Nuremberg, Germany, November 21, 1945. Available at: www.roberthjackson.org.

In this case, brought through a *habeas corpus* petition, Salim Ahmed Hamdan challenged the authority and policies of military commissions at Guantanamo Bay. The Court ruled that, in accordance with international conventions, Hamdan must be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[360]

While the self-correcting mechanism of American judicial review may not always be speedy or fully effective, its existence has been a source of considerable reassurance.

6.3. European Cynicism

Undoubtedly, there is significant cynicism in Europe regarding U.S. policy following the September 11 attacks. This sentiment is partly fueled by the complicity of European governments in the Extraordinary Rendition Program. During this program, CIA planes carrying detainees from Guantanamo Bay and other detention facilities landed at European airports for technical assistance before continuing to destinations where detainees faced a high risk of torture.[361]

The Parliamentary Assembly of the Council of Europe published a definitive report on the cooperation of certain European states with the "alleged" U.S. system of extraordinary renditions, secret detentions, and unlawful interstate transfers. Among its conclusions, the report described the system as resembling a "spider's web spun across the globe" and noted:

> The impression which some Governments tried to create at the beginning of this debate—that Europe was a victim of secret CIA plots—does not seem to correspond to reality. It is now clear—although we are still far from having established the whole truth—that authorities in several European countries actively participated with the

360 *Hamdan v. Rumsfeld,* 548 U.S. 557, 2006.

361 European Parliament resolution on presumed use of European countries by the CIA for the transportation and illegal detention of prisoners. Rapporteur: Giovanni Claudio Fava, *Bulletin EU 12–2005*.

> CIA in these unlawful activities. Other countries ignored them knowingly, or did not want to know (paragraph 285).[362]

European countries have also endured the scourge of terrorism over the past fifty years and have, at times, departed from democratic political principles and violated the rule of law. While such breaches may have been exceptions to a general respect for the law, they remain unacceptable for Western European democracies.

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[362] See Parliamentary Assembly Report, June 7, 2006, AS/Jur, 2006, 16 Part II, Committee on Legal Affairs and Human Rights, "Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States," Rapporteur: Mr. Dick Marty, Switzerland, ALDE. Specifically, in the concluding paragraphs, the report points to specific countries:

> 288. In this context, it must be stated that, to date, the following member states could be held responsible, to varying degrees—which are not always definitively settled—for violations of the rights of specific persons identified below (respecting chronological order as far as possible):
>
> - Sweden, in the cases of Ahmed Agiza and Mohamed Alzery;
> - Bosnia-Herzegovina, in the cases of Lakhdar Boumediene, Mohamed Nechle, Hadj Boudella, Belkacem Bensayah, Mustafa Ait Idir, and Saber Lahmar (the "Algerian Six");
> - The United Kingdom, in the cases of Bisher Al-Rawi, Jamil El-Banna, and Binyam Mohamed;
> - Italy, in the cases of Abu Omar and Maher Arar;
> - The former Yugoslav Republic of Macedonia, in the case of Khaled El-Masri;
> - Germany, in the cases of Abu Omar, the "Algerian Six," and Khaled El-Masri;
> - Turkey, in the case of the "Algerian Six."
>
> 289. Some of these aforementioned states, and others, could be held responsible for collusion—active or passive (in the sense of having tolerated or been negligent in fulfilling the duty to supervise)—involving secret detention and unlawful inter-state transfers of an unspecified number of persons whose identities remain unknown:
>
> - Poland and Romania, concerning the running of secret detention centres;
> - Germany, Turkey, Spain, and Cyprus for being "staging points" for flights involving the unlawful transfer of detainees;
> -Ireland, the United Kingdom, and Portugal.

Examples of such violations include the British MI6's fight against the IRA, which involved the extrajudicial execution of alleged terrorists; the systematic and indiscriminate use of torture by French armed forces during the Algerian War of Independence (1954–62); the suspicious "suicides" of three members of the Baader-Meinhof Group in German custody; the support of Italian far-right lodges by the State to counter the communist threat and combat the Red Brigades (*Brigate Rosse*); and, finally, the creation of the state-sponsored death squad GAL (*Grupos Antiterroristas de Liberación*, or Anti-Terrorist Liberation Group) in Spain in 1983— a paralegal structure of police officers financed by the Spanish intelligence agency CESID to fight ETA terrorism.

6.4. An Example of Democratic Failure: The Spanish Dirty War Against Terrorism

The Spanish departure from the rule of law during the 1980s stands as a particularly dramatic case. Ironically, it was Prime Minister Felipe González—the same political leader who, after rising to power in 1982, modernized Spain and helped shape its global image as a dynamic, developed country with a model transition from dictatorship to democracy—who left behind one of the worst legacies of rule of law violations in the fight against terrorism.

The *Grupos Antiterroristas de Liberación* (GAL, or Anti-Terrorist Liberation Groups) emerged in 1983, a year after González's Socialist government took office. At the time, killings by the Basque separatist group ETA (*Euskadi ta Askatasuna*, or Basque Homeland and Freedom) were at their peak, averaging four deaths per month throughout the year. GAL's mission was to eliminate ETA's "safe havens" across the border in France. Comprised of members of the Spanish security forces and hired assassins, GAL was responsible for 28 murders between 1983 and 1987.[363]

It is not difficult to understand the rationale behind the Spanish government's decision to adopt this approach. In the years following Franco's death, ETA's killings averaged twenty times more than during

[363] Anderson, Wayne, *The ETA (Inside the World's Most Infamous Terrorist Organizations Series): Spain's Basque Terrorists*, Rosen Publishing Group, 2003; Woodworth, Paddy, *Dirty War, Clean Hands: ETA, the GAL and Spanish Democracy*, Cork University Press, 2001.

the years prior to his death. However, understanding this rationale does not equate to justifying it—particularly in democratic nations committed to upholding the rule of law.

Had such actions been carried out by the Franco regime during the dictatorship, they would have elicited little surprise. However, they occurred after Spain's return to democracy—decades after the fall of the Second Republic in 1936, following Franco's *coup d'état* and the subsequent Spanish Civil War. For this reason, the international community expressed public outrage and continues to condemn these methods. Similarly, Russia's approach to combating terrorism in Chechnya has faced widespread criticism, as its public policies and individual actions frequently lack accountability and disregard the rule of law and human rights.

The fundamental principle is that citizens committed to democratic values cannot adopt the same means as terrorists. The ethical divergence lies in our unwavering commitment to these values, regardless of the challenges we face. We uphold and treasure the principles and systems of laws that have taken centuries to develop. Even alleged terrorists are entitled to the same human rights, particularly due process, as a reflection of these democratic ideals.

The government's breach of the law extended beyond violations of the Spanish Constitution to include a failure to meet fundamental obligations under international law, such as the principle of sovereignty enshrined in Article 2 of the United Nations Charter. Consider the implications of one democratic state conducting killings within the territory of a friendly democratic neighbor. It is almost unimaginable—even in the 1980s—to envision Italy's response if the French government had sent death squads across the Italian peninsula to execute Corsican nationalists living in Italy, or if MI6 officers had traveled to Spain to assassinate IRA supporters vacationing in the north of the country.[364]

The Spanish government's involvement in this clandestine armed group became the subject of a judicial inquiry and a Supreme Court trial. Ultimately, two senior government officials, José Barrionuevo and Rafael Vera, were convicted and sentenced by the Supreme Court to over ten years in prison.

[364] See also BBC News, "Europe's Secret Detentions and CIA Flights".

In the end, the rule of law prevailed. Ironically, it was Judge Baltasar Garzón—a former member of the Socialist Government who had resigned his seat in the Spanish Congress in 1993—who presided over the criminal proceedings against the same government. The result was a reinvigoration of the legal system and a strengthening of the rule of law, as those responsible were brought to justice and held accountable for their actions.

The most significant failure of European democracies in addressing security threats posed by terrorism has been the adoption of the same methods used by terrorists. By doing so, governments have sent a dangerous message of equivalence, erasing the ethical distinction between democrats and totalitarians. This approach has led to the delegitimization and weakening of public institutions, undermining their capacity to provide effective and lawful responses. Moreover, the frequent lack of accountability has fostered a culture of impunity for individuals who violated the law while acting in the name of the state.

6.4.1. Echoes of the Cold War, Victims, and Empathy for the Other

In 1985, the same year Mikhail Gorbachev was elected Secretary General of the Soviet Communist Party during the final tense hours of the Cold War, English singer Sting composed the song *Russians*. This poignant melody, inspired by Russian composer Sergei Prokofiev's *Romance Melody* from the *Lieutenant Kijé Suite*,[365] sought to highlight the irrationality of the confrontation. At the heart of the conflict were individuals caught in the ruthless logic of Cold War hostilities. One of the greatest dangers of the Cold War—or any war—is the inability to empathize with or understand the perspectives of the other side.

Sting captured this sentiment in his lyrics:

How can I save my little boy from Oppenheimer's deadly toy.
There is no monopoly of common sense
On either side of the political fence.
We share the same biology

[365] Sting, *Russians*, on *Dream of the Blue Turtles*, Universal, London, 1985.

Regardless of ideology.
Believe me when I say to you
I hope the Russians love their children too.

Sting's argument was clear: empathy for the other is rooted in shared human experiences, such as the desire to provide for one's people and the universal striving for better lives.

In the aftermath of September 11 and throughout the War on Terror, we have witnessed a revival of Cold War-era attitudes, habits, and perspectives rather than a commitment to the cultural and political values that emerged with the new vision of freedom after the fall of the Berlin Wall on November 9, 1989. These "revived manners" have also resurfaced prominently in 2019, evidenced by Brexit, Russian interference in the internal affairs of several states (including the 2016 U.S. presidential election won by Donald Trump), and China's increasingly assertive commercial, military, and foreign policies.

At the same time, Europe has demonstrated that much of its inability to address certain contemporary challenges effectively stems directly from the Cold War. The conflicts in Iraq, Afghanistan, Syria, and the Middle East serve as stark reminders of Europe's limitations. Shlomo Ben-Ami aptly highlighted these issues in his work *Europe's Dangerous Banalities*:

> Europe's inability to help resolve the Arab-Israeli conflict (and others) does not stem from its positions on the core issues, which are only microscopically different from those held by the United States […]. Europe, as Denis de Rougemont put it in 1946, is *la patrie de la mémoire*, a tormenting and tormented memory, one must admit. […] To the Israelis, Europe became the essayist Mario Andrea Rigoni's old lady, who after she had allowed herself all sorts of liberties […] and a great number of horrors, would like, once she has reached the age of society, fatigue, and weakness, to see the world adapt itself to her needs for moderation, equity, and peace […] It took Europe gruesome religious wars, two world wars, and more than one genocide to resolve its endemic disputes over borders

> and nationalism […] Its record in colonialism wrote monstrous pages in human history.[366]

It may be true that we remain in a transitional period following the Cold War, unable to fully define the character of our time. This perspective may also explain why traces of the Cold War persist across America and Europe more than half a century after its conclusion. History is shaped by the actions of individuals and the implementation of policies. President Obama will likely be remembered as a symbol of these significant, albeit gradual, changes yet to fully unfold.

6.4.2. Conflict Casualties

Professor Abdullahi Ahmed An-Na'im of Emory University has consistently addressed the shared aspirations of human beings, regardless of origin, culture, or citizenship. An-Na'im's work emphasizes the importance of recognizing the "human vulnerability concept,"[367] particularly in the context of military conflicts and their victims.

As of April 2009, a CNN count reported 4,597 coalition deaths in the Iraq War, including 4,280 Americans, two Australians, one Azerbaijani, 179 Britons, 13 Bulgarians, one Czech, seven Danes, two Dutch, two Estonians, one Fijian, five Georgians, one Hungarian, 33 Italians, one Kazakh, one Korean, three Latvians, 22 Poles, three Romanians, five Salvadorans, four Slovaks, 11 Spaniards, two Thais, and 18 Ukrainians.[368]

However, no comprehensive figure exists for the number of Iraqi civilian casualties. The Iraq Body Count (IBC)[369] project is one of several

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366 Ben-Ami, Shlomo, *Europe's Dangerous Banalities*, February 2009. Available at: www.project-syndicate.org.

367 Interview with Professor An-Na'im, Atlanta, October 10, 2006, cited in González Ibáñez, Joaquín, Raskin, Jamie B., and Ramadan, Hisham, *The Arab Garden and Ground Zero*, *Saberes Law Review*, Madrid: Alfonso X University, 2006. Available at: www.uax.es/publicaciones/saberes.htm.

368 Source: CNN, *Specials: Iraq Forces Casualties*, April 28, 2009. Available at: www.cnn.com/SPECIALS/2003/iraq/forces/casualties/

369 *Iraq Body Count*. Available at: www.iraqbodycount.org. On its database page, the IBC states: "Gaps in recording and reporting suggest that even our highest totals to date

initiatives attempting to record civilian deaths resulting from coalition and insurgent military action, sectarian violence, and criminal activity in Iraq since the U.S.-led invasion in 2003. This includes excess civilian deaths caused by the breakdown of law and order following the invasion.

Other efforts to estimate civilian casualties, such as *A Mortality Study: The Human Cost of the War in Iraq 2002–2006*[370]—conducted by Johns Hopkins University, Al Mustansiriya University in Baghdad, and the Massachusetts Institute of Technology—were dismissed outright by President Bush.[371] Estimates of Iraqi civilian deaths since the invasion vary widely, from the Iraq Body Count's lowest estimate of 91,676 to 101,083, to an Opinion Research Business survey in August 2007, which suggested a staggering range of 733,158 to 1,446,063 deaths.[372]

In the fall of 2008, during the presidential debates between Senator John McCain and Senator Barack Obama, the war in Iraq loomed large. Both candidates referenced the sacrifices of American soldiers killed in Iraq and Afghanistan. However, notably absent—especially from Senator Obama—was any expression of empathy for, or even mention of, the thousands of innocent civilians killed as a result of an invasion that was illegal under international law. This invasion was orchestrated on false premises: the alleged existence of weapons of mass destruction, supposed links between Al-Qaeda and Iraq, the events of 9/11, promises of freedom for Iraqis, democracy-building, and nation-building, among others.

"The other," the victim, lies at the core of a universal approach to human rights, where every single life must be valued equally. Yet, paradoxically, during the first three years of the Obama administration (2009–2011), President Obama authorized 193 drone strikes—more than four times the number of attacks carried out under President George W.

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may be missing many civilian deaths from violence." The group is staffed primarily by volunteers, including academics and activists based in the UK and the USA. The project was founded by John Sloboda and Hamit Dardagan.

370 *The Lancet*, Volume 368, Issue 9545, pp. 1421–1428, October 21, 2006. This report, available at www.thelancet.com, provides detailed findings on mortality in Iraq.

371 On the denial of the data, see CNN, *War Blamed for 655,000 Iraqi Deaths: President Bush Says He Does Not Consider Report Credible*. Available at: www.cnn.com/2006/WORLD/meast/10/11/iraq.deaths/.

372 See Opinion Research Business, *Newsroom Details*. Available at: www.opinion.co.uk/Newsroom_details.aspx?NewsId=78.

Bush's two terms.[373] In response to public pressure for greater transparency, President Obama signed an executive order in 2016 requiring U.S. intelligence officials to publish the number of civilians killed in drone strikes conducted outside war zones.[374] This order, however, was revoked by President Donald Trump on March 6, 2019.[375]

By the end of Obama's first term, an analysis by The Guardian and the human rights group Reprieve raised serious concerns about the accuracy of the intelligence guiding so-called "precise" strikes. The data revealed that while 41 individuals were targeted, U.S. drone strikes resulted in the deaths of 1,147 people, highlighting a deeply troubling ratio. The dramatic increase in drone strikes under Obama's administration, often

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[373] McKelvey, Tara, "Covering Obama's Secret War: When Drones Strike, Key Questions Go Unasked and Unanswered," *Columbia Journalism Review*, May/June 2011. Available at: https://archives.cjr.org/feature/covering_obamas_secret_war.php.

[374] Executive Order 13732 of July 1, 2016, *United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force*. The principles and goals are clearly defined in Section 1:

> *United States policy on civilian casualties resulting from U.S. operations involving the use of force in armed conflict or in the exercise of the Nation's inherent right of self-defense is based on our national interests, our values, and our legal obligations. As a Nation, we are steadfastly committed to complying with our obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality.*
>
> *The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to our national security. As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective than the requirements of the law of armed conflict that relate to the protection of civilians.*
>
> *Civilian casualties are a tragic and at times unavoidable consequence of the use of force in situations of armed conflict or in the exercise of a state's inherent right of self-defense. The U.S. Government shall maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from our operations to further enhance the protection of civilians.*

[375] See *Executive Order on Revocation of Reporting Requirement, National Security & Defense*, issued on March 6, 2019. Available at: https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requir, ment/.

criticized as "kill for peace," represented a strategy that some argued could backfire, creating long-term blowback in U.S. foreign policy.[376]

Even the data presented by the Obama administration in 2016 was contested for its accuracy. The administration reported having conducted 473 strikes against terrorist targets outside areas of active hostilities, resulting in an estimated 2,372–2,581 combatant deaths and 64–116 non-combatant deaths. Critics challenged these figures, pointing to inconsistencies and a lack of transparency in how the death toll was calculated.[377]

6.4.3. Torture, Accountability, and the Normal Function of Institutions

During an interview on January 11, 2009, President-elect Barack Obama stated, "while no one is 'above the law' […] my orientation's going to be to move forward."[378] On his second day in office, President Obama issued orders banning torture and closing the Guantanamo Bay detention center. In the same directive, he rescinded all legal opinions and memos that had justified harsh interrogation techniques, secret CIA prisons, and the detention of terror suspects outside the judicial system.

In April 2009, speaking at West Point Academy, former Attorney General Eric Holder reflected on the Bush administration's policies regarding the torture of prisoners in Iraq, Afghanistan, and Guantanamo Bay. Holder acknowledged, "The law was not always followed in [the] U.S.

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376 Ackerman, Spencer, "41 Men Targeted but 1,147 People Killed: US Drone Strikes – The Facts on the Ground." *The Guardian*, November 24, 2014. Available at: https://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147. For an analysis of the unintended consequences of American foreign policy, see Eugene Jarecki's 2005 documentary *Why We Fight*.

377 See Zenko, Mica, *Questioning Obama's Drone Deaths Data*, *Council on Foreign Relations*, July 1, 2016. Available at: https://www.cfr.org/blog/questioning-obamas-drone-deaths-data. Of particular interest is information released by *The Washington Times*: Blake, Andrew, *Obama-led Drone Strikes Kill Innocents 90% of the Time: Report*, October 15, 2015. Available at: https://www.washingtontimes.com/news/2015/oct/15/90-of-people-killed-by-us-drone-strikes-in-afghani/.

378 See Stephanopoulos, George, *Interview with President-Elect Barack Obama*, January 11, 2009. Available at: http://abcnews.go.com/ThisWeek/Economy/story?id=6618199&page=1.

war against terror." This statement underscores the obligation, under any legal system committed to the rule of law, to prosecute individuals who allegedly breach the law, whether under national or international obligations.[379]

Desmond Tutu wisely addressed the false dilemma often posed between protecting human rights and ensuring accountability for perpetrators. Referring to the arrest warrant issued for Sudanese President Omar Hassan al-Bashir by the International Criminal Court (ICC) in February 2009, Tutu challenged us to decide whether we stand "on the side of justice or on the side of injustice." He also criticized the troubling response from many African leaders to the ICC's prosecution of an African head of state, declaring "The answer so far from many African leaders has been shameful. Because the victims in Sudan are African."[380] Tutu's argument underscores that nationalism is irrelevant when addressing human rights violations. What matters is the shared humanity of the victims—in this case, African lives lost as a result of the orders of an African leader.

When it comes to torture, the identity or rationale of the perpetrator is irrelevant. Behind such justifications lies the fundamental destruction of human dignity and the violation of the inalienable rights of the tortured.

The constitutional system of checks and balances ensures mutual oversight among the legislative, executive, and judicial branches, preventing any excess or misuse of the powers assigned and limited by the Constitution. Reflecting on the historical consequences of failing to control governmental decisions, U.S. Supreme Court Justice Ruth Bader Ginsburg remarked, "What happened in Europe was the Holocaust, and people came to see that popularly elected representatives could not always be trusted to preserve the system's most basic values."[381]

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379 See Fitzgerald, Jim, *Eric Holder Tells West Point: The Law Was Not Always Followed in U.S. War Against Terror*, *Associated Press*, April 15, 2009. Available at: www.cleveland.com/nation/index.ssf/2009/04/eric_holder_tells_west_point_t.html.

380 Tutu, Desmond, *Will Africa Let Sudan Off the Hook?*, *The New York Times*, March 3, 2009.

381 Liptak, Adam, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, *The New York Times*, April 12, 2009. These comments were made by Ginsburg during a conference at Moritz College of Law at Ohio State University.

Professor Richard J. Wilson, a human rights scholar and former legal counsel for Guantanamo detainees, including Omar Khadr, provided a clear critique of the limitations of international law in proceedings against Guantanamo detainees during the War on Terror. Reflecting on his years of defending human rights under both American and international law, Wilson explained:

> As a teacher and practitioner of international human rights law, I have to admit that I have generally been disappointed with the response by the U.S. courts to issues put before them with international law dimensions. It is very clear that courts, particularly the lower federal courts, are either ignorant of or hostile to international law norms, and this is reflected in their decisions. But for the decision by the Supreme Court in the Hamdan case in 2006, which gives some recognition of basic obligations under the law of war, the courts have generally shied away from grounding their decisions in international law concepts, even norms as basic as those protecting against torture. The generally exceptional nature of U.S. practice in international law is reflected in the court decisions dealing with Guantanamo, which are solidly based on domestic law, and thus skewed against protection of basic human rights norms recognized in international law.[382]

In a similar vein, Mark J. McKeon, a former prosecutor at the International Criminal Tribunal for the former Yugoslavia (2001–2006), presented a compelling argument in favor of the application of the rule of law in his 2009 statement, *Why We Must Prosecute*:[383]

> In 2001 and the following few years, we at the international tribunal built a strong court case against Milosevic. We presented evidence that he had effective control over

[382] González Ibáñez, Joaquín, interview with Prof. Richard J. Wilson, May 3, 2009, Washington, D.C.

[383] McKeon, Mark J., *Why We Must Prosecute*, *The Washington Post*, *Torture Is a Breach of International Law*, *The New York Times*, April 28, 2009.

> soldiers and paramilitaries who tortured prisoners and did worse. We brought into court reports of atrocities that had been delivered to Milosevic by international organizations to show his knowledge of what was happening under his command. And we watched as other heads of state were indicted for similar crimes, including Charles Taylor in Liberia and, of course, Saddam Hussein in Iraq.
>
> At the same time, I watched with horror the changes that were happening back home. The events are now well known: Abu Ghraib; Guantanamo; secret 'renditions' of prisoners to countries where interrogators were not afraid to get rough; secret CIA prisons where there appeared to be no rules […] I hope that the United States has turned the page on those times and is returning to the values that sustained our country for so many years. But we cannot expect to regain our position of leadership in the world unless we hold ourselves to the same standards that we expect of others. That means punishing the most senior government officials responsible for these crimes. We have demanded this from other countries that have returned from walking on the dark side; we should expect no less from ourselves.

From a technical perspective, legal scholars such as Stephen Vladeck, a constitutional law professor at American University, acknowledge the challenges of bringing criminal charges against former President George W. Bush, former Vice President Dick Cheney, and other senior Bush administration officials. Vladeck describes such a process as "a complex, highly-charged undertaking," where even with strong evidence, "a conviction […] would be an uncertainty at best."

According to Vladeck, based on the information currently available in the public record, the most compelling allegation involves the use of torture. He emphasized: "There is a clear prohibition under both domestic and international law on torture. It clearly applied to the executive branch.

And it's pretty clear that the executive branch disregarded it on several occasions."[384]

6.5. Audiencia Nacional and Impunity

Meanwhile, Spain's *Audiencia Nacional* (National High Court) initiated criminal proceedings to investigate high-ranking political figures from the Bush administration's War on Terror. This initiative, while arguably paradoxical and even Quixotic, reflected the determination of Spanish judicial authorities to confront alleged human rights abuses.

In April 2009, the *Audiencia Nacional* launched a criminal investigation into allegations of torture brought by four former detainees. The court asserted jurisdiction over these cases because the individuals had previously been charged in Spain with criminal activities supporting al-Qaeda.[385] The four detainees alleged that they endured various forms of physical and psychological violence during their detention in different countries while under the authority of U.S. officials.[386]

At the same time, Cándido Conde-Pumpido, the Chief State Prosecutor, opposed pursuing the case. The future of the investigation ultimately rested on the decision of *Audiencia Nacional* Magistrate Baltasar Garzón, who allowed the case to proceed.[387]

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384 Williams, Joseph, *Some Call for Bush Administration Trials: Want Ex-Leader Accountable on Iraq War*, *The Boston Globe*, February 3, 2009.

385 See *CNN Europe*, April 23, 2009, *Spanish court sends Guantanamo case to new judge*. Available at: http://edition.cnn.com/2009/WORLD/europe/04/23/spain.court.guantanamo/.

386 *Auto April 27, 2009. Procedimiento: Diligencias Previas 150/09 – N, Delito: Torturas y otros. Juzgado central de instrucción, numero cinco, Audiencia Nacional, Madrid.* Available at: www.rtve.es/contenidos/documentos/autoguantanamo.doc.

387 Bettelheim, Adriel, *Obama Tries to Chill Spanish Court's Guantánamo Bay Investigation*, 16 April 2009, *CQ Politics*. Available at: http://blogs.cqpolitics.com/balance_of_power/2009/04/obama-tries-to-chill-spanish-c.html. Nevertheless, magistrate Baltasar Garzón's career as a judge came to a dramatic end in February 2012 when the Spanish Supreme Court sentenced him to an 11-year suspension for illegally wiretapping conversations between remand prisoners and their lawyers in a corruption case involving the former prime minister Mariano Rajoy's People's Party.

The former Bush administration officials—ex-Attorney General Alberto Gonzales; David Addington, former Vice President Dick Cheney's chief of staff; ex-Pentagon general counsel William Haynes; former Defense Department Undersecretary Douglas Feith; Jay Bybee, a former assistant attorney general; and ex-Justice Department lawyer John Yoo—were accused of approving interrogation techniques that violated the 1984 United Nations Convention Against Torture, the Third Geneva Convention, and the Spanish Criminal Code.

Judge Garzón's brief emphasized that both the "intellectual authors" and the "material implementers" of abuse—those who "authorized" it as well as those who "practiced" it—could be held criminally responsible under his investigation.

According to the *auto* (order), the four Guantanamo detainees alleged that they suffered a range of abuses, including sleep deprivation and vision damage caused by cells being lit continuously; constant broadcasting of "patriotic American songs" and other loud music; blows to the testicles and head; forced nudity; waterboarding (introducing water into the nostrils to induce a sensation of suffocation); subjection to extreme heat or cold; prolonged confinement in a dark underground space; deprivation of food; death threats; and sexual assault.

In 2014, the Spanish Congress initiated a reform of the statute regulating universal jurisdiction (*Ley Orgánica del Poder Judicial*, 6/1985, July 1). This reform resulted in the closure of the Guantanamo investigation in January 2016, as ordered by Judge José de la Mata. In an *Audiencia Nacional* order, Judge de la Mata concluded that, under the new legal framework, Spanish judicial bodies no longer had jurisdiction to investigate the alleged torture system at Guantanamo.[388]

6.6. The Misuse of Language and the War on Terror

In his book *LTI – Lingua Tertii Imperii* (*The Language of the Third Reich*), Victor Klemperer argues that one of the first casualties of war is language itself, particularly through its restriction and manipulation for

[388] See also the appeal at *Spanish Supreme Court Ruling on the end of the Guantanamo Investigation by the Audiencia Nacional, Tribunal Supremo, Sala de lo Penal, Sentencia No: 869/2016, RECURSO CASACIÓN (Spanish Supreme Court Appeal) No: 308/2016.*

political purposes. Klemperer, a Jewish scholar married to an "Aryan" woman, Eva Klemperer, avoided deportation to an extermination camp (*Vernichtungslager*) during the Nazi regime due to his wife's refusal to abandon him. Instead, he was forced into slave labor at a factory and tasked with removing debris in his hometown of Dresden.

Klemperer was a professor of French literature and German philology. However, during the six years of war, he was prohibited from borrowing books from the library, owning books, or teaching. Deprived of his academic pursuits, he devoted his time to documenting the distortion of language by the Third Reich.[389]

It is striking that all dictatorships share numerous similarities in their use of language: invoking a shared destiny for the entire community, glorifying heroism, appropriating terms like "fatherland" and "flag," emphasizing a common final effort and ultimate destiny, criminalizing dissent, celebrating the heroic deaths of group members, and portraying themselves as the chosen or exceptional.

Of course, I am not suggesting that the Bush administration represented a totalitarian regime. However, the systematic use of fear and the constant manipulation of language were undeniable aspects of daily life during that period. It is disheartening to still hear echoes of the manipulation of anxieties and suspicions that left many Americans fearful and disoriented.

During the Bush administration, in response to the terrorist threat, numerous new terms were coined, including the creation of the Department of Homeland Security. The era was marked by the proliferation of "heroes," frequent terror alerts, the public discrediting of skeptics of government policies, the labeling of political adversaries as unpatriotic, and rhetoric glorifying sacrifices made for "freedom" in Iraq and Afghanistan. Perhaps the most problematic concept introduced was the "War on Terror."

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[389] Klemperer begins his argument about language as a powerful tool and weapon, repeatedly affirming "that language acts and thinks for us." He recounts an anecdote of a Jewish friend who found great consolation in reading the official German reports of the African battlefield in December 1941: "They are having a terrible time in Africa," he says. "They write: 'Our troops who are fighting *heldenhaft* (heroically).' *Heldenhaft* sounds like an obituary, you can be sure of that." See Klemperer, Victor, *The Language of the Third Reich: LTI, Lingua Tertii Imperii – A Philologist's Notebook*, Continuum Books, New York and London, 2002.

President Obama's statement that his administration would avoid using such terminology was both prudent and insightful.[390] The "War on Terror" remains an undefined, non-legal category: it has a clear starting point, but its conclusion is ambiguous, depending entirely on those in power to declare its end.[391]

Peter Brooks, a professor at Yale University and director of *The Ethics of Reading* project,[392] asserts that *The Torture Memo*—authored by Jay Bybee and John Yoo as the legal foundation for the Bush administration's use of torture techniques at Guantanamo in February 2002—demonstrates a profound disregard for the essence of the rule of law and public freedoms. According to Brooks, the memo reflects a troubling manipulation of the semantics of democracy and the use of language for questionable political purposes. He observes, "It is simple and hideous how language can be used, interpreted, [and] manipulated to justify violence, and, perhaps, also to combat it."[393]

Similarly, J.M. Coetzee, in his work *Diary of a Bad Year*,[394] laments the ways in which the War on Terror has led governments—including

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390 Kamen, Al, *The End of the Global War on Terror*, *The Washington Post*, March 24, 2009. Available at: http://voices.washingtonpost.com/44/2009/03/23/the_end_of_the_global_war_on_t.html.

391 Probably the new terminology will be "overseas contingency operations." *The Guardian* reported that Tony Blair was an avid supporter of Bush's terminology: "Whatever the technical or legal issues about a declaration of war, the fact is we are at war with terrorism." Several experts concluded that the phrase was unhelpful. A "War on Terror" was too broad and vague ever to be won. These specialists in terrorism issues argued that not defining a group or ideology, but rather a type of violence as the enemy, was incoherent. Even Secretary of Defense Rumsfeld, one of the war's most active architects, unsuccessfully tried to persuade Bush to rename it the "global struggle against violent extremism." See Oliver Burkeman, *Obama administration says goodbye to 'war on terror.' U.S. defense department seems to confirm use of the bureaucratic phrase 'overseas contingency operations'*, *The Guardian,* March 25, 2009. Available at: www.guardian.co.uk/world/2009/mar/25/obama-war-terror-overseas-contingency-operations.

392 See *The Ethics of Reading Project,* available at: http://opa.yale.edu/news/article.aspx?id=2319.

393 *How Legal Rhetoric Shapes the Law - The Language of Violence and Torture,* Conference November 7, 2008, American University, Washington College of Law. Available at: www.wcl.american.edu/secle/fall/2008/081107.cfm.

394 See Coetzee, J. M., *Diary of a Bad Year*, Viking Books, 2008.

those of Australia, Russia, Britain, and the United States—to corrupt and distort words central to daily civic life.

The cynical manipulation of language by previous administrations rendered Barack Obama's plain-spoken presidential campaign remarkably effective. His use of clear and meaningful language took center stage, refreshing American political discourse and moving away from rhetorical manipulations like "If you are not with me, you are against me," a phrase symbolic of coarse and divisive rhetoric. Obama's campaign introduced a new tone, a new style, and renewed hopes, reinvigorating the democratic ideals at the heart of the American political system.

With his campaign mottos, "Change We Can Believe In" and "Yes We Can," Obama entered the presidency as a politician deeply committed to human rights. As a member of a minority group who closely identified with the struggle against racial segregation and who aimed to advance social welfare and respect for all individuals, Obama came to symbolize the nation's repudiation of torture as an instrument of state policy.

As for the legacy of President Trump, it is prudent to wait until the end of his second term to form a comprehensive judgment. However, after his first presidency there is evidence of troubling trends, including the prohibition of certain words in official documents and the adoption of language that is reshaping American politics and public institutions. Professor Karen J. Greenberg has described the Trump administration as "assaulting the language of American democracy,"[395] highlighting the profound impact of these changes on the nation's political and institutional discourse.

6.7. Common Heritage of Values and Ideals

The United States and its Western allies are bound by a common history and a foundation of core values shaped through two centuries of

[395] Greenberg, Karen J., *The Trump Administration's Dangerous Assault on Our Words*, *The Nation*, May 17, 2018. See also Winter, Jessica, *The Language of the Trump Administration Is the Language of Domestic Violence*, *The New Yorker*, June 11, 2018; Thompson, Dereck, *Donald Trump's Language Is Reshaping American Politics*, *The Atlantic*, February 15, 2019; and Sun, Lena H., and Eilperin, Juliet, *CDC gets list of forbidden words: Fetus, transgender, diversity*, *The Washington Post*, December 15, 2017.

interaction. While their paths have sometimes diverged and their manifestations differ across the Atlantic, both have worked to realize the common ideals born from the Enlightenment.

At the heart of the Enlightenment project lies the rule of law—a framework that provides certainty, legal enforcement, and the practical application of both international and domestic law. However, this system is "enlightened" by elements that set democratic regimes apart from authoritarian ones. At its core is an ethical commitment to justice. The rule of law embodies a moral framework shaped by conscience and reason, balancing right and wrong, good and evil.

Because of these principles, democratic law schools carry a profound responsibility: to instill in their students the belief that the rule of law is one of humanity's greatest achievements. This responsibility ensures that the values of justice, fairness, and moral integrity remain central to legal practice and governance.

Progress in democracy entails greater freedom and the empowerment of individuals, particularly those who are vulnerable or disadvantaged. No political or historical commitment in society holds greater importance than the pursuit of justice.

In the aftermath of the fall of the Berlin Wall, the "wise restraints that make mankind free" compel us to reaffirm the intrinsic value of human rights, as enshrined in the preamble of the United Nations Charter:

> "[…] 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 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 uphold these standards has contributed to a mutual misunderstanding between the United States and its allies across the Atlantic. The United States has often struggled to fully comprehend how its actions are perceived by other nations, particularly in relation to the

shared aspirations of humanity—aspirations that transcend origin, culture, or citizenship. These shared goals compel us to acknowledge the profound importance of the "human vulnerability concept," which highlights the universal fragility and dignity of all individuals.[396]

The message that Europeans largely took from the post–9/11 era was that the United States chose to act unilaterally, engage in preventive wars, and disregard international law, including international humanitarian law. It seemed as though a global agenda had been set into motion, driven by specific political goals to be achieved at any cost. This approach echoed the sentiment of the old Spanish proverb: "When politics enters through the door, justice escapes through the window."[397]

While Europeans understood the emotions and legitimacy behind the U.S. response to 9/11, they did not agree with the Bush administration's decision to subordinate the rule of law and democratic principles to a secondary priority. The same sentiment likely applies in 2019, under the policies of President Trump, particularly regarding immigration, his decision to erect a wall along the southern border, and his implicitly racist rhetoric. Most strikingly, the unprecedented U.S. threat to arrest International Criminal Court (ICC) judges if they pursued cases against Americans for alleged war crimes in Afghanistan marked a significant departure from respect for international norms.

History demonstrates that the absence of a legal framework to govern relations and ensure security, accountability, and mutual rights and obligations inevitably leads to cycles of revenge, injustice, inequity, and persistent unrest. Paradigmatically, in the months and years leading up to the 2003 invasion of Iraq, there was "no shortage of international law."[398]

The United States, however, contributed to the marginalization of the United Nations: "by undermining international humanitarian law, it squanders moral authority and the capacity to persuade and influence others."[399] Coupled with the policies pursued by President Bush from 2001

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396 See footnote 36 included in *The Arab Garden and Ground Zero,* published in *Saberes* 2006, Alfonso X University. Interview with Professor An-Na'im, Atlanta, October 10, 2006. Available at: www.uax.es/publicaciones/saberes.htm.

397 Spanish proverb from the Renaissance, "Cuando la política entra por la puerta, la justicia escapa por la ventana."

398 Byers, Michael, *War Law*, Grove Press, New York, 2005, p. 142.

399 *Ibid*., p. 154.

to 2008 under the banner of the War on Terror, it appears that international law was treated as a burdensome obstacle, hindering efforts to achieve victory against terrorism.

6.8. Renewed Foresight: Human Rights and International Obligations

A renewed respect for the opinions of other nations and international law was partially restored by the diplomacy of the Obama administration, particularly during Obama's second term. Rebuilding consensus and reassuring Americans and allies about the United States' global role emerged as clear priorities, as reflected in Obama's First Inauguration Speech in January 2009:

> […] As for our common defense, we reject as false the choice between our safety and our ideals. Our founding fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake. […][400]

This vision had already gained international attention before Obama's election, with large public gatherings in Berlin in July 2008 and in cities such as Paris, Prague, and Mexico City. Thousands of citizens voiced their support for Obama's multilateral approach to addressing global challenges. These gatherings symbolized a perception that the president-elect was transforming the face of American politics and demonstrating a willingness to collaborate with allied nations.[401]

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[400] Robert H. Jackson Opening Statement before the International Military Tribunal at Nuremberg, November 21, 1945. Available at: www.roberthjackson.org/Man/theman2–7–8–1/.

[401] Nelson Mandela highlighted the differences between *to do for* and *to do with*. The South African leader profoundly respected President Bill Clinton, whose policy had gained the confidence of Black citizens, minorities, women, and the disabled, marking a shift in traditional U.S. foreign policy in Africa. During the celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights on December 10, 1998,

Obama's First Inauguration Speech was, in many respects, both brilliant and encouraging. It also affirmed his empathy and commitment to fostering cooperation in international relations:

> Our founding fathers, faced with perils that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake.
> And so, to all the other peoples and governments who are watching today, from the grandest capitals to the small village where my father was born, know that America is a friend of each nation, and every man, woman and child who seeks a future of peace and dignity. And we are ready to lead once more.
> Recall that earlier generations faced down fascism and communism not just with missiles and tanks, but with sturdy alliances and enduring convictions. They understood that our power alone cannot protect us, nor does it entitle us to do as we please. Instead, they knew that our power grows through its prudent use; our security emanates from the justness of our cause, the force of our example, the tempering qualities of humility and restraint.
> We are the keepers of this legacy. Guided by these principles once more, we can meet those new threats that demand even greater effort, even greater cooperation and understanding between nations. We will begin to responsibly leave Iraq to its people and forge a hard-earned peace in Afghanistan.

Nelson Mandela quoted Clinton's words from a conversation they had: "I admire Clinton; he has changed the face of American politics. […] When he came here [South Africa], he set forth a very important question. He said: 'It used to be, when American policymakers thought of Africa at all, they would ask, what can we do for Africa, or whatever can we do about Africa? Those were the wrong questions. The right question today is, what can we do with Africa?'" See Carlin, John, *El gigante de la libertad, Mandela,* in Spanish weekly *El País Semanal,* published on December 6, 1998: pp. 21–23.

In addition to his rhetoric, Obama's appointments demonstrated his administration's intellectual and professional commitment to international law. A significant example was the nomination of Harold Koh as legal adviser to the U.S. State Department, highlighting the administration's intent to align its policies with global human rights standards.

John Kerry, Chair of the U.S. Senate Committee on Foreign Relations, commended Koh during his nomination hearing for the position of legal adviser. Kerry emphasized that Koh had been a staunch advocate for the rule of law and human rights, stating, "He understands that it is not a Rule of Law if it is invoked only when it is convenient, and it is not a Human Right if it applies only to some people. He knows that our nation is stronger and safer when our government adheres to fundamental American values."[402]

Koh championed a dynamic, "transnational" approach to international relations. He envisioned an America deeply and unavoidably interconnected with the global community through a web of security, trade, diplomacy, culture, history, and familial relationships. In such a society, international law serves as the foundational framework, obligating nations to respect and adhere to their international commitments. Koh frequently underscored this principle in public forums, remarking, "This is not only the right thing to do, it is the smart thing to do."[403]

He further articulated his perspective on the importance of adherence to international law:

> We limit our ability to lead internationally and to demand compliance by other states – including rogue states such as North Korea – when we are perceived as disobeying or disrespecting international law. […] Our sovereign power

[402] See p. 1 of the U.S. Senate Committee on Foreign Relations, Chairman John F. Kerry, *Opening Statement for Harold Koh Nomination,* U.S. State Department's legal adviser hearing, April 28, 2009. Available at: http://foreign.senate.gov/testimony/2009/KohTestimony090428p.pdf.

[403] For example, see comments during his keynote address: *The politics of implementation: The Role of Human Rights in Foreign Policy,* at the Conference *Realizing the promise of the Universal Declaration of Human Rights: examining the first 60 years and beyond,* December 2, 2008, American University Washington College of Law. See the webcast at www.wcl.american.edu/humright/center/webcast.cfm.

> and influence are magnified when we work with allies and international institutions. International law is a tool that can be used to advance U.S. interests in enhancing and disseminating the human and civil rights that are at the foundation of our constitutional framework.[404]

6.9. Conclusion

As of 2019, Abu Ghraib has become a detention facility almost forgotten by the broader public. Few may recall that the U.S. military officially handed over the prison to the Iraqi government on September 2, 2006. While its physical location is marked by specific map coordinates, Abu Ghraib represents far more than a geographic site. Over time, it has found its place in the same intellectual, cultural, political, and emotional gallery as Francisco Goya's *Disasters of War* and Pablo Picasso's *Guernica*. Abu Ghraib stands as a stark representation of the abuse of power, the degradation of human dignity, and the horrors of military torture—this time at the hands of Americans.

The War on Terror, at least as conceptualized and implemented during the period from 2001 to 2008, has ended. During the Bush administration, a comprehensive strategy was employed, rooted in the belief that "America was morally entitled to use untraditional weapons to combat an untraditional threat."[405] The administration argued that terrorists had forfeited their rights due to the nature of their atrocities and their intent to annihilate, asserting that the president's duty to protect the nation justified doing "whatever he and his advisers think helpful to that end."[406]

Democracies, however, often define themselves and either strengthen or weaken their systems based on how they respond to security threats. As Ronald Dworkin observed in *Is Democracy Possible Here?*,[407] such

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404 See note 57, statement from Koh's intervention before the Senate Committee on Foreign Relations.
405 Dworkin, Ronald, *Is Democracy Possible Here?*, Princeton University Press, Princeton, 2006, p. 27.
406 *Ibid.*, p. 27.
407 *Ibid.*, p. 16.

responses are critical not only for a nation's moral obligations but also for its self-respect: "The implications of the step [are] not for your moral responsibilities but for your self-respect."

Governments that act in ways that disregard the intrinsic value of any human life may not necessarily diminish their own dignity. However, it is crucial to question whether such actions reflect contempt for the value of other people's lives. Allegations concerning the administration's policies aimed at preserving American freedom must be critically examined, particularly in light of potential human rights abuses. If these policies violate human rights—regardless of the president in office—they are "indefensible," even when cloaked in legal justifications and claims of making America safer. Without prioritizing human rights, America risks misinterpreting the natural reciprocity of those aggrieved by its actions.

As Mark J. McKeon, a former prosecutor at the International Criminal Tribunal for the former Yugoslavia, stated, the crimes committed by the United States during the War on Terror differ from those of other nations but still demand accountability under the rule of law:

> To say that we should hold ourselves to the same standards of justice that we applied to Slobodan Milosevic and Saddam Hussein is not to say that the level of our leaders' crimes approached theirs. Thankfully, there is no evidence of that. And yet, torture and cruel treatment are as much violations of international humanitarian law as are murder and genocide. They demand a judicial response. We cannot expect the rest of humanity to live in a world that we ourselves are not willing to inhabit.[408]

President Obama's determination during his first days in office to close Guantanamo, uphold the rule of law, and enforce zero tolerance for torture offered hope for meaningful change. These actions signaled a potential return to democratic ideals and greater respect for fundamental rights and democracy. Signs of this "plausible" change had already begun to emerge during the final months of the Bush presidency.

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[408] McKeon, Mark J., *Why We Must Prosecute: Torture Is a Breach of International Law*, *The Washington Post*, April 28, 2009.

On November 7, 2008, Colonel Morris Davis testified before the Inter-American Commission on Human Rights during a session monitoring the precautionary measures imposed by the Commission on the United States in connection with the case of Djamel Ameziani, who was then in U.S. custody at Guantanamo Bay. Since September 2005, Davis had served as Chief Prosecutor for the Military Commissions at Guantanamo, overseeing legal proceedings against detainees.

In this capacity, Davis appeared as a witness for the Human Rights Clinic Program of the Washington College of Law and the Center for Justice and International Law (CEJIL) in opposition to the United States. During his testimony, he condemned the political nature of the proceedings at Guantanamo, drawing a comparison between these trials and those conducted against Nazi saboteurs in 1942 in *Ex parte Quirin.*

Colonel Morris Davis resigned on October 4, 2007, citing the impossibility of ensuring even the minimum guarantees of due process in the proceedings at Guantanamo. He objected to the Prosecution Office's practice of concealing exculpatory evidence and, in particular, to what he perceived as the Commission's role as a purely political court. His resignation came after he was warned that he was expected to secure guilty verdicts for all detainees at Guantanamo—a situation highlighted in *The New York Times* article "Guilty as Ordered," published on August 7, 2008.

Listening to Colonel Davis speak at an open session of the Inter-American Commission on Human Rights about the principles and values enshrined in the U.S. Constitution and the importance of international treaties was both historic and profoundly educational. I personally witnessed his testimony in Washington at the Commission, and it evoked in me the poignant words of Alonso Quijano (*Don Quixote*) in a moment of surpassing lucidity, dignity, and sorrow: "I know who I am" ("¡Yo sé quién soy!").[409]

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[409] See October 28, 2009. Hearings of the Regular Session of the IACHR: PM 259/02 – Detainees at the Guantánamo Naval Base/PM 211/08 – Djamel Ameziane, United States. This session in the Inter-American Commission of Human Rights was marked by drama and emotion, with Morris Davis initially appearing nervous and uncertain before presenting his argument to the Commission. In January 2009, I contacted Morris Davis, but he declined an interview. Davis had begun working at the Congressional Research Service (CRS) as the head of the Foreign Affairs, Defense, and Trade Division. He kindly responded that he regretted being unable to grant an interview due to his new position, which restricted him from commenting on issues likely to come

Some months before the 1945 London Conference—where the Charter of Military Tribunals was adopted, establishing the legal foundation for the Nuremberg Trials—the international legalism advocated by Henry Stimson prevailed within the Truman administration over Henry Morgenthau's vision of "victors' justice." This policy empowered Robert H. Jackson, the American Chief Prosecutor at Nuremberg, to embody the finest legacy of American legal principles, representing the apex of the United States' influence and esteem among nations. His opening statement at Nuremberg remains, even in the twenty-first century, a touchstone for any nation, culture, or civilization that venerates law as the most effective system for achieving justice, peace, and progress.

I concur with Henry Morgenthau's assertion that "the respect which the people of the world have for international law is in direct proportion to its ability to meet their needs."[410] This implies that nations failing to respect international law or to hold themselves accountable for their actions will inevitably face rejection and disapproval from those who voluntarily submit to the constraints and principles of international law, expecting justice and security from its application. Such a system must address fundamental needs: peace, security, human dignity, and justice.

Professor Jamie B. Raskin has wisely emphasized that the debate surrounding America's actions during the War on Terror is the "core issue." This debate, he argues, not only defines American morals and ethics but also reflects the nation's aspirations to construct a system of liberty grounded in a genuine and true rule of law:

> The horrors that took place at Abu Ghraib and Guantanamo are predictable within an ideology of perpetual war and military empire, but the official response has been one of mock surprise. The unfolding government response to these events has been: pretended shock, denial, a constant changing of the subject, and continuing efforts to shift the public's attention away from criminal acts by

before Congress; Guantánamo Bay and the treatment of detainees were among the issues Congress was expected to consider during that term.

[410] Morgenthau to Truman, May 29, 1945, *Morgenthau Diary*, vol. 2, pp. 1544–45, cited in Bass, Gary J., *Stay the Hand of Vengeance.*

> government actors. But the Obama Administration seems far more serious about dealing with the reality of what happened and responding to the growing public outrage. As during other periods of war when laws were broken (the My Lai massacre during the Vietnam War, for example), the question of moral responsibility is being debated and dodged endlessly by our foreign policy establishment. But the key question for us as a democratic society is whether we will continue our commitment to the rule of law as a real social practice and thus uphold it even against our own officers and commanders. In the final analysis, the question is whether our constitutional faith in the rule of law is going to be the organizing principle of our social life or mere window dressing and political rhetoric.[411]

From a European perspective, the legal visions and leadership exemplified by Robert H. Jackson and Telford Taylor, U.S. Chief Counsel at Nuremberg, remain enduring symbols of American democratic values. Their impartial advocacy at Nuremberg, as well as Taylor's critical reflection in *Nuremberg and Vietnam: An American Tragedy*,[412] continues to solidify the United States' reputation as one of the world's most independent sources of moral authority.

American civil society, along with civil servants across various fields—including the military, judiciary, law enforcement, academia, and education—remain central to preserving and advancing these principles. As Professor Louis Fisher aptly states in *The Constitution and 9/11: Recurring Threats to America's Freedoms*: "Free citizens cannot automatically defer to assertions and claims by those in authority, including the President."[413]

After World War I, Italian political scientist Guglielmo Ferrero described political legitimacy as the "invisible genius of the city."[414]

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411 Interview with Prof. Jamie B. Raskin, May 2009, Washington D.C. Jamie B. Raskin is a professor of Constitutional Law and a current U.S. Congressman.

412 Taylor, Telford, *Nuremberg and Vietnam: An American Tragedy*, The New York Times Books, 1971.

413 Fisher, Louis, *The Constitution and 9/11: Recurring Threat to America's Freedoms*, University Press of Kansas, Lawrence, 2008, p. 370.

414 Guglielmo Ferrero was a disciple of Cesare Lombroso, the inventor of "criminal anthropology," though Ferrero later focused on historical studies and political theory,

According to Ferrero, the primary purpose of legitimacy is to provide justifications for governmental actions and ensure these justifications are accepted and recognized peacefully. Legitimacy allows governments to avoid reliance on coercion and violence to impose their will and maintain authority. In a legitimate government, the relationship between rulers and citizens is built on the recognition that certain individuals possess a moral right to command obedience, while citizens, in turn, feel a corresponding duty to comply. When both rulers and the ruled agree on these principles, a government can operate without fear of its subjects. Conversely, illegitimate governments, which lack credibility, trust, and consent, are compelled to rely on violence and warfare to sustain power. This distinctive relationship between public authority and citizens in a democracy is marked by the relative absence of fear and coercion.

There is no doubt that the essence of democracy lies in the rule of law and respect for human rights. These principles serve as the foundation of legitimacy for our political and legal systems, both within and beyond national borders. History has shown that a hallmark of democratization and adherence to the rule of law—distinguishing democracies from other forms of governance—is the continuous expansion and recognition of international human rights law. This includes the progressive incorporation of the legal framework established by international treaties.

becoming one of Europe's most prestigious intellectuals 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 marked a radical departure from the ideas of Theodore Mommsen. After 1920, Ferrero became an ardent opponent of Mussolini and was forced to flee into exile in Switzerland. "The government will be far less frightened of its subjects 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, Guglielmo, *The Principles of Power: The Great Political Crises of History*, trans. 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.

The converging interests articulated in human rights treaties reflect, in practice, a collective acknowledgment by states of a shared framework of reciprocal oversight, common goals, mutual restraints, and universal principles.[415]

The current landscape in 2019, marked by the proliferation of fake news and the rise of populism in democracies on both sides of the Atlantic, has cast a shadow over the principles of human rights and the rule of law. Under the leadership of President Trump in the United States, as well as the policies promoted by the prime ministers of Poland, Hungary, and Italy, these democratic values have faced significant challenges. These leaders have fostered initiatives that undermine respect for human rights, the rule of law, and democratic life, while pursuing public policies that seek to criminalize migrants and minorities. Such developments suggest that, should a future scenario arise as complex as the one discussed in the preceding analysis, core democratic issues—such as human rights, the rule of law, and active democratic citizenship—may be relegated to a position of neglect and disdain.

As we have stated on other occasions, the international rule of law in relation to human rights law reflects the international community's commitment to realizing an ethical and moral aspiration. This aspiration reaffirms that the advancement of human rights represents one of the most significant markers of progress in the human condition. Such progress is particularly meaningful as it entails extending access to rights to vulnerable and excluded groups—women, children, indigenous peoples, the poor and marginalized, minorities, and, most critically, victims. Human rights are fundamentally *the rights of the other*, embodying a profound commitment to the cause of justice.[416]

As Primo Levi observed, "A country is considered the more civilized the more the wisdom and efficiency of its laws hinder a weak man from becoming too weak or a powerful one too powerful."[417] In 2025,

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415 Villarroel, D., *El derecho convencional en los sistemas constitucionales de América Latina*, Porrúa, México, 2005.

416 González Ibáñez, 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*, vol. 6, no. 1, November 2012.

417 Levi, Primo, *Se questo è un uomo*, Einaudi, Milan, 1997, p. 147. Translation by the author.

however, it is not difficult to encounter a distorted perception of, indifference to, or ignorance of "the other," alongside a profound lack of empathy. This is exemplified by the executive order revocation signed by President Trump on March 6, 2019. The original order, signed by President Obama in 2016, sought to minimize civilian casualties to further mission objectives, maintain the support of partner governments and vulnerable populations, and promote best practices in counterterrorism operations. Its overarching aim was to enhance the protection of civilians, ensure accountability when civilian casualties occurred, and draw lessons from such incidents to improve future operations.[418]

The dilemma of how democracies can legitimately fight terrorism remains unresolved. Achieving justice in democratic states necessitates the implementation of the international rule of law. This framework—justice achieved through the effective application of the rule of law, which intrinsically links democracy and legal accountability—embodies the philosophical and ethical ideals of international law. In many respects, democracy acts as a gateway to the rule of law.

This raises a timeless question at the heart of the challenge: Might or right? The answer could encompass both, but only if democracies confront terrorism within the framework of democratic principles and the rule of law. By doing so, their actions can achieve legitimacy in both domestic and international arenas. Meeting this standard would demonstrate democracies' capacity to reconcile the tensions and challenges inherent in combating terrorism while remaining faithful to their legal, ethical, and political commitments.[419]

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[418] See *Executive Order on Revocation of Reporting Requirement*, *National Security & Defense*, issued on March 6, 2019. Available at: https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement/.

[419] Part of the references presented here were initially introduced in Joaquín González Ibáñez, "International Rule of Law and Human Rights: The Aspiration of a Work in Progress," *The Journal Jurisprudence,* Volume 15, 2013. The author perceives the rule of law as a system that empowers individuals and other actors in limiting power. Law is seen as imperative: "It seems natural to think of laws as commands. In doing so, however, we have already begun to theorize about the nature of law […]." D. Lyons, *Ethics and the Rule of Law,* Cambridge, Cambridge University Press, 1993, p. 37. Law embodies a community's aspirations, reflecting the principles and values deemed necessary to provide dignity, justice, respect, and security to its members. Consequently, democracy is a system of rule by laws, not individuals. The rule of law in a democracy protects citizens' rights, maintains order, and limits governmental power. As a result, all

citizens are equal under the law, and no one should face discrimination based on race, religion, or other factors.

CHAPTER 7

The Arab Garden: A Dialogue on The Rule of Law, Democracy, and Development

We shared the same problems, and we approached them similarly. I was happy I had talked to them; I knew then that night I would sleep with fewer prejudices than I had when I woke up, and that is always something worth noting. Perhaps man's wisdom is not so much how knowledgeable and enlightened he becomes in life but how he manages to forsake and abandon unwanted shadows along the way.

La reina sin espejo, Lorenzo Silva

The difference that is made by seeing freedom as the principal ends of development can be illustrated with a few simple examples. Even though the full reach of this perspective can only emerge from a much more extensive analysis, the radical nature of the idea of 'development as freedom' can easily be illustrated with some elementary examples.
First, in the context of the narrower views of development in terms of GNP growth or industrialization, it is often asked whether certain political or social freedoms, such as the liberty of political participation and dissent, or opportunities to receive basic education, are or are not 'conducive to development.' In the light of the more foundational view of development as freedom, this way of posing the question tends to miss the important understanding that these substantive freedoms (that is, the liberty of political participation or the opportunity to receive basic education or health care) are among the constituent components of development.

Development as Freedom, Amartya Sen

7.1. Introduction*

This chapter explores the relationship between democratic citizenship, the importance of expanding access to education in Arab countries, and the responses of Western democratic nations to the threat of Islamic fundamentalist terrorism. It is grounded in the need for a deeper analysis of the causes behind the terrorist attacks in New York and Madrid. Additionally, the chapter examines how governments in Arab countries are perceived through the lens of Western democratic citizens.

The discussion is framed by the subjective European perspective of a European academic, a lecturer on International Law in Madrid. His perspective is critically examined by Egyptian Professor Hisham M. Ramadan, a Visiting Professor of Islamic Law at the University of Illinois, and American Professor Jamie Raskin, a Professor of Constitutional Law at American University's Washington College of Law.

7.2. The Beginning of a New Period Called "Globalization"

The 21st-century globalized society marks a new and complex period in history, following significant milestones such as the fall of the Berlin Wall and the end of the Cold War.

This current era remains difficult to define, often characterized by broad terms like "globalization" or "post-Cold War" to describe the transition from one historical period to another.[420] While the principles of

* The first version of this chapter was originally published as "The Arab Garden and Ground Zero: The Right to Education, an Allegory of Democratic Citizenship and Islamic Fundamentalist Terrorism," *SABERES: Alfonso X University Law Review*, Volume 4, Madrid, 2006. The content has since been updated for inclusion in this book.

420 As Prof. Shiro Okubo, Ritsumeikan University of Kyoto, points out, a new period has unfolded after the fall of the Berlin Wall, bringing a new challenge to understand and locate correctly the historical, legal, and political categories posed for this new era: "In the 1990s we saw the emergence of new concepts of 'human security,' 'global governance,' and 'global democracy.' These concepts are better vistas than doom prophecies such as the 'clash of civilizations.' We should first, however, ask if these

democracy and market freedom have been widely embraced by the international community, notable exceptions include countries like North Korea, Cuba, and certain Islamic nations such as Kuwait, Yemen, Saudi Arabia, and Libya.

My thesis is that the current political and economic context is shaped by three defining aspects of 21st-century international society.

1. The contradiction between the dynamics of globalization and the rise of nationalism.
2. The ever-widening wealth gap between developed and developing countries.
3. The upsurge in international terrorism.

The latter two aspects—wealth inequality and terrorism—are closely tied to the concept of human security. Let us now briefly examine these three features:

I. The concept of globalization dominates the fields of economics and international commerce. However, as Joseph S. Nye points out,[421] nationalism may now surpass globalization as a political force. For instance, fifty years ago, there were only sixty recognized countries; today, the international community comprises almost two hundred states. These states, alongside international organizations, individuals, non-governmental organizations (NGOs), national liberation movements, and multinational corporations, form what we consider "international society." This community emerged from the nation-state system that developed in Europe during the 15th century and drew upon Western philosophical and political principles, including those of the Roman Republic's democratic governance established over 2,500 years ago.[422]

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new concepts are clearly defined and if they work in the historical and actual context. We can then develop them into living ideas for our future and create our new identity." See Shiro Okubo, "Freedom from Fear and Want," in *Derechos Humanos, Globalización y Relaciones Internacionalek,* Gustavo Ibáñez-Universidad Alfonso X el Sabio, 2006.

421 Nye, Joseph, Jr., *Understanding International Conflicts*, Longman Classics, 6th ed., 2005, pp. 5–6.

422 It is extremely interesting to observe that the current democratic pattern was conceptualized in the 6th century BCE during the Roman Republic. M. Sellers offers a clear and precise analysis of the characteristics of Roman republican democracy:

Real democracy, however, requires the following components:

a) The separation of powers to ensure checks and balances;
b) Respect for human rights;
c) Free, pluralistic, and periodic elections;
d) The existence of the rule of law; and
e) A sovereign power represented by the people, composed of free citizens—men and women—with equal rights.

Among the nearly two hundred states in the international community, approximately sixty can be classified as democratic. This figure excludes countries such as the Russian Federation, Morocco, Egypt, Cuba, and China.[423]

II. The 21st century is a period in which the differences between developed regions and poor regions have become more profound, resulting in an increase in the vulnerability of individuals and communities. Human security,[424] a term coined by the United Nations Development

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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 BCE. 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 deliberative 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 master.

See Sellers, M. N. S., *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State*, 2003, p. 6. For additional information on the Roman Republic and its democratic model, see Cicero, *De Republica and De Legibus (On the Republic and the Laws)*, 1986.

[423] See CIA, *CIA World Factbook*, US, Virginia, 2005. Available at: https://www.cia.gov/library/publications/the-world-factbook/print/us.html.

[424] See Commission on Human Security (CHS), "Introduction to Human Security":

Program (UNDP) in 1994, is based on the idea of "seeking protection from threats to human life, livelihood, and dignity, and everything that threatens the realization of the full potential of each individual."[425] Human security addresses both conflict and development-related issues, including displacement, discrimination, and the persecution of vulnerable communities, as well as insecurities stemming from poverty, health crises, inadequate education, gender disparities, and other forms of inequality.

According to Professor Shiro Okubo of Ritsumeikan University in Kyoto, the most significant contribution of the human security concept lies in its inspirational nature. It highlights what life *ought to be like* for individuals in their daily existence. The phrase "freedom from fear and from want," which appears in the final report of the UN Commission on Human Security, originates from the Atlantic Charter of 1941. This charter, drafted during World War II, proclaimed that, following the destruction of Nazi tyranny, the Allies aimed to establish a peace that would enable all nations to live safely. For this reason, the focus of security must shift from nations to individuals.

In terms of GDP, access to education, and healthcare, the disparity between developed and impoverished regions has led to greater

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> The Commission on Human Security (CHS) has further clarified the concept as one that focuses on the individual and seeks protection from threats to human life, livelihood, and dignity, and the realization of the full potential of each individual. Human security addresses both conflict and developmental aspects, including displacement, discrimination, and persecution of vulnerable communities, as well as insecurities related to poverty, health, education, gender disparities, and other types of inequality.

Available at: www.humansecurity-chs.org:80/intro/index.html (accessed March 2003).

[425] The UNDP launched the concept of human security in the *Human Development Report* 1994. Seven interrelated dimensions were identified: economic security, food security, health security, environmental security, personal security, community security, and political security. According to UNDP 1994, 22: "Human security is a child who did not die, a disease that did not spread, a job that was not cut, an ethnic tension that did not explode into violence, a dissident who was not silenced." In *Poverty Trends and Voices of the Poor,* The World Bank, Washington: 2000, a Bulgarian respondent states: "Security is knowing what tomorrow will bring and how we will get food tomorrow." Human security is also conceived as ensuring "risk reduction," removing insecurity, or reducing vulnerabilities (Nef, 1999; UNDP and EC, 2000). See Mani, D., *Human Security: Concept and Definitions*, UNCRD, United Nations Center for Regional Development, Asia. Available at: www.uncrd.or.jp.

radicalization, vulnerability, and fragility within poor countries,[426] particularly since 1990.[427] Neither globalization nor international organizations have succeeded in reversing this trend.[428]

Economist Milton Friedman[429] highlighted these challenges in an article that cited findings from the *World Development Report 1999–2000*, published a decade after the end of the Cold War. According to the report, in countries such as Uganda, Ethiopia, and Malawi, the average life expectancy is below 45 years. In Sierra Leone, 28% of children die before reaching the age of five. In India, over half of all children suffer from malnutrition, while in Bangladesh, only half of adult men and less than a quarter of women are literate.

In many of the world's poorest countries, the combination of poverty and corrupt or ineffective governance has resulted in dire conditions. Among the fifty countries with the lowest incomes in 1990,

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426 Miller points out that, in the last 30 years, life expectancy in the poorest countries has increased from 46 to 63 years, literacy has risen to 60% of the population (from 20% previously), and macroeconomic statistics are generally positive. Nevertheless, according to the United Nations, 80% of the world's wealth is owned by 25% of the world's population, while the remaining 75% has access to only 20% of world production. Furthermore, 60,000 people die daily due to poverty-related, curable illnesses. Miller, M., *The Threat and Promise of Globalization: Can It Be Made to Work for a Brighter Future?*, in *World Citizenship: Allegiance to Humanity*, ed. Joseph Rotblat, McMillan Press Ltd., 1997. See also United Nations Development Program (UNDP), *UNDP Human Development Report 1999*. According to this report, one out of every five people in the world lives in extreme poverty, with the threshold set at an income below US$1 per day. The report also reveals that the average per capita income in poor countries is less than US$400, while in developed countries it exceeds US$22,000—more than 50 times higher.

427 Some authors, such as Thomas L. Friedman, have argued that globalization has opened new opportunities for development. For example, significant changes have occurred in India over the past decade. See Friedman, Thomas L., *The World Is Flat: A Brief History of the Twenty-First Century*, ed. John Farrar et al., 2005. See also Bhagwati, Jagdish, *In Defense of Globalization*, Oxford University Press, 2004.

428 This trend is evident not only among different states but also within the same state. Even in the so-called most developed countries, the gap between rich and poor is widening. For example, *The International Herald Tribune* reported on April 19, 1995, that "the richest 1 percent of Americans own 40 percent of the national wealth." See Hobsbawm, Eric, *Age of Extremes: A History of the World, 1914–1991*, Pantheon Books, 1994.

429 See Friedman, Benjamin M., "Globalization: Stiglitz's Case," review of *Globalization and Its Discontents*, by J. Stiglitz, *New York Times Review of Books*, 2002.

twenty-three now have even lower incomes than they did at that time. Of the remaining twenty-seven that managed to achieve some progress, the average annual income growth was a mere 2.7%.

III. International terrorism poses a significant threat to human security. In many ways, globalization has facilitated terrorism through mass media coverage, the vulnerability of civilian aircraft, the interconnectedness of nations, and other factors. Furthermore, fundamental cultural, philosophical, and religious differences remain as entrenched and unresolved as they were centuries ago.

Thomas L. Friedman, writing for *The New York Times*,[430] asserts that globalization has empowered individuals in unprecedented ways. For instance, terrorists now have global access to the latest scientific and technological advancements.

Later in this discussion, I will examine the terrorist attacks on New York, Madrid, and London, as well as the phenomenon of international Islamic terrorism, which I will refer to as fundamentalist terrorism.[431]

7.3. The Connection Among Education, Poverty, and Terrorism

Global terrorism, including the 9/11 attacks in the United States and the subsequent attacks in Madrid and London, has led Western societies to feel that their freedom, rights, and security are under direct threat. These terrorist acts undermine the foundations of the modern democratic state.

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[430] Friedman, Thomas L., *Longitudes and Attitudes: The World in the Age of Terrorism*, Anchor Books, 2002.

[431] To avoid stigmatizing moderate Islam, we define this type of terrorism as "fundamentalist terrorism." However, we acknowledge that there are other forms of fundamentalist terrorism tied to different religious identities. "1.- D'où vient le mot 'intégrisme.' Le mot est né dans les milieux catholiques françaises au début du XX siècle. Il a été créé par les partisans de l'ouverture de l'Église au monde moderne pour désigner les catholiques hostiles aux idées des Lumières, au libéralisme et à la laïcité. D'emblée, ce mot se veut péjoratif et s'inscrit dans une polémique. Ceux qu'on appelait, sous Pie X, intégralistes, se désignaient eux-mêmes comme 'catholiques intégraux.'" See Béresniak, Daniel, *Les Intégrismes: Idéologie du Délire Paranoïaque*, Grancher, 1998, p. 15.

Education is central to democracy. It provides individuals with the skills and values necessary for a just society, forming the foundation for civic ethics and democratic coexistence.[432] Education is also a public responsibility, as our collective security depends on it. Democratic societies rely on education as a unique form of self-defense.[433]

The security provided by education is twofold: it fosters individual growth and development while also cultivating civic (*cives*) and participatory (*polite*) dimensions. Education instills core values such as freedom, respect for others, and equity,[434] enabling individuals to transition from being passive members of society to active and engaged citizens.[435]

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[432] Regarding other forms of terrorism, state terrorism deserves particular attention. A paradigmatic example, discussed by Noam Chomsky, is the Clinton administration's decision to destroy the Al-Shifa pharmaceutical factory in Sudan in August 1998. The factory's destruction, combined with an international blockade, reportedly led to thousands of civilian deaths. See Chomsky, Noam, *9/11*, Open Media Book, 2001; and Chomsky, Noam, *Understanding Power: The Indispensable Chomsky*, edited by John Schoeffel and Peter Mitchell, Vintage Books, 2002.

[433] See Savater, Fernando, *Los Caminos para la Libertad: Ética y Educación*, Ariel-Instituto Tecnológico de Monterrey, 2000; Cortina, Adela, *Ciudadanos del Mundo: Hacia una Teoría de la Ciudadanía*, Alianza, 1997; and "Educar en una ciudadanía justa," *El País*, June 20, 2006.

[434] In *Paideia*, his classic work on Greek education and culture, Jaeger analyses the importance of respecting foreigners within the humanistic tradition of Greek society: "Education is such a natural and universal function within the human community (…), its trait appears relatively late in time in Greek society; at the beginning, it appeared in the form of commandments: honor the gods, honor your father and mother, respect foreigners (…)." See Jaeger, W., *Paideia*, Fondo de Cultura Económica, Mexico City, 1996, p. 19 (Spanish version).

[435] For further information on the influence and role of education in building a free and democratic state, see González Ibáñez, Joaquín, *Educación y Pensamiento Republicano Cívico*, Germanía, Valencia, 2005. Foundational works include Machiavelli, Niccolò, *Tutte le opere. I discorsi sulla prima decada di Tito Livio*, Mondadori, Roma, 1949; Rousseau, Jean-Jacques, *Emilio, o de la educación (Emile, or On Education)*, Alianza, Madrid, 1998; Rousseau, Jean-Jacques, *Cartas a Sofía (Letters to Sophie)*, Alianza, Madrid, 1999; Rousseau, Jean-Jacques, *El contrato social o principios de derecho político (The Social Contract, or Principles of Political Right)*, Tecnos, Madrid, 2000; Condorcet, Marie-Jean-Antoine de Caritat, Marquis de, *Informe y proyecto de decreto sobre la Organización General de la Instrucción Pública*, Editorial Ramón Areces, Madrid, 1990; Condorcet, *Cinq mémoires sur l'instruction publique*, GF-Flammarion, Paris, 1994; and Condorcet, *Esquisse d'un tableau historique des*

The United Nations, through UNESCO (United Nations Educational, Scientific and Cultural Organization), promotes democratic education as a means of fostering mutual understanding and tolerance. To address underdevelopment, primary education must provide individuals with the skills necessary to compete in the global economy while empowering them to become citizens capable of overcoming the persistent specters of poverty and social exclusion in an interconnected, globalized world.[436]

In his work *La naturaleza política de la educación* (*The Political Nature of Education*), Paulo Freire argues that education is the only tool through which civil society can organize itself and ensure the proper functioning of the state. Education is also essential for political integration.[437] Similarly, Spanish writer Antonio Muñoz Molina has asserted that education is "the one and only antidote against poverty."[438]

Poverty and the constraints on political freedom are central to understanding the hatred and isolation that underpin the heinous attacks perpetrated by terrorists.

When fundamentalist terrorism strikes the Western world, it transfers the anguish and extreme marginalization experienced by societies in the perpetrators' homelands—societies that often offer their citizens little hope for the future.

This sense of despair explains the deadly nature of these attacks. Since the Enlightenment, Europeans have harbored an irrational sense of optimism and a steadfast belief in progress. Education has fostered the idea that a fairer, more equitable society is attainable. This belief in progress was celebrated some 100 years after the French Revolution by intellectuals of the Second Spanish Republic, prior to the outbreak of the Spanish Civil War in 1936. Among them was the poet Antonio Machado,

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progrès de l'esprit humain, suivi de fragment sur l'Atlantide (introduction, chronology, and bibliography by Alain Pons), Flammarion, Paris, 1988.

436 See *World Declaration on Education for All: Meeting Basic Learning Needs*, Jomtien, 1990, and *Dakar Framework for Action: Education for All by 2015,* Dakar, 2000. Available at: www.unesco.org.

437 Freire, Paulo, *La Naturaleza Política de la Educación: Cultura, Poder y Liberación*, Paidós, Barcelona, 1990, pp. 31–36.

438 See *"La disciplina de la imaginación,"* lecture by Antonio Muñoz Molina, delivered in Madrid as part of a series of conferences organized by Grupo Santillana, entitled *La educación que queremos*, 22 September 1998.

whose verse, *"Hoy es siempre todavía/ Toda la vida es ahora"* (*"Today is still the moment/ Life is here and now"*) reflected the Enlightenment spirit of self-determination and hope for a better future.[439]

It is no coincidence, then, that the roots of fundamentalist terrorism can be traced to regions where freedom and liberty are severely restricted, and access to education is tightly controlled.[440] Institutions such as the European Union and UNESCO have highlighted this lack of educational access as one of the primary factors hindering development in the Arab world.[441] While terrorism cannot be solely attributed to reduced economic opportunities or individual ignorance, it is undeniably linked to oppressive political environments and pervasive feelings of indignity and frustration.

Alberto Abadie of Harvard University[442] argues that the development of terrorism is influenced by the level of political freedom in a region, combined with its geography. Meanwhile, Professors Jitka

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[439] See Machado, Antonio, *Proverbios y Cantares*, dedicated to José Ortega y Gasset, *Revista de Occidente*, no. III, September 1923.

[440] From a Western democratic perspective, no fully democratic country currently exists in the Arab world. The Palestinian territories represent one of the political communities with comparatively greater public freedoms, where women enjoy relatively better equality with men. For more information on education in the Arab world, see the *United Nations Human Development Report 2003* and the *UNICEF Report 2003* on access to elementary education worldwide, with specific references to North African countries (Maghreb and Mashreq) and the Near East.

[441] See UNESCO, *Education for All in the Arab States: Renewing the Commitment. The Arab Framework for Action to Ensure Basic Learning Needs in the Arab States in the Years 2000–2010* (adopted by the Regional Conference on Education for All in the Arab States, Cairo, Egypt, January 2000). This document, signed by all Arab states, highlights that 68 million people in the region are illiterate, identifies severe deficiencies in primary and secondary education, and critiques the elitist and underfunded higher education systems.

The EU Council Resolution, European Commission, December 4, 2003, *On Strengthening the European Union's Partnership with the Arab World,* emphasizes the crucial role of education in improving relations with Arab countries and describes it as "fundamental to improving Arab countries' prospects for development in today's world."

[442] Abadie, Alberto, "Poverty, Political Freedom, and the Roots of Terrorism," *National Bureau of Economic Research*, 2004.

Maleckova and Alan Krueger,[443] from Prague and Princeton universities respectively, assert that there is no direct link between poverty, education, and participation in terrorist attacks. Instead, they contend that terrorism is more closely tied to political conditions and a sense of frustration.

In summary, while it is evident that investment in education fosters economic growth, enhances health services, and drives social progress, it remains unclear whether low educational levels and poverty in Arab and Islamic countries directly lead individuals to commit acts of terrorism.

7.4. Civil Society as a Target for Fundamentalist Terrorism: The Aftermath of 9/11 and 3/11 in the United States and Europe

The terrorist attacks of March 11, 2004, in Madrid, and July 7, 2005, in London targeted free citizens of democratic countries, much like the 9/11 attacks in New York City. These individuals represented a diversity of political views and an enormous cultural and social richness. Both European attacks struck at the heart of two vibrant cities and were justified by the attackers on the grounds that the governments of José

[443] Maleckova, Jitka, and Krueger, Alan, "Education, Poverty and Terrorism: Is There a Causal Connection?" *Journal of Economic Perspectives* 17, no. 4, 2003; and Krueger, Alan, "The Economics and Education of Suicide Bombers: Does Poverty Cause Terrorism?" *The New Republic*, June 24, 2004. Maleckova and Krueger analyzed a poll of individuals who support terrorist attacks against Israel. The study revealed that support for terrorist attacks does not diminish among individuals with higher education levels and a higher standard of living. Their analysis also included a statistical review of data from the terrorist group Hezbollah in Lebanon, showing that education and poverty levels do not predict participation in Hezbollah activities. On the contrary, the study demonstrated that having a standard of living above poverty levels or holding secondary or higher education degrees is positively correlated with participation in Hezbollah. The study also analyzed Jewish fundamentalist settlers who engaged in terrorist attacks in the Palestinian occupied territories. These individuals were found to have well-paid jobs and higher education degrees, mostly at the university level. Consequently, there appears to be no direct causal link between poverty, education, and participation in individual violent terrorist acts. However, while economic situations may not correlate with terrorism at the individual level, endemic economic challenges could influence terrorism on a national level. For example, a poor country's citizens might support terrorist groups that claim to act for the country's welfare. Nevertheless, this notion is contradicted by examples of terrorist attacks in wealthy countries such as Spain, Ireland, and Italy.

María Aznar and Tony Blair had supported the United States in the invasion of Iraq.

This justification, however, can only be understood through the lens of fundamentalist terrorism. Nevertheless, we can observe notable differences in how the two European nations responded to these attacks[444] compared to the reaction in the United States. While comparing European and American responses may seem simplistic, it remains relevant given that all three involve Western democratic systems, albeit with very different historical, cultural, and political contexts.

On the one hand, Spain and the United Kingdom were once global empires but no longer hold such status. On the other hand, the United States, as Stanley Hoffman asserts,[445] remains a liberal democracy but has also become an empire— experiencing, for the first time, an attack on its own soil.

The European Union is a supranational organization that has assumed responsibilities on behalf of its Member States. However, the European Union is not a nation. Its aim is to create an area of peace and prosperity founded on freedom, security, and justice. It has also established a free market economy to promote development, guided by progressive social and environmental policies, scientific and technological advancements, and adherence to the rule of law. The principle of solidarity among Member States seeks to ensure social and economic cohesion. As Jean Monnet, one of the founding fathers of the European Communities, stated on April 30, 1952, "We are not making a coalition of States, but are uniting people."[446]

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444 Various authors, "Constitución europea y ciudadanía democrática," in *¿Globalización, integración económica y derechos humanos?,* Universidad Sergio Arboleda, Bogota, 2005.

445 Hoffman, Stanley, "America Goes Backward," *New York Times Book Review* 50, no. 10, June 12, 2003. Hoffman critiques the state of U.S. liberal democracy following the election of President George W. Bush: "The U.S. remains a liberal democracy, but those who have hoped for progressive policies at home and enlightened policies abroad may be forgiven if they have become deeply discouraged by a not-so-benign soft imperialism, by a fiscal and social policy that takes good care of the rich but shuns the poor on grounds of a far from 'compassionate conservatism,' and by the conformism, both dictated by the administration and often spontaneous among the public, that Tocqueville observed 130 years ago."

446 European Commission, *A Constitution for Europe,* European Commission, Brussels, 2004, p. 6.

Despite the current slowdown in the European integration process following Brexit,[447] the United Kingdom, Spain and the rest of the EU member States remain actively involved in political cooperation and development of association agreements.[448] The European Union has contributed to one of the longest periods of peace (1950–2025) in Western European history, since the end of the European religious wars, which concluded with the signing of the Peace of Westphalia in 1648. This exceptional European peace-building achievement, following the devastation of World War II, was recognized in 2012 when the European Union was awarded the Nobel Peace Prize. The Norwegian Committee acknowledged "the successful struggle for peace and reconciliation and for democracy and human rights". [449]

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[447] In the Brexit referendum held on 23 June 2016, UK citizens voted to leave the European Union. In December 2016, Brexit talks began between the UK and the 27 member states. After more than three years of negotiations, the withdrawal agreement entered into force upon the UK's exit from the EU on 31 January 2020. See *Timeline – The EU-UK Withdrawal Agreement*, available at https://www.consilium.europa.eu/en/policies/the-eu-uk-withdrawal-agreement/timeline-eu-uk-withdrawal-agreement/.

[448] Joseph Weiler and Marlene Wind, *European Constitutionalism Beyond the State,* Cambridge University Press, Cambridge, 2003. The concept of European integration evolved significantly after the Maastricht Treaty of 1991, which placed the citizen at the foundation of the European Union. This shift marked a transformation from "a Europe of merchants to a Europe of citizens," emphasizing political and civic integration.

[449] See The Norwegian Nobel Committee Prize announcement:
"The Norwegian Nobel Committee has decided that the Nobel Peace Prize for 2012 is to be awarded to the European Union (EU). The Union and its forerunners have over six decades contributed to the advancement of peace and reconciliation, democracy, and human rights in Europe.
In the inter-war years, the Norwegian Nobel Committee made several awards to individuals who were seeking reconciliation between Germany and France. Since 1945, that reconciliation has become a reality. The dreadful suffering in World War II demonstrated the need for a new Europe. Over a seventy-year period, Germany and France had fought three wars. Today, war between Germany and France is unthinkable. This shows how, through well-aimed efforts and by building up mutual confidence, historical enemies can become close partners.
In the 1980s, Greece, Spain, and Portugal joined the EU. The introduction of democracy was a condition for their membership. The fall of the Berlin Wall made EU membership possible for several Central and Eastern European countries, thereby opening a new era in European history. The division between East and West has, to a

The fact that Europeans built empires and endured in the 20th century the horrors of the Third Reich has "forced" them to embrace a unique form of democratic citizenship. A compelling example of this is the contrast between the reaction of American citizens to the 9/11 terrorist attacks in New York and Washington, and the responses of citizens in Madrid on March 11, 2004, and London on July 7, 2005. As a European citizen, I choose to believe this reflects a paradigm of civic life and community-based citizenship.

One indication of this vital and philosophical foundation is the legal response of Spain and other European states. Unlike in the United States, no new laws were required to address the threat of fundamentalist terrorism. This is partly because the scourge of terrorism has long been a feature of the political identity of several European countries, such as Spain, the United Kingdom, Germany, France, and Italy. These nations have been combating terrorism for over 35 years, generally balancing the use of public power with adherence to the rule of law and the protection of human rights.[450]

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large extent, been brought to an end; democracy has been strengthened; many ethnically-based national conflicts have been settled.
The admission of Croatia as a member in 2013, the opening of membership negotiations with Montenegro, and the granting of candidate status to Serbia all strengthen the process of reconciliation in the Balkans. In the past decade, the possibility of EU membership for Turkey has also advanced democracy and human rights in that country.
The EU is currently undergoing grave economic difficulties and considerable social unrest. The Norwegian Nobel Committee wishes to focus on what it sees as the EU's most important achievement: the successful struggle for peace and reconciliation, democracy, and human rights. The stabilizing part played by the EU has helped to transform most of Europe from a continent of war to a continent of peace.
The work of the EU represents fraternity between nations and amounts to a form of the peace congresses to which Alfred Nobel refers as criteria for the Peace Prize in his 1895 will.
Oslo, 12 October 2012.
Available at: https://www.nobelprize.org/prizes/peace/2012/press-release/

[450] While exceptions to democratic political principles have occurred in Europe over the last thirty years, such breaches remain unacceptable for Western European democracies. Examples include: the British MI6's activities against IRA terrorism, the alleged "mass suicides" of members of the Baader-Meinhof gang in Germany, Italian state-supported lodges that countered the communist threat and the Red Brigades (Brigate Rosse), and the creation of the state-sponsored death squads GAL (*Grupo*

This history of terrorism, coupled with the events of the 20th century, has prompted European states to address such threats primarily through legal mechanisms rather than relying heavily on military resources. Unlike the United States, no European country has implemented legislation comparable to the USA PATRIOT Act. In Spain, for instance, the Constitutional Court would likely rule such laws unconstitutional. Similarly, the British High Court has overturned certain legal orders issued by Tony Blair's government, deeming them incompatible with the European Convention on Human Rights.[451]

Antiterrorista de Liberación) in Spain in 1984 to combat ETA terrorism outside the rule of law.

[451] BBC News, "Judge Quashes Anti-Terror Orders," *BBC News*, June 28, 2006, https://www.bbc.co.uk.

> "Judge quashes anti-terror orders
> Control orders are part of the anti-terrorism effort
> A key plank of the government's anti-terrorism laws has been dealt a blow by the High Court. A senior judge said control orders made against six men break European human rights laws. Ministers say they will appeal against the ruling. The orders are imposed on people suspected of terrorism but where there is not enough evidence to go to court. They mean suspects can be tagged, confined to their homes, and banned from communicating with others. In his ruling, Mr. Justice Sullivan said control orders were incompatible with Article 5 of the European Convention on Human Rights, which outlaws indefinite detention without trial. The home secretary had no power to make the orders and they must therefore all be quashed, he said.
> TERRORISM JUDGEMENTS
> December 2004: Law lords say holding terror suspects without trial is unlawful
> April 2006: High Court overturns first control order made, saying the suspect had not received a "fair hearing" June 2006: Six control orders are quashed by the High Court for breaking European human rights laws.
> Under the control orders restrictions, the suspects have to stay indoors for 18 hours a day, between 4pm and 10am and are not allowed to use mobile phones or the internet. And there are limits on who they can meet. The judge said the restrictions were "the antithesis of liberty and equivalent to imprisonment". "Their liberty to live a normal life within their residences is so curtailed as to be non-existent for all practical purposes," he said. In April, the same judge ruled against the Act under which control orders are made, saying that those subjected to them had not received a fair hearing. (…)
> Laws under review.
> Tony Blair's official spokesman said Parliament had debated control orders at length and had expected the issue to go through the courts too. The government

Another indication of the differing philosophical approaches of European citizens surfaced during the demonstrations against the Iraq War in Madrid, Spain, in early 2003. Nobel Laureate in Literature José Saramago remarked that there were two superpowers on the international political stage: the United States and every citizen who had the civic courage to leave their homes and demand a different kind of public policy.

Echoing this sentiment, an anonymous citizen shared their perspective in a letter published on the discussion forum *Open Democracy* (accessible at www.opendemocracy.org), comparing the reactions of U.S. and European citizens to terrorist attacks:

> Americans saw on television what was happening in New York and Washington. They went home and locked themselves in. The next day, they went to war. Spaniards learned of a new terrorist attack in their country, unparalleled in their history. Spaniards and Europeans went out onto the streets to demonstrate against terror. The next day, the Spanish people went to vote in the general elections and changed the government of their country.

During its first month in power, the newly elected Spanish government decided to withdraw Spanish troops participating in the Iraq War, an engagement deemed illegal as it lacked a United Nations mandate. By doing so, the government upheld the principle of international legality and responded to the will of the Spanish people, 93% of whom had expressed their opposition to the 2003 invasion of Iraq.

Looking ahead, it is hoped that the future European Constitution will further solidify democracy and reinforce the supreme value of human rights, even in the face of terrorism.

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was already reviewing the way the courts interpreted the Human Rights Act, which incorporates the European convention into British law.
The government's terror law adviser, Lord Carlile, said he was "not at all surprised" the judge had ruled that the orders were too stringent. If the Court of Appeal also said the orders should be quashed, he expected the government would make the restrictions on the suspects less severe. (…)"

7.5. Conclusion: The Arab Garden, Ground Zero, and the Development of the Arab World

Spain is one of the European nations whose history has been profoundly shaped and enriched by Arab culture and civilization. Between 711 and 1492, the Islamic and Arab world maintained a prolonged and significant presence in various parts of the Iberian Peninsula. The cultural, historical, and philosophical legacy of this era is undeniable.[452] Numerous Arabic terms have been incorporated into the Spanish language, and Spain's ethnic and cultural identity reflects a natural blend of Mediterranean peoples, Visigoths, Jews, Arabs, Germanics, Celts, and others. Rather than a singular "Spanish race," Spain represents a diverse and intricate cultural mosaic.

Despite this shared history, a significant cultural, political, economic, and social divide exists between Spain and the Islamic world. Two pivotal historical moments have contributed to this separation. The first was the formation of Spain as a nation-state and the expulsion of Arab peoples in 1492 under the Catholic Monarchs. The second was the Industrial Revolution, accompanied by the spread of Enlightenment ideas and secularism across Western Europe.

Professor Bernard Lewis of Princeton University highlights these historical factors as fundamental to understanding the profound rupture between the West and the Islamic world:

> Later attempts to catch up with the Industrial Revolution fared little better. Unlike the rising powers of Asia, most of which started from a lower economic base than the Middle East, the countries in the region still lag behind in investment, job creation, productivity, and therefore in exports and incomes. According to a World Bank estimate, the total exports of the Arab world other than fossil fuels amount to less than those of Finland, a country of five million inhabitants. Nor is much coming into the region by way of capital investment. On the contrary, wealthy Middle

[452] Burckhardt, Titu, *La civilización hispano-árabe*, Alianza, Madrid, 1977.

> Easterners prefer to invest their capital abroad, in the developed world.[453]

It is fascinating to compare the contrasting visions of freedom, democracy, and welfare that exist on either side of the Strait of Gibraltar, separated by only nine nautical miles. For instance, Zacarias Moussaoui, the alleged twentieth hijacker in the 9/11 terrorist attacks, stated that one of the motivations for the attacks was the "return of Spain to Muslim rule."[454]

Moreover, it is essential to recognize that the modern concept of human rights emerged from Western political thought, particularly during the Enlightenment and the subsequent American and French Revolutions.[455] This historical context underscores the challenges of envisioning a truly universal approach to human rights, especially considering the practices in some Islamic countries and the near absence of democratic states in the Islamic world. However, despite these differences, we share a common human condition—one that encompasses aspirations such as the pursuit of happiness and a shared vulnerability.

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[453] Lewis, Bernard, *What Went Wrong? The Clash Between Islam and Modernity in the Middle East*, Perennial, New York, 2002, p. 47.

[454] Friedman, Thomas L., *Longitudes and Attitudes: Exploring the World After September 11*, Farrar, Straus and Giroux, New York, 2002, p. 311. http://books.google.com/books?id=X7ZQHgAACAAJ&dq=Friedman++Longitudes+and+Attitudes+Diary.

> "When Zacarias Moussaoui, the alleged twentieth hijacker who was captured in Minnesota trying to learn how to fly a 747, appeared in court in April 2002, he was given a chance to make a fifty-minute statement. In it he said he prayed for 'the destruction of the United States', 'the destruction of the Jewish people and state', and 'the return of Spain to Muslin rule'". Zacarias Moussaoui repeated these same motives in the hearing of the trial that took place in 2006. He was finally sentenced to life imprisonment."

[455] Anabitarte, Nicolás Héctor de, and Sanz, Ricardo Lorenzo, *De Revolutionibus: Historia y Filosofía de la Revolución Científica*, Cinco Press, Madrid, 1985.

The authors note that prior to 1789, the word "revolution" referred solely to the astronomical work of Polish philosopher and astronomer Nicolas Copernicus, *De Revolutionibus*, published in 1543. In *Encyclopédie*, edited by Denis Diderot and Jean le Rond d'Alembert, the term's only meaning was related to Copernicus's work. The French Revolution later expanded the meaning of the term to encompass political and social upheaval.

In this regard, Abdullahi Ahmed An-Na'im[456] of Emory University, with his generous and courageous perspective on Islam, suggests that our frame of reference should be the universality of human rights, rather than "the West" or "European societies." In fact, the contrast between the responses of European countries and the United States to terrorist attacks highlights the fallacy of the dichotomy between "the West" and "the rest."

As Professor Abdullahi Ahmed An-Na'im argues, we should focus on our "shared human vulnerability" on a global scale and understand that terrorism poses a threat to all of us. Therefore, the response to terrorism must be a collective effort—one that comes from humanity as a whole.

A year after the September 11 attacks, the UNDP published the *Arab Human Development Report 2002*.[457] The analysis of the data and

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[456] Prof. Abdullahi Ahmed An-Na'im provided a thoughtful critique of this text in October 2006. His reflections on the common aspirations of human beings—regardless of their origin, culture, or citizenship—led us to a deeper recognition of the value of the "human vulnerability" concept. Interview with Professor An-Na'im, Atlanta, October 10, 2006.

[457] See UNDP, *Arab Human Development Report 2002*, available at: http://www.undp.org.sa; and the articles "Self-Doomed to Failure," published on July 4, 2002, in *The Economist*; "Arabs at the Crossroads," written by Thomas L. Friedman, published in *The New York Times* on July 5, 2002; and *Longitudes and Attitudes* by Friedman, p. 299:

> "(…) it's not only the Palestinians who need radical reform of their governance - it's most of the Arab world. By coincidence, though, some other important folks had the courage to say that just this week: The U.N. Development Program, which published, along with the Arab Fund for Economic and Social Development, a brutally honest Arab Human Development Report yesterday analyzing the three main reasons the Arab world is falling off the globe. (The G.D.P. of Spain is greater than that of all 22 Arab states combined.) In brief, it's due to a shortage of freedom to speak, innovate and affect political life, a shortage of women's rights and a shortage of quality education. If you want to understand the milieu that produced bin Ladenism, and will reproduce it if nothing changes, read this report.
>
> While the 22 Arab states currently have 280 million people, soaring birthrates indicate that by 2020 they will have 410 to 459 million. If this new generation is not to grow up angry and impoverished, in already overcrowded cities, the Arab world will have to overcome its poverty - which is not a poverty of resources but a "poverty of capabilities and poverty of opportunities," the report argues.
>
> Though the report pays homage to the argument that the Arab-Israeli conflict and Israeli occupation have been both a cause and an excuse for lagging Arab development, it refuses to stop with that explanation.

conclusions in this report provide critical insights into the welfare disparities between the Western world and the Arab world. Key factors highlighted include the lack of political freedom, widespread corruption, and the deprivation of women's rights. Written by distinguished Arab intellectuals, the report contained alarming statistics. For instance, Spain's Gross Domestic Product (GDP) was found to be greater than the

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To begin with, it notes that "the wave of democracy that transformed governance in most of Latin America and East Asia in the 1980's and early 1990's has barely reached the Arab states. This freedom deficit undermines human development." Using a standard freedom index, the report notes that out of seven key regions of the world, the Arab region has the lowest freedom score - which includes civil liberties, political rights, a voice for the people, independence of the media and government accountability. In too many Arab states women can't vote, hold office or get access to capital for starting businesses. 'Sadly, the Arab world is largely depriving itself of the creativity and productivity of half its citizens,' the report says of Arab women.

On education, the report reveals that the whole Arab world translates about 300 books annually —one- fifth the number that Greece alone translates; investment in research is less than one-seventh the world average; and Internet connectivity is lower than in sub-Saharan Africa. In spite of progress in school enrollment, 65 million Arab adults are still illiterate, almost two-thirds of them women. No wonder half the Arab youths polled said they wanted to emigrate.

The report concludes that 'What the region needs to ensure a bright future for coming generations is the political will to invest in Arab capabilities and knowledge, particularly those of Arab women, in good governance, and in strong cooperation between Arab nations… The Arab world is at a crossroads. The fundamental choice is whether its trajectory will remain marked by inertia… and by ineffective policies that have produced the substantial development challenges facing the region; or whether prospects for an Arab renaissance, anchored in human development, will be actively pursued.'

Well said –and here's the best part: The report was written by a 'group of distinguished Arab intellectuals' who believed that only an 'unbiased, objective analysis' could help the 'Arab peoples and policy-makers in search of a brighter future.' (…)".

The 2003 World Bank Report revealed that the largest contrast between bordering states, from the point of view of economic development and social welfare, is not between the United States, the world's foremost economic power, and its southern neighbor, Mexico, but between Spain and Morocco. See *World Bank Report 2003*. Available at: www.worldbank.org.

combined GDP of the 22 Arab states.[458] Furthermore, there is minimal investment in education across the Arab world, even though 65 million people remain illiterate, two-thirds of whom are women. This situation is deeply concerning because, as Amartya Sen has argued,[459] freedom is a vital component of development—it fosters what he describes as "development as freedom."

Access to political rights, such as the right to education, is intrinsic to development. According to Fernando Reimers of Harvard University, education is the primary determinant of people's life chances.[460] He further emphasizes that education is essential for eradicating poverty and inequality.[461] The deprivation of education constitutes a form of poverty

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[458] See, *UNDP. Arab Human Development report 2002*, 99, United Nations, 2002. Available at: https://www.undp.org/arab-states/publications/arab-human-development-report-2002.

[459] See Sen, Amartya, *Development as Freedom*, Oxford University Press, 1999, p. 5.

> The difference that is made by seeing freedom as the principal ends of development can be illustrated with a few simple examples. Even though the full reach of this perspective can only emerge from a much more extensive analysis, the radical nature of the idea of 'development as freedom' can easily be illustrated with some elementary examples.
>
> First, in the context of the narrower views of development in terms of GNP growth or industrialization, it is often asked whether certain political or social freedoms, such as the liberty of political participation and dissent, or opportunities to receive basic education, are or are not 'conducive to development.' In the light of the more foundational view of development as freedom, this way of posing the question tends to miss the important understanding that these substantive freedoms (that is, the liberty of political participation or the opportunity to receive basic education or health care) are among the constituent components of development.

[460] J. Boti Ramírez and John W. Meyer consider education, aside from nationality, the main determinant of people's life chances around the world. See Ramírez, J. Boti, and John W. Meyer, "Explaining the Origins and Expansion of Mass Education," *Comparative Education Review* 29, no. 2, 1985, pp. 145–164.

[461] See Reimers, Fernando, "Educational Chances of the Poor at the End of the Twentieth Century," *PROSPECTS*, vol. XXIX, no. 4, December 1999 (Issue No. 112), Open File: Education, Poverty, and Inequality, p. 2:

> "The most significant expansion in access to education around the world at all levels has taken place during the last 100 years. Educational opportunity thus came to be perceived, in the collective consciousness of many in the middle of this century, both as a fundamental human right and as a gateway to social opportunity. Meritocratic societies increasingly allocate social status on the basis of educational

in itself, and perhaps Ground Zero serves as a symbolic epicenter of this underdevelopment. In April 2006, Koichiro Matsuura, the Director-General of UNESCO, stated that medical doctors, schoolteachers, and university professors are the most crucial professions for the civic reconstruction of Iraq.[462]

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attainment. The relationship between earnings and educational levels is well documented globally. Education is the single greatest predictor of life chances.

Several processes explain why education matters for the reduction of inequality and poverty. First, the cognitive skills, social skills and credentials that can be gained in school expand the choices available to people. These skills and credentials increase the probability that people can become more productive and obtain better paid jobs, they increase the likelihood that they adopt practices that lead to better health, and they increase the possibility to effectively influence the number of children in the family.

Obviously poverty and inequality cannot be improved by only intervening in education. Higher levels of education in themselves will not generate more jobs with decent pay. Those are a product of the choices countries make about how to respond to the opportunities and constraints posed by participation in the international economy. The 'quality' of growth is key, as not all growth has the same impact on employment and wages. There are, however, interactive processes in how these choices on matters of economic policy influence poverty where the educational level of the labour force intervenes.

Reducing poverty and improving income distribution is the result of multifaceted economic and social processes, not just of improving educational conditions. An important factor in the reduction of poverty incidence is an increase in economic productivity so that average per capita income can increase and so that the living conditions of all people, including the poor, improve. From this perspective, an avenue to reduce poverty is to foster economic growth. Growth and other processes associated with increases in national income, such as urbanization, expansion of basic infrastructure and reduction in fertility rates, will increase the incomes of many families so that the percentage living in poverty declines."

[462] Koichiro Matsuura also condemned the campaign of violence waged against Iraqi academics and intellectuals, noting that doctors and professors have been among the main targets of the targeted killings in Iraq. Since the invasion of Iraq in May 2003, 180 teachers have been killed, 3,250 teachers have fled the country, and up to 100 were kidnapped. See UN Office for the Coordination of Humanitarian Affairs, *IRIN: Humanitarian News and Analysis*. Available at: http://www.irinnews.org/

7.5.1. Education as a Response to Terrorism

The March 11, 2004, terrorist attack in Madrid, carried out by Moroccan citizens, highlighted the pressing need to understand the underlying factors behind such acts. Their lack of political freedom and low levels of education prompted me to reflect more deeply on the direct connection between development and education. A year later, I found a literary allegory that offered some insight. While traveling near the North African coast, on the small island of Pantelleria opposite Tunisia, I gazed across the horizon toward the Arab world.

As I scanned the landscape, an unexpected summer thought came to me. It was a metaphor that blended Arab and European cultures, architecture, and education. This idea contrasted the previously mentioned notion of Ground Zero with the image of the Arab Garden, which I will now explain.[463]

Pantelleria, a small volcanic island in the Sicilian province of Trapani, lies between the island of Sicily and Tunisia and is shaped by relentless, unending winds. Its historical and multicultural background reflects the diversity of the Mediterranean world, having been inhabited over the centuries by Greeks, Phoenicians, Byzantines, Arabs, Spanish-Aragonese, and now Italians.

The simile came to me when I learned about the numerous cylindrical constructions scattered across the island. Built from rectangular lava blocks—the only construction material available on the island—they measure about 6 meters (18 feet) in diameter and approximately 5 meters (15 feet) in height, with walls nearly 1 meter (3 feet) thick. These are called *il giardino arabo* (the Arab garden), I was told. I began to imagine how they must have been built—the effort, the endless hours laboring under a merciless sun, breathing the heavy, oppressive air. I pictured rough, calloused hands carrying the blocks, enduring all that strenuous effort just to create a small stone enclosure in which to shield a fragile world from the unrelenting wind.

Inside, I saw a small olive tree, now able to grow upright and strong, no longer forced to crawl along the ground like other trees on the island. A cypress stood tall next to the wall, its trunk straight and

[463] See González Ibáñez, Joaquín, *Educación y Pensamiento Republicano Cívico*, "Epílogo: El Jardín Árabe," *Germanía*, Valencia, 2005, pp. 235–241.

unwavering. Palm trees thrived on the scarce water, sheltered from the relentless wind. An almond tree, its white blossoms heralding spring, stood full of fruit by summer's end, its delicate beauty preserved within the protective walls.

"Interesting!" I thought. The Arab garden was like education. We often fail to recognize that the wall protecting education must be strong, deeply rooted, complete, and adaptable. Only such a priceless wall—difficult and laborious to build, much like the lava blocks of the Arab garden—can nurture the inner growth that allows us to become autonomous individuals. It creates the space to think, reflect, and express our perspectives, just as the Arab garden provides its fragile inhabitants a sanctuary to flourish. That is the essence of education!

The plants within the garden are, after all, just plants. Yet, those protective walls allow them to thrive, yielding the best of themselves—wood, green leaves, vibrant colors, and abundant fruit. At the time, I didn't fully grasp the depth of this parallel. However, after the terrorist attacks in Madrid, I have come to strongly believe that the lack of freedom, security, and what I call the "quasi-promotion of ignorance"[464] in parts of the Arab world are key factors fueling fear and distrust. These conditions are intrinsically linked to the absence of education—education that empowers individuals to build their own futures freely, unrestrained by cultural gatekeepers or fundamentalists.

In the aftermath of the Madrid attacks, I concluded that the Arab world can only achieve the historical momentum necessary for its development by demanding the opportunity, the will, and the courage to "plant" Arab gardens within its society. Such gardens would create protected spaces that nurture free education—spaces imbued with the clean air of civic ethics, which are indispensable to any democracy.

Ojalá is a Spanish word derived from the Arabic phrase *wa šá lláh*, meaning "God willing." And so, *ojalá*, future generations of our Arab neighbors will have access to educational environments that empower

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[464] This reasoning becomes accentuated when we study the allocation of national budgets in Arab countries and realize that very little is invested in education, especially when compared with investments in defense. The most alarming examples are those of Pakistan, Egypt, Yemen, United Arab Emirates, Burma, Sri Lanka, Botswana, and Sierra Leone. See Rourke, John T., *World Politics: International Politics on the World Stage*, 9th ed., McGraw-Hill, 2002.

them to freely choose and believe in a future shaped by their own participation. *Ojalá*, this education will foster a sense of progress and development, enabling them to combat the poverty and inequality that define their world and circumstances.

The journey is long and requires perseverance and determination to reach the finish line. It took some European nations, like Spain, nearly two centuries of struggle to finally break free from the constraints of the Ancient Regime and build an open and free society, liberated from historical determinism and religious shadows.

The Western world must play a pivotal role and bear responsibility in addressing underdevelopment. The progress, positive impacts, and well-being fostered by rising human rights standards and universal access to education in the West should serve as the most effective form of "soft power,"[465] translating into equity-driven policies for Arab countries. It is our duty to address the "Ground Zero" areas that perpetuate underdevelopment and ensure these regions have access to free, pluralistic education. Such education is essential to equipping citizens with the autonomy needed to shape their own futures.

As Europeans, we focus on what we can achieve *with* the Arab world, rather than *for* the Arab world.[466] Ultimately, however, the future

[465] By soft power we mean the idea developed by Joseph S. Nye, Jr.: "Soft power rests on the ability to shape the preferences of others (…) It is also the ability to attract, and attraction often leads to acquiescence." In a certain way, soft power is the capacity to attract and influence others built on persuasion, legitimacy, and equity. See Nye, Joseph S., Jr., *Soft Power*, PublicAffairs, 2004, pp. 5–7.

[466] Nelson Mandela highlighted the difference between doing for and doing with. The South African leader profoundly respected President Bill Clinton, as Clinton's policies in the United States had won the confidence of Black citizens, minorities, women, and the disabled, while also signifying a shift in traditional U.S. foreign policy towards Africa. During the celebration of the Fiftieth Anniversary of the Universal Declaration of Human Rights on December 10, 1998, Mandela quoted Clinton's words from a conversation they had: "I admire Clinton; he has changed the face of American politics. (…) When he came here [South Africa] he set forth a very important question. He said: 'It used to be, when American policymakers thought of Africa at all, they would ask, what can we do for Africa, or whatever can we do about Africa? Those were the wrong questions. The right question today is, what can we do with Africa?'" See Carlin, John, *El gigante de la libertad*, Mandela, in *El País Semanal*, published December 6, 1998, pp. 21–23.

lies in the hands of the Arab peoples themselves and their determination to transform their circumstances and shape a better future.[467]

Education is everything!

***Zona Cero* by Ismael Serrano**

La Zona Cero está en el alma de occidente,
cerca del corazón, en un solar de Manhattan.
Cayeron los gigantes. Lágrimas de septiembre.
Lágrimas de carne y metal.
El planeta contuvo la respiración.
Los hijos del ocaso se armaron en respuesta.
Qué pena que no sepas repartir tu piedad.
También que cada herida en la piel de este planeta
es una Zona Cero que llorar.
Y abres otra herida repitiendo el mismo error.
La Zona Cero sangra en las ruinas de Kabul.
Una boca sin dientes sonríe bajo un burka.
La Zona Cero extiende sus manchas hacia el sur.

***Ground Zero* by Ismael Serrano**

Ground Zero is in the soul of the West,
near the heart, in an empty lot in Manhattan.
The two giants have fallen.
September tears.
Tears of flesh and iron.
The planet held its breath.
The sunset's sons armed themselves to respond.
Shame you can't share your piety.
Each wound on the flesh of this planet
is another Ground Zero to cry for.
And yet, you inflict another wound,
making the same mistake once again.
In the ruins of Kabul, Ground Zero bleeds.
Behind a burqa, a toothless mouth smiles.
Ground Zero spreads its stains toward the south.

[467] In 1916, Spanish philosopher José Ortega y Gasset coined the expression "I am me and my circumstances" to convey the idea that if a person lacks the capacity or will to change their context and circumstances, they will not be able to change their future. See Ortega y Gasset, José, *Meditaciones del Quijote*, "Personas, obras, cosas" (Meditations on Quixote, "People, Works, Things"), Alianza Editorial–Revista de Occidente, 1983. (Spanish version).

Y no hay septiembres ni lamentos
para esta tierra agujereada por el fuego. (…)
Rodeado de alambradas, muy cerca de Belén,
en plena Zona Cero nació el hijo de un dios.
Los olivos se secan y Palestina ve
como bajo los escombros duermen
palomas que se esconden del invierno.
Desde un hotel contempla la bella Scherezade,
cegada por las llamas, las calles de Bagdad.
Las mujeres se esconden del lobo en Ciudad Juárez.
Y en un semáforo de Río de Janeiro
los niños comen plomo y papel de celofán.
En África la Zona Cero hincha los vientres
y llenará sus camas de sombras y delirios.
Un indio en una selva hoy sueña con serpientes.
Y en un café de Grozni los más viejos
lloran por la calma que no volverá. (…)

No more Septembers, no more cries
for this land pierced and burned by fire. (…)
Near Bethlehem, surrounded by a wire fence,
in the middle of Ground Zero, the son of a god was born.
The olive trees dry up, and Palestine watches
as doves sleep under the rubble, seeking shelter from the winter.
From a hotel, beautiful Scheherazade,
dazzled by the flames,
looks onto the streets of Baghdad.
Women in Ciudad Juárez hide from the wolf.
And at a traffic light in Rio de Janeiro,
children eat lead and cellophane.
In Africa, Ground Zero swells the bellies
and fills their beds with ghosts and nightmares.
An Indian in the jungle dreams of snakes today.
And in a café in Grozny, the elderly weep,
longing for the calm that will never return. (…)

7.6. The Arab Garden: A Response to Professor Ibáñez by Hisham Ramadan

Professor Ibáñez focused his argument on three factors that contribute to the rise of international terrorism by individuals who identify themselves as Muslims. These factors are the lack of democracy, the economic failure of numerous Muslim states, and the lack of education. In my opinion, these factors are not exhaustive. Several other factors have contributed to the current crises, including the oppressive regimes of Muslim states that deprive Muslims of basic political rights under the guise of secularism, the deprivation of Muslims in Western societies of numerous human rights—e.g., mosques being prohibited from using loudspeakers to call for prayers while church bells ring freely, the prohibition of females from wearing headscarves, and the use of offensive language when addressing Muslims. I will focus my discussion on the issues raised by Professor Ibáñez, presenting an Islamic perspective while also noting several other contributing factors. I conclude my essay with an analysis that exposes the reasons for the current crisis.

7.6.1. Education

Early in the Islamic period, Islamic states recognized their potential as leading democracies in a world where knowledge—whether religious, scientific, or otherwise—was highly valued and encouraged. However, shortly after the democratic model presented by the Prophet Mohammed and his companions was established, it was abandoned due to political struggles among various factions. Despite this, the pursuit of knowledge through education has always been a matter of high importance in Islamic societies.

Muslims' contributions to humanity cannot be denied by unbiased observers. For instance, figures such as *al-Razi* (Razes), *Abulcasis* (Bucasis, *Al-Zahrawi*), *Ibn Sina* (Avicenna), *Ibn Rushd* (Averroes), and *Ibn al-Nafis* were pioneers in the field of medicine for centuries. Similarly, other fields were founded or significantly advanced by Muslim scientists, laying the groundwork for modern science. *Al-Khwarizmi* (Algorizm) is considered one of the founders of algebra. *Jabir ibn Hayyan* is recognized as the father

of chemistry. *Al-Haitham* (Alhazen) is regarded as the father of modern optics. *Ibn Khaldun* is universally acknowledged as the founder and father of sociology and the sciences of history.

The remarkable contributions of Muslim scientists did not emerge in a vacuum but have deep roots in Islamic thought. Promoting education for every individual, whether male or female, is a fundamental Islamic principle. Numerous verses in the Qur'an and the traditions of the Prophet Mohammed emphasize this goal. The first Qur'anic command was "Read!",[468] an imperative that underscores the importance of education. Islam elevates the status of reason and honors those who possess knowledge,[469] urging Muslims to seek knowledge not only for its practical benefits but also for its intrinsic value.[470] Muslims are commanded to study both religious and worldly sciences.[471]

Those who refuse to use their faculty of reasoning by neglecting education and learning are condemned.[472] Whether a contemporary regime advances Islamic educational principles depends on various political and

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468 *(Read! In the name of thy Lord and Cherisher, Who created…)* The Holy Qur'an 1:96.

469 *(Say: Are those equal, those who know and those who do not know?)* The Holy Qur'an 39:9; *(Those truly fear Allah, among His Servants, who have knowledge: for Allah is Exalted in Might, Oft-Forgiving.)* The Holy Qur'an 35:28.

470 *(High above all is Allah, the King, the Truth! Be not in haste with the Qur'an before its revelation to thee is completed, but say, "O my Lord! Advance me in knowledge.")* The Holy Qur'an 20:114. *(Of camels a pair, and of oxen a pair; say, hath He forbidden the two males, or the two females, or (the young) which the wombs of the two females enclose? Were ye present when Allah ordered you such a thing? But who doth more wrong than one who invents a lie against Allah, to lead astray men without knowledge? For Allah guides not People who do wrong.)* The Holy Qur'an 6:114. *(He (Allah/God) grants wisdom to whom He pleases; and he to whom wisdom is granted receives indeed a benefit overflowing; but none will grasp the Message but men of understanding.)* The Holy Qur'an 2:269. See also *(Yahya related to me from Malik that he heard that Luqman al-Hakim made his will and counseled his son, saying, "My son! Sit with the learned men and keep close to them. Allah gives life to the hearts with the light of wisdom as Allah gives life to the dead earth with the abundant rain of the sky.") Malik's Muwatta'*, Hadith no. 59.1.1.

471 *(Do they see nothing in the government of the heavens and the earth and all that Allah hath created? (Do they not see) that it may well be that their term is nigh drawing to an end? In what Message after this will they then believe?)* The Holy Qur'an 7:185. *(Do they not look at the Camels, how they are created? And at the Sky, how it is raised high? And at the Mountains, how they are fixed firm? And at the Earth, how it is spread out?)* The Holy Qur'an 88:17–20.

472 *(For the worst of beasts in the sight of Allah are the deaf and the dumb, those who understand not.)* The Holy Qur'an 8:22. In this verse, the Qur'an described those who refuse to listen and see as "the worst of beasts."

social factors, including tribal customs that may contradict Islamic teachings. For instance, the Taliban regime, which defines itself as Islamic, has regrettably deprived females of education, claiming it is unlawful or un-Islamic.[473] However, this claim lacks any foundation in the basic sources of Islamic law, such as the Qur'an and Sunna, or even Islamic jurisprudence. Instead, such policies appear to stem from tribal customs or the whims of tribal leaders, unjustifiably labeled as Islamic.

7.6.2. Democracy

Professor Ibáñez identifies five characteristics of a democratic state. Each of these deserves individual discussion:

a) Real Separation of the State's Powers (Checks and Balances)

Islamic law does not prohibit the separation of state powers. On the contrary, the fundamental principle in Islam—that all things are permissible unless expressly prohibited—makes adopting a system of separation of powers a viable option in an Islamic state. However, if the purpose of separation of powers is to ensure checks and balances, Islamic law provides an even more robust and effective mechanism through the concept of *hisbah*.[474]

Under *hisbah*, the entire society participates in an accountability system, granting every citizen the right to monitor the state's actions to ensure compliance with the law. A citizen may challenge state actions, legislation, or even unfair practices by other individuals if they contradict the law of the land, which in an Islamic state is Islamic law. In this context, Islamic society is seen as a single entity, where harm to the collective or deprivation of a lawful gain affects every individual. This approach

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[473] See Al-Qaradawi, *State in Islam*, *supra* note 72, at p. 113. He criticized the Taliban regime for unjustifiably forbidding women's education and the election process.

[474] For jurisprudential foundation, see *(Ye are the best of Peoples, evolved for mankind, enjoining what is right, forbidding what is wrong, and believing in Allah)* The Holy Qur'an 3:110. See also *(The Messenger of Allah (peace and blessings of Allah be upon him) said, "Whoever sees an evil action, let him change it with his hand [by taking action], and if he cannot, then with his tongue [by speaking out], and if he cannot, then with his heart [by feeling that it is wrong], and that is the weakest of faith.")* Sahih Muslim, Hadith no. 78.

emphasizes the rights and responsibilities of citizenship in their fullest sense, fostering a participatory and inclusive model of governance and oversight that has no direct equivalent in Western democracies.

In contrast to Islamic law's broader approach to public accountability, many Western democracies place limitations on citizens' ability to address societal issues through legal mechanisms. For example, the United States Supreme Court's standing requirement[475] restricts individuals from raising constitutional challenges unless their own rights are directly affected. While the intention behind such policies may be to reduce politically motivated litigation and manage court caseloads, they raise important questions about the balance of harms and benefits. Are these justifications sufficient to tolerate the cost of unaddressed legal violations? Should such policies discourage citizens from acting in the public interest, effectively sending a "mind your own business" message to society?

Islamic law offers a fundamentally different perspective, prioritizing the advancement of public good above competing rationales. In Islamic governance, a societal concern is inherently a citizen's concern. Anything that affects society as a whole, or even a single member of society, is considered to affect every individual within it. The principle of *hisbah* explicitly encourages all individuals to "enjoin good and forbid evil." Merely wishing for good without active participation is seen as the weakest and least desirable form of engagement.[476]

Given the all-encompassing scope of *hisbah*, the Islamic accountability system provides oversight so comprehensive that it arguably renders the separation of powers redundant. While an Islamic constitution may choose to incorporate the separation of powers doctrine, its function would be limited compared to the broader and more unrestricted oversight offered by *hisbah*. This raises a compelling question: if *hisbah* ensures comprehensive societal accountability, does the

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[475] See *Doremus v. Board of Education of Borough of Hawthorne*, 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 43 S. Ct. 597, 67 L. Ed. 1078 (1923). For criticism, see Abram Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4 (1982) (criticizing the United States Supreme Court for discouraging citizens from public rights litigation).
[476] See the principle of *hisbah*, as explained in footnote 468.

compartmentalized system of checks and balances inherent in the separation of powers model remain necessary?

b) Respect for Human Rights

Long before the Magna Carta, Islamic law laid the foundation for a comprehensive human rights framework. The fundamental rights embedded in Islamic law—many of which arguably surpass those outlined in modern human rights instruments—are rooted in its primary sources: the Qur'an and the Sunna. Islamic law upholds universal principles including the right to life and the right to justice.[477] Furthermore, it pioneered the recognition of key liberties, such as religious freedom, the right to privacy, and the equality of all human beings.[478]

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[477] For the right of life, see The Holy Qur'an, Sura Al-Maidah (5:32):
"On that account: We ordained for the Children of Israel that if anyone slew a person—unless it be for murder or for spreading mischief in the land—it would be as if he slew the whole people: and if anyone saved a life, it would be as if he saved the life of the whole people. Then although there came to them Our Messengers with Clear Signs, yet, even after that, many of them continued to commit excesses in the land."
See also The Holy Qur'an, Sura Al-An'am (6:151):
"Take not life, which Allah hath made sacred, except by way of justice and law: thus doth He command you, that ye may learn wisdom."
For the right to justice, see The Holy Qur'an, Sura An-Nisaa' (4:135):
"O ye who believe! stand out firmly for justice, as witnesses to Allah, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor: for Allah can best protect both. Follow not the lusts (of your hearts), lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do."
See also The Holy Qur'an, Sura Al-Maidah (5:8):
"O ye who believe! stand out firmly for Allah, as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to Piety: and fear Allah. For Allah is well-acquainted with all that ye do."

[478] Respecting freedom of religion, see The Holy Qur'an, Sura Al-Baqarah (2:256):
"Let there be no compulsion in religion: Truth stands out clear from Error: whoever rejects Evil and believes in Allah hath grasped the most trustworthy hand-hold, that never breaks. And Allah hears and knows all things."
Regarding the right of privacy, see The Holy Qur'an, Sura Al-Hujurat (49:12):
"O ye who believe! avoid suspicion as much (as possible): for suspicion in some cases is a sin: and spy not on each other, nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye would abhor it. But fear Allah: for Allah is Oft-Returning, Most-Merciful."

Additionally, Islamic law establishes rights that are often absent or underdeveloped in modern human rights instruments, such as the right to a basic standard of living, which aligns with the concept of a welfare state.[479] These rights exemplify the broad scope of protections guaranteed under Islamic law.

In recent decades, significant efforts have been made to codify Islamic human rights principles in a way that parallels Western-style human rights instruments. Two notable examples are the *Universal Islamic Declaration of Human Rights* (1981) and the *Cairo Declaration on Human Rights in Islam* (1990). These documents represent an attempt to align Islamic human rights principles with contemporary frameworks while remaining faithful to the foundational values of Islamic law.

Two key principles often emphasized in these discussions are:

1. Elections that are free, pluralistic, and periodic.
2. Sovereign power vested in the people, comprising free men and women with equal rights.

(These principles are interconnected and will be addressed together in the following discussion.)

Professor Ibáñez highlights how these features of Western democracies may not be universal due to their underlying assumptions. Before exploring the differences between Islamic and Western democracies, it is essential to briefly explain the concept of democracy in Islam.

Regarding the right to equality, see The Holy Qur'an, Sura Al-Hujurat (49:13):

> *"O mankind! We created you from a single (pair) of a male and a female, and made you into nations and tribes, that ye may know each other (not that ye may despise each other). Verily the most honored of you in the sight of Allah is (he who is) the most righteous of you. And Allah has full Knowledge and is well-acquainted (with all things)."*

This verse dismantles any foundation for inequality by emphasizing that humanity has only one origin, and therefore all humans are equal. The division of humanity into nations and races is for the sake of distinction, so individuals belonging to different races and nations may become acquainted with one another.

[479] Islam pioneered a social welfare system that guarantees providing the needy, regardless of race, religion, national affiliation, or other distinctions, with the basic necessities of life. See The Holy Qur'an, Sura Az-Zariyat (51:19):

> *"And in their wealth there is an acknowledged right for the needy and destitute."*

The term democracy originates from two Greek words: *demos* (people) and *kratos* (power), meaning "power to the people." This definition implies that the people hold the authority to govern and legislate. Notably, this concept does not exclude the freedom to choose a religious framework as the supreme law of the land. Democracy, by definition, is neutral regarding religion; it neither opposes nor endorses it. Whether a state adopts secular or religious laws depends entirely on the will of its citizens.

An Islamic state is no exception to this principle. Its citizens determine their path through mutual consultation (*shura*), which is not a modern proposition but the only acceptable method of governance in Islam, as outlined in the Qur'an.[480] The Prophet Mohammed himself practiced the doctrine of consultation as the head of the Islamic state.[481] He did not appoint a successor, leaving it to the Muslim community to elect or choose their leader. Additionally, he consistently sought counsel from his people in secular matters.

Islamic law's scholarly work on democracy is rooted in the fundamental democratic principles outlined in the Qur'an and practiced by the Prophet Mohammed. Al-Mawardi, a prominent Islamic scholar, detailed the qualifications required of the *Imam* (Head of State), which include justice, physical fitness, knowledge of Islamic law, and sound judgment.[482] Once a candidate fulfills these conditions, the legitimate representatives of the nation (*Ahl al-Aqd wa al-Hall*, meaning "those who bind and loose") select the individual who best meets these criteria and who is likely to earn the nation's respect and allegiance.

The nominated candidate has the right to accept or refuse the leadership position, as leadership in Islam is fundamentally a contract between the leader and the nation. Once the legitimate representatives—or the majority of the nation—elect a leader, and the candidate accepts the

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480 The Holy Qur'an, Sura Ash-Shura (42:38):
"Those who hearken to their Lord, and establish regular prayer; who (conduct) their affairs by mutual consultation; who spend out of what We bestow on them for sustenance."

481 The Holy Qur'an, Sura Al-i-Imran (3:159):
"It is part of the Mercy of Allah that thou dost deal gently with them. Wert thou severe or harsh-hearted, they would have broken away from about thee: so pass over (their faults), and ask for (Allah's) forgiveness for them; and consult them in affairs (of moment). Then, when thou hast taken a decision, put thy trust in Allah. For Allah loves those who put their trust (in Him)."

482 See Mawardi, p 6.

position, they are to be obeyed by all citizens. If the leader fails to maintain the required qualities of leadership, such as committing a major crime, they may be impeached. However, they could potentially be re-elected under a new contract with the nation.[483]

In contrast, dictatorial regimes are inherently un-Islamic. If a leader is not elected by the nation through its legitimate representatives or direct elections, their leadership is considered illegitimate. The vast majority of Islamic scholars have declared that self-imposed leadership holds no validity under Islamic law.[484]

Alternatively, Al-Mawardi suggested that the leader of the nation (*Imam*) may appoint their successor.[485] He based this proposition on historical precedents, where some of the Companions of the Prophet Mohammed either appointed or shortlisted their successors. However, this rationale does not align with contemporary realities or provide sufficient justification. None of today's Muslim leaders possess the same level of knowledge of Islamic law, standing among Muslims, or methodology in governing the Islamic state as the Prophet's Companions.[486]

Indeed, if one of those Companions were alive today, the nation would undoubtedly elect them. However, the Companions are unique, unrepeatable figures. Moreover, using the classical Islamic law analysis of balancing benefits versus harm, the potential harm caused by an error in judgment when appointing a successor far outweighs any perceived benefit.[487] The risk of unforeseen dictatorship, particularly if the successor

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483 Some scholars suggest that a leader does not require a new contract if he has committed a sinful act and repented. *Id.* at p. 19.

484 *Id.* at pp. 7–8.

485 *Id.* at p. 10.

486 *"Hold on to my Sunnah and the Sunnah of the Rightly Guided Caliphs after me. Hold on to it firmly. And beware of heretical innovations (bida') because each heretical innovation (bid'ah) is a falsehood and each falsehood is a deviation from the right path."*
Hadith reported by Sunan Ibn Majah, Hadith No. 42 (*Book of Al-Iman*).
Note: This Hadith emphasizes the exceptional and unrepeatable position of the Prophet Mohammed's companions, who later became Caliphs (rulers).

487 The Holy Qur'an, Sura Al-Baqarah (2:219):
"They ask you about intoxicants and gambling: say, 'In them there is a gross sin and some benefits for the people. But their sinfulness far outweighs their benefit.'"
This verse teaches Muslims how to conduct a harm/benefit analysis, as exemplified in the prohibition of alcohol.

is a family member, poses a significant threat. Therefore, the only acceptable method of appointing a ruler is through mutual consultation (*shura*) among Muslims.

Some Islamic law scholars argue that democracy is a foreign concept limited to secular regimes, contending that the idea of popular sovereignty contradicts the basic Islamic creed, which holds that ultimate sovereignty belongs to God.[488] Interestingly, however, those who reject the label of popular sovereignty still adhere to the fundamental principles of Islamic democratic governance. They maintain that while people should govern themselves, ultimate authority remains with God. This suggests that scholars who dismiss democracy as inherently secular may be misunderstanding its essence. In reality, Islamic democracy is a viable option. In Muslim nations, the majority of citizens willingly embrace Islam without coercion, and by doing so, they accept the consequences of their faith—namely, submission to the will of God and the recognition of Islamic law as the supreme law of the land.

Accordingly, Maududi, in an attempt to distinguish Islamic democracy from secular democracy, proposed that the most accurate term to describe the Islamic system of governance is *Theo-democracy*, in which popular sovereignty is limited by the direct commands of God.[489] From a Western perspective, it is difficult to object to this form of democracy. Even in the most liberal Western democracies, people choose the laws that govern their lives, regardless of how extreme or unfair these laws might appear to outsiders. For example, the Netherlands has legalized drugs, while many European nations continue to prohibit them. Similarly, some Western countries have legalized prostitution, while others deem it immoral and illegal. No valid human rights claim can deprive a sovereign nation of the right to choose its own legal path. Whether drugs, prostitution, or abortion are considered legal or illegal, moral or immoral, depends on the prevailing moral and legal norms of each individual state. The Islamic state is no exception to this rule. Muslims have the right to implement their own laws within their state, even if these laws grant ultimate authority to the foundational sources of Islamic law—namely, the Qur'an and the Sunna.

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[488] See Esposito, John L., and John O. Voll, *Islam and Democracy*, 1996, p. 23. See also Maududi, S. Abul A'la, *Islamic Law and Constitution*, 12th ed., 1997, pp. 139–145.
[489] Maududi, S. Abul A'la, *Islamic Law and Constitution*, 12th ed., 1997, pp. 139–145.

Another possible contrast between Islamic democracy and the common practices of Western democracies lies in the period of service in public office. Professor Ibáñez suggested that elections in democratic societies should be periodic. However, the assumption that extended service in office—even for a life term—is inherently undemocratic is unfounded. What if the people choose to elect a representative for a life term, provided they retain the right to impeach that individual if deemed unfit to serve? Should an external or foreign sovereignty override the will of the people in an Islamic society by imposing periodic elections? The clear answer is no. The people of a state have the right to regulate their election processes and procedures as they see fit, even if they choose to appoint a ruler or representative for life. This is not to suggest that Islamic law opposes periodic elections. Rather, it is a procedural matter that remains subject to the will of the people and their chosen form of governance.

Apart from sovereignty to God and variations in the practice of periodic elections, it appears that Islamic law aligns with the broader democratic process in requiring a free, plural, and sovereign power that represents the people (*Ahel Al-Aqed wa-Al-Hall*), composed of a citizenry of free men and women with equal voting rights.

c) The Existence of a Rule of Law

The rule of law necessitates subjecting both the government and citizens to the law as applied and regularly adopted. This principle, often traced to the Magna Carta, is a cornerstone of Western jurisprudence.[490] However, centuries before the Magna Carta, the basic sources of Islamic law—Qur'an and Hadith—had already affirmed the rule of law at both the doctrinal level and in practical application.[491] In Islamic jurisprudence,

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490 The Magna Carta states: "*No free man shall be taken, imprisoned, disseized, outlawed, or banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and the law of the land.*"

491 (O ye who believe! Be steadfast witnesses for Allah in equity and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your duty. Observe your duty to Allah. Lo! Allah is Informed of what ye do.) The Holy Qur'an, Sura Al-Maidah (5:8). See also Hadith ("prophetic tradition"): *Narrated 'Aisha: The Quraish people became very worried about the Makhzumiya lady who had committed theft. They said, 'Nobody can speak (in favor of the lady) to Allah's Apostle and nobody dares do that except Usama*

the rule of law is exceptionally fundamental and is not only monitored and enforced by governmental organizations but also upheld by the people through the right of *hisbah*. No one, regardless of status, is above the law. For instance, when the Caliph Omar Ibn Khatab wore a long robe, a sign of spending a moderate amount of money on clothing, the people questioned him about the source of the funds, demonstrating their commitment to accountability and the rule of law.

7.6.3. Islamic Economy

The Islamic economy adopts a liberal perspective grounded in the principles of a welfare state, prohibiting the exploitation of the needy and discouraging unfair practices.[492] However, Islamic law differs significantly

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who is the favorite of Allah's Apostle.' When Usama spoke to Allah's Apostle about that matter, Allah's Apostle said, 'Do you intercede (with me) to violate one of the legal punishments of Allah?' Then he got up and addressed the people, saying, 'O people! The nations before you went astray because if a noble person committed theft, they used to leave him, but if a weak person among them committed theft, they used to inflict the legal punishment on him. By Allah, if Fatima, the daughter of Muhammad committed theft, Muhammad will cut off her hand!'" Sahih Bukhari, *Book of Al-Hudud*, Hadith no. 779. See also Yakub, Ali Iyad, *The Islamic Roots of Democracy*, 12 *University of Miami International and Comparative Law Review* 269, 294.

[492] Generally, see: *(O ye who believe! Fulfill your undertakings.)* The Holy Qur'an, Sura Al-Maidah (5:1). *(O you who believe! Do not devour your property among yourselves falsely, except that it be trading by your mutual consent, and do not kill yourselves. Surely Allah is Merciful to you.)* The Holy Qur'an, Sura An-Nissa (4:29). See also the prohibition of deception in transactions: Abdullah b. Dinar narrated that he heard Ibn 'Umar (Allah be pleased with them) saying: *"A man mentioned to the Messenger of Allah (may peace be upon him) that he was deceived in a business transaction, whereupon Allah's Messenger (may peace be upon him) said: When you enter into a transaction, say: There should be no attempt to deceive."* Sahih Muslim, Book 10, Hadith no.3663. Regarding debt forgiveness policies for insolvency: Abu Sa'id al-Khudri (Allah be pleased with him) reported that in the time of Allah's Messenger (may peace be upon him) a man suffered loss in fruits he had bought, and his debt increased; so Allah's Messenger (may peace be upon him) told (the people) to give him charity, and they gave him charity, but that was not enough to pay the debt in full, whereupon Allah's Messenger (may peace be upon him) said to his creditors: *"Take what you find, you will have nothing but alms."* Sahih Muslim, Hadith no. 3777. It is forbidden for a solvent individual to delay the payment of debt: Abu Huraira (Allah be pleased with him) reported Allah's Messenger (may peace be upon him) as saying: *"Delay (in the payment of debt) on the part of a rich man is injustice, and when one of you is referred to a rich man, he should follow him."* Sahih Muslim, Hadith no. 3796. Monopoly is forbidden: *(None*

from Western jurisprudence in certain key aspects, particularly the prohibition of *riba* (commonly translated as usury) and *gharar* (often translated as uncertainty, risk, or speculation) in contracts.[493] *Riba* is categorized into two primary forms: *riba nasi'a*, which occurs when a lender offers the borrower the option, upon the maturity of the debt, to either repay the debt or extend the maturity date in exchange for an increased payment,[494] and *riba al-fadl*, which involves repayment of a loan with an added increase, regardless of whether this increase is agreed upon at the time of the loan's formation or arises from a delay in repayment.[495] Thus, Islamic law prohibits any form of increase in the repayment of a debt, whether it arises from a delay in repayment or is predetermined in the loan agreement.

Gharar, on the other hand, arises in transactions where the parties lack perfect knowledge of the items or values being exchanged. For instance, in a contract of sale, *gharar* occurs when the item being sold is not sufficiently defined—such as when the subject of the sale involves

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monopolize but a sinner.) Sahih Muslim, quoted in Yusuf Al-Qaradawi, *Islamic Concept of Education & Economy* 51 (El-Falah Trans. 1998). Social welfare is encouraged: *(Narrated Abu Musa Al-Ash'ari: The Prophet said, "Give food to the hungry, pay a visit to the sick, and release (set free) the one in captivity by paying his ransom.")* Sahih Bukhari, Hadith no. 286. Investment is also encouraged: *(If anyone has land, he should cultivate it or lend it to his brother.)* Al-Lu'lu' Wa al-Marjan, Hadith no. 993–994.

493 *Those who swallow usury cannot rise up save as he arises whom the devil has prostrated by (his) touch. That is because they say: Trade is just like usury; whereas Allah permitted trading and forbade usury. He unto whom an admonition from his Lord comes, and (he) refrained (in obedience thereto), he shall keep (the profits of) that which is past, and his affair (henceforth) is with Allah. As for him who return (to usury)—such are rightful owners of the Fire. They will abide therein.* The Holy Qur'an, Sura Al-Baqarah (2:275).

494 Al-Gasas, *1 Ahkam Al-Qur'an*, pp. 552–553.

495 *Id.* See also: ('Uthman b. 'Affan reported Allah's Messenger (may peace be upon him) as saying: "Do not sell a dinar for two dinars and one dirham for two dirhams.") *Sahih Muslim*, Hadith no. 3849. (Abu Sa'id al-Khudri reported Allah's Messenger (may peace be upon him) as saying: "Do not sell gold for gold, except like for like, and don't increase something of it upon something; and don't sell silver unless like for like, and don't increase something of it upon something, and do not sell for ready money something to be given later.") *Sahih Muslim*, Hadith no. 3845. ('Abdullah (b. Mas'ud) (Allah be pleased with him) said that Allah's Messenger (may peace be upon him) cursed the one who accepted interest and the one who paid it. I asked about the one who recorded it, and two witnesses to it. He (the narrator) said: "We narrate what we have heard.") *Sahih Muslim*, Hadith no. 3880.

goods that are not yet available (e.g., unripe fruits or vegetables) or sales that involve speculation (e.g., betting on one of several potential items).[496] One of the primary rationales behind the prohibition of *gharar* is to prevent conflicts between the buyer and the seller, which may result from discrepancies between the buyer's expectations and what they ultimately receive. Notably, certain types of contracts are considered exceptions to the prohibition of *gharar*. Examples include *istisna* (a contract to manufacture), *ijara* (a hire or lease contract), and sales with advanced payment. These exceptions illustrate the adaptability of Islamic economic principles to address practical needs while maintaining ethical standards.

The prohibition of *gharar* and *riba* does not paralyze the state economy; rather, it creates an economic system that seeks to eradicate the exploitation of the weak by a callous interest-based banking system while encouraging investment in a liberal market by abolishing easy, risk-free gains generated by *riba*-based banking interests. Under Islamic law, individuals are encouraged to invest in the market with the inherent risk of loss, as opposed to allowing their capital to remain idle and depreciate due to inflation. This system effectively transforms individuals from mere creditors into active partners in economic ventures. Moreover, the prohibition of *gharar* enhances market equity by eliminating uncertainty and speculation in contracts, thereby fostering fairer economic practices.

Islamic banks employ various methodologies to replace the *riba* system. For instance, under a *mudaraba* contract (Trust Financing), a bank may act as an agent for the financier, investing their funds in the market in exchange for a share of the profits. If the investment incurs a loss, the financier absorbs the financial loss, while the bank only forfeits its efforts.[497] Alternatively, under a *musharaka* contract (Partnership Financing), a bank collaborates with project sponsors by jointly financing a venture on a prearranged profit-sharing ratio.[498] Unlike *mudaraba*, the bank assumes both the risk of loss and the prospect of gain, reflecting a shared responsibility in the economic endeavor.

It is worth noting that the Islamic financial system, although it may seem alien to the common reader, has experienced remarkable growth and

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[496] Imam Serkhasi, *Al-Mabsut*, vol. 7, p. 68.
[497] Bilal, Gohar, *Islamic Finance: Alternatives to Western Models*, Fletcher Forum of World Affairs 23, 1999, pp. 147, 156.
[498] *Id.* at p. 157.

success over the past few decades and has proven to be competitive with the typical Western financial system in the market.[499]

7.6.4. The Dilemma

The persistent question, following the brief illustration of Islamic democratic principles, as well as its educational and economic policies, is this: if Islam pioneered human rights guarantees and established fair and progressive educational and economic guidelines, then what is the cause of widespread human rights violations, failed educational systems, and economic adversity in Muslim states? Perhaps the key concept to explain this paradox lies in the distinction, as highlighted by former pop singer Cat Stevens, between the car and the driver. In this metaphor, the car represents Islamic law, and the driver represents its application. Additionally, we must consider the driving conditions—i.e., the unfavorable circumstances facing the Islamic world.

According to this metaphor, the current state of the Islamic world is akin to a poor driver operating an excellent vehicle under very challenging conditions. In other words, while Islamic law is virtuous, several factors contribute to the crises in the Islamic world. These include the erroneous application of Islamic law principles, prevailing unfavorable attitudes toward Islam, and the influence of superpower interests in the region.[500] The following analysis explores these issues further.

A. Islamic Economy and the Current State of Affairs

Historically, imperialistic powers have drained the natural resources of the most vulnerable nations. In the present day, the relentless train of globalization, driven by the interests of superpowers, continues to harm developing countries, including Islamic states, to a significant extent. To be sure, globalization is not universally beneficial; it favors only those nations with advanced technology and robust industrial and agricultural platforms, allowing them to compete successfully.

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[499] See *supra* note 147.

[500] This list is far from exhaustive. Indeed, a full historical, economic, and political analysis lies beyond the scope of the article.

It is inconceivable that a country such as Tanzania could compete with Silicon Valley in the software and blue-chip industries. Similarly, in agriculture, the advanced technologies employed in Western nations far exceed the capabilities of farmers in developing countries. To compound the problem, most developed nations subsidize their agricultural industries and impose import restrictions on foreign products. Any country that dares to challenge the global economic model risks being isolated through export bans and denial of access to technological advancements. The Islamic world is no exception to this dynamic. Most, if not all, Muslim states are developing countries unable to compete effectively in a globalized economy.

The slow development of the Islamic economy and the prevalence of economic challenges in Muslim states can, in part, be traced back to the imperialist era. By the end of the 19th century, Muslim states were introduced to the Western economic model as a result of imperialism—a model fundamentally inconsistent with their beliefs and customs. This imposition rested on the flawed assumption that "what is good for the West is good for the rest." Such an assumption ignores the fact that laws, including economic regulations, are expressions of a people's values and customs. Prohibitions of *riba* and *gharar* and contracts such as *mudaraba* or *musharaka*, which reflect Islamic principles and customs, have no equivalent in the Western financial system. For an extended period, Muslims were compelled to operate within a financial framework that directly contradicted their beliefs. When they failed, the blame should not have fallen on them but rather on the powers that imposed this alien financial system upon them.

B. Unfavorable Attitude Towards Islam

The unfavorable attitude towards Islam in general is remarkable. President Bush, along with numerous United States senators and representatives, frequently used the term "Islamic fascism" in reference to

the war on terrorism.[501] This sweeping term taints Islam as a religion, a faith followed by one-quarter of the world's population.[502]

Neither President Bush nor U.S. senators have ever employed similar terms to describe other religions, such as "Christian fascism," "Jewish fascism," or "Hindu fascism."[503] Additionally, Pope Benedict XVI made highly controversial comments about Islam by quoting a criticism of the religion and the Prophet Mohammed. He cited the Byzantine Emperor Manuel II Palaeologus, who wrote that everything Mohammed brought was "evil and inhuman," including "his command to spread by the sword the faith he preached."[504] Although the Vatican later issued a statement clarifying that the Pope had not intended to offend Islam, the Catholic Encyclopedia contains even more damaging descriptions of Islam and the Prophet Mohammed. It describes the Prophet as "a devil and first-born child of Satan," attributing his alleged revelations to "epileptic fits" or "a paroxysm of cataleptic insanity." It further states, "He approved of assassination, when it furthered his cause; however barbarous or treacherous the means, the end justified it in his eyes; and in more than one case, he not only approved but also instigated the crime."[505]

This negative portrayal of Islam extends beyond political and religious leaders to include prominent intellectuals in Western society. Professor Ibáñez, in his portion of this article, noted:

> Professor Lewis, from Princeton University, has pointed out that this aspect is fundamental to understanding the deep and profound rupture between the West and Islam, and more specifically to understand the difficulties Islam is

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501 See *BBC News*, "Fighting Words: The Abuse of Islam in Political Rhetoric." Available at: http://news.bbc.co.uk/2/hi/americas/4785065.strm. See also Ali Khan, "Fighting Words: The Abuse of Islam in Political Rhetoric." Available at: http://jurist.law.pitt.edu/forumy/2006/08/fighting-words-abuse-of-isalm-in.php (last accessed August 2006).

502 *Id.*

503 *Id.*

504 See *CNN*, "Pope's Comments on Islam Spark Outrage." Available at: http://www.cnn.com/2006/WORLD/africa/09/14/pope.muslims.reut/index.html?section=cnn_world

505 See Catholic Encyclopedia, "Mohammed and Mohammedanism." Available at: http://www.newadvent.org/cathen/10424a.htm

> having in keeping its cultural, social, and material development in step with the principles derived from the technical and philosophical revolutions that took place in 18th-century Europe and which, still today, are the philosophical basis of the world's capitalist democracies.

Professor Lewis' ideology is not only offensive but also lacks sound rationale and contradicts fundamental democratic principles. His message suggests that the failure of the Islamic world to embrace Western philosophy is a cause—or at least a contributing factor—to the current crises in the Islamic world. This raises the question: Does Islam need to conform to Western philosophy, even if it contradicts Islamic principles, to be regarded as an acceptable, civilized, and problem-free society? My answer is unequivocally no.

Professor Lewis and his followers fail to grasp the concept of diversity in a global society. Their illusion of superiority leads them to dismiss any opposing viewpoints as unacceptable or as the root of societal problems. If Professor Lewis truly believes in democracy, he must recognize that every nation has the right to choose its own path, including its laws and philosophies. This attitude—whether demonstrated by President Bush, the Catholic Church, or certain intellectuals—undermines trustful communication between the Muslim world and the West, fosters hatred, incites violent crimes against Muslims, and reinforces the notion that there is a war against Islam.

C. The Internal Dimension of the Dilemma

While some of the problems faced by the Muslim world are caused by external forces, the Muslim world itself is not free from blame. Violations of basic Islamic human rights and the failure to implement essential Islamic democratic principles may be the primary causes of the issues afflicting Muslim societies, including the rise of international terrorism.[506]

When individuals are subjected to oppressive regimes that violate their fundamental rights and suppress free speech, and they

[506] For instance, see *IRIN*, "Middle East English Service." Available at: http://www.irinnews.org/ME.asp?SelectTheme=Human_rights.

simultaneously witness external countries interfering in their domestic affairs, some may retreat into underground networks and develop extreme ideologies. These ideologies, in their minds, justify acts of violence, including the killing of innocents and the widespread dissemination of terror within societies.

Although Islamic law unequivocally prohibits such actions, the proper Islamic discourse capable of countering these extreme ideologies has been suppressed in many Muslim and Western states. Governments in the Muslim world often fear that permitting free Islamic speech would lead to criticism of oppressive regimes, ultimately threatening their grip on power. Meanwhile, Western governments are frequently driven by long-standing biases against a religion that differs from their own, coupled with economic and political interests—such as controlling vital natural resources like oil or maintaining political dominance over vulnerable societies.

D. Conclusion: Hope for the Future

The right and reasonable solution to the dilemma facing the Muslim world must begin by addressing its root causes. For Western societies, the first step should involve a genuine effort to understand Islam, including its democratic principles, human rights guarantees, and political and economic doctrines. Following this, and rooted in a sincere belief in democratic values, Western societies and governments must respect and accept differing opinions, even when they conflict with their own interests. Finally, Western democracies should exert every effort to empower the people of Muslim countries.

The alternative to this approach is the perpetuation of the current state of affairs: widespread ignorance of Islamic principles—fueled by hatred or politically motivated rhetoric—combined with the pursuit of economic and political interests through collaboration with oppressive regimes. Turning a blind eye to practices that violate both Islamic and Western democratic principles, as long as they serve the interests of certain Western nations, only perpetuates this destructive cycle. The inevitable outcome of this alternative is an unending conflict with groups blinded by hatred toward foreign interventions in their countries and driven by a

misguided understanding of Islam—what is often referred to as the "war on terror."

Muslims in Muslim states must strive to implement Islamic democratic principles by all peaceful and legitimate means. Likewise, Muslims living in Western societies have a responsibility to share the true message of Islam, enlightening both non-Muslims and uninformed Muslims about Islam's democratic and ethical principles. By doing so, we will begin to construct the Arab garden, whose foundations are deeply rooted and whose walls are strong enough to withstand the dark forces of ignorance, self-interest, and the sacrifice of innocent lives as mere collateral damage.

Hisham Ramadan

7.7. A Comment on Professor Ibáñez and Ramadan's Essays by Jamie B. Raskin*

I am fascinated to observe the exchange between Professor Ibáñez and Professor Ramadan. When I first read their essays, I saw them as two ships passing in the night on their way to opposite sides of the world. The Ibáñez essay reads as an eloquent and thoroughly up-to-date defense of liberal Enlightenment values for the new century. It emphasizes human rights, constitutional democracy, civic participation, the corrosive effects of poverty and injustice, and the primacy of education as the instrument for social progress and liberation. Professor Ibáñez has essentially invited us to view the process of education for democratic citizenship—not military mobilization and war--as our principal weapon in global defense against religious zealotry, fanaticism and terrorism. He has given us a framework to make the commitments of liberal democracy universal and meaningful in a world fractured by poverty, injustice, terrorist violence, imperial war and theocratic intentions. Professor Ibáñez offers five specific criteria for democracy: separation of government powers, respect for human rights, free and periodic elections, the Rule of Law, and the sovereignty of the people (men and women bestowed with equal rights).

* Professor of Law, American University Washington College of Law; State Senator, Maryland.

These values are essential to protect the dignity of the person against the awesome power of the state and the terrible winds of misfortune and poverty.

The Ramadan essay reads instead like a subtle and sophisticated defense of Islamist ideology or, perhaps more charitably, the ideology of "Islamic democracy." From this perspective, "Muslims have the right to impose their own laws in their state even if such laws delegate the ultimate authority to basic sources of Islamic law, i.e. Quran and Sunna." (p.6) He tells us that the system of separate and divided powers is unnecessary where the "right of Hosbah" exists--that is, a right of every citizen to challenge legislation on the basis that it "contradicts" Islamic religious law. (pp.2-3) "Ultimately, if the right of Hosbah provides ultimate control among powers then, what is the need for a limited, in scope, method of control such as separation of powers?" (p.3).

Where Ibáñez champions a political democracy that respects the rule of law and the individual's right of private religious conscience, Ramadan collapses democracy, the rule of law and individual rights all under the power of a religious state: democracy, he tells us, "definitely does not preclude people from the freedom of belief including the freedom to choose particular religious beliefs as the supreme law of the land." (p.5) These precepts imply add up to a "Theo-democracy," in a word coined by Maududi and affirmatively quoted by Ramadan (p.6), and a psychology of total religious domination and submission: "Once the legal representatives or the majority of the nation elected a leader and the candidate accepted the position, he is obeyed by every citizen." (p.5) This is most certainly not the attitude necessary to protect democracy and human rights; in my country (the USA), for example, we are struggling against the idea that our "leader," who has plunged us into aggressive war on false evidence, spied on American citizens outside of the rule of law, and abandoned long-standing prohibitions against torture, must be "obeyed." It is true that Ibáñez says that a leader who "loses one or more of the qualities of leadership, e.g. committed a major crime," may be "impeached," but the either/or options of obedience and impeachment do not give the citizenry much room to change its mind, dissent and struggle for change.

The dramatic differences between Ibáñez and Ramadi were, at first, depressing to me. Here are two excellent scholars, one from Spain

and one from Egypt, both seeking a decent future for humanity during a very dark and dangerous time. And, yet, one speaks in the language of the Enlightenment, the other in the language of "Theo-democracy." One advances the trajectory of secular democracy, the other religious state power--in other words, precisely the ideological attitudes that the Enlightenment rebelled against.

And, yet, I now find some grounds for hope in this dialogue. Here is why. There is a struggle for decency and human dignity in every society and culture on earth. It is a struggle that has taken place in well-organized and highly-cultured industrial societies, like Germany, which unleashed primitive impulses and genocidal violence in the middle of the last century, but now stands strong as a protector of democracy, individual rights and the rule of law. It is a struggle that has defined Spain, which was also caught up in authoritarian and fascist ways of doing business in parts of the last century, but now leads the world in many human rights advances, including the rights of women and gay and lesbian citizens. It is a struggle that has defined the United States of America. We are a nation conceived not only in democratic insurgency against monarchy but also the enslavement and kidnapping of Africans and genocide against the Indians. Yet, we have been transformed and uplifted by the struggles for universal suffrage, civil rights, women's rights, labor rights, multiculturalism, civil liberty and minimums of social provision and justice. Democracy is a constant social project.

The struggles for Enlightenment values in our countries are struggles that have taken place both in the arenas of the state and of civil society, including our churches and religions. Indeed, it is hard to think of a major advance in the struggle for human rights in the United States that did not involve a political alliance between those who are champions of progressive secular change and those in the religious community seeking to bring the best of religious values to the project of social reform. In the United States, religious activism has played an important role in nearly all of our civilizing movements, including abolitionism, the modern civil rights movement and anti-war movements, even as these movements also drew on important secularist reform impulses as well.

In other words, I see a bridge of hope being built with this dialogue. For us to place world politics on a more hopeful and non-violent path, we need to integrate populations treated now as superfluous and

allocated "NO FUTURE", (p.15, 16) in Professor Ibáñez's terms. To draw all people into the mainstream of world history, we will have to call upon both the contemporary voices of the secular Enlightenment, like Professor Ibáñez', and the more humane, lucid and moderate voices within all of our religions, including and especially Islam. This is why I welcome Professor Ramadan's contribution. Indeed, we will have to find many more religious voices than secular ones since religion is dominant and pervasive today and, in many parts of the world, it is being mobilized to fanatical and violent agendas. Religion must be reformed and liberalized from within; nowhere is this project more urgent than in the Muslim world.

Thus, the dialogue taking place here itself provides hope for constructive collaboration. I do not mean to minimize the urgent importance of having contemporary democracy protect rights of individual conscience and honor the separation of church and state. But I am convinced that, over time, the truly humane traditions within each religion will come to recognize the explosive dangers associated with the merger of religious dogma and state power. From the Inquisition and the crusades to the witchcraft trials, from holy war to suicide bombing and the bloody sectarian violence of Iraq, the world has seen the horrors of state-imposed religious truth and conviction. And surely the faithful have suffered as much, if not more, than the non-believers from the never-ending cycles of religious wars and repression. The progress of civilization will come with a rising secular commitment to human rights, pluralism, and liberal democracy, and a corresponding rise in religious self-criticism, moderation and restraint. In this process, religion might recover its prophetic moral role and abandon its legalistic insistence upon correct dogma and obedience.

The way that we professors can assist in this process is, as Professor Ibáñez argues, through education, which is both the key to each individual's life chances and the best opportunity to break away politically from the resurgent medieval traditions of torture, holy war, slavery and human trafficking. Education itself must be conscious of what John Dewey called both the "formal" and "informal" curricula. The formal curriculum is the subject matter imparted in specific courses. The informal curriculum, at least of equal importance, is what students learn from professors and the way they behave in the classroom, university and larger world. Thus, we should see to it that our universities model the values of

toleration and equity that we champion for the broader society. We should make sure that foreign students—especially those from the Muslim world—are not marginalized or mistreated. We should work much harder than we ever have to convert the lessons of the classroom into active service in our communities. And we should remember always that the sciences and technology alone cannot redeem the world; we need arts, language, literature, theater, psychology and philosophy to awaken the conscience of the world. We need the humanities to rescue humanity.

I should remark, finally, that we will depend on university research and academic knowledge, as well as practical politics and experimentation, to teach us about the futility of violence and how to break the lethal cycles we are in. Ultimately, we will have to invent ways to control the increasingly obsolete and destructive forces associated with state violence, sexism and militarism, as well as sectarian violence and holy terror. In this century, the virtue of knowledge produced in universities will turn on its instrumental power to rescue the world from authoritarian relationships and violence as a way of life.

In this discussion, the very fact of the dialogue and the actual relationships of the participants are as important as the substance of the ideas communicated. I commend the good professors and urge them to keep cultivating the garden of humanity that lives on, with passion, in our hearts.

Jamie B. Raskin

7.8. Reply to the Three Main Articles: A Hope for Dialogue and Understanding

The preceding academic essays by Professors Raskin, Ramadan, and González were enriched by further comments and an ongoing dialogue among the authors. This exchange required a tremendous effort to understand each other's perspectives. The reward, as Hisham Ramadan expressed, is encapsulated in his statement: "Can a group of individuals initiate a global dialogue that diverts wars and saves lives? I think if good intentions are present, so much could be done."

Reply from Hisham Ramadan

To: Joaquín González Ibáñez and Jamie B. Raskin
Michigan, February 28, 2007

Dear Sirs,

When we discussed our joint project, I envisioned a dialogue—idea for idea, concept for concept—the true purpose of academia: an open and frank discussion that benefits the public to a great extent. I never imagined that the discussion would disintegrate in such a way: personal attacks, pitting Hisham (or the "Islamic view") against democracy and liberal ideology; Hisham the Egyptian versus Western Enlightenment. This is a common tactic to undermine an opposing perspective by labeling it as different from the "good" or the "average" within a community. I have been labeled as Egyptian to emphasize my "otherness," even though I am also American, as is Professor Raskin. The mention of my background seems intended to alienate readers from my writing. According to Professor Raskin, I am portrayed as an enemy to the glossy concept of liberal democracy.

Professor Raskin's commentary reflects what he and numerous other law professors and politicians advocate for: Islamic law reformers. These so-called reformers are expected to infuse Western values—however unfamiliar or alien they may be to the Muslim world—into Islam. Professor Raskin's call is clear when he states, "Religion must be reformed and liberalized from within; nowhere is this project more urgent than in the Muslim world." Indeed, many reformers have been accepted into American law schools, but the results have been disastrous. Their writings are largely rejected in the Muslim world, and they mislead the American public by insinuating that Islam is inherently flawed and in need of reform.

This has consequences. The American political machine often pressures Muslim states to amend laws related to Islamic jurisprudence. If the rulers of these states resist, they are labeled as anti-democratic, anti-human rights, or even as sponsors of terrorism. If they comply with such demands, they are viewed by their own people as mere puppets of America. This breeds resentment, and in some cases, individuals in these states commit heinous acts, wrongly believing they are defending Islam. It

is clear that the absence of a genuine, frank discussion—one that avoids claims of superiority—can trigger a chain reaction that ultimately leads to violence, human suffering, and loss of life on both sides, with each side believing they are justified.

I urge you, Professor Raskin, and every honest academic in the world, to engage in this frank dialogue so that we may succeed in steering the wheel of misery toward a brighter future.

Please note that I will not grant permission to publish my submitted portion of the joint project without the inclusion of the above response to Professor Raskin's commentary.

Peace,
Hisham

Reply from Jamie B. Raskin

To: Hisham Ramadan and Joaquín González Ibáñez
Washington DC, February 28, 2007

Dear Hisham and Joaquin,

Forgive me if I have caused offence. I have no problem at all with Hisham's statement running as an answer, and would be delighted to participate in a second (and third and fourth) round of communications if you think this would advance our dialogue, which is important to me.

The most important thing that I want to say in my defense, Hisham, is that you were identified to me as a professor from Egypt, which is why I (wrongly) assumed that you were Egyptian. I never said that you are the "enemy of the glossy concept of liberal democracy," nor do I believe such a thing. Meantime, I do believe that church and state must be separated and that democracy should be grounded in universal ideals of liberty and human dignity rather than particular religious texts or traditions, which are, by definition, sectarian, violently controversial, inscrutable and not amenable in public spaces to reasoned dialogue and discussion.

I do not champion some opaque abstraction like "Western values," and hoped that I had made it clear that there is a struggle for

decency and civil liberty in every culture and society, and began with the examples of Germany and our nation, the United States. I do not see the struggle for basic human rights and liberal democracy as a Western export—far from it (witness, for example our intervention on behalf of authoritarianism in Chile or our continuing alliance with the theocratic and repressive Saudi Arabia)—but as the very life instinct of human civilization everywhere.

Yours,
Jamie

Reply from Joaquín González Ibáñez

To: Hisham Ramadan and Jamie B. Raskin
Madrid, March 1, 2007

Dear Jamie and Hisham,

Thank you so much for your involvement and determination to articulate your ideas and opinions. I would like to share some comments regarding your responses and reflect on "our three articles."

1. When I proposed working together on the theme of "Radical Islamic Terrorism, education, and the perception from Western and Arab Countries," I did so knowing that the perspectives of an American professor of Constitutional Law, Jamie Raskin, an Egyptian academic and visiting professor in a U.S. institution, Hisham Ramadan, and a European from Spain, myself, would be complementary, different, and, in certain respects, opposed.

2. One of the fundamental principles of democracy and academia is honest, sincere, open, and, of course, respectful debate about ideas and reasoning. The dialogue I proposed was intended to foster exactly that: a constructive exchange of ideas.

3. The authentic meaning of dialogue—its etymology *διάλογος*—comes from the Greek, meaning "a crossing of reasonings, a crossing of ideas."

4. Throughout the three articles, I have not found any instance of disrespect, insensitivity, or an intention to "label" one another's arguments

as "evil" or "destructive." At the heart of this dialogue is the principle that enriches both democracy and academia: "We agree to disagree."

Hisham, please see our comments not as an attempt to impose the idea that "things should not be that way" or that your views are "illegitimate." Quite the opposite: as scholars, we develop reasoning based on our experiences, cultural backgrounds, knowledge, and critical, constructive approaches. When we express opinions or endorse certain reasoning, it is because, after careful analysis, we find them convincing.

This does not mean we are necessarily "right," but it does mean we are entitled to express our views and to be intellectually challenged. None of us holds a monopoly on truth.

In fact, I do not believe in absolutes in academia—apart from axioms in mathematics or physics—and this is, of course, a personal viewpoint.

I anticipated this kind of dialogue because, in these challenging times, peaceful exchanges such as ours enrich both academic and civic life. I wish I could have read discussions like this when I was a student—open, free, and honest discussions without the pressures of politics, intolerance, or other obstacles to respectful dialogue.

Hisham, if I had your authorization to publish the articles, I would include all replies, as omitting them would amount to censorship. Censorship has no place in democratic or academic life.

Jamie and Hisham, the realities of world affairs often leave little room for academic exchanges like this one. Yet cooperation and dialogue are essential—not only in the widespread observance of international norms but also in academia's role in fostering understanding and collaboration.

In our global and complex era, we need students and professors—citizens—who are educated to understand international problems (like the ones we discuss here) and act from a civic perspective with the goal of promoting peace. As Primo Levi wrote in *La chiave a stella* (*The Wrench*), "Bridges are the opposite of frontiers; bridges unify different realities, while frontiers can destroy even homogeneous ones." Bridges are what we need today.

Hisham, you represent a beacon of hope, helping us understand the perspectives of Islamic nations while serving as a bridge between different worlds. As Jamie aptly stated, "there is a struggle for decency and

civil liberty in every culture." Our three articles and the ensuing dialogue create a unique and invaluable intellectual effort to address one of the most pressing international issues of our time.

The culture of peace through education is precisely what we have pursued with our academic contributions. It does not matter whether I am a Jew, a Christian, a Muslim, or a Buddhist; what matters is that we engage in an academic environment of peace, where political and religious jealousies are set aside, and international unity is fostered.

The ultimate goal is to provide readers—students and professors alike—with critical perspectives and the capacity to understand the most important issues in international relations based on principles of tolerance and mutual understanding.

In these times of terrorism, threats to peace, and intolerance, the culture of peace can only be achieved through dialogue and the exchange of viewpoints among diverse realities. As Primo Levi observed, we must continuously build bridges among nations, cultures, and civilizations while avoiding new frontiers that divide us.

This is why I love being a scholar—not only teaching in the classroom but also encouraging people to think, question, and build bridges between different perspectives and scenarios.

Yours sincerely,

Joaquín

> It is useful to know about other nations and habits in order to judge our own in a healthy way, fashion, and not to imagine everything which differs from ours should be dismissed as ridiculous or illogical, as it is frequently done by those who have not seen anything.
>
> *Descartes*

Final Reply from Hisham Ramadan

To: Joaquín González Ibáñez and Jamie B. Raskin
Michigan, March 2, 2007

Dear Professors Raskin and González,

I can see good intentions from all of us, and this is a very positive step on the road to hope. Now, how would you like to proceed? We can publish the three original essays, my response, and any response Professor Raskin would like to include. In general, this would serve as the first round of our dialogue.

For the second phase, I suggest we discuss these important issues further, in writing, through a series of essays. We could also consider inviting other scholars to participate. Personally, I know some excellent Islamic law thinkers who would significantly enrich the discussion.

Joaquín may choose to include the first round of our dialogue in his book, providing readers with the background and context for our exchange.

Can a group of individuals initiate a global dialogue that diverts wars and saves lives? I believe that, if good intentions are present, so much can be achieved.

Sincerely,
Hisham Ramadan

CHAPTER 8

International Rule of Law and the CEDAW Convention in the Republic of Chad: A Practical Approach to the Arab Garden*

> *An international legal system which aims at effectively safeguarding human freedom in all aspects is no longer an abstraction. It is as real as man's interest in the guarantee and the preservation of his inalienable rights as a rational and moral being. International Law which has excelled in punctilious insistence on the respect owed by one sovereign state to another, henceforth acknowledges the sovereignty of man. For fundamental human rights are rights superior to the law of the sovereign State.*
>
> Henry J. Steiner and Philip Alston, 2000

8.1. Introduction

A victim's legacy of dignity can stand as a profound testament to the barbarism of a specific historical moment and place. The Republic of Chad, alongside one of its citizen-victims, Rose Lokissim, exemplifies the struggles of a nation emerging from colonial rule, navigating the turbulent process of state-building during the Cold War, and enduring the oppressive abuses of authoritarian rulers against its people.

The establishment of the Republic of Chad in 1960, grounded in the principle of self-determination, underscores the complexities of building a state founded on the rule of law while navigating the creation of international human rights standards. Similarly, Chad's membership in the Convention on the Elimination of All Forms of Discrimination

Against Women (CEDAW) provides a lens through which to examine the struggles faced by developing nations in integrating themselves into the framework of the international rule of law.

Chad's recent history is marked by serious human rights violations and institutional fragility, which hinder its capacity to guarantee a consistent framework of rights and institutional recognition. These limitations are especially pronounced in the realm of women's rights. The analysis of CEDAW obligations and Chad's progress—or lack thereof—offers critical insight into the broader challenges of international human rights implementation in fragile and transitional states.

8.2. Chad and the Right to Self-Determination

The aspiration of a political community to exercise its sovereign capacity to define its future and establish itself as a legal entity within the framework of the State has been a recurring ambition since the emergence of modernity. During the 20th century, certain communities successfully exercised their sovereign right to self-determination within the legal framework of international law. This framework drew inspiration from Trotsky's ideas on limiting and dismantling European empires and President Wilson's advocacy for the recognition and freedom of peoples.

In 1945, the United Nations Charter enshrined the principle of equality and self-determination in Article 1.2, marking its first formal recognition in international law:

> (The Purposes of the United Nations are) to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

As Antonio Cassese observes, the State can be likened to a Moloch or Leviathan that collaborates with other States primarily to ensure its survival and to implement mechanisms of protection against

disintegration.[507] The State operates as a legal fiction—a construct of reciprocal trust among legal subjects—supported by the principle of *pacta sunt servanda*, which underpins a voluntarist system of international law created by States to bind themselves to shared norms while simultaneously safeguarding their sovereignty.[508]

From an international perspective, this sovereignty marked a departure from the colonial rule that had dominated previous centuries. The establishment of self-determination as an international obligation affirmed the right of peoples to chart their own course, free from external domination, and became a cornerstone of modern international law.

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* This chapter was authored by Joaquín González Ibáñez as part of the research project "CEDAW 40 Years Later: The Liquid Rights of Women?", 2024 developed by the Department of International Law, Ecclesiastical Law, and Philosophy of Law at Complutense University of Madrid.

[507] Cassese, Antonio, *Pensando en Derechos Humanos: Reflexiones desde el Derecho Internacional,* Berg Institute, Madrid, 2020, p. 94.

[508] Professors Hathaway and Shapiro provide an inspiring narrative about the principle of *pacta sunt servanda* and why States uphold International Law:

> "Rather than viewing these violations of the legal order as reason to abandon it, we should instead see them as reason to redouble our support for it. After all, the health of a legal system is not measured solely by the moments when the law is broken. In 2014, for example, there were 1,165,383 violent crimes reported by law enforcement in the United States. But that does not mean that the laws against violent crimes in the United States are ineffectual. No rule is perfectly effective. What matters is not whether the law is sometimes broken. What matters is whether it is largely effective, even if imperfectly so. And what matters is the response when the law is broken. Violent crime has fallen significantly in the last two decades in the United States. And when there is a violent crime, the police investigate; if they find the offender, he or she is tried; and, if found guilty, sentenced.
>
> The test, then, of the international legal system is not whether we can point to instances where the law is violated. We should instead look to whether the law has largely, if not perfectly, worked. To that, the answer is clearly yes—interstate war has declined precipitously and conquests have almost completely disappeared. Moreover, we should look to what happens when the law is broken. In the international system, the legal order is policed by outcasting, not by war. As we have shown, Russia continues to labor under extensive sanctions cutting it off from valuable trade with Europe and the United States in direct response to its actions in Crimea and Ukraine. And one hundred nations voted in support of a General Assembly resolution calling on states, international organizations, and specialized agencies not to recognize any change in the status of Crimea".

See Hathaway, Oona A., and Scott Shapiro, *The Internationalists: And Their Plan to Outlaw War*, Penguin Books, 2017, p. 418.

Article 55 of the United Nations Charter,[509] along with UN General Assembly Resolution 1514 of December 14, 1960, on the Declaration on the Granting of Independence to Colonial Countries and Peoples and UN General Assembly Resolution 2625 of October 24, 1970, on the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, as well as the judgments and advisory opinions of the International Court of Justice, collectively constitute the programmatic principles of the right to self-determination in the international legal order.

As Urbina notes:

> This principle (self-determination) is established in the Charter as one of the purposes of the Organization, so that it has a programmatic character without being able to derive directly and immediately rights for the peoples or obligations for the Member States. However, its inclusion in this text makes it an authentic legal principle.[510]

In the case of Chad, which became part of the French colonial regime in 1905, the right to self-determination of peoples under the contemporary United Nations system was recognized by the international community and implemented by France, its former colonial power, in 1960.

On August 11, 1960, the Republic of Chad was formally granted independence by France. On the evening of August 10, 1960, André Malraux, then Minister of Cultural Affairs and representative of General

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509 *Charter of the United Nations*, Article 55:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: Higher standards of living, full employment, and conditions of economic and social progress and development; Solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

510 Urbina, Jorge Julio, "Las Naciones Unidas y su contribución al desarrollo del principio de autodeterminación," *Dereito*, vol. 10, no. 1, 2001, p. 203.

de Gaulle, delivered the letter of independence *en catimini* (discreetly) as a gesture of gratitude for Chad's support of Free France during World War II. In the words of the French intellectual, this moment symbolized "the end of fraternity and the beginning of history."[511]

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[511] Speech delivered by André Malraux, Minister of State for Cultural Affairs, on the occasion of Chad's declaration of independence. Fort-Lamy [N'Djamena], August 10, 1960, shortly before midnight.

> "Voici donc que ce jour de fraternité s'achève et que commence l'histoire ; bientôt va s'élever la salve solennelle qui salue l'indépendance des peuples comme elle salue la naissance des rois, et qui retentira dans la mémoire de vos enfants pendant toute la vie de votre nation. Nuit d'autant plus émouvante pour nous que votre destin et celui de la France Libre se sont accomplis côte à côte. C'est de cette ville qu'est partie l'épopée qui conduisait le général Leclerc à Strasbourg; c'est ici que le gouverneur Eboué a uni la plus noble fidélité à la France à la plus lucide confiance dans les qualités africaines, et posé les principes dont nous fêtons ensemble les suites grandioses. Puissent une rue du général Leclerc et une rue Félix Eboué se rejoindre chez vous, sur une place de l'Indépendance ! Que la France y soit ou non nommée, nous y serons présents ensemble par ce que nous avons de meilleur. La venue du Général de Gaulle a fait du Tchad un des lieux historiques de la France Libre; son retour, une libre République de la Communauté. Quelles qu'aient été dans le monde entier et pendant tant d'années les conditions de l'histoire, la France peut être fière au moins de notre dialogue d'aujourd'hui : pour vous, pour nous, pour le monde, cette ville est un rendez-vous de l'histoire et de la liberté. J'étais ici, vous vous en souvenez peut-être, pour l'anniversaire de votre République. Dans la joie et dans les danses, avec l'enthousiasme saccadé des tam-tams, [c'était] l'heure qui fait dire plus tard dans les temps de détresse : « Les nôtres auront un jour vécu selon leur cœur… » Selon votre cœur et selon le nôtre, car la France, qui a marqué toutes les routes des Croisades des tombes de ses chevaliers, toutes les routes de la Révolution des tombes des soldats de la République – la France, qui proclame aujourd'hui dix indépendances dont aucune n'a connu une goutte de sang, retrouvait dans votre joie une tradition séculaire. En ce temps où tant de ses amis prétendent ne juger la France renaissante que sur ce qu'elle n'a pas encore accompli, salut ! jeune République tchadienne dont la joie est la nôtre, dans les frémissements de la terre africaine ! L'espoir, Messieurs les membres du Gouvernement et de l'Assemblée, est un des mots les plus exaltants de l'histoire, parce que l'histoire est faite, entre autres choses, d'une succession de Terres promises. Nous allons vivre les heures de la promesse, et ni vous ni moi ne les oublierons… Mais pour que cette promesse soit tenue, pour qu'il demeure de l'indépendance autre chose que le souvenir d'un temps d'enthousiasme – car il existe maintes formes de dépendances, même dans l'indépendance –, il n'est qu'un recours : l'État. Lénine mourant retrouve les rois de Babylone, Cyrus « qui fut le premier à gouverner selon la justice », Richelieu, Saint-Just et Napoléon : « Il n'est pas une révolution, dit-il, qui n'ait renforcé le pouvoir de l'État ». Les nations ont

The Declaration of Independence was read at midnight on August 11, under the light of a lantern, by Chad's first president, François Tombalbaye. From that point onward, the national political life of Chad, proclaimed a republic two years earlier but still part of the French Community of Africa, formally began.

The first decade of Chad's independence was marked by an incipient but poorly managed political landscape. The country quickly descended into rebellions and internal conflicts. In 1965, the first Chadian rebellion erupted in Mangalmé. Between 1973 and 1975, President François Tombalbaye, a Christian from the south, initiated a controversial program aimed at returning to traditional socio-religious practices. However, these reforms sparked widespread unrest, culminating in his assassination in 1975.

The high-profile kidnapping of Francoise Claustre[512] by rebel guerrillas highlighted the rise of militia groups, particularly those led by Hissène Habré, who would later become president. This period, from 1974 to 1977, saw the guerrilla forces entrenched in the Tibesti mountains. France was compelled to negotiate with Libyan leader Muammar Gaddafi, securing his support for the subsequent conflict over the Aouzou Strip.

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inventé bien des formes d'États, depuis les théocraties de l'ancien Orient jusqu'aux États totalitaires ; mais l'histoire des États faibles a toujours été celle des nations condamnées. Et ne croyons pas que la force de l'État se confonde avec celle de l'économie : Rome était moins riche que Carthage, les Mongols étaient démunis lorsqu'ils conquirent l'Asie – et nous pourrions penser à quelques États contemporains. La France vous lègue une administration et s'il n'y a pas d'État sans administration, il ne suffit pas d'une administration pour faire un État. Car une administration n'est pas une gérance, mais l'instrument d'un destin national dont la charge vous incombe : votre destin, une part de celui de la nouvelle Afrique, et par là, peut-être une part du destin du monde… Vous voici donc, Messieurs, en face du problème millénaire que pose l'histoire à ceux qui reçoivent le « triste et fier honneur » de la faire. Quand vous aurez prononcé, Monsieur le Premier Ministre, les paroles qui vont précéder la proclamation de l'Indépendance de la République tchadienne, les grandes heures de l'espoir commenceront. Sachez alors, qu'à l'Indépendance qui va naître cette nuit dans la joie, je souhaite avec confiance, au plus profond du cœur, l'État qui assumera cet espoir fraternel."

Source: André Malraux, *Discours, allocutions, conférences de presse de M. André Malraux, ministre d'État chargé des Affaires culturelles, 1958–1969,* s.l.n.d. [Paris: Ministry of Cultural Affairs, 1970], n.p. [178 pages], text no. 17. Accessible at www.malraux.org.

[512] Claustre, Françoise, *Sahara et Sahel à l'âge du fer: Borkou, Tchad,* Société des Africanistes, "Mémoires de la Société des Africanistes", Paris, 1982.

Between 1975 and 1982, Chad experienced three successive regimes, each plagued by severe social, political, and military challenges. Following a military coup in April 1975, General Félix Malloum became Chad's second president. However, his tenure was marked by chaos, including widespread rebellion, war, and famine, forcing many citizens to survive on wild plants. In March 1979, Malloum was exiled, and the presidency passed to Lol Mahamat Choua, who led a transitional government under the banner of the *Gouvernement d'Union Nationale du Tchad* (GUNT) until September of that year. Goukouni Oueddei then assumed power from 1979 to 1982, though his regime remained fragile, failing to unite the country or hold any national celebrations. Throughout this period, Chad remained deeply divided between the north and the south, with rival governments perpetually at odds.

The 1980s were defined by the brutal dictatorship of President Hissène Habré. His regime left a grim legacy of an estimated 40,000 victims, resulting from military repression and other systematic atrocities. Despite these abuses, Habré's rule received support from France and the United States, who saw him as a bulwark against Libyan expansionism in the Sahel under Colonel Muammar Gaddafi. After his regime collapsed, Habré fled into exile, first seeking refuge in Cameroon and later in Senegal.

Habré was succeeded by Idriss Déby, whose three-decade rule began in 1990. Although Déby introduced a multiparty electoral system in 1996, his governance quickly devolved into authoritarianism. A 2013 Amnesty International report accused Déby of brutally suppressing dissent and reneging on promises to uphold human rights.[513] In 2020, during Chad's sixtieth independence anniversary celebrations, Déby cemented his grip on power by declaring himself Marshal Idriss Déby Itno, a title symbolizing supreme military leadership. The National Assembly's decision to confer this honor was widely criticized as a theatrical display reminiscent of other African autocrats, such as Marshal

[513] Amnesty International, "Chad: In the Name of Security? Arrests, Detentions and Restrictions on Freedom of Expression in Chad," October 24, 2013, Index Number: AFR 20/007/2013. Available at: https://www.amnesty.org/en/documents/AFR20/007/2013/en/.

Jean-Bédel Bokassa of the Central African Republic and Mobutu Sese Seko of Zaire (now the Democratic Republic of Congo).[514]

8.3. A Woman and a Fighter: Rose Lokissim as the Rosetta Stone of Human Rights Violations and the Absence of the Rule of Law in Chad

Rose Lokissim was born in 1955 in Chad, then under French colonial rule, and later became a patriot and defender of human rights. In 1986, she was executed by the Habré regime.[515]

On September 14, 1984, at the age of 31, Rose Lokissim was arrested in N'Djamena, the capital of Chad, on accusations of conspiring against the regime of Hissène Habré. For two years, she endured relentless torture and humiliation but never yielded. Despite her suffering, Rose secretly documented the horrors she witnessed. She wrote tirelessly on scraps of paper, cigarette wrappers, and the remains of soap boxes, recording the names of victims and perpetrators. Through great ingenuity and courage, she managed to smuggle these records abroad to ensure the world would know of the atrocities being committed.

Her civic and ethical legacy has been preserved, most notably through the 2015 documentary *Parler de Rose* by Isabel Coixet,[516] narrated

[514] Nodjita, Camille Manyenan, SJ, Fundación Ramón Grosso, "Chad Celebra 60 Años de Independencia," available at: https://www.fundacionramongrosso.com/post/independencia-chad.

[515] Naranjo, José, "El increíble coraje de Rose Lokissim," *El País*, April 20, 2015, available at: https://elpais.com/elpais/2015/04/20/africa_no_es_un_pais/1429509600_142950.html.

[516] The documentary *Parler de Rose* (2015) by Spanish director Isabel Coixet recounts Hissène Habré's terrifying repression and highlights Rose Lokissim's incredible courage, as narrated by French actress Juliette Binoche. Arrested for her opposition to Habré's regime, Rose was imprisoned in cell C of the Documentation and Security Directorate (DDS), sharing a cramped space with sixty men. Survivors remember her as a brave inmate who cared for the sick, boosted morale, and sent clandestine messages to inform relatives about those imprisoned. When Habré's political police discovered her actions, she was executed. Among the DDS files uncovered by Human Rights Watch in 2001 was the report of Rose's final interrogation, in which she stated, "Chad will thank her, and history will talk about her." Twenty-nine years later, her bravery is

by Juliette Binoche. The film provides a poignant account of Rose's bravery and the eventual criminal proceedings against Habré's regime in Senegal.

With the end of Habré's rule, it took 23 years before the impunity he enjoyed could be meaningfully addressed. Rose Lokissim and other victims became the focal point of Chad's reckoning with its history and the pursuit of justice, facilitated by international criminal proceedings. This effort was an extraordinary application of international law, leveraging the principle of complementarity and marking the first instance of the principle of universal jurisdiction being exercised by an international organization—the African Union.

The African Union established an *ad hoc* tribunal in Senegal, the Extraordinary African Chambers, to adjudicate international crimes committed during Habré's regime between 1982 and 1990. The trial, often referred to as "the African Pinochet trial,"[517] underscored the dual responsibility of addressing international crimes and enforcing universal jurisdiction.

The main legal proponent of this initiative was the jurist Reed Brody, whose book *To Catch a Dictator*[518] chronicles the litigation and communication strategies,[519] as well as the numerous legal hurdles

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remembered as Hissène Habré stood trial in Senegal beginning on July 20, 2015. Available at: https://www.imdb.com/title/tt4816890/plotsummary/?ref_=tt_ov_pl.

[517] Sansani, I., "The Pinochet Precedence in Africa: Prosecution of Hissène Habré," *Human Rights Brief* 8, 2001.

[518] Brody, Reed, *To Catch a Dictator*, Columbia University Press, New York, 2024.

[519] Among the strategies devised by Brody, the communication strategy played a crucial role. Referring to the aforementioned documentary on Rose Lokissim, Brody notes:

> "We fought this as hard as we could and enlisted the Swiss government to help make our case. At the last minute, the Senegalese government agreed to provide the necessary funding, and we all breathed a sigh of relief. The arrangement was to have three cameras in the courtroom, and their coverage would be broadcast on Chadian television and streamed live over the internet. Each session would then be posted to YouTube so people could watch or rewatch whenever they wanted to. The Chambers' outreach team would show trial excerpts in towns and villages all over Chad. My new life partner, the Spanish filmmaker Isabel Coixet, released a documentary about Rose Lokissim, the woman who told her DDS captors before her execution that 'history will talk of me.' The French actress Juliette Binoche narrated, giving the project star power. 'Rose's chosen mission, for the world to know the truth about Hissène Habré's prisons, is finally being achieved,' Binoche

encountered.[520] The tribunal in Senegal adhered to robust international standards of human rights and international criminal law, offering Habré's victims long-awaited access to justice.[521]

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says at the end of the film. 'And history is talking about Rose.' With this as a starting point, I found money for six small 'Rose Lokissim grants' for reporters to travel to Chad and Senegal and cover the case. Their stories wound up in the *New York Times*, *The Guardian*, and *El País*, among other publications. One grantee, Celeste Hicks, even wrote a book about the trial and the campaign that had led to it. The French-language press needed less prodding."

See Brody, *To Catch a Dictator*, p. 173.

[520] Brody recounts one of the many compelling accounts from the investigation:

"Martein Schotmans and Maria Koulouris, two young lawyers I had on the ground conducting interviews, had proposed a list of twenty-five key witnesses for Fransen to talk to. Some were victims and some were Habré insiders. Fransen wanted to see them all. The usually sluggish Chadian government provided the judge with a courtroom and a security detail, plus two four-wheel drives so he and his entourage could see Habré's old prisons for themselves. One of the leaders of the victims' association, Souleymane Abdoulaye Taher, showed the judge the sweltering underground cell in the Piscine where, as a boy of fourteen, he had been crowded in with seventy-two other Zaghawas, only eleven of whom survived. Clément Abaifouta took Fransen and his team to the Plain of the Dead, where he and Sabadet had dug graves for hundreds of their fellow prisoners. Ismael Hachim managed to turn Fransen's visit into an opportunity to confront the operative who had ordered his detention and torture. Touka Haliki, who had been Habré's director of intelligence during the persecution of the Zaghawa, denied any involvement in the brutal crackdown until Fransen called Hachim in for a face-to-face confrontation. Hachim produced DDS documents proving that Haliki had ordered his arrest and signed off on his interrogation."

See Brody, *To Catch a Dictator*, p. 66.

[521] Brody observed firsthand the complexities of navigating victim narratives tied to ethnic divisions and the challenges of prioritizing leadership within the case. He recounts:

"Back home, many victims accepted Souleymane's new stardom, but others resented it, like Ismael Hachim, the president of the victims' association. In a country deeply divided along ethnic and religious lines, the victims' association was one of the few voluntary groups with members throughout Chad. Habré had killed Southern Christians and northern Muslims alike. But the divide existed among the victims too. Souleymane and his friends had elected Ismael as their leader, a Zaghawa Muslim like Déby, calculating that their association would have more clout if the autocratic Déby saw a friendly face at the helm. But Hachim, before being arrested and badly tortured in 1989, had been the cabinet director for Habré's Zaghawa minister of interior, and many victims refused to be represented by him. Jacqueline did not trust Zaghawas in general, and the Chadian human

The process began with Habré's arrest in Senegal in 2015. The Extraordinary African Chambers, established through collaboration between the African Union and the Senegalese government,[522] were supported by contributions from various governments and organizations, including the USA, Belgium, the European Union, and the African Union, with a budget of 7.4 million euros. The investigation spanned 19 months, during which four rogatory commissions were launched, and the testimonies of 2,500 victims were collected. The tribunal found sufficient evidence to charge Habré with criminal responsibility for torture, war crimes, and crimes against humanity.

The trial commenced on July 20, 2015, in Senegal. During the proceedings, 69 victims, 23 witnesses, and 10 expert witnesses provided testimony. Ultimately, the Extraordinary African Chambers in Dakar sentenced Hissène Habré to life imprisonment for torture, crimes against humanity, and war crimes committed in Chad between 1982 and 1990.[523]

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rights organizations found it hard to collaborate with Hachim, whom they saw as close to President Déby, whom they despised. And given Hachim's business dealings with the new Zaghawa elite running Chad, many also suspected that he was merely looking out for himself. The French ambassador described Hachim to me as an 'affairiste,' a wheeler-dealer. Hachim was unapologetic, though, and I always found his honesty endearing. 'Reed, we [the Zaghawas] are in power for the first time. Who knows how long that will last. We have to make the most of it.' (Just as I could never quite decipher the impact of ethnicity, Hachim saw everything through the tribal lens. When he went to Belgium to meet Judge Fransen, he told me, speaking of our Flemish researcher Martien Schotsmans, 'OK, now I understand. Martien is part of the majority ethnic group here.')"

See Brody, *To Catch a Dictator*, "Building the Case," p. 78.

[522] See *"Accord entre le Gouvernement de la République du Sénégal et l'Union africaine sur la création de chambres africaines extraordinaires au sein des juridictions sénégalaises,"* signé à Dakar le 22 août 2012.

Article Premier de l'Accord:

"Création : Le Gouvernement sénégalais et la Commission de l'Union africaine conviennent de créer au sein des juridictions sénégalaises les Chambres africaines extraordinaires chargées de poursuivre le ou les principaux responsables des crimes et violations graves du droit international, de la coutume internationale et des conventions internationales ratifiées par le Tchad et le Sénégal, commis sur le territoire tchadien du 7 juin 1982 au 1er décembre 1990."

Available at: http://www.chambresafricaines.org/pdf/Accord%20UA-Senegal%20Chambres%20africaines%20extra%20Aout%202012.pdf.

[523] Chambre africaine extraordinaire d'assises, Dakar, May 30, 2016, *Ministère public c. Hissein Habré.* Available at:

8.4. International Human Rights Law in Chad After the Habré Regime

In 2000, Chad was included in the Human Development Index (HDI) for the first time by the United Nations Development Program (UNDP), and the data was alarming: life expectancy at birth was 47.4 years; expected years of schooling, 4.9 years; mean years of schooling, 1.3 years; and gross national income per capita, $893 (PPP). By 2021, the latest HDI data for Chad showed modest progress: life expectancy at birth had increased to 52.5 years; expected years of schooling to 8.2 years; mean years of schooling to 2.3 years; and gross national income per capita to $1,405 (PPP). Despite these improvements, Chad remains among the poorest countries on Earth, alongside the Central African Republic, Somalia, South Sudan, Niger, Mali, Yemen, and Burkina Faso.[524]

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https://assets.budh.nl/tijdschriften/aj/hissein_habre_01.pdf. Also, the appeal judgment by the *Chambre africaine extraordinaire d'assises d'appel,* Dakar, April 27, 2017, *Situation en République du Chad Le Procureur Général c. Hissein Habré.* Available at: http://www.chambresafricaines.org/pdf/Arrêt_intégral.pdf.

[524] In the 2018 *Report of the Working Group on the Issue of Discrimination Against Women in Law and in Practice on Its Mission to Chad,* presented at the United Nations Human Rights Council, the underdevelopment situation in Chad was described in the context section:

> "4. Chad, which still bears the marks of decades of internal conflict, is currently facing a situation of both domestic and regional instability caused by the threat of terrorism, the humanitarian crisis in the Lake Chad area, the conflicts raging in a number of neighbouring countries and inflows of refugees numbering in the hundreds of thousands. The country's already poor social and economic conditions have been exacerbated in recent years by several sharp recessions.
>
> 5. Human development index values for Chad, which was ranked 186th out of 188 countries in 2016, are among the lowest in the world. The country's low literacy rate (50.1 per cent) displays a very clear gender inequality (22 per cent of women are literate, as opposed to 54 per cent of men); and access to health care and to water and sanitation is limited (only 56.1 per cent of the population has access to an improved water source and only 8.2 per cent to improved sanitation facilities). Climate change — in the form of rising temperatures and ever scarcer rainfall — has contributed to increased food insecurity, thus further worsening the situation.
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> 6. According to a number of international indicators, Chad ranks near the bottom in terms of gender equality as well. For example, it is in 157th place out of 159 countries on the gender inequality index of the United Nations Development Programme and 141st place out of 144 in the World Economic Forum's global gender gap index. Although there are differences from one region of the country to

Chad has ratified or signed some of the most significant human rights treaties, including:

> ICERD: International Convention on the Elimination of All Forms of Racial Discrimination (1977)
> ICESCR: International Covenant on Economic, Social and Cultural Rights (1995)
> ICCPR: International Covenant on Civil and Political Rights (1995)
> CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women (1995)
> CAT: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1995)
> CRC: Convention on the Rights of the Child (1990)
> OP-CRC-AC: Optional Protocol to the CRC on the involvement of children in armed conflict (2002)
> OP-CRC-SC: Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography (2002)
> ICPPED: International Convention for the Protection of All Persons from Enforced Disappearance (signed only, 2007).[525]

As a tribute to Rose Lokissim and the rights she never lived to enjoy, this section will examine the international framework that Chad, as a signatory and member of CEDAW (the Convention on the Elimination

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another, all Chadian women experience severe discrimination in every facet of their lives.

7. Despite the progress posted in recent years, numerous systemic constraints, such as corruption, legislative gaps and the way public officials approach societal and cultural challenges, continue to raise barriers preventing the achievement of gender equality. Chad cannot hope to improve its socioeconomic situation and achieve the Sustainable Development Goals by 2030 as long as inequalities between women and men persist in the country."

See, *Protocol Committee Report: Chad,* May 8, 2018, *Human Rights Council, Thirty-Eighth Session, June 18–July 6, 2018, Agenda Item 3, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development.* Available at: https://documents.un.org/doc/undoc/gen/g18/127/41/pdf/g1812741.pdf.

[525] Available at: https://upr-info.org/sites/default/files/documents/2018-11/a_hrc_wg.6_31_tcd_2_chad_annex.pdf.

of All Forms of Discrimination Against Women) since 1995, must integrate into its legal system. Additionally, Chad ratified the CEDAW Protocol in 2012, which allows for oversight by the CEDAW Committee.

8.5. Development and CEDAW Obligations in Chad

A reading of the CEDAW Convention today, at the end of the first quarter of the twenty-first century, evokes both astonishment and admiration for the determination of states during the negotiation and acceptance phase of the Convention's text. The use of terms, categories, and objectives that appear as contemporary as today's debates were, in fact, formulated forty-four years ago.

The Charter of the United Nations solemnly declares in its preamble the responsibility 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." Moreover, the Universal Declaration of Human Rights, proclaimed by the General Assembly, begins with Article 1: "All human beings are born free and equal in dignity and rights and, endowed as they are with reason and conscience, should act towards one another in a spirit of brotherhood."

The Charter of the United Nations prominently reaffirms the equal rights of men and women. Article 1 stipulates that one of the purposes of the United Nations is to promote respect for human rights and fundamental freedoms "without distinction as to race, sex, language or religion."[526] The prohibition of discrimination on the basis of sex is reiterated in Article 13(b), which mandates the General Assembly to "promote international cooperation in economic, social, cultural, educational and health matters and to assist in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." Article 55(c) further emphasizes the organization's responsibility to "promote universal respect for, and observance of,

[526] See, United Nations, *Women's Rights are Human Rights,* New York and Geneva, 2014, p. 3. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR-PUB-14-2_SP.pdf.

human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Since then, the United Nations has helped to create a framework of internationally agreed-upon strategies, norms, programs, and goals aimed at improving the status and rights of women worldwide. As UN Secretary-General Kofi Annan once stated, CEDAW represents a milestone in the global fight against discrimination, reflecting the principle of universal and indivisible rights shared by all nations, transcending cultural divides, and applying equally to both sexes: "CEDAW is a milestone and reflects the principle of universal and indivisible rights shared by all nations, alien to any culture and common to both sexes."[527]

Despite this progress, a reading of CEDAW may give the impression that there is a normative redundancy or tautology in international human rights law regarding discrimination against women. This complementary framework or "mesh" of instruments prohibits discrimination while explicitly promoting and recognizing women's rights. However, as Professor Macarena Sáez notes, international human rights law has historically exhibited "an ambiguous relationship with respect to women." While foundational instruments, such as the Charter of the United Nations, the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social and Cultural Rights, should have sufficed to protect both women and men from human rights violations, a tendency toward parallel development emerged. This led to the creation of instruments specifically addressing women's rights.

At its first session in 1945, the United Nations Economic and Social Council (ECOSOC) established a sub-commission on the status of women. This sub-commission was tasked with preparing reports, proposals, and recommendations on the status of women to the UN Commission on Human Rights. By 1947, ECOSOC elevated the sub-

527 *Ibid.*, "This 'Women's Bill of Rights' stands as a milestone. It reflects the principle of universal and indivisible rights shared by all nations, foreign to no culture and common to both genders." Mr. Kofi Annan, Secretary-General of the United Nations, December 10, 1999, p. 10.

commission to the status of a full Commission on the Status of Women, reporting directly to the Council.[528]

The Commission on the Status of Women, established in Lake Success, New York, in February 1947,[529] initially focused on promoting international treaties aimed at eradicating or amending laws that favored discrimination against women. Between its creation and the early 1960s, the Commission facilitated the development of three key instruments:

1. The Convention on the Political Rights of Women (March 31, 1952),[530]
2. The Convention on the Nationality of Married Women (January 29, 1957),[531] and
3. The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages (November 7, 1962).[532]

[528] The Commission's objective, to date, is to promote the incorporation of the principle of equal rights between men and women. Since 1987, the Commission has had a broader mandate, covering the promotion of the objectives of equality, development, and peace and follow-up on the implementation of the measures set out in the strategy document for the advancement of women agreed at the 1985 Nairobi Conference. It is also responsible for reviewing and evaluating the advancement of women at the national, regional, and sectoral levels. Since 1995, the Commission has been part of the tripartite intergovernmental mechanism with the General Assembly and ECOSOC. See Sáez, M., «Breve ana lisis de las tendencias feministas contempora neas y su relacio n con el derecho» en *Protección Internacional de Derechos Humanos y Estado de Derecho,* AAVV, director y editor González Ibáñez, J., Ediciones Jurídicas Gustavo Ibáñez, Bogotá, 2009, p. 789.

[529] See *A Short History of the Commission on the Status of Women,* Intergovernmental Support Division, UN Women, New York, January 2019. Available at: https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2019/A-short-history-of-the-CSW-en.pdf.

[530] *Convention on the Political Rights of Women,* adopted on March 31, 1952. Resolution 640 (VII), adopted by the General Assembly of the United Nations on December 20, 1952. Entry into force: July 7, 1954.

[531] *Convention on the Nationality of Married Women,* adopted on January 29, 1957. Resolution 1040 (XI), adopted by the General Assembly on January 29, 1957. Entry into force: August 11, 1958.

[532] *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,* adopted on November 7, 1962. Resolution 1763 A (XVII), adopted by the General Assembly on November 7, 1962. Entry into force: December 9, 1964.

These efforts laid the foundation for the broader adoption of CEDAW in 1979, which remains a cornerstone of the international legal framework addressing gender discrimination and promoting substantive equality for women.

8.5.1. The Principle of Non-Discrimination in CEDAW

The principle of non-discrimination is intrinsically linked to the principle of equality, as articulated in Article 1 of the Universal Declaration of Human Rights: "All human beings are born free and equal in dignity and rights." Together, these principles form a cornerstone of international human rights law, providing an interpretative framework for understanding and applying its provisions.[533]

Non-discrimination is not only an essential feature of CEDAW but also a cross-cutting principle in international human rights law.[534] It is explicitly enshrined in all major human rights treaties and applies universally to everyone in relation to all human rights and freedoms. This principle prohibits discrimination based on a non-exhaustive list of categories, including sex, race, and color.

The 1993 Vienna Declaration underscores the fundamental importance of non-discrimination. Point 15 of the Declaration states:

> 15. Respect for human rights and for fundamental freedoms without distinction of any kind is a fundamental rule of international human rights law. The speedy and comprehensive elimination of all forms of racism and racial discrimination, xenophobia and related intolerance is a priority task for the international community. Governments should take effective measures to prevent

[533] See Salvioli, Fabián, *Introducción a los derechos humanos. Concepto, fundamentos, características, obligaciones del Estado y criterios de interpretación jurídica*, Instituto Interamericano de Responsabilidad Social y Derechos Humanos (IIRESODH), San José de Costa Rica, 2019, p. 183.

[534] Salvioli, Fabián, and Joaquín González Ibáñez, "Derechos Humanos, terrorismo y políticas públicas," in *Terrorismo, cuerpos de seguridad y derechos humanos*, Dirección Nacional de Escuelas de Policía de Colombia and Berg Institute, Bogotá, 2012, p. 44.

> and combat them. Groups, institutions, intergovernmental and non-governmental organizations and individuals are urged to intensify their efforts in cooperating and coordinating their activities against these evils.

Furthermore, the United Nations has developed mechanisms to evaluate the implementation of public policies within the framework of development cooperation and obligations arising from international conventions. Through a Human Rights-Based Approach (HRBA), the UN has established systems to assess and promote compliance with CEDAW obligations, particularly in advancing non-discrimination and equality for women.[535] This evaluative framework ensures that development policies are aligned with international human rights standards and that governments are held accountable for their commitments under CEDAW.

According to the Human Rights-Based Approach (HRBA), treaty standards such as those outlined in CEDAW provide detailed guidance on the measures required to realize women's human rights. Implementing HRBA effectively involves the deliberate and informed use of this guidance. Programming must be grounded in a thorough understanding of the specific human rights standards that apply and the corresponding measures necessary to promote and protect these rights.

This women's rights framework is rooted in the provisions of human rights treaties, particularly CEDAW, as well as the General Recommendations issued by its Committee. It is further applied to specific country contexts, as reflected in the Committee's concluding observations. While the frequent reiteration of international treaties and resolutions by various institutions and organizations may seem like a normative tautology, this approach is deliberately designed within a multi-conventional system. Its purpose is to enhance the protection of women's

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[535] United Nations Fund for Women, *The CEDAW and the Human Rights-Based Approach to Programming,* authored by Lee Waldorf, with research by Christine Arab and Menaka Guruswamy, London, 2007. Available at: http://cedawsouthasia.org/wp-content/uploads/2017/07/CEDAW-and-the-Human-Rights-Based-Approach-to-Programming.pdf. See also Cunego, Aram, *La evaluación de políticas de desarrollo a través de una perspectiva de derechos humanos,* Berg Institute, Madrid, 2015, p. 122.

rights by fostering systematicity, comprehensiveness, and improved mechanisms for supervision and compliance.

8.5.2. Core Obligations of CEDAW

According to the Committee's interpretation, CEDAW implicitly prohibits discrimination against women based on gender. While "sex" refers to the biological differences between men and women, "gender" encompasses the socially constructed identities, roles, and attributes assigned to them, as well as the cultural and societal meanings associated with these differences. This social and political construct establishes hierarchical relationships that often lead to an unequal distribution of power and rights in favor of men. Recognizing that the concept of "sex" is influenced by human and temporal factors, CEDAW addresses systemic imbalances rooted in the societal roles assigned to men and women. These roles are shaped by political, economic, cultural, social, religious, ideological, and environmental factors, which communities and societies can reshape over time.[536]

General Recommendation 39 of the CEDAW Committee on the Rights of Indigenous Women and Girls articulates CEDAW's goals through the Principle of Substantive Equality. This principle extends beyond formal equality to encompass *de facto* or real equality, ensuring not only equal opportunities but also equal access and an enabling environment for achieving equitable outcomes. Substantive equality requires examining the impact of national policies implementing CEDAW obligations and goes beyond mere legal guarantees of equal treatment.[537]

In General Recommendation No. 13, the Committee underscores the importance of applying the most effective conventions to achieve CEDAW's objectives:

> The Committee recalls article 23 of the Convention, in which it is indicated that any provisions in national legislation or international treaties other than the

[536] *Ibid.*, no. 5.

[537] CEDAW Committee, C/GC/39: General Recommendation No. 39, 2022 on the rights of Indigenous women and girls, October 26, 2022, points 3, 15, 21, 44, 46, 48.

> Convention that are more conducive to the achievement of equality between women and men will prevail over the obligations in the Convention and, accordingly, the recommendations in the present general recommendation.[538]

The cornerstone of this framework is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the United Nations General Assembly in 1979. Often referred to as the international "Bill of Rights for Women," CEDAW defines discrimination against women and establishes substantive legal obligations for States Parties to eradicate such discrimination, as will be examined in the following section.[539]

A parallel development emerged to identify and combat the violations of rights historically suffered by women specifically due to their gender. This initiative also sought to raise global awareness of equality issues. A key strategy involved crafting a more inclusive and representative language for women's rights in international conventions. As a result, CEDAW stands out as the most significant instrument in the pursuit of equality and the elimination of all forms of discrimination. The influence of feminist thought is evident in the language of these instruments. While treaties from the 1950s primarily focused on achieving equality between men and women—especially in integrating women into "public life"—CEDAW goes further. It incorporates terms like "inferiority" and "superiority," employing more direct and assertive language than its predecessors.[540]

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538 *Ibid.*, General Recommendation No. 35, para. 13.

539 *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: Handbook for Parliamentarians*, New York, 2003, p. 3. Available at: http://archive.ipu.org/pdf/publications/cedaw_en.pdf.

540 Article 5 of the CEDAW stipulates that States Parties shall take all appropriate measures:

> (a) To modify the social and cultural patterns of conduct of men and women, with a view to eliminating prejudices and customary or other practices based on the idea of the inferiority or superiority of either sex or on stereotyped roles for men and women;
>
> (b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and

This approach implies that States, their agencies, and civil society entities must seek to understand the *ratio legis* of CEDAW. This involves employing various interpretative methods, such as systematic, logical, and historical analyses, particularly within the normative framework of the United Nations system that culminated in the Convention's adoption in 1979.[541]

CEDAW aims not only to enforce the fundamental principle of human equality but also to promote the values of autonomy, freedom, and diversity. The human rights principles embodied in CEDAW rest on the presumption that all human beings—irrespective of time and place of birth, national or ethnic origin, race, language, class, caste, gender, sexual orientation, disability, or any other constructed classification—are inherently rational and responsible individuals, capable of aspiring to autonomy and self-determination.[542]

8.5.3. Substantive Rights

CEDAW outlines a core set of obligations in Articles 7 to 16, which must be interpreted alongside foundational provisions in Articles 1, 2, and 5, as explored in the preceding chapter. Article 1 defines discrimination on the basis of gender, and the Committee elaborates on this by stating:

> This definition states that any distinction, exclusion, or restriction which has the purpose or effect of impairing or nullifying the recognition, enjoyment, or exercise by women of human rights and fundamental freedoms

women in the upbringing and development of their children, with the best interests of the children being the paramount consideration in all cases.

[541] Ferrari, Majela Y., *REDEA*, "The Language of Law: Challenges and Opportunities for Legal Interpretation" (*El lenguaje del Derecho, retos y posibilidades para la interpretación jurídica*), *Derechos en Acción*, Year 5, no. 17, Spring 2020, p. 776.

[542] Van Leeuwen, F., "Women's Rights Are Human Rights: The Practice of the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights," in *Women's Human Rights: CEDAW in International, Regional, and National Law*, edited by Anne Hellum and Henriette Sinding Aasen, Cambridge University Press, Cambridge, 2013, p. 242.

> constitutes discrimination, even if it is unintentional. This would mean that identical or neutral treatment of women and men could constitute discrimination against women if such treatment would have the consequence or effect of denying women the exercise of a right because the pre-existing gender-based disadvantages and inequalities faced by women are not recognized.[543]

This definition underscores that discrimination need not be deliberate to be harmful. Neutral or identical treatment may still disadvantage women if it fails to address pre-existing inequalities. The provisions within CEDAW aim to combat these disparities and ensure the full recognition and enjoyment of women's human rights.

The purpose of CEDAW is to eliminate all forms of discrimination against women based on sex and to ensure women's equal recognition and enjoyment of all human rights and fundamental freedoms across political, economic, social, cultural, civil, domestic, and other spheres. This is to be achieved irrespective of marital status and on equal terms with men.[544]

CEDAW outlines a set of human rights specifically designed to prevent discrimination against women.[545] While many of these rights were recognized in earlier international treaties, CEDAW built upon them, responding to the need for updated interpretations of the geopolitical and legal framework that emerged after the fall of the Berlin Wall, as emphasized in the 1993 United Nations Vienna Declaration on Human Rights.

General Recommendation No. 28 highlights that CEDAW is part of an interconnected framework of international instruments aimed at eradicating discrimination. These include foundational documents such as the UN Charter, the Universal Declaration of Human Rights, the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, as well as other universal and regional treaties, the Cairo Program

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543 *Ibid.*, point no. 5, Comité CEDAW, *Recomendación General 28*.
544 *Ibid.*, point no. 4.
545 United Nations, *Women's Rights are Human Rights*, New York and Geneva, 2014, p. 3. Available at: https://www.ohchr.org/sites/default/files/Documents/Publications/HR-PUB-14-2_SP.pdf.

of Action, and the Beijing Declaration and Platform for Action on Women's Rights.

In Articles 7 to 16, CEDAW promotes the recognition and realization of human rights specifically to combat discrimination against women.

a) Participation in Public Life, Membership in the Political Community, and the Right to a Nationality

The promotion of opportunities for women to participate in public and political life is a key obligation outlined in Article 7 of CEDAW. This provision ensures women's right to vote in elections and referendums, take part in governmental actions, hold public office, and establish or participate in non-governmental associations.[546]

Article 8 of CEDAW extends these protections to include women's participation in international public life, prohibiting discrimination in their representation by government bodies on the international stage.[547]

Article 9 obliges Member States to address one of the most historically neglected human rights: the right to hold a nationality. This includes eliminating discrimination in the acquisition, change, or retention of nationality, as well as ensuring non-discrimination in the nationality of children.[548]

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[546] CEDAW, art. 7: States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

[547] CEDAW, art. 8: States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations.

[548] CEDAW, Article 9: 1. States Parties shall grant women equal rights with men to acquire, change, or retain their nationality. They shall ensure, in particular, that neither marriage to an alien nor a change of nationality by the husband during marriage shall automatically change the nationality of the wife, render her stateless, or force upon her

b) Access to Education, Employment, Health, Economic and Social Benefits, and the Vulnerability and Exclusion of Women in Rural Areas

The prohibition of discrimination builds on the principles established in the 1960 Convention against Discrimination in Education. Article 10 of CEDAW mandates that States Parties take a broad range of actions to ensure equal access to education and training at all levels, from early childhood to higher technical, university, and vocational education. These measures include ensuring equal opportunities, scholarships, assistance, supplementary and special education, fee payment, access to sports and physical education, and information essential for family welfare.[549]

Equally detailed and ambitious, Article 11.1 of CEDAW calls on States to adopt appropriate measures to eliminate discrimination in the field of employment. It emphasizes the achievement of a labor framework with equal opportunities, without restrictions on access to employment,

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the nationality of the husband. 2. States Parties shall grant women equal rights with men with respect to the nationality of their children.

[549] CEDAW, Article 10: States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure equal rights with men in the field of education and, in particular, to ensure, on a basis of equality of men and women: (a) The same conditions for career and vocational guidance, for access to studies, and for the achievement of diplomas in educational establishments of all categories, in both rural and urban areas. This equality shall be ensured in pre-school, general, technical, professional, and higher technical education, as well as in all types of vocational training; (b) Access to the same curricula, the same examinations, teaching staff with qualifications of the same standard, and school premises and equipment of the same quality; (c) The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education that will help to achieve this aim and, in particular, by revising textbooks and school programmes and adapting teaching methods; (d) The same opportunities to benefit from scholarships and other study grants; (e) The same opportunities for access to programmes of continuing education, including adult and functional literacy programmes, particularly those aimed at reducing, at the earliest possible time, any gap in education existing between men and women; (f) The reduction of female student drop-out rates and the organization of programmes for girls and women who have left school prematurely; (g) The same opportunities to participate actively in sports and physical education; (h) Access to specific educational information to help ensure the health and well-being of families, including information and advice on family planning.

equal pay, and benefits related to health, unemployment, old age, or disability, as well as paid vacations and workplace health protections.[550] Article 11.2 highlights the need for special protection[551] to prevent discrimination on the grounds of marriage or maternity. This includes measures to avoid dismissal or sanctions due to pregnancy, maternity, or marital status, the obligation to introduce paid maternity leave, and the promotion of social assistance services. Article 11.3 further urges States to review and update domestic legislation in light of technological and scientific developments.[552]

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[550] CEDAW, Article 11.1: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on the basis of equality between men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings; (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment; (c) The right to free choice of profession and employment, the right to promotion, job security, and all benefits and conditions of service, as well as the right to receive vocational training and retraining, including apprenticeships, advanced vocational training, and recurrent training; (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work; (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity, old age, and other incapacity to work, as well as the right to paid leave; (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

[551] CEDAW, Article 11.2: In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, *States Parties* shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority, or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

[552] CEDAW, Article 11.3: Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed, or extended as necessary.

The Committee, in its General Recommendation No. 19, extended the understanding of workplace violence to include sexual harassment and its effects on women's professional and occupational development.[553]

Article 12 of CEDAW[554] highlights the responsibility of States Parties to provide general medical care and assistance, including family planning, women's health, and nutrition before and after childbirth and during breastfeeding. The Committee also contextualized harmful practices affecting women's health in General Recommendation No. 19, explicitly addressing cultural or traditional practices such as son preference and the prohibition of female circumcision or genital mutilation.[555]

At the time CEDAW was adopted in 1979, 61% of the world's population lived in rural areas. By 2022, according to the World Bank, this

[553] CEDAW Committee, "General Recommendation No. 19 on violence against women," United Nations Document CEDAW A/47/38, January 30, 1992, paras. 17 and 18: Art. 11. 17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace. 18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruitment or promotion, or when it creates a hostile working environment.

[554] CEDAW, Article 12.1: 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement, and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

[555] *Ibid.*, General Recommendation No. 19, paras. 19 and 20: Article 12. 19. States Parties are required by article 12 to take measures to ensure equal access to health care. Violence against women puts their health and lives at risk. 20. In some States, there are traditional practices perpetuated by culture and tradition that are harmful to the health of women and children. These practices include dietary restrictions for pregnant women, preference for male children, and female circumcision or genital mutilation.

figure had decreased to 43%.[556] Article 14 of CEDAW[557] urges States Parties to address the unique challenges faced by women in rural areas, where non-monetary labor is particularly significant, and family survival often depends on their work. It calls for measures enabling women's participation in rural development policies, medical services, social security programs, special education, the creation of associations and cooperatives, access to credit, and essential infrastructure such as housing, health services, energy, water, transportation, and communications.[558]

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[556] World Bank, Data, Rural Population: The information is also broken down by country, and attention should be paid to the difference between developed and developing countries (e.g., Afghanistan had 73% rural population in 2022, while France had 18%).
Available at: https://datos.bancomundial.org/indicator/SP.RUR.TOTL.ZS

[557] CEDAW, Article 14: 1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas. 2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
(a) To participate in the elaboration and implementation of development planning at all levels;
(b) To have access to adequate health care facilities, including information, counselling, and services in family planning;
(c) To benefit directly from social security programmes;
(d) To obtain all types of training and education, formal and non-formal, including that relating to functional literacy, as well as, inter alia, the benefit of all community and extension services, in order to increase their technical proficiency;
(e) To organize self-help groups and co-operatives in order to obtain equal access to economic opportunities through employment or self-employment;
(f) To participate in all community activities;
(g) To have access to agricultural credit and loans, marketing facilities, appropriate technology, and equal treatment in land and agrarian reform as well as in land resettlement schemes;
(h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport, and communications.

[558] CEDAW, Article 13: States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to family benefits; (b) The right to bank loans, mortgages and other forms of

The gradual shift from rural to urban areas has also heightened the risk of violence and exploitation faced by women of rural origin. The Committee, in its General Recommendation No. 19, highlighted the increased vulnerability of these women as they seek work in urban settings.[559]

c) Rights Linked to the Principle of Equality Before the Law, Capacity to Act in the Civil and Commercial Sphere, and Non-Discrimination in Marriage

The final component of substantive rights under CEDAW addresses the legal capacity of women and the potential impairments or discriminatory practices embedded in domestic legal systems. Article 15 of CEDAW obligates States Parties to ensure equal civil capacity for women, granting them the same legal rights to act in civil, commercial, and mercantile life, as well as equal access to justice. It also affirms women's rights to move and reside freely within the signatory State. Furthermore, Article 15 mandates the invalidation of any laws or provisions within domestic legal systems that restrict women's legal capacity.[560]

Article 16 of CEDAW[561] prohibits discrimination in legal matters, ensuring equal rights for men and women in matters related to marriage,

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financial credit; (c) The right to participate in recreational activities, sports and all aspects of cultural life.

[559] *Ibid.*, General Recommendation No. 19, para. 21. Article 14: 21. Rural women are at risk of gender-based violence because of traditional attitudes regarding the subordinate role of women that persist in many rural communities. Girls from rural communities are at special risk of violence and sexual exploitation when they leave the rural community to seek employment in towns.

[560] CEDAW, Article 15: 1. States Parties shall accord to women equality with men before the law. 2. States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals. 3. States Parties agree that all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void. 4. States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.

[561] CEDAW, Article 16:

family relations, and their dissolution. In General Recommendation No. 19, the Committee underscored the harmful effects of certain family planning practices on women's health and rights. It also brought attention to the serious issue of domestic violence, highlighting how economic dependence and coercion within families often create dynamics of subordination and vulnerability for women.[562]

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1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(a) The same right to enter into marriage;

(b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

(c) The same rights and responsibilities during marriage and at its dissolution;

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

(g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

[562] *Ibid.*, General Recommendation No. 19, paras. 22 and 23. Article 16 (and Article 5): 22. Compulsory sterilization or abortion adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children. 23. Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships, women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality.

8.5.4. CEDAW and the "Mesh" of Normative and Institutional Sources and Remedies

The effective implementation of CEDAW obligations by States Parties requires their careful incorporation into domestic legal systems. This process involves interpreting CEDAW and ensuring compliance through the CEDAW Committee, which employs a dynamic approach to analyzing the convention. The Committee's General Recommendations, along with its review of country reports, play a crucial role in guiding States Parties toward fulfilling their obligations. Achieving the convention's objectives necessitates a cohesive framework of normative measures and reliable information.

Beyond the network of specific treaties aimed at protecting women's rights, the 1993 United Nations Vienna Declaration and Program of Action (VDHR) represents a significant reinterpretation of the human rights framework following the fall of the Berlin Wall.[563] Adopted by 171 States at the World Conference on Human Rights, the VDHR highlighted critiques of the UN human rights system and served as a foundational document for advancing gender equality.

The interpretation of CEDAW's substantive obligations must consider the VDHR, alongside the 1995 Beijing Declaration and Platform for Action, which emerged from the Fourth World Conference on Women. The Vienna Declaration explicitly emphasizes the need to combat discrimination and violence against women. Notably, it led to the appointment of the first rapporteur on violence against women, marking a milestone in advancing women's rights.[564]

The Declaration's preamble acknowledges the global prevalence of discrimination and violence against women, stating that the General Assembly is: "Deeply concerned by various forms of discrimination and violence, to which women continue to be exposed all over the world."

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563 Holtmaat, R., "The CEDAW: A Holistic Approach to Women's Equality and Freedom," in *Women's Human Rights: CEDAW in International, Regional and National Law*, edited by Anne Hellum and Henriette Sinding Aasen, Cambridge University Press, Cambridge, 2013, p. 95; and Morsink, J., "Women's Rights in the Universal Declaration," in *Human Rights Quarterly*, 13, no. 2, 1991, p. 229.

564 *Vienna Declaration and Programme of Action* adopted by the World Conference on Human Rights on June 25, 1993. United Nations document A/CONF.157/23.

Points 28 and 29 of the Declaration[565] underscore concerns about sexual violence against women in conflict settings, while point 38 highlights CEDAW's substantive obligations to eliminate violence against women in both private and public spheres.[566] Moreover, the Declaration reaffirms women's rights to mental and physical health, dignity, and family

[565] *Ibid.*, VDHR, para. 28: The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, 'ethnic cleansing,' and systematic rape of women in war situations, creating mass exodus of refugees and displaced persons. While strongly condemning such abhorrent practices, it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.

[566] *Ibid.*, VDHR, paras. 29 and 38:

29. (…) The World Conference on Human Rights is deeply concerned about violations of human rights during armed conflicts, affecting the civilian population, especially women, children, the elderly, and the disabled. The Conference therefore calls upon States and all parties to armed conflicts to strictly observe international humanitarian law, as set forth in the Geneva Conventions of 1949 and other rules and principles of international law, as well as minimum standards for protection of human rights, as laid down in international conventions. The World Conference on Human Rights reaffirms the right of the victims to be assisted by humanitarian organizations, as set forth in the Geneva Conventions of 1949 and other relevant instruments of international humanitarian law, and calls for the safe and timely access for such assistance.

38. The World Conference on Human Rights recognizes the important role of non-governmental organizations in the promotion of all human rights and in humanitarian activities at national, regional and international levels. The World Conference on Human Rights appreciates their contribution to increasing public awareness of human rights issues, to the conduct of education, training, and research in this field, and to the promotion and protection of all human rights and fundamental freedoms. While recognizing that the primary responsibility for standard-setting lies with States, the conference also appreciates the contribution of non-governmental organizations to this process. In this respect, the World Conference on Human Rights emphasizes the importance of continued dialogue and cooperation between Governments and non-governmental organizations. Non-governmental organizations and their members genuinely involved in the field of human rights should enjoy the rights and freedoms recognized in the Universal Declaration of Human Rights, and the protection of national law. These rights and freedoms may not be exercised contrary to the purposes and principles of the United Nations. Non-governmental organizations should be free to carry out their human rights activities, without interference, within the framework of national law and the Universal Declaration of Human Rights.

planning as fundamental human rights, aligning with similar provisions outlined in Articles 11, 12, 5, 10, 14, and 16 of CEDAW.[567]

The CEDAW Committee actively fulfils its mandate to implement the Vienna Declaration's agenda, strengthening enforcement mechanisms and fostering innovative processes. Point 40[568] of the Declaration emphasizes the importance of procedural efficacy, while point 42[569] calls on States Parties to provide reliable data on the legal (*de jure*) and practical (*de facto*) status of women in their reports. Additionally, it mandates the

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567 *Ibid.*, VDHR, para. 41: The World Conference on Human Rights recognizes the importance of the enjoyment by women of the highest standard of physical and mental health throughout their life span. In the context of the World Conference on Women and the Convention on the Elimination of All Forms of Discrimination against Women, as well as the Proclamation of Tehran of 1968, the World Conference on Human Rights reaffirms, on the basis of equality between women and men, a woman's right to accessible and adequate health care and the widest range of family planning services, as well as equal access to education at all levels.

568 *Ibid.*, VDHR, para. 40: Treaty monitoring bodies should disseminate necessary information to enable women to make more effective use of existing implementation procedures in their pursuit of full and equal enjoyment of human rights and non-discrimination. New procedures should also be adopted to strengthen implementation of the commitment to women's equality and the human rights of women. The Commission on the Status of Women and the Committee on the Elimination of Discrimination against Women should quickly examine the possibility of introducing the right of petition through the preparation of an optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women. The World Conference on Human Rights welcomes the decision of the Commission on Human Rights to consider the appointment of a special rapporteur on violence against women at its fiftieth session.

569 *Ibid.*, VDHR, para. 42: Treaty monitoring bodies should include the status of women and the human rights of women in their deliberations and findings, making use of gender-specific data. States should be encouraged to supply information on the situation of women *de jure* and *de facto* in their reports to treaty monitoring bodies. The World Conference on Human Rights notes with satisfaction that the Commission on Human Rights adopted at its forty-ninth session resolution 1993/46 of March 8, 1993 stating that rapporteurs and working groups in the field of human rights should also be encouraged to do so. Steps should also be taken by the Division for the Advancement of Women in cooperation with other United Nations bodies, specifically the Centre for Human Rights, to ensure that the human rights activities of the United Nations regularly address violations of women's human rights, including gender-specific abuses. Training for United Nations human rights and humanitarian relief personnel to assist them to recognize and deal with human rights abuses particular to women and to carry out their work without gender bias should be encouraged.

training of UN personnel to address issues of discrimination, abuse, and violations specifically targeting women's rights.

In this normative and institutional "mesh," the UN General Assembly established UN Women in 2010,[570] accompanied by a Strategic Plan[571] aimed at achieving Sustainable Development Goal 5 (SDG 5) of the Sustainable Development Goals (SDGs). UN Women also focuses on eight other critical areas, including leadership and political participation; economic empowerment; ending violence against women; women, peace, and security; humanitarian action; governance and national planning; support for women and girls with disabilities; and addressing HIV and AIDS.

In addition to UN Women's efforts, the programs and annual reports prepared by the World Bank,[572] as well as the research and academic contributions of non-governmental actors, play a crucial role in

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570 The United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) was created by the General Assembly on July 2, 2010 (A/64/L.56, 64/289) as part of the UN reform agenda, consolidating resources and mandates to generate greater impact. UN Women merged the efforts of four key components of the UN system, focusing exclusively on women's equality and empowerment: Division for the Advancement of Women (DAW), established in 1946; International Research and Training Institute for the Advancement of Women (INSTRAW), established in 1976; Office of the Special Advisor on Gender Issues (OSAGI), established in 1997; and United Nations Development Fund for Women (UNIFEM), established in 1976. For more details, see: UN Creates New Structure for Women's Empowerment.

571 United Nations Entity for Gender Equality and the Empowerment of Women (UN Women), Strategic Plan 2022–2025, Second Regular Session 2021. Available at: https://documents.un.org/doc/undoc/gen/n21/186/25/pdf/n2118625.pdf?token=so8Vt5P5yHonHlHW3m&fe=true.

572 According to the World Bank, only 14 economies had achieved legal parity between men and women by 2022, as measured by *Women, Business and the Law*, with progress varying across regions and over time. Globally, all economies have implemented at least one reform since 1970, moving closer to legal gender parity.
See: World Bank, *Voice and Agency: Empowering Women and Girls for Shared Prosperity* (2018). Available at: https://www.worldbank.org/content/dam/Worldbank/document/Gender/World_bank_gender_voice_LOWRES.pdf. Also see: World Bank, *Women, Business and the Law: Women Economic Empowerment Study,* International Bank for Reconstruction and Development / The World Bank, Washington, 2023. Available at: https://openknowledge.worldbank.org/server/api/core/bitstreams/b60c615b-09e7-46e4-84c1-bd5f4ab88903/content.

the qualitative and quantitative assessment of CEDAW's implementation and the realization of its objectives in States Parties.[573]

In September 2015, acknowledging the challenges in achieving the Millennium Development Goals (MDGs) established in 2000, States agreed to reframe and expand these goals into a more ambitious and comprehensive agenda: the 17 Sustainable Development Goals (SDGs) with 169 targets. This agenda, set to be achieved by 2030, aims to eradicate poverty, address inequalities, and promote prosperity while ensuring environmental sustainability.

SDG 5 is a direct reflection of CEDAW's mandate: achieving gender equality and empowering all women and girls.[574] This goal aligns

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[573] In particular, see: Human Rights Watch, *Global Report on Women's Human Rights*. Available at: https://www.hrw.org/reports/pdfs/g/general/general958.pdf. Also see: Oxford University, *Our World in Data: Women's Rights*. Available at: https://ourworldindata.org/women-rights (last accessed February 12, 2024).

[574] The targets of Goal 5 of the UN Sustainable Development Goals (SDGs) provide a detailed articulation of the objectives of CEDAW, updated with inputs from the Beijing Conference:

> 5.1 End all forms of discrimination against all women and girls everywhere.
> 5.2 Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.
> 5.3 Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation.
> 5.4 Recognize and value unpaid care and domestic work through the provision of public services, infrastructure, and social protection policies, and the promotion of shared responsibility within the household and family, as nationally appropriate.
> 5.5 Ensure women's full and effective participation and equal opportunities for leadership at all levels of decision-making in political, economic, and public life.
> 5.6 Ensure universal access to sexual and reproductive health and reproductive rights as agreed in accordance with the Program of Action of the International Conference on Population and Development, the Beijing Platform for Action, and the outcome documents of their review conferences.
> 5.A Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance, and natural resources, in accordance with national laws.
> 5.B Enhance the use of enabling technology, in particular information and communications technology, to promote the empowerment of women.
> 5.C Adopt and strengthen sound policies and enforceable legislation for the promotion of gender equality and the empowerment of all women and girls at all levels.

Available at: https://www.un.org/sustainabledevelopment/gender-equality/.

with the broader framework of women's rights established by treaties predating CEDAW (1979), the Vienna Declaration of 1993, and the continued efforts of UN Women. It also benefits from the interaction and monitoring conducted by numerous non-governmental organizations and academic institutions. Together, these elements ensure that the obligations of States Parties to CEDAW are continually updated, expanded, and aligned with contemporary global priorities.

8.5.5. *Jus Cogens* and CEDAW Substantive Rights

The designation of CEDAW as the "Magna Carta" of women's rights is supported by the near-universal commitment of the international community, with 193 States Parties. Only the United States and Palau have not ratified the convention, while Somalia, Iran, Sudan, Niue, and Tonga have yet to sign it.[575] CEDAW is considered one of the principal United Nations Human Rights treaties and remains the foremost international instrument for the defense and promotion of women's rights.

The four World Conferences on Women and the adoption of various declarations, such as the 1993 Declaration on the Elimination of Violence Against Women,[576] have similarly aimed to promote equality and enable women to fully enjoy their inherent rights. These instruments emphasize the universal obligation to eliminate discrimination against women. In its preamble, CEDAW describes its dual purpose as both a foundational international bill of rights for women and a program of action for States Parties to ensure their full realization: "The Convention establishes not only an international bill of rights for women, but also a program of action for States Parties to ensure the enjoyment of those rights."

Professor Martti Koskenniemi has emphasized that the elevation of human dignity as a core value has transformed certain principles into

[575] List of States Parties to CEDAW, including dates of signature and ratification. Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en. Last accessed: February 12, 2024.

[576] Declaration on the Elimination of Violence against Women, General Assembly Resolution 48/104 of December 20, 1993.

jus cogens norms. These include the prohibitions of genocide, torture, slavery, racial discrimination, and aggression, as well as the reaffirmation of the self-determination of peoples.[577]

This raises the question: Could CEDAW be considered a *jus cogens* norm, given the importance of the principles of equality and non-discrimination in international law?[578]

Article 24 of CEDAW reiterates that each State Party is obligated to adopt measures outlined in Articles 1 to 16 and to implement the necessary national initiatives to promote and fully realize the rights recognized in the Convention. The principle of non-discrimination, both substantive and formal, as contained in Articles 1, 2, and 5 of CEDAW, invites serious consideration of its status as a *jus cogens* norm.[579]

In its General Recommendation No. 35, the CEDAW Committee emphasized that gender-based violence has become a principle of customary international law:

> For more than 25 years, in their practice, States parties have endorsed the Committee's interpretation. The *opinio juris* and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law. General Recommendation No. 19 has been a key catalyst for that process.[580]

In the regional system for the protection of human rights in the Western Hemisphere,[581] the Inter-American Court of Human Rights has

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577 Koskenniemi, M., *Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law,* Geneva, United Nations, p. 374.

578 For a discussion of *jus cogens* norms in the field of human rights, see Lobo, J.F., «¿No hay lugar para el derecho internacional? Crítica a *La forma del derecho* de Fernando Atria», *Revista de Estudios de la Justicia,* no. 28, 2018, Santiago de Chile, p. 99, footnote 15. Available at: https://rej.uchile.cl/index.php/RECEJ/article/view/50372/52819.

579 Kusumowardono, Rr. (2023). "Elimination of Discrimination Against Women & CEDAW: To What Extent is it *Jus Cogens*?" *Yuridika,* vol. 38, pp. 191–202. DOI: 10.20473/ydk.v38i1.41663.

580 Committee on the Elimination of Discrimination against Women, "General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19," UN Document CEDAW/C/GC/35, July 26, 2017, para. 2.

581 García Cores, A., *Estándares de protección de derechos humanos de las mujeres: herramientas necesarias para la defensa y protección de derechos humanos de las mujeres*, OEA, ONU Mujeres,

similarly recognized the principle of equality and non-discrimination as having the force of *jus cogens*. In the case of *Gutiérrez Hernández et al. v. Guatemala*, concerning the forced disappearance of Mayra Angelina Gutiérrez Hernández and the lack of a timely investigation, the Court declared:[582]

> At the present stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. On it rests the legal scaffolding of the national and international public order and permeates the entire legal system.[583]

Thus, the principle of non-discrimination against women—though not necessarily the full framework of substantive obligations in Articles 7 to 16—can be considered a peremptory norm of international law. It is intrinsically linked to the principle of solidarity among States in addressing violations of the substantive and material principle of non-discrimination against women.[584]

The obligations established in Articles 7 to 16 of CEDAW require States Parties to adopt domestic legislative and public policy measures to fulfil their commitments. However, in practice, these obligations have often been undermined by generic reservations made by States at the time of ratification. Article 28(2) of CEDAW explicitly prohibits reservations that are incompatible with the object and purpose of the Convention.[585]

Washington, 2022, p. 17. Available at: https://lac.unwomen.org/sites/default/files/2023-08/estandaresvcmp_2023.pdf.

582 See Inter-American Court of Human Rights (IACtHR), *Atala Riffo and Daughters v. Chile,* Judgment of February 24, 2012, para. 79.

583 IACtHR, *Gutiérrez Hernández et al. v. Guatemala,* Judgment of August 24, 2017, para. 150.

584 See Criddle, Evan J., and Evan Fox-Decent, "Human Rights and Jus Cogens," in *Fiduciaries of Humanity: How International Law Constitutes Authority*, Oxford Academic, New York, 2016. Available at: https://academic.oup.com/book/2615/chapterabstract/142999570?redirectedFrom=fulltext.

585 CEDAW*,* Art. 28.2: "No reservation shall be permitted which is incompatible with the object and purpose of the present Convention."

In 1992, in response to the persistent formulation of reservations, the Committee issued *General Recommendation No. 20* to address this issue.[586] Additionally, the *1993 Vienna Declaration and Program of Action on Human Rights* urged States to limit the scope of reservations, ensure their compatibility with the object and purpose of the treaty, and periodically review them with the aim of withdrawing those that undermine the treaty's effectiveness. Despite these efforts, the CEDAW Committee has expressed ongoing concern about the number and breadth of reservations, particularly those made to Articles 2 and 16, which are fundamental provisions of the Convention.[587]

The Advisory Opinions and Judgments of the International Court of Justice (ICJ) and the Opinions of the International Law Commission (ILC) serve as mechanisms to identify norms that qualify as *jus cogens*. In 2022, the ILC included a list of peremptory norms in Annex 9.[588]

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[586] General Recommendation No. 20, Committee on the Elimination of Discrimination against Women, 11th session (1992), United Nations document A/47/38.

[587] An example of this practice is the reservation made by Saudi Arabia upon ratifying the *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* in 2000. The reservation states:

"In case of contradiction between any terms of the Convention and the rules of Islamic law, the Kingdom is not bound to observe the contradictory terms of the Convention. The Kingdom does not consider itself bound by Article 9(2) (concerning the nationality of children) and Article 29(1) (concerning the settlement of disputes) of the Convention."

[588] In a second reading of the 2019 Draft (A/CN.4/748), the ILC adopted the 2022 Draft with its commentaries. The Commission included an illustrative list of eight *jus cogens* norms:

1. The prohibition of aggression or aggressive use of force;
2. The prohibition of genocide;
3. The prohibition of slavery;
4. The prohibition of apartheid and racial discrimination;
5. The prohibition of crimes against humanity;
6. The prohibition of torture;
7. The right to self-determination;
8. The basic rules of international humanitarian law.

This report was preceded by the work of the Special Rapporteur on *jus cogens* norms, "Fifth report on peremptory norms of general international law (*jus cogens*) submitted by Dire Tladi, Special Rapporteur," No. A/CN.4/747; see also: Annex to ILC Report, No. 10 (A/69/10), pp. 295–304. Available at: https://legal.un.org/ilc/reports/2019/spanish/chp5.pdf.

On this topic, see Ferrer Lloret, J., "Las 'consecuencias particulares' de las violaciones graves de normas de *ius cogens* en el Proyecto de la CDI de 2022: ¿desarrollo progresivo

However, the principle of non-discrimination on the basis of sex and the obligations arising from it were notably absent from this list.[589]

The near-universal ratification of CEDAW by the international community is undermined by the significant number of reservations made by States Parties. Such reservations have led to a weakening of the Convention's normative impact. As a result, it is difficult to assert that the substantive framework of CEDAW constitutes a *jus cogens* norm. This conclusion aligns with the observations made by the ILC in 2022.

The extensive reservations made by numerous States—including Algeria, Bahamas, Bahrain, Bangladesh, Brunei, India, Iraq, Jordan, Kuwait, Lebanon, Lesotho, Malaysia, Morocco, North Korea, Niger, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Syria, and the United Arab Emirates—along with objections and opposition declarations by other States, underscore this point. These reservations challenge the universality of CEDAW's substantive rights, as one defining feature of *jus cogens* norms is their universal, non-derogable nature.[590] Such norms serve as fundamental principles of justice, providing general criteria to guide and limit State actions.[591]

8.6. Conclusion. Human Rights Obligations and Self-Determination: A Practical Approach to the Arab Garden

The substantive rights enshrined in CEDAW represent one of the most significant political and legal milestones achieved by the international community in its commitment to combat violence and discrimination against women. This international treaty establishes a systematic, multi-

del Derecho Internacional?" *Anuario Español de Derecho Internacional,* Vol. 39, 2023, pp. 149–207.

589 Sellers, P.V., "*Jus Cogens*: Redux," *American Journal of International Law,* No. 116, 2022, p. 281.

590 See Ginsburg, Tom, "Objections to Treaty Reservations: A Comparative Approach to Decentralized Interpretation," in *Comparative International Law*, edited by Anthea Roberts, Paul B. Stephan III, Pierre-Hugues Verdier, and Mila Versteeg, Oxford University Press, New York, 2018.

591 On the material and formal criteria for determining the existence of a norm of *jus cogens,* see Fuller, Lon, *The Morality of Law,* 2nd ed., Yale University Press, New Haven, 1969.

conventional strategy for the protection of women's rights. It seeks, through the principles of specialization and effectiveness, to render the prohibition of violence and discrimination against women both legally binding and enforceable.

The enduring relevance and practical applicability of CEDAW, along with the mechanisms for monitoring its implementation, are foundational to the success of any human rights treaty. Indian judge Sujata Manohar, during the signing of the Optional Protocol to the CEDAW Committee, highlighted the importance of this instrument and underscored the challenges of reliably implementing international obligations within domestic legal systems. Her words resonate as a call to action for state institutions and legal practitioners alike:

> The Optional Protocol will strengthen the hands of the domestic courts in giving effect to their domestic bills of rights and in implementing them in the light of the Convention… One of the main hurdles to the implementation of human rights has been judicial apathy towards international treaties and unwillingness to look at them, or worse still, judicial ignorance of international norms. The same is true of lawyers. The fact that an international body can entertain complaints of violation and ask for the State Party to remove discrimination is bound to give a great impetus to the removal of such apathy and enforcement of Convention rights by the domestic courts.[592]

In the context of Chad, the Committee issued a report in 2011 identifying critical areas of concern, including female genital mutilation, forced marriages, human trafficking, child labor within the framework of "solidarity children," and discriminatory barriers to education.[593] In

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[592] See Judge Mahona's text in *The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol: Handbook for Parliamentarians,* New York, 2003. Available at: http://archive.ipu.org/pdf/publications/cedaw_en.pdf.

[593] *Question from Experts:* An expert raised concerns about the low attendance rates of girls at school in Chad, which extended beyond poverty and were influenced by cultural norms, stereotypes, and the civil war. The expert questioned whether schools were safe

response, Chad submitted a new report in 2023, outlining the state's efforts to address the issues raised by the Committee.[594] This

environments for girls, free from sexual and physical harassment by boys and teachers, noting that violence against girls seemed pervasive in Chadian society. Concerns were also expressed regarding the recruitment of children, including girls, into armed conflict, and whether measures existed to protect them and reintegrate them, especially girls, into the educational system. The societal focus on preparing girls for marriage instead of education was highlighted as a factor that devalued girls. Additionally, early marriage was viewed by parents as a way to protect girls from harassment in schools. The expert asked about measures to challenge these cultural norms and promote the education of girls. Questions were also raised about Government policies addressing adolescent pregnancy, whether girls who became pregnant could continue their education, and the re-entry of young mothers into schools. It was noted that only 39% of registrants in technical institutions were girls, indicating the need to address the issue of illiteracy at the foundational educational level. See CEDAW, *Committee on the Elimination of Discrimination against Women considers report of Chad,* October 12, 2011, p. 8. Available at: file:///Users/imac/Downloads/Full_Report.pdf.

[594] Comité pour l'élimination de la discrimination à l'égard des femmes. *Cinquième rapport périodique soumis par le Tchad en application de l'article 18 de la Convention, attendu en 2015* [Date de réception : 3 août 2023]. Respecto a la situación de la discriminación de acceso a la educación para las niñas y mujeres, el informe del Estado señala que:
"L'éducation au sujet des mesures destinées à assurer l'égalité d'accès de fait des filles et des jeunes femmes à tous les niveaux d'éducation:

1. Au titre des mesures législatives: depuis l'adoption de la loi n° 16/PR/2006 du 13 mars 2006 portant orientation du système éducatif tchadien, aucune autre législation n'est adoptée.
2. Sur le plan administratif: pour assurer l'égalité d'accès aux filles et aux jeunes femmes à tous les niveaux de l'éducation, le Gouvernement a pris d'importantes mesures règlementaires, à savoir les décrets, arrêtés, notes circulaires et décisions relatifs à l'application des différents décrets d'application de la loi n°16 précitée. Ces différents textes ont porté notamment sur l'instauration de trois bulletins dans l'année scolaire au lieu de deux précédemment et le contrôle rigoureux des inspecteurs sur les enseignants à remplir convenablement les heures de cours.
3. Plusieurs plans, programmes et stratégies: ont été adoptés et mis en œuvre. Dans le Cadre du Plan National de Développement 2017–2021, par exemple, le Gouvernement a œuvré pour le développement de l'accès élargi à l'éducation de base. C'est ainsi que les programmes suivants sont en cours d'exécution:
    - Programme d'éducation de base ;
    - Projet de revitalisation de l'éducation de base au Tchad ;
    - Projet d'appui à l'Enseignement Bilingue (en cours – PAEB IV) ;

demonstrated a commitment, however gradual, to aligning national policies with CEDAW's obligations.

It is the responsibility and obligation of state institutions—exercising their constitutional powers within the legislative, executive, and judicial spheres—to create the legal framework necessary to foster the sociological changes required for the eventual recognition of the substantive rights outlined in CEDAW as norms of *jus cogens*. These institutions must ensure the application and enforcement of the principles of non-discrimination and equality through public policies and continuous improvements to the national legislative framework.

The current global context, marked by emerging regional armed conflicts, the anticipated mass displacement caused by climate change, and a new generation of refugees, presents significant challenges to the protection of human rights, particularly those of women. Realizing the substantive rights of CEDAW in such circumstances will demand renewed efforts. Feminism, women's human rights advocacy, and movements representing sexual minorities will play a critical role in this endeavor. Additionally, the responsible use of digital networks will become increasingly vital in combating incitement to discrimination—often a precursor to hate crimes—and in reaffirming the importance of respecting and upholding the rights of women as articulated in CEDAW.

The incorporation of CEDAW obligations into national legal systems faces significant challenges, particularly in the absence of an institutional framework that upholds its principles and a functioning democratic regime. Democracies, though imperfect, remain the most effective systems for protecting human rights and enabling the sovereign voice of citizens to participate in shaping the affairs of their communities.

- Projet de Développement de l'Enseignement Bilingue Primaire (PRODEB-Primaire en cours) ;
- Projet d'appui au secteur de l'éducation (PASE) ;
- Projet de Formation des Maitres communautaires (MC) ;
- Plan triennal pour la période de 2022–2024 ;
- Projet pour l'amélioration de la qualité de l'éducation au Tchad ;
- Projet de l'éducation des enfants."

See *Comité pour l'élimination de la discrimination à l'égard des femmes, Cinquième rapport périodique soumis par le Tchad,* p. 34. Available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FTCD%2F5&Lang=en.

For developing countries like Chad, this highlights the daunting challenge of integrating the elements of the international rule of law. Although the principle of self-determination of peoples was established in Article 1 of the San Francisco Charter in 1945 as a foundational basis for post-war international relations, its recognition as a human right came later. While the principle served as a guideline for states, its conception as a collective right of peoples—beyond its advisory role for states—was absent from the Charter.

The 1948 Universal Declaration of Human Rights (UDHR) marked a significant milestone by introducing a universal framework of rights recognized for all human beings, irrespective of the territorial jurisdiction to which they belonged. Although the UDHR, as a United Nations General Assembly resolution, lacked binding legal force, it represented a substantial step forward in the development of the international legal system for the protection of human rights. However, the UDHR made no mention of the right to self-determination of peoples.[595]

As Hannum states: "it was not initially recognized as a fundamental right of the United Nations regime established in 1945."[596] Human rights are organized within societies, and while some of these rights can be considered purely individual, others, such as rights to religion, education, and language, are inherently collective and gain meaning only when exercised in concert with others. Political rights, including the right to participate in government and the right to self-determination, presume the existence of a collectivity.[597]

In this context, the original concept of self-determination must be reinterpreted in the twenty-first century. It is no longer solely about asserting independence from a colonial power that exercised sovereignty

[595] Although there was a proposal by the USSR to include the right of self-determination in the UDHR, it was ultimately rejected. See Musgrave, Thomas D., *Self-Determination and National Minorities, op. cit.*, p. 67.

[596] Hannum, Hurst, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights, op. cit.*, p. 33.

[597] *Ibid., op. cit.*, p. 109: "Human rights are organized in societies, and few rights can be thought of as purely 'individual.' As noted below, rights to religion, education, and language generally have meaning only if they can be exercised in concert with others. 'Political' rights, such as the right to participate in government and to self-determination, presume the existence of a collectivity."

over territories from afar. Instead, self-determination today encompasses the capacity of citizens to establish and exercise effective self-governance based on democratic principles. As the Carter Center has pointed out:

> International law contains a large number of obligations relevant for democratic governance and democratic elections. Contrary to conventional wisdom, these obligations are often detailed and comprehensive. International law guarantees key elements of democratic governance, such as the separation of powers, accountability, rule of law, and transparency. International law also protects key principles of democratic elections such as universal suffrage, secrecy of the vote, the right to vote and be elected, the right to freely assemble and associate, and, importantly, the right to an election that is "genuine."[598]

The structural principle of self-determination in international law was codified through treaty in the International Covenant on Civil and Political Rights (ICCPR), which explicitly enshrines the right to self-determination in Article 1:

> 1. All peoples have the right of self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development.
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law. In no case may a people be deprived of its own means of subsistence.
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination and shall respect that right, in

[598] *Strengthening International Law to Support Democratic Governance and Genuine Elections,* Carter Center, 2012.

> conformity with the provisions of the Charter of the United Nations.

Additionally, ICCPR Article 25 introduces the cornerstone of democratic governance and genuine elections under international law, which is today viewed as the practical application of the right to self-determination within each community and State. Article 25 explicitly affirms the right to participate in the conduct of public affairs and ensures equal suffrage. Several essential components of democracy derive from Article 25, including the separation of powers, minimum rights of Parliament, full and effective civilian supervision of the security sector, and transparent and inclusive constitution-making processes.

As Manfred Nowak has observed, the national exercise of self-determination—referred to as "internal political self-determination"—is particularly significant:

> The right of all peoples to self-determination follows from the second sentence of Art. 1(1). The free determination of their political status can be achieved both by providing broad autonomy within a given State and by granting the relevant corresponding participation in the State's political decision-making process. The right of internal political self-determination is based on a democratic element, which is to be exercised together with the Covenant's other political rights and freedoms, especially Arts. 19, 21, 22, and 25. Expressed in this way, the right of internal self-determination represents a prerequisite for the enjoyment of other (individual) human rights. Understood in this way, the right of internal political self-determination contains the seeds of a right of revolution against dictatorships that systematically and grossly violate human rights.[599]

[599] Nowak, Manfred, *UN Covenant on Civil and Political Rights: CCPR Commentary,* Engel Publisher, Kehl, 1993, p. 23. Available at: https://searchlibrary.ohchr.org/record/14675.

Self-determination for the community is intrinsically tied to achieving self-determination for each individual within that community.[600] If the international law of the United Nations era introduced a conceptual revolution by proclaiming the principles of self-determination of peoples and the respect and promotion of human rights, it is clear that this revolution remains ongoing and unfinished. Contemporary international law continues to protect the traditional sovereign interests of states, yet it has increasingly placed individuals at the center of political, legal, and social discourse.

The plausible application of the right to self-determination in the internal politics of every country, as outlined by Professor Nowak, may be one of the key elements facilitating the effective implementation of international human rights obligations, such as those enshrined in CEDAW. This raises an important question: how can the International Rule of Law become feasible for underdeveloped countries like Chad, given the significant challenges and obstacles to the effective implementation of principles and standards already ratified in human rights conventions like CEDAW?

The previous chapter, *The Arab Garden*, offers a practical case study on how the denial of the right to education—arguably the most empowering right—has, for decades, undermined true development in communities within the Arab world. This denial has stifled the ability of individuals to realize their potential, thereby hindering broader societal progress.

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[600] The emerging principle of democratic governance in international law and the possible existence of a right to democracy in international law has been the subject of intense debates in several fora. In international scholarship, the idea was first expressed in 1988 by Professor Henry Steiner. See Henry Steiner, "Political Participation as a Human Right," *Harvard Human Rights Yearbook,* vol. 1, 1988, p. 77. It was Professor Thomas Franck who deepened this analysis, and his approach received international attention. See T. M. Franck, "The Emerging Right to Democratic Governance," *American Journal of International Law,* vol. 86, 1992. See also Cécile Vandewoude, "The Rise of Self-Determination Versus the Rise of Democracy," *Goettingen Journal of International Law,* vol. 2, no. 3, 2010, pp. 981–996. Additionally, see *Principles of Democracy: Self-determination and Consent of the Governed.* Available at: https://newnaratif.com/self-determination/.

9. EPILOGUE

… Il popolo russo sentiva il tradimento della sua classe dirigente. La corruzione di quella classe rivoluzionaria era palese…

In quel tempo sulle strade di Mosca pesavano bianche nubi di polvere, rotte dal tonfo dei picconi, dal cigolio delle catene di ferro delle gru, da un ansimar roco di macchine. Io camminavo attraverso quelle nuvole di polvere, e ripetevo fra me una parola russa che avevo imparato in quei giorni, un'antica parola russa che udivo suonare sulle labbra di tutti. Dicevo tra me «naplivaiu», che vuol dire «ci sputo sopra», ed è un'antica e cara parola russa, che esprime un'antichissima, nobile tradizione nazionale russa... Tutto il popolo russo volgeva lentamente il viso verso l'Occidente: un viso pallido, smunto, madido di sudore. Immense strisce di tela rossa, che portavano scritto con grandi caratteri bianchi «Viva Lenin. Viva il Comunismo. Viva il Pratiletra», erano tese attraverso le strade. Nel viso della gente, fatto di materia molle e grigiastra come la carne di polpo, erano ancora visibili i segni delle terribili sofferenze degli anni ormai trascorsi, gli «anni nudi», come li chiama Boris Pilniak, gli anni della guerra civile, della fame, delle epidemie, delle stragi, e si vedeva nascere negli occhi la paura delle terribili sofferenze che il Piatiletka prometteva al popolo russo per il trionfo del comunismo» …. Tutti, intorno a me, dicevano « naplivaiu» e sorridevano tristemente, sputando per terra.

Il pensiero che forse il popolo russo soffriva anche per me, ripugnava alla mia coscienza. Dicevo «naplivaiu», e sputavo per terra, perché mi sentivo offeso nella mia dignità di uomo, di uomo civile, di europeo, al pensiero che forse il popolo russo soffriva anche per me, accettava anche per me la fame, la paura, la schiavitù, la morte, anche per me, per la mia libertà, per il mio avvenire, per la mia salute…

Passavo gran parte delle mie giornate nella biblioteca dell'Istituto Lenin, non ancora aperta al pubblico, che la cortesia di Lunaciarski, Commissario del Popolo per l'Istruzione Pubblica e le Belle Arti, mi consentiva di frequentare. La mia giovane segretaria, Marika S., una

ragazza giorgiana, di Tiflis, che m'era stata raccomandata da Madame Kamenev, la sorella di Trozki, direttrice dell'Intourist, mi rendeva più lieve e più spedito il mio lavoro, traducendomi gli scritti inediti e le lettere di Lenin, consultando i documenti ufficiali sui giorni della rivoluzione d'Ottobre, sulla parte avuta da Lenin e da Trozki in quei memorabili avvenimenti, aiutandomi a raccogliere quel prezioso materiale che mi è poi servito per scrivere la Technique du coup d'État *e* Le bonhomme Lénine. *Non prevedevo, allora, che quei due libri mi avrebbero valso la condanna, in Italia, a molti mesi di reclusione nella prigione…*

…« In russo si dice miortvaia jisn, vita morta » disse Marika.

«A pensarci bene» dissi «vien da ridere. Vien proprio da ridere. Ci torturano, ci fanno soffrire, ci seppelliscono nelle galere, ci tolgono la libertà, di pensare, di esser felici, di vivere, e tutto questo perché? per insegnarci a salvare la pelle! Se ci torturassero, se ci ammazzassero per insegnarci a salvar l'anima, lo capirei. Ma la pelle! La pelle umana!

È così dappertutto, in Europa. C'è più ipocrisia in Europa che in Russia, in quanto alla pelle. Tutti lavorano allo stesso scopo, in Europa. La pelle umana non conta più nulla; in Europa, conta assai meno dell'anima, eppure non pensano che a insegnare agli uomini a salvar la pelle».

Curzio Malaparte, *Il ballo al Kremlino* 1929-1946

… The Russian people felt the betrayal of their ruling class. The corruption of that revolutionary class was blatant…

At that time, white clouds of dust hung over the streets of Moscow, broken by the thud of pickaxes, the creaking of the iron chains of cranes, and the hoarse wheezing of machines. I walked through those clouds of dust and repeated to myself a Russian word I had learned in those days—an ancient Russian word that I heard ringing on everyone's lips. I was saying to myself, "*naplivaiu*," which means *"I spit on it,"* and it is an ancient and dear Russian word, expressing a very old, noble Russian national tradition.

All the Russian people slowly turned their faces toward the West: a pale, wispy face, drenched in sweat. Immense strips of red cloth, which bore written in large white letters, *"Long live Lenin. Long live Communism. Long live the Proletariat,"* were stretched across the streets. On the people's faces, made of soft, grayish matter like octopus flesh, were still visible the marks of the terrible suffering of the years that had now passed—the "naked years," as Boris Pilniak calls them—the years of civil war, starvation, epidemics, and massacres. And one could see dawning in their eyes the fear of the terrible suffering that the *Piatiletka* (Five-Year Plan) promised the Russian people for the triumph of communism. … Everyone around me said, *"naplivaiu,"* and smiled sadly, spitting on the ground.

The thought that perhaps the Russian people were also suffering for me repulsed my conscience. I used to say, *"naplivaiu,"* and spit on the ground because I felt offended in my dignity as a man—as a civilized man, as a European—at the thought that maybe the Russian people were suffering for me too, accepting hunger, fear, slavery, and death for my freedom, for my future, for my health…

I spent most of my days in the library of the Lenin Institute, not yet open to the public, which the courtesy of Lunaciarski, People's Commissar for Public Education and Fine Arts, allowed me to attend. My young secretary, Marika S., a Georgian girl from Tiflis, who had been recommended to me by Madame Kamenew, Trotsky's sister, editor of the *Intourist,* made my work lighter and more expeditious by translating Lenin's unpublished writings and letters, consulting official documents about the days of the October Revolution, and gathering valuable material. That material later served me in writing *Technique du coup d'État*

and *Le bonhomme Lénine*. I did not foresee, then, that those two books would earn me a sentence in Italy of many months' imprisonment…

"In Russian we say *miortvaia jisn,* dead life," Marika said.

"Come to think of it," I said, "it comes to laughing. It really comes to laughing. They torture us, they make us suffer, they bury us in jails, they take away our freedom to think, to be happy, to live, and all of this—why? To teach us how to save our skins! If they torture us, if they kill us to teach us to save our souls, I would understand. But the skin! The human skin!

It is like that everywhere in Europe. There is more hypocrisy in Europe than in Russia, as far as the skin is concerned. Everyone works to the same end in Europe. The human skin counts for nothing anymore; in Europe, it counts for far less than the soul, and yet they think of nothing but teaching men to save their skins."

Curzio Malaparte, *The Dance at the Kremlin* 1929-1946
Translation by Joaquín González Ibáñez

The War in Ukraine and International Law
Rule of Law, Ukraine, and the Act of Aggression by the Russian Federation

Perhaps the title of Thomas Fitschen's article on the "invention" of the rule of law for the United Nations, referenced in Chapter 3, is not only a timely and suggestive expression but also highly relevant in the current context of the breakdown of the international legal order. It remains to be seen whether this "invention" has a substantive legal and institutional basis to support the consolidation of the principle of the rule of law as a genuine objective of the United Nations. Countries such as China and Russia are beginning to shape a new paradigm around the concepts of democracy and human rights, a development that will inevitably influence any future conceptualization of the rule of law.[601]

The instrumentalization of international law and the principles of the rule of law became evident with Russia's renewed invasion of

[601] Joint Declaration of the Russian Federation and the People's Republic of China on the Entry of International Relations into a New Era and Sustainable Global Development. See the analysis by Andrea Rizzi, María R. Sahuquillo, and Macarena Vidal Liy in "The Ukrainian crisis emerges as a symbol of the new world order championed by Xi and Putin" (*Declaración conjunta de la Federación Rusa y de la República Popular China sobre la entrada de las relaciones internacionales en una nueva era y el desarrollo global sostenible. Análisis de Andrea Rizzi, María R. Sahuquillo, Macarena Vidal Liy en* «La crisis ucrania emerge como símbolo del nuevo orden mundial que abanderan Xi y Putin»), *El País*, February 16, 2022. Available at: https://elpais.com/internacional/2022-02-16/la-crisis-ucrania-emerge-como-simbolo-del-nuevo-orden-mundial-que-abanderan-xi-y-putin.html. See also "Beijing and Moscow unite in efforts to redefine democracy itself," February 6, 2022, *NPR*, Washington, D.C. Available at: https://www.npr.org/2022/02/06/1078432575/beijing-and-moscow-unite-in-efforts-to-redefine-democracy-itself.

Ukrainian territory on February 22, 2022, mirroring the acts of aggression in 2014 and the subsequent annexation of the Crimean Peninsula.

Putin's aggressive decisions over the last decade evoke a cartography of longed-for empires, seemingly designed to deny and erase the memory of victims. While his actions may appear as an attempt to return to the history of the 20th century, it might be more accurate to interpret them as a return not to the Cold War but to the turbulent period following World War I and the Treaty of Versailles in 1919. This era of hardship and instability preceded the construction of the spirit of Locarno in 1925 and the landmark Briand-Kellogg Pact of 1929, which sought to renounce war as an instrument of national policy—principles later invoked by Robert H. Jackson in his writings and during the Nuremberg trials.[602]

Putin has justified the war offensive against Ukraine by claiming it protects ethnic Russians. His political and legal arguments frame the military aggression as both necessary and legitimate, asserting that it is intended to prevent what Putin refers to as a "genocide" allegedly committed by Ukrainian authorities.

This justification bears a troubling resemblance to the League of Nations' handling of the Japanese invasion of Manchuria. In 1937, Japan described the Nanjing Massacre and its actions in Manchuria not as acts of war against China but as a "police operation." Such a framework of protection and intervention, used to legitimize acts of aggression, recalls the principles outlined in the first international human rights treaty of the United Nations era: the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

The concept of genocide itself was first introduced in Madrid in October 1933 by Raphael Lemkin, initially under the term "crime of barbarism." It was designed to protect human groups from destruction. The specific term "genocide," however, would not emerge until 1943, when Lemkin coined the neologism. For Lemkin, language and words became pathways to justice. He argued that the criminal acts constituting genocide—the total or partial destruction of an ethnic, national, racial, or religious group—had been perpetuated throughout history partly because

[602] See González Ibáñez, Joaquín, "Putin, el derecho internacional y la penicilina de Stalin," *El País*, April 7, 2022. Available at: https://elpais.com/babelia/2022-04-07/putin-el-derecho-internacional-y-la-penicilina-de-stalin.html.

no word existed to define, comprehend, and confront their abhorrent nature, which is contrary to all principles of humanity.

Paradoxes of history: the crimes, vexations, and horrors committed by the Russian army on Ukrainian territory in 2022 are deeply tied to the revolutionary ideas that have shaped international law over the past 80 years. Unbeknownst to Putin, the current theater of war is also the birthplace of three pivotal figures in 20th-century international law: Aaron Trainin, Hersch Lauterpacht, and Raphael Lemkin. These jurists conceptualized the international crimes of aggression (formerly crimes against peace), crimes against humanity, and genocide, respectively. Over time, states have voluntarily incorporated these legal categories into international treaties, limiting their sovereign powers and subjecting themselves to international oversight.

Trainin was born in 1883 in Vitebsk, then part of the Russian Empire (now Belarus). Lauterpacht was born in 1897 in Zolkiew, a town in the Lviv region that was part of the Austro-Hungarian Empire at the time, later became part of Poland, and is now in Ukraine. Lemkin was born in 1900 in Bezwodne and grew up in Bialystok, then under the Russian Empire, later Polish territory, and now Ukraine. All three were Jewish jurists. Trainin studied at the University of Moscow, while Lemkin and Lauterpacht pursued their studies in the city of Lviv—a UNESCO World Heritage Site that today shelters millions of internally displaced Ukrainians. Those who cross the country's borders will join the growing number of refugees.

These jurists conceptualized the international crimes that might one day be applied by a future *ad hoc* international criminal court or the International Criminal Court to hold Vladimir Putin and his military command accountable, aiming to prevent impunity for the atrocities of this war. For now, however, Ukraine has taken a different legal route by initiating proceedings to determine the international responsibility of the Russian state. On February 26, 2022, just four days after the aggression began, Ukraine filed a complaint against Russia before the UN International Court of Justice, accusing Russia of bad faith and misusing the Genocide Convention. The complaint specifically challenged Putin's false and inflammatory claim that the invasion was necessary to prevent the alleged genocide of the Russian minority in the Donbas region by Ukraine.

In the context of these proceedings, during the hearing on March 7, 2022, concerning Ukraine's request for provisional measures against Russia, the Russian authorities chose not to appear and instead submitted a brief communication denying the Court's jurisdiction to hear Ukraine's complaint. Professor Harold Koh, representing Ukraine, concluded his argument by emphasizing that the case extended beyond Ukraine's complaint against Russia. He framed it as a challenge to humanity itself, raising the critical question of whether Russia's interests would prevail over the legal order established after World War II. Koh urged the Court to consider that preventing the unfolding tragedy—the destruction of cities and human lives in Kharkiv, Mariupol, and Kyiv—was precisely the aim articulated in the Charter of the United Nations, invoking its preamble, which states:

> We the peoples of the United Nations determined 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.

A week later, the UN International Court of Justice granted Ukraine's request for provisional measures. By a majority vote of 13 to 2, the Court ordered the immediate suspension of all Russian military operations and directed Russia to ensure that it does not provide assistance to any armed military unit or irregular group supporting or promoting such actions. The two dissenting judges were Chinese Judge Xue Hanqin and Russian Judge Kirill Gevorgian, raising concerns that the political agendas of China and Russia may involve the instrumentalization of international justice, thereby undermining the institutions that sustain the international legal system.

Despite these concerns, there is both ethical and legal hope. Several Member States of the Genocide Convention—including Spain, twelve other European Union states, the United States, the United Kingdom, Australia, and New Zealand—have invoked Article 63 of the Statute of

the International Court of Justice[603] to submit declarations of intervention in the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia)*. Spain's statement[604] affirms the Court's jurisdiction to hear the case, strongly condemns the Russian Federation's military intervention in Ukraine, highlights the serious threat it poses to international peace and security, and reiterates its unwavering commitment to Ukraine's territorial integrity and independence. Furthermore, Spain underscores its adherence to international law and its respect for international human rights law, with the Genocide Convention serving as a cornerstone of these principles.

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[603] Article 63 of the Statute of the International Court of Justice: 1) In the case of the interpretation of a convention to which States other than the parties to the dispute are parties, the Registrar shall immediately notify all States concerned. 2) Any State so notified shall have the right to intervene in the proceedings; but if it exercises that right, the interpretation contained in the judgment will be equally binding on it.

[604] The original declaration submitted by Spain, *Declaration of Intervention of Spain: Intervention pursuant to Article 63 of the Statute of the International Court of Justice,* is available on the website of the International Court of Justice: https://www.icj-cij.org/public/files/case-related/182/182-20220929-WRI-01-00-EN.pdf. The Ministry of Foreign Affairs, European Union and Cooperation of Spain published Communiqué 062, dated September 29, 2022: "Spain submits the Declaration of Intervention before the International Court of Justice in the Ukraine v. Russia case. The Embassy of Spain in The Hague has submitted to the International Court of Justice the Declaration of Intervention of Spain in the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation).* On February 26, Ukraine filed an application with the International Court of Justice against the Russian Federation, invoking the commission of genocide by the Ukrainian authorities as a pretext to justify its military aggression against Ukraine. As a State party to the Convention on the Prevention and Punishment of the Crime of Genocide, Spain has the right to intervene in the proceedings as an interested State. With this step, Spain joins other Member States of the European Union, in addition to the United States and Canada, among others, that have submitted similar declarations. In its Declaration, Spain argues that the Court has jurisdiction to try this case. Spain reiterates its strong condemnation of the Russian Federation's military intervention in Ukraine, which poses a serious threat to international peace and security, and underlines its commitment to Ukraine's territorial integrity and independence. Spain also reaffirms its commitment to international law and, in particular, to the obligations of States not to resort to the threat or use of force against the territorial integrity or political independence of any State and to respect international human rights law, of which the Genocide Convention is a fundamental text." Available at: https://www.exteriores.gob.es/es/Comunicacion/Comunicados/Paginas/2022_COMUNICADOS/20220929_COMU062.aspx.

Benjamin Ferencz, former chief prosecutor at Nuremberg Trial No. 9 (Einsatzgruppen Trial), referenced Telford Taylor's *Nuremberg and Vietnam: An American Tragedy* to underscore the legal and civic denunciation of actions by the United States during the Vietnam War that violated norms of international humanitarian law. In March 1968, televised and radio reports revealed that the U.S. military had destroyed entire villages suspected of harboring and supporting the communist Vietcong. Taylor, recalling General MacArthur's admonition about a soldier's duty to protect the weak and unarmed, sought to reaffirm his country's commitment to the Geneva Conventions of 1949. He also highlighted the military's responsibility for war crimes committed by U.S. soldiers, including the infamous My Lai massacre.

U.S. soldiers had deliberately machine-gunned defenseless Vietnamese civilians, including women and children, as they sought shelter in a ditch.[605] Ferencz recalls that a few years later, when the United States withdrew from Vietnam in 1975, "it had lost over 58,000 men and women. Millions of Vietnamese were killed in a war that had never been declared by Congress. North Vietnam had not attacked the United States, and the Security Council had not authorized the use of armed force in what was a civil war between rival political factions. Cambodia, a country with which

[605] In the same vein, Marcus Raskin pointed out: "There is little difference between the actions alleged in the Yamashita case and the programs which have been trumpeted by American commanders in Vietnam. If the Yamashita standard was applied to the Vietnam War as Taylor suggests, the responsibility for Son My would be placed squarely on the American military commander though he might not even have known about the incident. It should be noted that General Westmoreland had continuous and virtually instantaneous communications with tactical units operating in the field as well as with Honolulu and Washington command centers. As a matter of policy General Westmoreland urged military commanders to have high body counts. In a guerrilla war the consequences of such a policy is that the entire civilian population of a contested area becomes the enemy. Given reliance on firepower and the fact that all Vietnamese were perceived as enemies or potential enemies, it is no wonder that Son My and other such incidents occur. Everyone in a designated war zone becomes fair game." See Raskin, Marcus G., *Yale Review of Law and Social Action*, Volume 1, Issue 4, Article 10 , 1971.

we were not at war, was bombed by U.S. planes in an effort to interdict supplies going to North Vietnamese troops fighting in the South."[606]

In this same conflict zone, but 41 years later, President Barack Obama acknowledged—though did not apologize as head of state—for the devastation caused by the U.S. bombing of Laos during the Vietnam War. Laos, a country bordering Vietnam, was not a belligerent party to the conflict, yet the United States secretly dropped more bombs on it than during the entirety of the Second World War, making it the most bombed country in history.[607]

Paradoxically, during the first three years of the Obama Administration (2009–2011), President Obama authorized 193 drone strikes in the Afghanistan and Iraq campaigns—more than four times the number of strikes President George W. Bush authorized during his two terms.[608]

Due to public pressure for greater transparency in government decision-making, President Obama signed an executive order in 2016 requiring U.S. intelligence officials to publish the number of civilians killed

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[606] Ferencz, Benjamin, "Will We Finally Apply Nuremberg's Lessons?" from the introduction to *Telford Taylor's A New Introduction to Nuremberg and Vietnam: An American Tragedy*, Foundations of the Laws of War Series, Lawbook Exchange, March 1, 2010.

[607] President Obama described Laos as the most bombed country in history. During the U.S. involvement in the Vietnam War, between 1964 and 1973, an average of eight bombs were dropped per minute, more than the number used during the entire Second World War. The U.S. flew 580,344 bombing missions over Laos, dropping 260 million bombs, equivalent to 2 million tons of ammunition, with many targets in the south and north bombed repeatedly as part of efforts to isolate communist forces from North Vietnam. Most of the devices dropped were anti-personnel cluster bombs. It is estimated that 30% of these munitions did not detonate. Ten of Laos' eighteen provinces have now been described as "severely contaminated" by unexploded ordnance (UXO). See "Laos: Barack Obama Regrets 'Biggest Bombing in History'," *BBC,* September 7, 2016. Available at: https://www.bbc.com/news/world-asia-37286520.

[608] See McKelvey, Tara, "Covering Obama's Secret War: When Drones Strike, Key Questions Go Unasked and Unanswered," *Columbia Journalism Review,* May/June 2011. Available at: https://archives.cjr.org/feature/covering_obamas_secret_war.php.

in drone strikes outside of war zones.[609] However, this presidential order was rescinded on March 6, 2019, by President Trump.[610]

At the end of President Obama's first term, an analysis conducted by The Guardian and the human rights group Reprieve raised significant doubts about the accuracy of the intelligence guiding the so-called "precise strikes." The report revealed that 41 men were targeted, yet 1,147 people were killed by U.S. drone strikes.[611] This death toll highlights a dramatic

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[609] See President Obama's enactment of Executive Order 13732, "United States Policy on Pre– and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force," July 1, 2016. The principles and goals are clearly defined in Section 1:

> *"United States policy on civilian casualties resulting from U.S. operations involving the use of force in armed conflict or in the exercise of the Nation's inherent right of self-defense is based on our national interests, our values, and our legal obligations. As a Nation, we are steadfastly committed to complying with our obligations under the law of armed conflict, including those that address the protection of civilians, such as the fundamental principles of necessity, humanity, distinction, and proportionality. The protection of civilians is fundamentally consistent with the effective, efficient, and decisive use of force in pursuit of U.S. national interests. Minimizing civilian casualties can further mission objectives; help maintain the support of partner governments and vulnerable populations, especially in the conduct of counterterrorism and counterinsurgency operations; and enhance the legitimacy and sustainability of U.S. operations critical to our national security. As a matter of policy, the United States therefore routinely imposes certain heightened policy standards that are more protective than the requirements of the law of armed conflict that relate to the protection of civilians. Civilian casualties are a tragic and at times unavoidable consequence of the use of force in situations of armed conflict or in the exercise of a state's inherent right of self-defense. The U.S. Government shall maintain and promote best practices that reduce the likelihood of civilian casualties, take appropriate steps when such casualties occur, and draw lessons from our operations to further enhance the protection of civilians."*

The Executive Order 13732 full text is available at https://www.presidency.ucsb.edu/documents/executive-order-13732-united-states-policy-pre-and-post-strike-measures-address-civilian

[610] See *Executive Order on Revocation of Reporting Requirement*, National Security & Defense, March 6, 2019. Available at: https://www.whitehouse.gov/presidential-actions/executive-order-revocation-reporting-requirement/.

[611] See Zenko, Micah, "Questioning Obama's Drone Deaths Data," *Council on Foreign Relations*, July 1, 2016, Washington. Available at: https://www.cfr.org/blog/questioning-obamas-drone-deaths-data. See also Blake, Andrew, "Obama–led drone strikes kill innocents 90% of the time: report," *The Washington Times*, October 15, 2015. Available at: https://www.washingtontimes.com/news/2015/oct/15/90-of-people-killed-by-us-drone-strikes-in-afghani/.

escalation in drone operations during the Obama Administration, a strategy critics labelled "killing for peace."[612] While ostensibly aimed at combating terrorism, this approach risks being counterproductive to U.S. foreign policy in the long run. It also raises a critical question: Where were the standards of the rule of law in the Obama Administration's foreign actions?

The concept of legal and civic reflection centers on adherence to the rule of law, the efforts of jurists like Jackson and Taylor, and the international obligations that must underpin the principles and legal framework constraining institutional actions. Beyond its blatant violation, the challenge lies in addressing impunity with legal effectiveness and holding perpetrators accountable for international crimes. Upholding the rule of law remains the sole answer to the arbitrary use of force and the commission of international crimes. This principle applies universally, whether in Vietnam, Afghanistan, Laos, Iraq, or Ukraine—regardless of the territory where such crimes occur or the state and agents responsible for committing them.

To the horror of the international community and in defiance of the defense of human rights, the Russian Federation's actions during its 2022 war of aggression against Ukraine reveal the extent of daily devastation caused by crimes against humanity and war crimes. On July 30, 2022, the Russian Embassy in the United Kingdom issued a formal communication stating: "The militants of the Azov steel plant deserve to be executed, but not by firing squad—by hanging, because they're not real soldiers. They deserve a humiliating death."[613]

Meanwhile, within Russia, Aleksei Gorinov, a municipal councilor of Moscow's Krasnoselsky district, was prosecuted and sentenced to seven years in prison for peacefully fulfilling his obligation to oppose the war in Ukraine.[614] These events underscore the alarming erosion of the rule of law, the disregard for international obligations, and the failure to achieve

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[612] See Ackerman, Spencer, "41 men targeted but 1,147 people killed: US drone strikes – the facts on the ground," *The Guardian*, November 24, 2014. Available at: https://www.theguardian.com/us-news/2014/Nov/24/-sp-us-drone-strikes-kill-1147. See also Eugene Jarecki's documentary, *Why We Fight* (2005).

[613] See Appendix, Image 1.

[614] See Appendix, Image 2.

justice by addressing impunity for grave international crimes. It is as if the Nuremberg Principles have been eclipsed once again by *raison d'état*.

Perhaps, returning to the title of this book, the aspiration for the rule of law remains a work in progress. The narrative—the ongoing struggle against impunity and the recognition of victims' rights—reflects a process of unfinished construction within domestic legal systems and, by extension, in international law. The development of the contemporary legal community must grapple with the persistent paradoxes of this unfinished revolution. This challenge is particularly acute in moments and spaces of extreme vulnerability for victims, such as those created by armed conflict and war.

Now, here in Europe, on the territory of Ukraine, the time of law is not *postbellum*; it is the reality we inhabit here and now, in the midst of war. History has repeatedly shown that the most dreadful and abject international crimes—those repugnant to the conscience of humanity—have often been accompanied by a legacy of impunity for the perpetrators.[615] The grim reality shaped by Putin's violence reveals his disdain for international law, perceiving it as an obstacle to power. Yet he ignores the fact that law, however imperfect, is woven into the fabric of coexistence among nations and reflects humanity's inalienable yearning for justice.

Even as President Volodymyr Zelenskyy declares that Ukrainians are prepared to let Russia destroy their entire country in the fight to safeguard dignity and freedom, their unwavering yearning for justice remains intact.

The jurist Antonio Cassese once remarked that international law governs the relationships between Leviathan-States, describing it as "the morality of madmen, who set limits to their own madness" and, above all, "a system of ethical principles addressed to madmen, i.e., to the States which it tries to curb in their folly." Even Russia, during or after the conflict, will need to construct a legal framework to inform the political and diplomatic decisions of the months ahead. Moreover, both Russia and Putin will inevitably face legal processes—whether national or international—that will investigate and determine accountability for

[615] González Ibáñez, Joaquín, "Putin, el derecho internacional y la penicilina de Stalin," *El País*, April 7, 2022, https://elpais.com/babelia/2022-04-07/putin-el-derecho-internacional-y-la-penicilina-de-stalin.html.

actions which, since Nuremberg, have been classified as international crimes. Ultimately, the responsibility for ensuring justice lies with the international community as a whole.

This monumental task cannot be left solely to jurists and international institutions. It is also the responsibility of all citizens to uphold the values of memory and justice. At its core, Putin's objective is to dismantle the very essence of the Enlightenment—a project rooted in truth and justice, which laid the foundation for political communities inspired by liberal ideals, the rule of law, and democratic principles. These principles have since been given renewed significance through the development of international human rights law.

For citizens, and particularly for jurists, every effort to uphold, defend, and apply the law—and to support institutions in articulating a vision of justice—represents an aspiration for justice, an ethical commitment to human rights, and a dedication to the principles of democracy. The rule of law is not merely the soul of democracies or their secular religion, as Tom Bingham described it, but also the material foundation of the legal system. It manifests in its institutions, principles, and, most importantly, its ultimate goal: ensuring access to justice.

International law, despite its limitations and imperfections, remains the most progressive, civilized, and structured mechanism for advancing the principles of the rule of law. It seeks to ensure that legal institutions—both national and international—serve as guarantors of compliance with international obligations. Among these obligations, since the Briand-Kellogg Pact, the renunciation of the use or threat of force to resolve disputes has been paramount, alongside the imperative to prevent impunity, investigate crimes, and hold those responsible for international crimes accountable.[616]

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[616] "In the New World Order, the problems created by clumsy decolonization are devilishly hard to fix. There is no way, short of Security Council intervention, to compel a resolution of the conflict. Conflicts over contested territory can only be resolved by mutual agreement. As a result, blurry lines and botched handoffs are the major reason why the rules against conquest are sometimes broken, even though Might no longer makes Right.
Recall that, aside from the immediate postwar transfers, the only other recognized territorial transfers during the 1929–1948 period that were not later reversed were border disputes created by blurry lines: Saudi Arabia's seizure from Yemen in 1934, Paraguay's seizure of border territory from Bolivia in 1935, and Peru's seizure of

And last but not least, a final comment on the situation in Israel and the Middle East. After decades of the Palestinian-Israeli conflict, Israel's political and military response to the heinous terrorist attacks by Hamas on 7 October 2023 has posed a new challenge to the application of international law and human rights. The proceedings initiated by South Africa before the International Court of Justice (ICJ) in 2023, alleging that Israel has committed genocide, as well as the charges brought by the International Criminal Court (ICC) against Israel's Prime Minister and Minister of Defence, reflect not only an escalation of violence and the use of force but also the broader instability and the difficulties in applying international law effectively.

As I reflect on this complex issue, I am once again reminded of the significance of truth and how power and force often seek to control or even suppress access to it. Historian Annette Becker, in her work *Messagers du désastre. Lemkin et Karski et les génocides* (*Messengers of Disaster: Lemkin, Karski, and the Genocides*), highlights how Raphael Lemkin, in coining the term "genocide," aimed to adopt a universal perspective on humanity. He linked genocide to a shared human experience, ensuring that it was not solely recognized in relation to the pogroms in Europe and the Nazis' Final Solution against the Jewish people. Instead, Lemkin's goal was to establish genocide as a crime that transcends specific histories and becomes part of a universal legal consciousness. By "de-Judaising" the concept of genocide, Lemkin facilitated its integration into the global legal vocabulary.[617]

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disputed border territory from Ecuador in 1942. And many of the major conquests in the postwar era—such as Indonesia's seizure of West Papua in 1963 and North Vietnam's conquest of South Vietnam in 1975—took place following botched handoffs.
When the rule against conquest is violated, then, it is almost never in cases of naked aggression against foreign sovereign territory, but rather when newly independent states attempt to fill the legal vacuums left by withdrawing empires that failed to ensure a clear chain of sovereignty." See Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: And Their Plan to Outlaw War*, Penguin Books, New York, 2017, p. 357.

[617] Lemkin, lui, tout à son obsession de faire passer le mot *génocide* dans la conscience mondiale et le vocabulaire juridique international, le *déjudaïse* pour l'universaliser. Relativiser le poids de la catastrophe juive, qui pourtant pesait tellement sur lui, se révèle nécessaire. See Becker, Annette, *Messagers du désastre. Lemkin et Karski et les génocides,* Fayard, Paris, 2018, p. 193.

Becker's work explores the historical efforts of two Polish citizens, Lemkin and Jan Karski, who sought to inform the U.S. government about the Nazi-perpetrated genocide during World War II. Today, international law—through the Convention on the Prevention and Punishment of the Crime of Genocide (commonly known as the Lemkin Convention)—continues to challenge the international community morally and legally by reinforcing the principle of human protection, regardless of who commits the crime. Genocide remains the *crime of crimes*.

The crucial question now is whether international law will hold states accountable in the ICJ case and ensure that perpetrators of international crimes do not escape justice in ICC proceedings. Just as Russia's aggression against Ukraine has become a litmus test for the international rule of law, Israel's response to Hamas's terrorist attacks will serve as a critical assessment of its current state. Moreover, the outcome of the 2024 U.S. presidential election and the potential return of Donald Trump could represent a defining moment—an unprecedented stress test for the international legal system and for states' commitments to upholding *jus cogens* norms.

Madrid, February 2025

We know that history does not care about morality and that it lets crimes go unpunished, but every error has repercussions and exacts revenge unto the seventh generation. For that reason we focus all our efforts on eliminative mistakes before they take root. Never before in history was so much power over the future of mankind concentrated in so few minds as in our revolution. Every false idea we acted on became a crime against future generations. Therefore we had to punish false ideas the way we punish other crimes: with death. People considered us fanatics, because we were so consistent, because we carried our thoughts and actions to their logical conclusions. People compared us to the Inquisition, because like them we always felt the full burden of responsibility for a hereafter, a future that transcended the individual. Like the great inquisitors we attempted to root out evil not only by prosecuting deeds; we delved into the thoughts themselves. We refused to acknowledge any private sphere, not even in the innermost space within the skull. Our lives were constrained by our own logic, by the need to think things through to the end. Because our thinking was shackled to chains of cause and effect, our feelings were constantly short-circuited. As a result we now must burn one another at the stake.

I have thought and acted as I had to. I was one of us: I have destroyed people who were close to me and given power to others whom I did not love; I took the place that history put before me; I have used up the credit that it extended; if l am right, I will have no cause for regret; if l am wrong, then I will pay.

Arthur Koestler, *Darkness at Noon*, 1940.

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