The Role of Human Rights Law in the Protection of Civilians

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I am delighted to be back at the Western Hemisphere Institute for Security Cooperation during Human Rights and Democracy Week. It is a special pleasure that this event has been timed in such a way as to permit me to pay my greatest respects to my friend, your Commandant, COL Felix Santiago. Colonel, you followed a long line of first-rate soldiers and educators in this position, and you have acquitted yourself admirably. WHINSEC is a better place because of your time here as its leader. I know that everyone connected with this institution thanks you for your service, and wishes you well, and godspeed, on your next assignment.

Human Rights and Democracy Week at WHINSEC – a wonderful tradition that is entirely consistent with the mission of this Institute – directs our attention to two values which overlap and complement each other, but are not quite the same. I will have something to say about both of them this afternoon, and I hope to provoke your thinking not only about each individually, but about how they interrelate. I am going to begin from some propositions perhaps more abstract, and more fundamental, than those presented by my colleagues on the panel.

Right-thinking people since the dawn of civilization have paid tribute to what we now call "human rights." They lie at the heart of the Judeo-Christian tradition, even including the Golden Rule, instructing us to treat others as we would wish to be treated. Nor do they require a belief in any divine source: pre-Christian and non-Western societies also espouse these values, and our own culture, which tries to keep our religious views separate from our political ones, does not for that reason shrink from defending and enforcing them.

Yet in the last 60 years, driven by a resolve not to permit repetition of the kinds of abuses committed in the supposedly civilized world during the Second World War, there has been a major change in the ways in which human rights are conceived, articulated, and protected. This momentous development is simply reported in a single sentence: in the second half of the twentieth century, it became generally accepted that the set of rules defining the rights that all of us have simply by virtue of our humanity is a **legal** system. It is not just a bunch of New Year's resolutions, or the contents of a sermon read to us by a cleric in church on Sunday, with no consequences except those provoked in our own consciences. Human rights law does not simply counsel us to be nice to one another: it orders us to engage in certain actions, and to refrain from others. And it holds us legally, not just morally, responsible if and when we fail to do so.

It is in this context that I want to talk today about the role of human rights law in protecting civilians, and the concepts of guilt and responsibility when those legal rules are broken. It is essential to the nature of a legal system that the violation of its rules has consequences, and that violators of its rules may be held to account in certain specified ways.

Even raising the issues of guilt and responsibility in international law, of course, assumes a fundamental progression in the nature of the international legal regime beyond its traditional roots.

Historically, only states had rights and obligations imposed or created by international law. Although there have always been certain exceptions to that proposition – for example, the pirate has been considered an offender not only against domestic law but against the law of nations for centuries – the exceptions are few in number, and share certain obvious characteristics. They concern activities outside the territory of any state, and therefore beyond the ability of any single state alone to control.

Today, that premise has fundamentally changed. We recognize today that individuals may be charged, convicted, and punished either in domestic or in international courts for gross violations of the laws embodying human rights. This concept finds its origin in the notion that the obligation to honor human rights is not owed only to the individuals most directly affected: it is owed to humanity as a whole, and it may be enforced by humanity as a whole. And it is borne not only by nations, but by those who act in their name, or who carry, or wear, their colors.

Of course, to say that the international regime of human rights is a set of legal rules does not mean that it is always observed. From the fact that its enforcement is flawed, however, it should never be inferred that a set of the rules does not exist. This proposition is ignored at your peril, as would be the testimony of numerous defendants, both military and civilian, who have been or are being brought to justice for misconduct in Rwanda, Sierra Leone, Cambodia, and former Yugoslavia. There may not be a consensus in all cases about exactly how to define the human rights that the law will enforce, or to describe precisely the violations that we will sanction. But national societies too – including our own – also experience debates, sometimes wrenching ones, about just what citizens might mean by "justice," or what kinds of conduct the law should address.

There is agreement at least in principle that where a violation of international human rights law has been proved, and we have the guilty party under our control, then that person should be punished according to legal rules. There is perhaps less consensus that where there has been a violation of someone's legal rights, there should be procedures established by the law to vindicate those rights. Note that these concepts are different: first I spoke of punishing the guilty, and then of imposing liability on those responsible. Yet both mark measures of protection for civilians, and both indicate ways in which violations and violators of human rights may be dealt with according to the law.

To speak of assigning individual guilt for violations of international law presupposes a number of things. First, there must be law binding on the person accused. That law must be sufficiently specific to permit the defendant to understand that her or his conduct may have violated it. And there must be some kind of procedure to determine whether in fact the law has been broken in a given case: whether the elements of the offense have been proved, and in particular whether the burden of proof imposed on the prosecution has been satisfied.

The procedures we employ for these purposes must conform to certain standards of fairness. We must be certain, for example, that due process of law is extended to defendants accused of any kind of crime, whether international or domestic, whether large scale or small, and whether heinous or not. Those elements of due process include such propositions as that every defendant has the right to counsel, to be tried before an impartial tribunal, and to call witnesses in her or his defense. In this country these are elements of our constitutional foundation, and they have been incorporated into international law through customs and conventions over many decades.

Sadly, the United States has strayed in recent years from its commitment to the rule of law in this regard. The notion that we would charge individuals who are not prisoners of war with crimes allegedly committed not on any battlefield, and that we would do so without providing the most basic elements of human rights protection – such as the writ of habeas corpus, guaranteed by our Constitution itself – illustrates how fragile may be the structure of international law even now. Yet the fact that the United States Supreme Court repeatedly told the President of this country that the rule of law comes first, and that he however reluctantly was required to honor that rule, is itself testimony to the importance of this discussion.

What can we confidently say constitutes the content of international criminal law? In the first instance, we know that it will include what international lawyers call *jus cogens*, fundamental principles of law, from which no derogation is ever permitted, regardless of the circumstances. Torture, genocide, and slavery, among other things, are literally inexcusable in international law, and they entail the potential criminal liability of their individual perpetrators. And there should be no mistake: even if reasonable people can disagree about whether the pain inflicted during a particular interrogation has risen to the level of torture, there are techniques of interrogation (including waterboarding), and methods of detention (including the use of dogs, mock executions, and extreme conditions of temperature, noise, or sleep deprivation), that allow no debate. They are torture, they are illegal, and they place their perpetrators at risk of criminal liability.

Your course here at WHINSEC will provide you with extensive exposure to the specific contents of international legal regimes protecting human rights: the Universal Declaration, the Geneva Conventions, the Pact of San Jose, the International Covenant on Civil and Political Rights. But how these agreements among states translated themselves into rules applicable to individuals is not a simple question. It is regularly said that the foundation of the international legal system is the consent of states, which may be evidenced in treaties or in the emergence of custom. But criminal law by its nature imposes obligations not on states, but on people, who were never asked for and never granted such consent. There is something more than slightly undemocratic about the international criminal law regime, since it has no grounding in the consent of the governed, which is to say those who are required to conform their conduct to it.

Delineating which parts of the law impose criminal liability on individuals is another problem. In domestic systems we have a legislature, and we have compilations of the laws that legislature has enacted. If there is a dispute about what the law is, we know where to go to find the answer. We may not always be able to agree on what the law **means** – that is one reason we have courts – but finding out what the law **says** is ordinarily easy enough. Yet even this is not so easy with respect to international law, where there is no Congress and no civil code. It is often a daunting process to establish conclusively the content of international law.

To make them binding on individuals, domestic legal systems must import or incorporate principles of international law. There are different ways of doing this. We in the United States generally use the device of express legislative adoption: that is, Congress passes and the President signs a statute providing that specific acts or conduct in violation of international law are also criminal offenses under own law, and will be punished accordingly. So it is, for example, that this country just recently outlawed the crime of torture wherever it occurs, and prosecuted "Chuckie" Taylor, son of the former Liberian leader, for acts he committed against other Africans in Africa.

If we are going to establish a truly international criminal law system, then we must address what we want this system to achieve. Surely it cannot have as its goal the imposition of one nation's views – however powerful that country may be – on the rest of the world. Nor can it engage in victors' justice, defining international crimes as the acts committed by the side that lost the war.

But if we start from the premise that it is a system of law we are creating, then all of these questions become markedly less difficult. The goal of international criminal law is the same as that of domestic criminal law: it is to bring accused violators of binding norms to the bar of justice, subjecting them to procedures that will determine and not presuppose their guilt, and if they are convicted after fair proceedings, punishing them in proportion to the scale of their offenses. But we want to do more than punish. We want to be able to provide a sense of vindication for victims. We want to defend the structure and rigor of the legal regime itself. It is very hard to stand behind the pillars of a legal regime that is not enforced.

There are many possible ways of enforcing these norms and punishing those guilty of violating them. International tribunals may be assigned the mission of determining, interpreting, and applying the normative content of international law. The mandates of such courts resemble closely those of domestic tribunals: ordering arrests, conducting trials, and imposing punishments when necessary. There has been an increasing use of these tribunals, from the courts at Nuremberg and Tokyo after the Second World War, through the ones established by the United Nations specially for Rwanda and the Former Yugoslavia, to, most recently, the permanent International Criminal Court.

But international tribunals are not the only forum for the enforcement of international law. Domestic tribunals can achieve that objective as well. As we have seen, one way of accomplishing this is through incorporation of international law into domestic law. That is, a state may allege that the defendant committed an act criminal not only under the international regime that may be applicable, but under its own laws as well.

It is sometimes contended that a state has no right to create offenses or to try offenders for acts committed outside its borders. But even if that view ever was correct, it has long been outdated. States have the right to legislate and to punish for acts that cause direct effects on their soil, no matter where they occurred. In this age of increasingly border-less economics and trade, it would be impossible to imagine regulation that stops in all cases at the water's edge.

States may impose legal obligations on their citizens when they are abroad. Or they may enact laws to prevent harm to their nationals, or to their national interests. It was under such laws that Spain proposed to prosecute Gen. Pinochet, accused of crimes committed in Chile, although against Spanish citizens.

The most interesting, and most controversial, doctrine by which states have claimed the right to impose criminal punishment on individuals who have acted outside of their territory is the principle of universal jurisdiction. Taken to its extreme, this notion has not been widely accepted by the international community. Belgium recently found itself having to repeal legislation permitting prosecution of defendants accused of crimes against humanity even if they were committed outside Belgium, even if their victims were not Belgian, and even if the defendant himself or herself was never present on Belgian soil.

But universal jurisdiction is not the only basis for asserting individual criminal liability for human rights abuses. States have employed other means of deploying their own domestic legal systems to enforce the international regime. Israel, for example, has had on its books since 1950 a statute called the Nazis and Nazi Collaborators Act. In 1985, a human rights organization on whose board I served received a call from the Chief Judge of the U.S. District Court in Cleveland, Ohio. He had an extradition request before him presented by the Justice Department for a local man, John Demjanjuk, accused in Israel of having committed acts of particular brutality at death camps at Treblinka and Sobibor during the Holocaust. The individual concerned was not a military commander: he was charged with committing these acts with his own hands. The judge was concerned about whether he could lawfully accede to the extradition request, for two reasons: the crimes of which the defendant was accused occurred outside Israel, before it came into existence as a state. The Judge wanted to know whether international law would permit Israel to try Demjanjuk under these circumstances.

My colleagues and I submitted a brief arguing that it was permissible under international law Demjanjuk to be tried in Israel, because the acts of which he was accused were criminal when and where they were committed. The judge agreed, the court of appeals affirmed the decision, and ultimately the Supreme Court denied review.

Demjanjuk was extradited to Israel. Some of you may know the rest of the very odd saga that followed. He was convicted under the 1950 Israeli law, and was sentenced to death. While Demjanjuk's appeal was pending before the Israeli Supreme Court, there came to light evidence that the documents on the basis of which the extradition from the U.S. had been obtained may have been forged. For that reason, the Supreme Court of Israel ultimately set aside the conviction. Demjanjuk was returned to the United States, where he lived without incident until a couple of years ago. At that point, the Government of Germany sought his extradition for involvement in the murders of some 20,000 civilians. Note that these crimes were not committed in Germany, and it is unlikely that many of the victims were German nationals. On the other hand, few would contest the special responsibility that Germany had and has for all of the mass murders committed in its name. Demjanjuk was extradited to Germany, and the outcome of his trial is awaited shortly.

If we are actually going to have a system of functioning courts applying criminal law, empowered to deprive people of their property or their freedom, there have to be procedures for determining guilt and innocence, and they have to contemplate the possibility that some defendants may not be guilty. If any court ought to be especially solicitous about due process protections that have been enshrined in the basic documents of human rights law, it should be an international court commissioned to apply the law of human rights. If such courts preach that gospel, they must live by it. And so it must be open to a defendant, for example, to demonstrate that at the time he committed the acts of which he is accused they were not criminal: there was no binding legal norm forbidding them.

Some defenses will be especially problematic. One raises the issue of command responsibility, posing two questions. First, if "I was just following orders," does that absolve me of guilt? Despite the common perception, the Nuremberg Tribunals did not disallow that defense for all time: people were convicted at Nuremberg not for following orders, but for giving them. There may well be cases in which the degree of a defendant's guilt is mitigated if he can show that, in fact, he was obeying orders that he believed in good faith to be lawful when they were given, or if he had an honest belief that disobedience to his superiors' orders would result in his own death. That issue is likely to be determined in any given case on the basis of a highly fact-specific analysis.

The second question relating to command responsibility is this: if I was actually following orders when I violated applicable legal rules, then what does that say about the superior officer who gave those orders? Is he or she guilty simply for having issued them? And what does "giving orders" mean, anyway? Do the very words "burn the village" or "waterboard the suspect" have to have been spoken or written by the commander? How close does he or she have to have been to where the offense was committed? How high up the chain of command may liability fairly be assigned? These too are open questions, about which the caselaw has not been consistent. I predict that they will be the subjects of debate for years to come.

Two things are clear, though. First, the commander who orders his or her troops to violate or to ignore the human rights of civilian populations may be held criminally liable for the consequences. And second, the jurisdictional threads that link the court trying that officer to the offense need be only that: threads, not ropes. The courts of individual states may claim the right to try alleged violators of rights to which they are connected by nationality (whether of perpetrator or of victim), through direct effects, or under the doctrine of universal jurisdiction where it applies. When there exist international tribunals, whether regional or constituted to address the aftermath of particular conflicts, of course the question of extraterritorial jurisdiction does not even arise: the international community will have given its assent to the notion that such cases may be tried, and convicted offenders punished.

At the beginning of my talk, I said I would distinguish between guilt and responsibility in international law. So far I have focused on criminal law, and therefore on guilt. But as I indicated at the start, the metamorphosis of human rights principles into law has also meant that individual victims are increasingly able to obtain civil remedies against their abusers. Here, the issue is punishing a perpetrator of human rights abuses for having defaulted not on a debt to society, but rather on obligations owed to individuals specially affected by those violations. The civil law too has emerged as an important legal protection for civilians in times of conflict.

Here in the United States, the Alien Tort Statute provides one means, but by no means the only one, to achieve that objective. The Statute, which dates back to 1789, authorizes the federal courts to hear cases brought by aliens, in tort only, for violations of the law of nations or of a treaty of the United States.

For nearly 200 years, the Statute sat on the books unnoticed, largely because of the assumption that, to be a violation of international law, an act had to have actor and victim of different nationalities. The changes in human rights law over the last decades – the changes I have spoken about today – forever altered that premise. Today, there is no question but that the treatment by a state of its own nationals has legitimate international law implications.

Since the landmark *Filartiga* case in 1979, the Alien Tort Statute has been invoked as the basis of federal jurisdiction in private lawsuits by victims of human rights abuses who are able to find their perpetrators in the United States. The Act requires only a case sounding in tort, a plaintiff who is a non-citizen, and the allegation that the tort was committed in violation of international law. If the law of human rights is solidly grounded in the international legal regime, then a violation of that set of legal principles will trigger the statute and open the door of the courts of the United States.

In 2005, in *Sosa v. Alvarez-Machain*, the Supreme Court interpreted this law for the first time. It taught that the Statute means what it says: it is the basis of federal jurisdiction if the rule of

international law that has been violated is sufficiently clear and binding to constitute a broad condemnation of the conduct of which the defendant stands accused.

If the jurisdictional prerequisites of the Act are satisfied, then a plaintiff-victim may sue her human rights abuser and bring the case to trial. If she can carry her burdens of proof, then she can get a verdict and an award of damages. And in some cases substantial monetary damages have been not only awarded but collected: not only against Ferdinand Marcos, but more recently from a Haitian military officer found liable for human rights abuses in Haiti, who (believe it or not!) happened to win the Florida State Lottery, providing him ample assets available in that State for seizure by his judgment creditors.

But whether or not any award of damages under the Act is collectible, the point is that such domestic legislation provides a vehicle for assigning legal responsibility for human rights abuses to those who committed them. And even when a judicial award ultimately does not result in the payment of compensation to the successful plaintiffs, there are nonetheless important legal consequences for individuals who have committed these offenses.

In domestic legal systems, a civil action lies against someone who abuses my rights without excuse. Perpetrators of such abuses are held responsible for them, in other words, and may be ordered by the legal system to make their victims whole. If we see international law as a source of legal rights, then the rights it protects should be treated no differently from rights that find root in the statute book, or in the *Code Civile*, or in the common law. Where there is a legal right, there is a legal remedy.

As international law creates mechanisms for the punishment of violators of human rights, and as domestic systems extend their scope to permit civil suits relying on those rights, the result is the increased use of human rights law to protect civilians in times of conflict. International law has moved, so to speak, on two fronts, developing the concepts of criminal guilt, and of civil responsibility. Both of these are the direct result of the important change in the international legal regime since the Second World War to which I alluded at the beginning of my talk.

The conclusions are these: individuals have rights and obligations by virtue of their humanity; these are the proper subject matter of international law; and they are enforceable as a matter of law. No longer, as Judge Eugene Nickerson wrote when the *Filartiga* case was remanded to him for trial, are international human rights principles "a mere set of benevolent yearnings, never to be given effect."

Of course, like all of the corpus of international law, this critical shift can be undone by fundamental changes in the attitudes of states, and especially of those whose influence and power are most keenly felt on the global plane. That is why it is so critical that states not be permitted to act as if they were free to operate entirely outside the constraints of the international legal regime.

In my view, it is precisely the power and prestige of the United States that have made its conduct of the so-called Global War on Terror especially threatening to the global order. This is true not simply because of the potential criminal or civil liability of the perpetrators of abuses of which U.S. soldiers and civilians have been accused, although that potential exists. But, on a higher level, such conduct suggests that strong states do not need to obey the law. Since no one can force them to comply, it seems to say, the law does not apply to them.

In my view, that is a recipe for international anarchy, and would undo all of the gains the members of this panel have been discussing. Perhaps this is a subject for another day. With luck, the changes in policy this country has already seen since early 2009 will make such a discussion irrelevant except to historians. It would be sadly ironic, however, if the end of the road for the development of guilt and responsibility in international law came about through actions of the United States, the nation so instrumental in the birth of the international human rights regime after the end of World War Two.

If international law can be a useful protection for civilians, it must be capable of requiring that nations, and those who represent nations, change their behavior even when they are most reluctant to do so. Otherwise it is not a legal regime, and it offers neither protection nor justice.

Given that this Week is not "Human Rights Week" at WHINSEC, but "Human Rights and Democracy Week," I do not want to yield the podium before saying just one word about a recent event of great importance to the topic of this panel. I refer to the flaming out of the career of GEN Stanley McChrystal, the highest military officer fired by the President of the United States in decades for, let us call it, extra-curricular conduct. In this case, worthy of a Greek tragedy, the brilliant commander of U.S. and Allied forces in Afghanistan was quoted in an interview as expressing contempt, disdain, and utter insubordination toward the civilian leadership of the country he served.

Here at WHINSEC, and here at Fort Benning, it is easy to see how there can be created an assumption that the virtues of military professionalism, and the commitment of the military to the basic principles of our democratic society, are beyond question. The GEN McChrystal story reminds us that in a democracy, the people's choice of political leadership controls all aspects of the operation of the state, including the armed forces. At some point in the hierarchy of command, the person giving orders wears a business suit, not a uniform, and that is how it should and must be.

A military culture that considers itself free to operate outside the constraints of civilian, democratic leadership is a dangerous thing. It is dangerous because it is unresponsive: it follows its own impulses and sets its own priorities, without regard for the rules civilization has developed to prevent excesses. This should sound familiar. The threat posed by GEN McChrystal's attitude is precisely the same as the threat of which I just made mention.

It is easy to obey the law when your instincts are the same as those endorsed by the law, and when you have no desire to do anything that the law forbids. It becomes harder when the law issues orders that you do not want to follow, and proposes to punish you for doing what you consider it in your interest to do.

Arrogance is not only a vice that brings military careers to an end: it is also a potential poison pill in the emergence of a legal system, including the law of human rights. Sometimes, pride is not only one of the Seven Deadly Sins. Sometimes demonstrations of pride – seen here as the confidence that the law is for others, and has nothing to say to me – cross the vital line separating what is immoral from what is illegal.

As I have tried to show, Human Rights and Democracy Week celebrates the emergence of a system of law. Acts outside the law, including violations of rights protected by the law, have legal consequences. That is what links these issues together.

The forging of these links on the international plane is one of the great achievements of mankind in recent times. It should be celebrated. Yet we have so much still to do.

Thank you for inviting me to WHINSEC. I look forward to taking your questions.