Guilt and Responsibility in International Law

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In his introduction, my friend David Wippman told you about how he and I got to know each other from opposite sides of the courtroom. We litigated a protracted and very complex case, and David's side won most of the battles. Now he says that his professorial colleagues have concluded that my client's position was right all along. This reminds me of what a partner of mine who is an economist says about his profession: an economist is somebody who takes something that is true in fact and proves that it is also true in theory. It's nice to know that, although a whole series of judges disagreed with our point of view, academics approve of it. I suppose that there is some solace to be found there, although as far as I am concerned, we still lost the case.

It's a pleasure to be here at Cornell. Although we began as adversaries, David and I quickly found that in much more important issues we were close allies. I am referring to the promotion of human rights as legal rights both within the United States and internationally. It is in that context that I want to talk today about guilt and responsibility in international law.

It seems to me that the development of the concepts of guilt and responsibility – which I will argue are different but overlapping – is something now occupying the attention not only of practitioners and scholars but perhaps most importantly of politicians, whose attention to the area of international law has been somewhat spotty in the past. Yet they now find themselves concerned with the questions that I propose to present to you this afternoon.

Even raising the issues of guilt and responsibility arising in international law, of course, assumes a certain fundamental change in the nature of the international legal regime from its traditional roots. Historically, only sovereigns were said to be the subjects or the objects of international law. That is, only sovereigns had obligations, and only sovereigns had rights that could be enforced in whatever system international law provided for the enforcement and defense of rights.

Of course, there have always been certain exceptions to that rule. For example, that the pirate offended against the law of nations is a proposition going back at least to the eighteenth century. But exceptions to the general proposition, that the scope of international law was the regulation of the conduct of states, were few, and they had obvious characteristics in common. The exceptional cases concerned activities that occurred outside the territory of any state, and therefore no state was capable of regulating them. Illustrations, aside from piracy, are conduct by individuals who represented states, acted on their behalf, or even notionally personified them. There is a venerable tradition, for example, under which the protection of diplomats is a matter of proper concern to international law.

But since World War Two and the birth of the United Nations, the vocabulary of international law has changed. I do not mean simply to say that in the years following the Universal Declaration of

Human Rights we have all learned to articulate goals and moral principles as if they were propositions of law. Principles of international human rights have in fact achieved the status of binding legal norms. In the words written by Judge Eugene Nickerson, when the landmark *Filartiga* case was remanded to him 20 years ago, human rights are no longer "a mere set of benevolent yearnings never to be given effect," but rather are grounded in a system of law.

This is not to say, of course, that the international legal regime of human rights is a set of rules which are always observed. Nor are the traffic laws in New York City always observed, yet that fact does not support the contention that those norms do not exist. That human rights law consists of binding norms means that, at least in principle, violations of those rules are in some sense punishable. They require the imposition of justice. And even if in any given case there may not be a consensus about exactly how to define the violation, or what precisely we might mean by justice, there is agreement at least in principle that where a violation of international human rights law is proved, and we have the culprit, then that person is to be punished by some legal system. I will defer for a few moments the question of what kind of legal system might accomplish that function.

In addition to the proposition that where there has been a violation of the law that there should be punishment, there is a parallel but different notion that where there has been a violation of someone's rights those rights must be vindicated. These are independent of one another: in any given case either can hold sway with or without the other. Yet both concepts marked the progress of international human rights law in the latter half of the twentieth century, and both are at a very decisive moment in their development right now.

We no longer can take for granted that the semantic units, the individual atomic parts, of international law are states. We know, for example, to a certainty today that there are entities that are not states whose behavior is routinely governed by international law: they have obligations imposed on them, and rights conferred upon them as well. There continues to be resistance to these developments, some of which has come from unexpected places. In fact, some of it has come from political leaders in the United States.

Yet it cannot be denied today that the universe of those who are affected by international law has expanded. A good illustration of this is the very title of a collection of essays recently edited by Professor Wippman, *International Law & Ethnic Conflict*. The fact that a book with such a title could be written already implies a rather substantial change in international law from, say, the 1930s, when that would have been a very thin book indeed. In those days, international law would have had little to say about ethnic conflict except in cases in which that conflict might spill over and cause an interaction between states.

With that as preface, let me turn to the notion of guilt. To speak of individual guilt for violations of international law presupposes a number of things. There must be law that is binding on the person accused. That binding law must be sufficiently specific to permit the defendant to understand that her or his conduct was potentially violative of it. And there must be some kind of procedure to determine whether in fact the law has been violated 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. In the 21st century, we must ensure that the procedures we employ for these purposes 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 no one may be a judge in his own cause, that everyone has the right to counsel, that every defendant has the right to an impartial tribunal, 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.

The elements of law to which I have been referring may be loosely grouped into the two familiar categories of substance and procedure. What are the substantive elements of international criminal law? Even to ask the question requires recognition that this is an area of international law fundamentally different from all others. 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, both demonstrating the acceptance by states that they are willing to be bound to act or to refrain from acting in certain ways. But criminal law by its nature imposes obligations not on states, but on individuals. Nobody has asked me if I consent to the development of a norm the violation of which might then subject me to punishment. So there is already something slightly anomalous about the elements of international criminal law, since they are not based on the consent of the governed.

That having been said, what rules can we confidently say constitute the content of international criminal law? In the first instance, we know that they 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 can be said to entail the potential criminal liability of their individual perpetrators. We also know that violations of international humanitarian law, *jus in bello*, can constitute criminal offenses. We have all witnessed through the media recent examples of violations of the laws of war: ethnic cleansing, the use of rape as a weapon of war, and similar offenses that International Criminal Tribunals for the former Yugoslavia and Rwanda have had to address, and have resolved to condemn and punish.

Violations of international humanitarian law as codified in the Geneva Conventions and as interpreted by courts of competent jurisdiction, as well as other acts of mass destruction, genocide, whether or not in the context of armed conflict, ethnic cleansing, large scale targeting of populations: such heinous and atrocious acts are prohibited by all domestic legal systems all over the world. They are generally felt to be especially deserving of condemnation when they target victims based on a characteristic such as nationality, or ethnicity, or religion, or sex.

If what I have articulated thus far is at least the bare outline or the nucleus of the criminal code in international law, it is fair to ask where that list came from. In domestic systems we know how to answer such a question. We have a process of law-making, with a legislature, and separation of powers among the branches of government. 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 easily on what the law **means** – that is why we have courts – but to find out what the law **says** is ordinarily easy enough. Yet this is not so easy in the context of international law, which lacks not only a legislature but any other body that performs the function of codification or compilation.

There are some traditional guides to addressing the determination of the content of international law. For example, the Statute of the International Court of Justice explicitly spells out the sources of international law to be used in that tribunal. It lists four: treaties, custom, and general principles of law are primary sources, to be supplemented by the writings of scholars and decisions of courts.

Much of the content of international criminal law may be found in the frequently overlooked category of general principles accepted as law by civilized nations. All nations share at least certain elements in their criminal code. Murder, for example, is always against the law: as Lon Fuller wrote, if there is no provision in the criminal law to prohibit unauthorized homicide, then there is no system of law at all. General principles tell us that certain kinds of offenses are criminal by their nature in domestic law, and they must also be criminal if committed across borders, or if they target victims of a particular nationality, or ethnicity, or protected class, or if they entail a deliberate or inadvertent international consequence.

Many legal systems expressly incorporate the principles of international law into domestic law. We in the United States generally reject the notion of common law crimes. In this country, every alleged offense against the criminal law can be tested against an express enactment of the legislature. Yet even in the United States, there are criminal statutes, such as the law prohibiting piracy, that define their terms by incorporation of international law as it might be from time to time. The Supreme Court has held that such a statute is not unconstitutionally vague, because it can be ascertained with sufficient certainty at any time what the content of the international norm against piracy, for example, might be.

But as we look for the content of international criminal law, and we have recourse to the general principles of law, we should not overlook a source of law something to which lawyers generally do not like to refer. I am speaking of moral principles, by which people are guided, and for which we need make no apologies. We know to a certainty that certain kinds of conduct cannot be justified in any terms, and they are or must be forbidden by any system of law. Certain acts are simply are impermissible, and subject their perpetrators to punishment not only domestically but internationally.

Why is it asserted, for example, that Saddam Hussein can be tried in an international court? It goes without saying that his abuse of his people must have been a violation of the laws of Iraq. Yet the confidence that he can be tried in an international forum is based on a perception that is difficult to define. Crimes of the scale of his inevitably have international consequences, and it would be a denial of the rights of the international community to require that they be resolved exclusively by the state in which they occurred. I would draw an analogy to apartheid. The South African Government regularly maintained throughout the apartheid era that whether or not its policy was consistent with some treaty or resolution of the United Nations was really of no consequence, because it was a matter of exclusive domestic concern. It was a policy applied within the four corners of the South African nation, and at the end of the day could be defended on the basis of South African sovereignty. The world community rejected this position. A crime of the scale of apartheid, targeting victims on the basis of a characteristic shared by people around the world, cannot be confined to the consideration of a single state. The international character of the offense had nothing to do with its having exceeded the borders of the state responsible for it.

If these, then, are to be the sources of an international criminal law, then to devise appropriate procedures we must next address what we want this system of law to achieve. I think that the goal of international criminal law is the same as the goal of domestic criminal law: it must bring accused perpetrators to the bar of justice, subject them to a system that will determine and not presuppose their guilt, and if they are convicted, punish them based on some sense of the proportionality of their offenses. 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. So only if we can make sure that perpetrators are forced to pay their debt to the international community – in domestic contexts, we often refer to "a debt to society" – then the community of nations remains somehow an unsatisfied creditor. It has been offended, but it has not been able to receive recompense for the offense, even once we know who committed it.

The only way we can preserve an international balance, a truing-up of accounts, would be by devising a system for the enforcement of these norms and the punishment for those who are guilty. But how can we accomplish this? There are a number of possibilities. International institutions can establish tribunals whose mission is the interpretation and application of the normative content of international law. The mandate of such courts would include enforcement of the law, through arrest, through trial, and through punishment if necessary. There has been an increasing use of such tribunals, from the special courts at Nuremberg and Tokyo after the Second World War, through the tribunals established by the United Nations for Rwanda and the Former Yugoslavia, and, most recently, the permanent International Criminal Court. All are international bodies, charged with applying international law, empowered to try defendants brought before them, to extend to them the due process to which they are entitled, and then ultimately to determine and to carry out their sentences if they are convicted.

International tribunals are not the only vehicle for the enforcement of international law. Domestic tribunals can achieve that objective as well. When domestic tribunals are in the business of enforcing international law, as opposed to domestic law that just happens to coincide with international law, they are acting as agents of the international system. This is, again, because if a crime is an offense against society, the society offended by a violation of international human rights law is not only that of an individual state participant in the international community, but is the international community itself. States, therefore, have developed various techniques for addressing the need to proceed domestically against accused international human rights abusers who find themselves on their soil.

As we have seen, one way of accomplishing this is through the incorporation of international law into domestic law, permitting prosecutions under the domestic legal system. This approach produced, for example, the prosecution of General Pinochet, accused of crimes committed in Chile against Spanish citizens. The Spanish courts claimed the right to do this under a traditional principle of extraterritorial jurisdiction, the passive personality principle, under which a state may adjudicate a criminal case against someone accused of abusing the rights of its nationals.

Other nations have deployed the doctrine of universal jurisdiction to achieve a similar objective, although perhaps not without controversy. Belgium recently found itself running afoul of the United States and other governments when it enacted legislation to permit prosecutions 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 not present on Belgian soil. While the first two provisions of Belgium's law may have been consistent with historical notions of universal jurisdiction, proceeding without the defendant present and served with process was novel. It was this aspect that caused a great deal of uproar in Washington and elsewhere, as the Belgians began to evaluate prospective prosecutions of such people as Ariel Sharon for acts alleged to have violated the international law of human rights.

Other states have employed other means of deploying their own domestic legal systems in defense of the international regime. Israel has had on the books since 1950 the Nazis and Nazi

Collaborators Act. In 1985, when I was on the Board of Directors of the International Human Rights Law Group, I received a call from the Chief Judge of the U.S. District Court for the Northern District of Ohio, Judge Frank Battisti. He had before him an extradition request presented by the Justice Department for a man living in the Cleveland area, who was accused in Israel of having committed acts of singular brutality at death camps at Treblinka and Sobibor. Chief Judge Battisti was concerned about whether he could lawfully accede to the extradition request, for two reasons: because the crimes of which the defendant stood accused occurred outside the territory of Israel, before it came into existence as a state. The Judge wondered aloud whether it was consistent with international law to authorize the accused's extradition to stand trial in Israel under these circumstances.

After doing a long analysis of these questions, my Law Group colleagues and I submitted a brief arguing that it was indeed permissible under international law for this defendant to be tried in Israel, because the acts of which John Demjanjuk was accused were acts that were criminal when and where they were committed. The only difference, we argued, between his proposed trial in Israel, and a concededly appropriate trial in Poland, Ukraine, or Germany, was venue. And there is no fundamental right to be tried in one place rather than another, so long as basic due process is provided. Judge Battisti agreed, the Sixth Circuit affirmed his decision, and ultimately the Supreme Court denied review.

Demjanjuk was extradited to Israel. Some of you 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 Cleveland had been obtained may have been forged. For that reason, the Supreme Court of Israel came to be concerned whether the defendant was properly present in the jurisdiction, and ultimately, it set aside the conviction. It is interesting to note that, in similar circumstances, the United States Supreme Court would almost surely not have been distracted by this issue, since the law of this country appears to be that it is no business of the courts how someone came to be present before them, and they will not interrogate law enforcement authorities to ensure that the defendant's rendition was consistent with international law.

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 in fact not be guilty. What kinds of defenses will work? Obviously "it wasn't me," and "I wasn't there…" are defenses. If any court anywhere in the world ought to be especially solicitous about due process protections that have been enshrined in the basic documents of international 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 in such contexts. An obvious example is "I was just following orders." It is of course not true that the Nuremberg Tribunals disallowed that defense for all time. Most of the people who were tried at Nuremberg were not in fact following orders, they were giving orders. No privates or master sergeants were tried at Nuremberg. 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

following 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 death.

There must also be available procedural as well as substantive defenses, including ones that challenge the jurisdiction of the tribunal. Every defendant always has the right to be tried in a forum that is properly seized of the case against him. It appears as if the decision of the United States to stay out of the regime of the International Criminal Court will virtually guarantee a jurisdictional donnybrook (and worse) were any American ever brought for trial there. Still, the prospect that the ICC – a true international tribunal, established on a permanent (and not an ad hoc) basis – will have the confidence of the vast majority of the international community in making determinations of guilt and innocence, crime and punishment, is a very encouraging development in the progress of international human rights law.

When I speak of responsibility, as contrasted with guilt, in international law, I mean to focus not on the punishment of a perpetrator of human rights abuses as having defaulted on a debt to society, but rather on what remedies might be available to the victims of those abuses. I exclude here the remedy of vindication undoubtedly felt by some as they watch the murderer of their family member being led to the execution chamber. I want to focus on the more mundane goal of compensation.

There is no proposal, yet at least, for the establishment of an international civil court. The only legal fora open to victims of human rights abuses, therefore, are those provided by domestic legal systems. And it is open to lawyers committed to the continued evolution of human rights law to use the tools of those domestic systems in service of protecting those rights.

Here in the United States, the Alien Tort Claims Act provides one means, but by no means the only one, to achieve that objective. The Alien Tort Claims Act, as I am sure you all know, dates back to 1789, and provides that the federal district courts shall have original jurisdiction over all cases brought by an alien in tort only, for a violation of the law of nations or a treaty of the United States. That language was enacted as Section 9 of the Judiciary Act of 1789, and has been essentially unchanged in the 215 years since then.

Since the *Filartiga* case in 1979, the Alien Tort Claims Act 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 statute requires only that the court have personal jurisdiction over the defendant, that the case sound in tort, that the plaintiff be a non-citizen, and that the allegation include the commission of a tort in violation of international law. The statute does not purport to create "a private right of action": this is not necessary, since all cases coming within the statute are cases in tort.

And this past term, in *Sosa v. Alvarez-Machain*, the Supreme Court – interpreting the law for the first time – has taught that the statute means what it says: it is the basis of federal jurisdiction if the norm of international law that has been violated is sufficiently clear and binding to constitute a broad international condemnation of the conduct of which the defendant stands accused. This, said Justice Souter for a 6-3 Court, is what the first Congress meant when it spoke of a "tort . . . committed in violation of the law of nations."

If the jurisdictional prerequisites of the Act are satisfied, then a plaintiff-victim may sue her human rights abuser, take discovery, go through the entire procedure in a civil case, and bring the case to

trial. If she can carry her burdens of proof, then, at the end of the day, she can get a verdict and an award of damages. And in some cases there have been substantial damages awarded and 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 property available in Florida for seizure by the plaintiffs.

It is true that most Alien Tort Claims Act cases have led to judgments that could not be enforced. But many civil cases end in uncollectible verdicts. The point is that, under such domestic legislation as the Alien Tort Claims Act, there is a vehicle for assigning responsibility for human rights abuses to those who committed them. And even if the judicial remedy awarded ultimately does not result in the payment of compensation to the successful plaintiffs, that there are legal consequences for individuals who have committed these offenses is still an important development.

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 (to the extent that compensation can ever accomplish this). International law is a source of legal rights, and those rights protected by international law are treated in such domestic contexts no differently from rights that stem from the statute book, or from the *Code Civile*, or from the common law.

As the international legal regime creates mechanisms for the punishment of violators of internationally-protected human rights, and as domestic systems extend their scope to encompass civil suits relying on such rights, the result is the parallel development of the concepts of guilt and responsibility in international law. Underlying both of these is a common conception, and I submit that it represents the single most important change in the international legal regime since the Second World War. It is simply stated.

Individuals have rights and obligations in international law, and these are enforceable as a matter of law. No longer, as Judge Eugene Nickerson wrote when the *Filartiga* case was remanded to him for trial, is international human rights law "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 those whose influence is most keenly felt in the international regime. It is possible that these last few years have begun to mark a swing back, in favor of a kind of lawless realpolitik, in which powerful states feel themselves to be entirely outside the constraints of the international regime.

I believe that we, as American international lawyers, have no more solemn obligation than that of using what skills and resources we have to ensure that such a result does not flow from the ideological triumph of our country in the Cold War. It would be sadly ironic if the end of the road for the development of guilt and responsibility in international law came about through actions of the United States, which was so instrumental in the improvements of the second half of the last century, and yet which seems no longer to have an interest in participating in any regime that would restrain its international behavior. That way lies chaos.

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