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INTERNATIONAL LEGAL RESPONSES TO THE HOLOCAUST AND GENOCIDE AFTER NUREMBERG

Professor Phillip Alston: The topic for this afternoon is International Legal Responses to the Holocaust and genocide after Nuremberg. It gives us a particularly important opportunity to draw some of the parallels between the Holocaust and situations which have emerged subsequently. It also gives us the opportunity to reflect on the inability of the international community to take the sort of action that any objective observer back in 1946 would have assumed to be inevitable.

First of all, we will look at the development of the concept of crimes against humanity. The United Nations has been engaged in trying to draft a code of offenses on that subject basically since the late 1940s. This is very much on the agenda today and the risk, of course, is that it will be very much on the agenda for another fifty years time. Similarly, when we look at what the U.N. has been able to do with respect to genocide, someone rather ominously mentioned earlier that the Holocaust had been relegated to a footnote. That's a rather ironic comment in view of recent developments within the United Nations when a special rapporteur was appointed to study the question of genocide and to present a number of suggestions as to what the United Nations could conceivably do in the future to prevent the recurrence of genocidal episodes. The major controversy before he began his work was whether or not he would name names. He decided essentially not to do that with the exception of one paragraph, the infamous paragraph twenty-four of his report, which essentially was made up of footnotes just saying that lots of genocides have happened in recent years — for example, problems in Armenia, Paraguay, Burundi and so on.

The entire United Nations debate, with contributions from experts from many different countries, focused on how outrageous it was to have named any of the above countries without a thorough and exhaustive study being undertaken. Of course, everyone knew this should never have been done in the United Nations context. It is sad to say that experts from a whole variety of countries unexpectedly took a very nationalistic, very narrow-minded approach to the question of genocide. Most experts ended up saying, “We can talk about genocide in the abstract without dirtying our hands and talking about specific instances.”

I think that really sets us up for the panel that is going to take place this afternoon. This morning, we saw the extent to which states have always wanted to bury the past. To quote Professor Cotler and others, we're still doing that and as long as we bury the past, we'll never have to confront the real dilemmas of responding to genocide. And, we will always be in this sort of no-man's land of formal international legal responses to genocidal episodes when they do occur. The first speaker this afternoon is Professor Ewa Brantley who is going to speak to us about the concept of crimes against humanity.

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discuss a current attempt to make some use of the Genocide Convention in the case of Kampuchea. I'll finally offer a couple of concluding thoughts on the overall subject that is being addressed today.

I think that while all of us would be appropriately critical of formal U.N. action with respect to stopping incipient genocide or even condemning genocide that has already occurred, we shouldn't underestimate the impact that it had at least in the immediate postwar period. I don't know if I would go so far as to suggest that without the U.N., the Nuremburg Tribunal would have simply been another example of the victors executing a few of the vanquished. But, the U.N. certainly gave a legal and moral legitimacy to the Nuremburg Tribunal that it would not otherwise have enjoyed. It is important to remember that it was during the General Assembly's first session in 1946 that a resolution was unanimously adopted stating that genocide was a crime under international law. Two years later, in 1948, the Genocide Convention itself was adopted. Ewa has explained with great clarity some of the particular political issues that were prevalent at that time. There now are 96 parties to that Convention. Despite recent action in the United States Senate, the U.S. has not yet ratified the Genocide Convention. One of the many reservations attached to Senate approval was an agreement by the President that he would not deposit the instrument of ratification until the necessary domestic implementing legislation was adopted. That legislation has not yet been introduced, so it will be at least a number of months before the U.S. is formally a party to the Genocide Convention.

Very little happened between 1951, when the Convention came into force, and the present in terms of its direct implementation. There was a World Court case concerned with the effect and legitimacy of reservations to the Genocide Convention which contains some interesting language but doesn't deal with any specific issue of genocide. In 1969, the U.N. first formally began to reconsider genocide and the Convention through the appointment of a special rapporteur.9 Nine years later, in 1978, the special rapporteur's final report was considered by the Subcommission but never published, largely because he attempted to deal with the question of genocide against the Armenians by the Ottoman Empire. Incredible political pressure was brought to bear by the Turks, and the report was withdrawn. Five years thereafter, Benjamin Whitaker, who is the Executive Director of the Minority Rights Group in London and a member of the Subcommission, was asked to update and revise this earlier study on genocide. That revision was discussed last August in the subcommission.

At the risk of going into some detail, I think that a review of that debate offers an interesting perspective on the current political situation in the U.N. with respect to discussions of genocide. The study itself was a very serious one. Among its specific recommendations was that the focus should not be so much on punishing those who have committed genocide, but rather on preventing genocides which either are occurring or may occur in the near future. The study indicated that better data was necessary and, in rather vague terms, that some sort of early warning system also was needed as a way of identifying potential situations of genocide, mass movements of peoples, and famine.

4 Special rapporteurs are used by many of the U.N. Human Rights bodies, including the Commission on Human Rights, which is the major governmental body that meets every year in Geneva in February and March, and its subcommission, which is a body of experts that meets in August. Special rapporteurs can deal with issues in a public but not overtly political manner. They often are assigned to consider issues which can be handled in a general rather than a country-specific manner.
Whittaker also suggested that, under Article 8 of the Convention, a new international body within the United Nations might be established, as either a separate committee on genocide or simply a working group of some existing body. He also recommended that the International Penal Tribunal referred to in the Convention be brought into effect. Unfortunately, after forty years, I think that recommendation is unlikely to be accepted. If no formal mechanisms can be established, the report suggests that all states should accept the principle of universal jurisdiction.

As Professor Alston mentioned, most of the debate in the Subcommission did not concern these substantive issues, but rather focused on the naming of countries. The situations mentioned in footnotes included the Ottoman genocide against Armenians, the Ukrainian programs against the Jews, the massacres in Burundi in the early 1970s, genocide against the Indians in Paraguay in the mid 1970s, and genocide by the Khmer Rouge in Cambodia between 1975 and 1979.

Two resolutions were introduced concerning this report. One dealt with the specific recommendations that Whitaker had made. This, after some discussion, was deferred by consensus because, even in this allegedly expert body, no one was willing to approach the substance of making the Genocide Convention work more effectively. The second resolution concerned the report itself, rather than the recommendations. It merely took note of the report, as the Subcommission was not willing to admit that it had even received the report. One can conclude from this performance that it is unlikely that the U.N. will take any action to reform the Genocide Convention in the near future. Even if we can't see any real progress with respect to genocide, U.N. action in the realm of human rights has not been insignificant. Within the Commission on Human Rights, for example, there is a working group on summary and arbitrary executions that meets throughout the year. It contacts governments on a confidential basis when people are about to be executed or where massacres have taken place, and it seems to have saved a few lives. There is a special rapporteur that acts in a similar manner with respect to cases of disappearances. Originally, he primarily dealt with Chile and Argentina, but disappearances are unfortunately a phenomenon around the world. Just in the past year, a similar rapporteur has been appointed to investigate torture. There are also rapporteurs on religious intolerance and other issues related to genocide, which are frequently considered by U.N. bodies. Thus even if "genocide" is not discussed very often, the U.N. does deal with "gross violations of human rights" or "arbitrary executions." If one is concerned more with changing conduct than attaching labels to it, it would be unfair to suggest that the U.N. has been totally inactive in this area.

One also has to see action on genocide in the context of actions that the U.N. has been unable to take with respect to other issues. I think it was Professor Cotler who said that one of the lessons of Nuremburg was, "never again." One of the lessons of the U.N. Charter was "never again" with respect to war. I don't think the U.N. has been any less successful in preventing genocide than it has been in preventing war. One also has to view the U.N.'s efforts in the context of general disrespect for international law and the blurring between the rights of civilians during times of armed conflict and in peace. It would have been nice if one could have concluded after World War II that new norms with respect to the protection of civilians, particularly during armed conflict, had been established. Unfortunately, World War II seems to have set a precedent in precisely the opposite direction.

An interesting Bill Moyers' television show a year or so ago considered the differences that advances in weaponry had made in the way war is waged. Members of the
British Military and Defense Establishment during World War II indicated that, while it was Germany that began the bombing of cities with no military value (e.g. Coventry), retaliation was not even considered at first. According to the laws of war, you simply didn't bomb civilian populations, and no matter how outraged they were about these barbarous acts, it was felt that the British public would simply not have stood for the killing of German civilians. However, within two years, there were the fire bombings of Dresden, the saturation bombings of Hamburg, and Hiroshima and Nagasaki. While a few people were subsequently condemned by the Nuremberg Tribunal for other war crimes, such Allied bombings suggested that distinctions between civilian and military targets were of little consequence. Unfortunately, that lack of distinction has continued to this day.

I mentioned Kampuchea earlier. Let me try to be a little more positive than I have been during the last couple of minutes and suggest that, even though the Genocide Treaty hasn't been specifically invoked in its forty year history, it has nevertheless been important.

Under anyone's definition of genocide, it certainly occurred in Democratic Kampuchea in the period between 1975 and 1979. In fact, if one considers percentages rather than absolute numbers, I'd suggest that what occurred in Kampuchea was much more serious than even the Holocaust. Somewhere between a quarter and a third of the entire population of Kampuchea was destroyed by its own government.

The U.N. did begin to act and, in 1978, asked the Chairman of the Subcommission on Prevention of Discrimination and Protection of Minorities to prepare an analysis of information received about events in Kampuchea. His report was presented in March 1979 to the Human Rights Commission, and a fairly serious debate ensued. Formal submissions from Australia, Canada, Norway, the United States, and the United Kingdom alleged that genocide had occurred.

Unfortunately or fortunately, depending on one's perspective, Vietnam invaded Cambodia in January 1979. Thus, by March 1979, any discussion of genocide was subsumed into a larger, more political discussion of self-determination. What had been a debate that had focused on human rights within a country shifted to whether the Vietnamese invasion was justified. This is precisely what Professor Matas referred to earlier today when he talked about nationalism as the reason behind the objection of some groups to trying Nazi war criminals; they feel that this undercuts the "independence" of, e.g., the Baltic countries or of the Ukraine. There is a similar situation with respect to Kampuchea, and I was a bit surprised that it wasn't mentioned. Today, if one talks about genocide in Kampuchea, that is seen by some as somehow legitimizing the continuing Vietnamese occupation by attacking the former Khmer Rouge government.

The United States and the U.N., of course, accuse Vietnam of genocide against Cambodia, which makes any rational discussion almost impossible and shifts the focus to the legitimacy of a government, rather than genocide.

David Hawk is an activist who lives in New York and Director of the Cambodian Documentation Commission. He has been working for the last several years to document, in a very serious and legal way, the incidents that occurred between 1975 and 1979 in Kampuchea. In the first session this morning, we heard how difficult proof was in the German war crime trials. Change the language, place the country several thousand miles away, and make all the people killed have brown skins rather than white skins, and you will have some idea of the difficulties involved in proving genocide in Kampuchea.
I've now been involved with David Hawk over the past several months drafting a complaint to the World Court under the Genocide Treaty. Cambodia is a party to the Genocide Convention without reservation as to the jurisdiction of the Court under the convention. Cambodia also has accepted the compulsory jurisdiction of the World Court. Consequently, one may be able to argue on customary international law grounds that go beyond the narrow definitions of the Genocide Convention. Because of the lack of public interest and political sensitivity of the issue, we have decided that we must do what any self-respecting government should be doing. We are preparing a brief that is sufficiently persuasive on the law and facts so that we can approach foreign ministries and say, "Here, genocide occurred in Cambodia. Take this case to the World Court, and you should win."

However, taking a case to the court is a very serious step for any government to take. It seems to me to be an obvious one in this case, but we have at best a 50/50 chance of success.

Just let me end with a couple of general comments about what was said this morning. First, I think that this conference is extremely important and particularly in its focus on Holocaust and Human Rights Law. For too long, these have been considered to be in two very separate categories. Equally unfortunate is that, during all this morning's presentations, no other situation of mass killings or genocide, except for the World War II experience, was mentioned. While that reflects to some extent the focus of the Conference, it is overly narrow.

I think that, as Professor Cotler says, one of the problems is that when one starts to talk about prosecuting Nazi war criminals, one immediately is asked the question, "Why bother?" Prosecution has been turned into an issue of Jewish revenge rather than of justice. However, one of the reasons that it's important to prosecute Nazi war criminals is that if we don't prosecute them, we're not going to be able to prosecute anyone else. But it is not sufficient, I would suggest, for those of you primarily interested in the Holocaust to stop your research in 1945. It is not sufficient for you to seek justice only for those who committed genocide then. After all, soon there won't be any more time for justice — ten to fifteen years from now, everyone is going to be dead. I fully support the moral, legal, and political ideal of trying to make people pay for the crimes that they've committed, but I think that one has to look forward.

If this can be a first step, and I think the prosecution of Nazi war criminals is a first step, it needs to be seen as that. All of you who are working in this area unfortunately should be looking forward to prosecuting the next generation of genocidal killers as well. Thank you.

Professor Alston: With so little time available to us with an eternal 15 years to go we'd better move along fairly rapidly. The next speaker is Professor Alfred Rubin. He was scheduled to speak on a positivist reflection on Conceptions of Universal Jurisdiction and Retributive Justice. I think we should perhaps change that to a positive reflection since that's what we're in need of at this stage rather than a positivist reflection.

Professor Alfred Rubin: I'm not sure how positive I can be here because the problems of implementing the Genocide Convention, and other human rights documents, seem to

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5 Professor Rubin teaches international law at the Fletcher School of Law and Diplomacy. He
me to be great. The inherent problems cannot be cured by ignoring them. I'm reminded of the child who asked his mother, "Where do we come from?" and the mother thinking fast said "Well, from dust we came." And then the child asked the mother, "Where do we go when we die?" She said "Well, to dust we return." And the child then said, "Well, you know there are an awful lot of people upstairs under my bed and I don't know whether they're coming or going."

The talk of the Genocide Convention so far has, for example, simply assumed that once you have defined the acts that you've determined to be illegal, then by definition all the problems are solved. Somewhere you'll find an appropriate tribunal, the standing for somebody to bring the claim, and a prosecutorial interest. I suspect that Hurst, drafting his proposed complaint to the International Court, has uncovered a whole range of problems that cannot be assumed away: They reflect far deeper aspects of the international legal order, aspects that are not technicalities. If you strip away the legal technicalities you find yourself in the position of Sir Thomas More in the *Man for All Seasons*, refusing to chop down all the trees to get at the devil himself for fear that when the devil was trapped in the corner and turned around, where would you hide? The technicalities affect the applicability of the Genocide Convention. For example, the Convention requires the extermination of a racial or ethnic or similar group, presumably by another ethnic or religious group. Where does Pol Pot fit into that? Can we simply assume that his aim was a total reformation of the economic and political system of Kampuchea without regard to the ethnic, religious or other affinities of the people he was ruling? He was himself Kampuchean. If Hitler's attack had not been specifically against Jews, but against Germans whom he didn't like because they were socialists or communists, would he have been accused of committing genocide? Not according to the Genocide Convention. The Russians and others were very clear that they did not want political persecution and economic persecution to be categorized as genocide. Genocide involved things like the killing off of Gypsies, Jews, and others because of a racial classification.

The second problem under the Genocide Convention is that only the country with jurisdiction to handle prosecution is the country with jurisdiction over the place in which the acts occur. A genocide trial under the terms of the Genocide Convention regarding events in Kampuchea would thus have to be held in Kampuchea. By whom? By the government of Kampuchea? The current government of Kampuchea would probably be delighted to hold a trial of Pol Pot and probably wouldn't even bother accusing him of genocide. Yet that is the only government with jurisdiction over the event under the terms of the Convention. We can argue that it's a mere technicality of the Convention. But if so, it's a technicality that was demanded as a condition for the Convention to be accepted and ratified by the large number of states that have ratified it. To wipe away that condition on the ground that they didn't mean it or that they didn't know what

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also has taught at the United States Naval War College and the University of Oregon. Prior to teaching, Professor Rubin worked as an Attorney Adviser in the Office of the Assistant General Counsel (International Affairs), Department of Defense, and as the Director of Trade Control, in the Office of the Assistant Secretary of Defense (International Security Affairs). Professor Rubin's extensive publications list includes two books on legal aspects of British imperialism in the Far East and over fifty articles in professional and student-edited journals. Professor Rubin recently completed a third book on the law of piracy. He is currently Chairman of the International Law Association's Committee on Extradition (Terrorists).
they were doing is impossible. Of course they knew what they were doing. They were protecting other interests.

I find that most of the documents that are being cited, aside from the Genocide Convention, are very carefully drafted and therefore exclude almost all practical effect. The documents that one cites for their ringing affirmations of law are in fact documents drafted not in the legal order, but documents drafted in the moral order. The distinction between these two kinds of documents sometimes gets very fine. But it is a distinction vital to an understanding of the law. We have a maxim in international criminal law that there is no punishment without a law.

There is no tribunal without a law. Somebody has to give authority for the tribunal to act. Somebody must tell it what the law is. Most naturalist jurists think that the law with regard to human rights can be derived from our self-examination of a value system: everybody who is capable of right reason and fair judgment will come to essentially the same conclusion and therefore, it doesn't matter what tribunal you go before, because they're all enforcing the same law. Talk to a judge about that. You will find out that a tribunal is not created by the international legal order. A tribunal is created by a constitutional order which chooses its judges from those eligible to be judges within that constitutional order.

The United States Supreme Court enforces American law by American judges sitting in accordance with the United States Constitution, bound by U.S. traditions. When it purports to pronounce on questions of public international law, we may be convinced because we think that's what international law should be, but very few other countries are convinced the Court is right that it is anything more than an American statement, an American interpretation of what international law is as applied by the United States to a case properly within American jurisdiction.

The persuasiveness of that judgment depends upon its persuasiveness to judges raised in different legal orders, who derive their authority from different appointment systems or election systems, whose training is in different educational systems and whose perception of what might be Natural Law might well emphasize different values.

These kinds of problems are crystallized in various rules of human rights in the international legal order that we don't like to talk about. We assert things like universal jurisdiction, universal standing and universal law. I will say bluntly that in my opinion, after some attempted analysis, none of those things exist. We are really talking about universal morality.

Let me raise some of the legal problems that don't exist in the world of morals. In the Nuremberg Tribunals, if war crimes are truly subject to universal jurisdiction, how would the United States have acted if an Italian Tribunal seized Admiral Nimitz, who had confessed to committing a war crime as part of World War II, and said, "Happy to see you here on a visit to a NATO base, Admiral, you're under arrest under universal jurisdiction? We will try you for having declared unrestricted submarine warfare in the Pacific Ocean on December 7, 1941, which you confessed to have done on orders from Washington, and if we could get hold of President Roosevelt we would try him." Would we, for an instant, have thought that there was universal jurisdiction? I submit that we would not. That's victor's justice.

As for universal standing, I've found only two cases in which the place of apprehension was by that fact alone considered to allow a trial. One was in 1705 in Regina v. Greene where thirteen innocent men were hanged. The other was the Attorney General of Hong Kong v. Kwok-A-Sing in 1873. In that case, there was a Chinese citizen who
committed mutiny on board a French ship and took the ship back to China so that he could escape from what he and his Chinese shipmates regarded as forced labor. They were tried for piracy on a universal offense so that the Hong Kong Court could get jurisdiction because they didn’t trust the Chinese Courts and the French didn’t want jurisdiction over so sensitive a case. It was obviously not a case of piracy, but a case of mutiny within French jurisdiction. Those are the only two universal jurisdiction cases that I’ve ever found. I have found multiple assertions of the existence of universal jurisdiction. But never has it been asserted in the absence of something more.

Now what more is required? In my opinion, what is required is standing. Why don’t we ever hear about standing when we talk about human rights cases? Standing is a very common conception in Anglo-American Law. It means that if you don’t like the struggle going on between your neighbor and your neighbor’s husband or wife, and you want them to solve it, you can’t bring them to court. You might bring them to court if they make enough noise to disturb you. Then you are injured. But if you’re not legally injured, it’s none of your business and the court will simply not hear your complaint.

International law has an equivalent to the problem of standing, quite analogous to this question of family law. The equivalent has been the subject of three ICJ decisions, The Nottebohm Case (Liechtenstein v. Guatemala), 1955; Southwest Africa Cases (second phase) (Ethiopia v. S. Africa; Liberia v. S. Africa), 1966; and Barcelona Traction, Light and Power Co., Ltd. (second phase)(Belg. v. Spain), 1970.

Judge Jessup, who had written two books on the subject, Transnational Law (1956) and A Modern Law of Nations (1948), arguing that “standing” was an artificial problem that should be ignored, found himself sitting on the ICJ where the standing issue was addressed in a property rights contest. Belgian property owners had invested in a Canadian corporation that had then invested in Spain. Spain was accused of running a false bankruptcy proceeding, then taking over the corporation, allegedly violating international law. When Canada refused to act, the Belgian property owners brought suit. With Judge Jessup concurring the court threw the case out for lack of standing. Therefore, no substantive rules of law were addressed.

The two other cases, one dealing with individual imprisonment and property deprivation, the other with the obligation of a Mandatory Power to administer mandated territory in the interest of its indigenous people, were thrown out by the court due to the lack of standing. Now we sit and talk about Universal Human Rights Law and try to refine the concepts of what are human rights, never grappling with what is in fact blocking the enforcement of the law: the absence of a tribunal, the absence of standing and the absence of jurisdiction. If you want to do something about human rights then, you ought to do something about what the ICJ says is blocking action in human rights.

To do that you’ve got to grapple with the structure of the legal order, not simply assume it away.

I will conclude my remarks by simply stating that when one talks about crimes against humanity and sees the basis for the definition of crimes against humanity and the Nuremberg Tribunal and the Nuremberg Statute, we frequently forget that the Nuremberg Statute defines crimes against humanity as murder, extermination, slavery, deportation and other inhumane acts committed against any civilian population before or during war. The tribunal has authority to prosecute only these crimes. War crimes are well known. They are violations of the laws and customs of war. In 1945 it was not clear that crimes against humanity were war crimes. The concept of war crimes has evolved to include crimes against humanity, so that these crimes are now considered war
crimes. There is an assumption made explicit here, that enslavement, deportation, and other inhumane acts are at least contrary to the law of belligerent occupation. Thus, the well established concept of war crimes may be a subset of the general set of things that you must not do under the guise of belligerent rights.

Given this background and the careful restriction in the London Charter and at Nuremburg, and the evolution of the concept and the drafting of the Genocide Convention with all of its restrictions that are rarely mentioned, and the restriction of the documents to political and moral bodies like the U.N. General Assembly, where the power to make law is notably lacking, we can see an underlying element of international law. This is not to deny law by asserting the supremacy of "Realpolitik" but to bring to consciousness an essential part of the international legal order. States will not undertake obligations resting upon a legal process over which they have no control. Presidents are elected by constituencies and they act to satisfy those constituencies. Foreigners are not part of those constituencies. The ringing statements are statements given to internal audiences. The documents are restricted to documents that are given to powerless audiences. I suggest that much of the rhetoric surrounding human rights is rhetoric that confuses law with morality. Thank you.

Professor Alston: Thank you Professor Rubin. At a time when acts of provocation can have dire consequences, I think Professor Rubin has been remarkably courageous.

Mr. Hannum: I agree with much of what Professor Rubin said. I think that many human rights activists read human rights in much too broad a fashion. However, I have three rather brief comments on the specifics, in reverse order.

First, it is certainly true that the Nuremburg Charter was limited to crimes connected with the war. It is also true that the limitation was rejected both by the General Assembly and in the Genocide Convention. I don't have the General Assembly Resolution, but the first article of the Genocide Convention says that the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which the parties undertake to punish.

Second, with respect to the Nottebohm and Barcelona Traction cases, I think it is a bit disingenuous to pretend that all human rights are the same. Both of those cases were primarily property cases even if Nottebohm was in jail for a short period of time. I think there is a distinction, first, between diplomatic protection, which was really the issue in these cases, and the larger protection of human rights. Second, there is a distinction between property rights, which are not generally considered to fall within the area of fundamental human rights, and genocide. Third, there is a distinction between imprisonment and apartheid. If one doesn't recognize that there are distinctions among human rights and among the protections accorded to them, one falls into a trap similar to that Professor Rubin has accused human rights activists of falling into, i.e., blurring distinctions that are very meaningful.

Finally, with respect to the Genocide Convention and Cambodia, one of the groups protected from genocide is national, as well as ethnical, religious, and racial. It is difficult to argue, that one can kill part of one's own national group, but there is no limitation in the Convention as to the characteristics of the perpetrators or victims of genocide. Therefore, it is neither intellectually nor legally impossible for Pol Pot to have committed genocide against members of his own national group, as such. But that's a tough argu-
ment to win, and one should not lose sight of the fact that genocide was also committed against both racial and religious groups within Cambodia.

Professor Alston: I'll violate human rights, since Professor Rubin doesn't believe in them, and I won't let him respond. I'll just start taking questions from the audience.

Question: I just wanted to make a comment concerning the London Agreement. In most discussions it's overlooked as to what caused certain things to be inserted into the London Agreements at Nuremberg. The Crimes Against Humanity section, which was unfortunately named perhaps, was a way to attempt to get around the various restrictions that you were talking about. It failed!

The Nuremberg Tribunal refused to accept the attempts of American prosecution. When you actually look at what you have read, you will notice that the words are virtually the same as war crimes in the beginning of this paragraph. Only the final phrase, however it goes, on religious, national or whatever grounds is at issue. The argument there has always turned on whether the phrase was proceeded by a semi-colon or a comma in the German translation. It has been argued that the semi-colon made it a prewar offense as well and, therefore, to be totally technical, the violations did not have to be tied to the war crimes themselves. Now when you come to the actual judgment of Nuremburg and of the U.S. Military Tribunals you will find that the courts state, in fact, that they couldn't tell the difference between the two. So this whole business of the Crimes Against Humanity, which now is being used in the prosecution of Klaus Barbie, has never been defined in any intelligent way as being different from war crimes. Deportations are also war crimes, except for this business of persecution for religious grounds, and that seems to be the one separate item of Crimes Against Humanity. Is that enough to define so universal a matter?

Professor Rubin: I'd first respond that probably the easiest way to resolve the question of the German language is to see where the separable prefix is. You ask whether it's enough. I'd say, consistent with what I've said before, that it might or might not be. That's not the real problem. We can define, refine, and add to the definitions, but they all remain definitions in the moral order unless there is some way of getting over the problems of standing and jurisdiction. We can define away what's nasty, but it doesn't become illegal unless there is a mechanism set up with which the legal order can grapple. So I would not spend effort on refining and defining precisely whether "nation," for example, means the same as "people" within a state or ethnic group. After all, the etymological meaning of nation is an ethnic group. Austria is a country of many nations, even though it was all rooted in the same state. I would simply refuse to answer on the grounds that that's not where the problem is. It may be a problem you'd like to address, but not one that I think affects real human rights issues.

Professor Alston: Professor Rubin resolves these punctuation problems in his own writing by putting exclamation marks at each point.

Question: First of all, my recollection of Nuremburg was that there were a couple of defendants who were convicted for crimes against humanity without being convicted of war crimes.
Another observation I had concerned Viet Nam. My understanding is that when Viet Nam took over Kampuchea, they did prosecute some people for genocide after the Genocide Convention. I also made an observation about the need for talking about prosecution or bringing to justice all those who commit genocide. I think that is an easy statement to make. The problem you get is that unless you prosecute in all genocides you cannot prosecute the Holocaust.

Mr. Hannum: You prosecute whomever you can, I think is the answer.

Question: I would like to address this to Mr. Hannum. In view of the fact that very little has been written on crimes against the peace, very little has been discussed, and very little has been considered, even at Nuremburg where it hardly figured in the trial at all. I'd like Mr. Hannum, if he would, to address the concept of crimes against the peace as first put forward at Nuremburg and the subsequent developments since then.

Mr. Hannum: I think I would like to pass that to some of the other panelists. Phillip Alston just handed me the Second Report on the Draft Code of Offenses Against the Peace and Security of Mankind, which the International Law Commission has now been working on for nearly forty years. This is only the second report. They haven't come up with a draft. The first twenty years were spent trying to define "aggression." The General Assembly finally did define aggression, as I recall, though not necessarily to everyone's satisfaction. I'm reluctant to attempt to define "crimes against the peace." I think that, as we've seen with "state action," defining aggression is often less important than the "Realpolitik" which Professor Rubin talked about.

Professor Alston: Ewa, would you like to comment?

Professor Brantley: I think when one talks in terms of crimes against the peace, the Nuremburg Tribunal speaks of peace and security. As Hurst said, there has just been a single definition of aggression. There was quite a long hiatus in terms of the different deliberations of the International Law Commission before it completed its second report. I personally find the second report very unsatisfactory because, in essence, "crimes against the peace and security" is a broad moral definition of the same types of crimes without being as specific as the crimes of war. I think that nothing really happened in terms of crimes against peace and security and I think it's because, perhaps to be facetious, sovereign nations want to reserve the right to be aggressive towards one another and to get away with it.

Question: A case recently came down, the Demjanjuk Case. There someone committed crimes in state one, moved into state two, and was extradited to state three to be tried under a theory of universal jurisdiction. I wish you could address this because it raises some very serious procedural questions.

Professor Rubin: Actually, the things that I was reading were from the Demjanjuk Case. There is no shortage of isolated cases in which judges go out of their way to make a major point. They do so usually in ringing language with great phrases that are immediately picked up by the human rights constituency who all try to say that the case is the leading case that will from now on determine our view of the law. That's the Demjanjuk
decision and the Filartiga case and there are some others. The problem is that when you start to look at what the judgment actually says, and on the logic upon which it's based, you find enormous leaps. It is simply not true. You find no mention of standing. Just about every sentence assumes a natural law world in which the function of the tribunal is to apply a law that the judge perceives as existing beyond the legislative competence of the constitution that gave him authority to decide the case, or the statute under which he is acting, or the treaties that are made law by the constitution or statute. By applying directly his conception of a value system that he has very little expertise to determine, he fashions a ringing declaration of all sorts of things. It's like the prosecution's argument in the Nuremburg trial. Wonderful reading until you begin to read it carefully and consider, could he possibly mean it?

Questions then would arise that if the Japanese had won World War II, could they have accused the Americans of the same things that the Americans were accusing the Japanese of? The answer is surprisingly "yes." In that case, the generalities turn out to be the imposition of our value system and the things that we think are of the highest order on others who simply don't share that. They're just as much human beings as we are. To say that we have greater insight than anybody else to what God wants, or the world wants, or history wants is arrogance that fools nobody but ourselves. The result of that is the willingness to use force even when nobody else thinks that the law is in danger. We have had an example coming rather close to that fairly recently.

Question: I agree with what you say. It is not a question of universal jurisdiction and piracy. I'm a little confused by the emphasis on cases, as though somehow common law provides analytical techniques which determine international law. As an amateur, I was always impressed by the provision in the statute governing sources of law for implication before the ICJ that specifies opinions of publicists as a major source. So if it is in fact the consensus of writers and scholars in the field that there is universal jurisdiction in piracy cases, why consider a couple of decisions by the English courts?

Professor Rubin: I've been through all the piracy cases I could find, which were quite a lot. The opinions of publicists with regard to what constitutes piracy, and universal jurisdiction, were all collected in the 1982 Harvard research. If you go over them you find a hodgepodge of misconception and a misconstruction of history that almost defies categorization. The fact is that the International Law of Piracy was fixed by reference back to Roman precedents in which the word "pirate" was used. The label "pirate" was attached, not to criminals under Roman law, but rather to eastern Mediterranean tribes who were disrupting the Roman conception of where commerce had the right to go on. The criminal law conception of piracy doesn't really come into existence until the 16th century, and then "piracy" is simply the admiralty word for robbery within the jurisdiction of the admiral.

"Robbery" is defined by the English Common Law and in continental countries by the equivalent of their common law. The word "piracy" is mentioned only once in the Roman digest.

Now if you go through all of this and take it through the evolution of criminal law and see how the cases construed it, you will, I think, find that the publicists had negligible influence on states or tribunals. If you find then that their influence has been only on each other, you will realize why in the book I don't mention the publicists until I'd been through about six hundred pages of analysis of other things. I then reduce them to a
single footnote saying here are about five or six publicists who have contributed noteworthy views recently, but they are really not worth looking at further. Proof of that or the importance of that is if you then look at the International Law Commission draft of 1958 to see where they went wrong, you will find that they dismissed the publicists out of hand, as simply unpersuasive.

Professor Alan Dershowitz*: It strikes me that what you characterize a stretch of logical decision as dangerous because you think that they had impact on future cases of the kind. I could only hope you appreciate that those of us involved in the case were concerned that if we didn't get a decision like this, there would be no cases of this kind in the future, and that Demjanjuk would be manufacturing cars in Cleveland today, after having allegedly gassed 900,000 civilians in Treblinka as Ivan the Terrible. The previous efforts to define that such people can be brought to trial in a democratic state had all failed. Certain stretches of logic can often become splendid laws when they have been seized upon by good judges in the future and made into precedents. What the Romans thought of piracy is not nearly as important as how we formulate the use of the word in the future.

I would also suggest that this discussion has ignored the fact that there was a Treaty of Extradition between the United States and the state of Israel which specifically permitted the Secretary of State to extradite two Israeli individuals who committed crimes outside the territory of Israel, if he chose to do so.

Second, the treaty between the United States and Israel was negotiated in a time Adolf Eichmann was being tried, convicted, and hanged by Israel. The State Department, in its negotiations with Israel, and the Senate in the ratification of the treaty, specifically did not reserve any jurisdiction so as to limit it to crimes that occurred after Israel's existence or to more conventional kinds of war crimes. The Canadian government, on the other hand, when it negotiated its Treaty of Extradition with Israel did specifically that because of Eichmann. It seems to me that a positive piece of legislation like the treaties is really the basis for the extradition of Demjanjuk. Out of that we can get a principle that people like Demjanjuk will be be brought to justice in the future.

Professor Rubin: Basically I would agree with everything you're saying. I would argue that the conclusion of a treaty to take care of the very special circumstances following World War II is a precedent for dealing with very special circumstances. It is an attempt to find a legal way to handle what is fundamentally a political problem. You simply cannot stand to have people who have done the kinds of things that Demjanjuk is accused of to not be kept in terror for the rest of their lives. That seems to me a good basis for making a treaty, but a bad basis for making general law. We will see whether it goes anywhere: I hope we never have World War II all over again. If we do, we might have another set of treaties like that.

Professor Dershowitz: I wish there was an hour to give a non-positivist, skeptical view about the morality of law, especially in its application. But I am going to have to keep my response very brief to save time. Law is a flexible moving process which incorporates

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*Professor Dershowitz teaches criminal, constitutional, and international human rights law at Harvard Law School. He was part of Anatoly Scharansky's defense team. Professor Dershowitz was one of the original members of the Holocaust/Human Rights Research Project's Advisory Board.
both the tension between what we punish and the tension between human rights and civil liberties. These can never be encapsulated in the simplistic formula of standing, suggesting for example that standing reflects an inflexible notion which is applied to the context of conventional law. For example, our courts have broadened concepts of standing in religious cases. Now surely it doesn't take an extraordinary expansionist to say that if a person is accused of genocide against a particular people, those people would certainly have some kind of standing which would be recognized in a flexible development context of law.

That is not to say that any of your particular answers necessarily were wrong or right. I think they are subject to debate on the basis of a reasonable balancing, the way I think reasonable constitutional principles are subject to debate here. But what I think Professor Rubin conveyed to the students and accumulated audience here is that there is a right and wrong answer. You, by your accumulated footnotes and analyses of cases, have provided not the only right answer, but an answer which will be rejected as a matter of fact. You will be in the minority and in the dissent over time.

For example, we are having problems with extradition and terrorism. No matter what the footnotes in the past have said about an analog to terrorism, we are facing a different experience and phenomenon today. If the Americans, instead of bombing Libya, had sent in a group of people to capture the terrorists from Libya and brought them into the United States, I absolutely guarantee that your footnotes, your briefs and legal analysis would not prevent any American court, by a widely unanimous view, from finding jurisdiction in the United States to try such terrorists under American law. This would be true even if they were charged with crimes that pre-dated the particular statute at issue. I think it just makes a lot more sense to look at the law from a much more evolutionary point of view, and of course this is supposed to be a question so I will ask you: How would your positivist system enable you to have the tools as a lawyer in Nazi Germany or pre-Nazi Germany to report what was after all positive law, and we in our mistaken arrogance somehow assume that the Nuremburg laws (I'm talking about the pre-World War II Nuremburg laws and not the post-World War II Nuremburg laws) was somehow wrong? Should we not have the tools available to us to fight the positive law at any given time and shouldn't those tools come from outside positivistic views of existing law?

Professor Rubin: I hope what I did was not to pose an absolutely correct rigid moral system. But what I thought I was doing, what I said I was doing, was pointing out the problems that those who think that morals and law are identical are ignoring the reasons why they have trouble. I have no doubt that an American court for example, would try whomever they want and a bad capture would not invalidate the trials in the United States. The fact that this would be overwhelmingly popular in the United States does not mean that the U.S. would find it easy to get along with our allies if we pursued that view and there are values inherent in our allies' approach that must not be ignored except at our peril. When Filartiga came down, I think I wrote the only article that pointed out about a dozen different things that simply didn't make sense. Others may say I was wrong.

I think what I'm saying really is not that I have a better beacon to give you, but that you will get that beacon only if you find out the reasons why as inarticulate a judge as Judge Bork and one as hard headed in some ways as Judge Bork, could come out with a decision in Tel-Oren that would take the majority with him. My article also points out
why the perfectly balanced Foreign Sovereignty Immunities Act is a very bad statute, inconsistent with the Legal Order and therefore not very likely to be useful once it's made several million dollars for the drafters of the act who lobbied it through. I've written a great deal on this subject and so far the kinds of things applying this analytical approach that I've been predicting have, in fact, come true.

Professor Alston: O.K. I think given time constraints we'll leave the panel at that point. Thank you all.