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The specialized vocabularies of lawyers, ethicists and political scientists obscure the roots of many real disagreements. In this book, the distinguished American international lawyer Alfred P. Rubin provides a penetrating account of where these roots lie, and argues powerfully that disagreements which have existed for 3,000 years are unlikely to be resolved soon. Current attempts to make "war crimes" or "terrorism" criminal under international law seem doomed to fail for the same reasons that attempts failed in the early nineteenth century to make piracy and the international traffic in slaves criminal under the law of nations. And for the same reasons, Professor Rubin argues, it is unlikely that an international criminal court can be instituted today to enforce ethicists' and "natural law" advocates' versions of "international law."

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To my students in Law 203 at The Fletcher School of Law and Diplomacy, who have helped my understanding of much of this, and to my wife, who has helped my understanding of everything else

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Preface

This monograph had two inspirations. Between 1963 and late 1965 I was the junior attorney in the United States Department of Defense General Counsel's office principally responsible for legal questions involved in the Far Eastern entanglements of the United States military. We were not consulted often regarding our Viet Nam involvement. But at the annual meeting of the American Society of International Law in April 1973, some seven years after I had left that office, I was asked to serve on a panel to discuss some aspects of the laws of war as applied (or not) in Viet Nam. One of the other panelists asked some pointed questions about the United States not arresting and trying before its own courts various officials of the Government of South Viet Nam who had been photographed committing what seemed obvious violations of the "positive" laws of war (i.e., those laws adopted through an exercise of human discretion; in this case at least in part by treaty). When I replied that neither general international law nor the pertinent treaties gave the United States the jurisdiction to apply those rules to foreigners acting in their own country, he asserted that the codifying treaties gave all countries the authority to try anybody for war crimes committed anywhere; that "universal offenses" implied "universal jurisdiction" to adjudicate and enforce; thus that violators of the acknowledged laws of war could be legally punished by any country's tribunal anywhere. My response was to question his assertion of law, but, more tellingly in light of what I regarded as an attack on the integrity of myself and my country, to ask why, if his view were correct, his own country had not requested South Vietnam to extradite (or "hand over" in the terms of the pertinent treaties, to avoid the complications of the technical laws of each country relating to "extradition") the accused war criminals and then prosecute them. He clearly had not expected the question and his answer related to his

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country making quiet diplomatic expressions of concern rather than arrests and trials. Of course, that is exactly what we had done.

When I received my copy of the formal record of the panel for correction prior to its being published in the *Annual Proceedings* of the Society I discovered that he had deleted his acerbic questions, leaving my response to appear an ill-tempered and unprovoked assault which he appeared to have calmly (if rather evasively) answered. Unwilling myself to tamper with a record of fact, I approved the transcript in so far as it recorded my own remarks regardless of the changed context.

In the years following, I mulled the question of the international legal order and the frequent assertions that it contains provisions dealing with "universal crimes" such as "war crimes" and "piracy," and the assumption that with the category "universal crime" there is inevitably a corollary "universal jurisdiction."

In 1981–2, while serving as Charles H. Stockton Professor of International Law at the US Naval War College, I investigated the "piracy" precedents at some length and discovered that the notion of universal crime/universal jurisdiction had in fact been common in the eighteenth and early nineteenth centuries, but had been far more popular with academics than with statesmen; had been given lip service by judges, but rarely applied in cases in which the issues were squarely presented. The result of that investigation was a book, *The Law of Piracy*, published in 1988 by the Naval War College Press as volume LXIII in its "Blue Book" series of International Law Studies. After reviewing all the oft-cited "piracy" cases in the English and American literature, and the history of the concept as reflected also in accounts, literature and diplomatic correspondence contemporary with the events from antiquity to the present, it seemed to me that there were some serious confusions in current "conventional wisdom." The reasons appeared to me to rest on fundamental jurisprudential assumptions. The "ontology," intellectual "models" of the world order, in the minds of those addressing the questions seemed to reflect aspects of culture and definitions of "law" that seemed unrelated to the realities of "authority," its real distribution in the world, and predictable and demonstrable state practice. I found this distance between assertions of "law" by jurists, and the practices accepted as lawful by statesmen, to be demeaning to the law, subversive of its vital influence on civilized behavior, and generally polemical.

In the light of renewed interest in an international criminal court arising from "terrorism" and the public exposure of atrocities in former Yugoslavia and Rwanda, the issues of "universal crimes" and "universal

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jurisdiction" are again posed. Further analysis of the underlying jurisprudential issues seems urgently needed. Indeed, in the absence of such an analysis, an inappropriate model of the international legal order seems to have been adopted by the UN Security Council in setting up a tribunal to try persons accused of atrocities in connection with events in former Yugoslavia. The inconsistency of that model with the actual distribution of authority in the current international legal order makes it almost certain that the tribunal will fail to achieve its stated purposes. That this is not a negligible error in perception by some of our most effective and well-motivated leaders is a tragedy.

The weaknesses of the intellectual model underlying the new and proposed tribunals are illustrated by an obvious elision: none of the tribunals is given jurisdiction to apply the supposed universal law to the officials of those countries most enthusiastically supporting the idea. To explain this anomaly, advocates of universal law and universal jurisdiction usually cite the "Nuremberg" precedent: the trial of defeated Nazi leaders by the victorious allies of 1945. The pretension is that the allies represented civilized humanity, and only the defeated Nazis had conspired to wage aggressive war, had committed crimes against humanity or had committed war crimes. The pretension is patently false. But the precedent is in fact illuminating. When it was imitated only a short time later in Tokyo, it provoked a dissent by Judge Radhabinod Pal (India) and a partial dissent by Judge Bert V. A. Röling (The Netherlands). And other anomalies were noted in the process. The outstanding "precedential" value of Nuremberg might well be the fact that for fifty years it has *not* been followed. But during this period there has been no shortage of wars, atrocities and moral revulsion.

It seems to me that the reason the Nuremberg "precedent" has failed in the real world has been because the precedent relies on "victory," completely open records and a level of hypocrisy rarely achieved in even this imperfect world. For example, the charge against the Nazi Foreign Minister, Joachim von Ribbentrop, of conspiring to commit aggressive war, managed to avoid mention of the no-longer-secret provision of the Molotov–Ribbentrop Pact under which the invasion of Poland was agreed between Hitler's Germany and the USSR. Yet officials of the USSR were in the prosecution and on the bench at Nuremberg. None was a defendant.

Of course, the inconsistencies of the Nuremberg process in no way excuse the villains who were caught in it. "*Tu quoque* [you, too]" is not a persuasive defense for people who commit atrocities and was specifically rejected at Nuremberg. Assuming that international law in fact forbids

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atrocities authorized by a national legal order, the vice is not merely in the application of the "international" law directly to individuals; it is in the selective application of the law by pre-arrangement. Lest I be misunderstood, perhaps I should mention that in my view the Nuremberg process was morally important both to the victors and to Germany and politically probably the best alternative available to them both in the aftermath of the cataclysm of the Second World War. I have problems with its legal basis. As pointed out in *Judgment on Nuremburg*, a study by William J. Bosch, published by the University of North Carolina Press in 1970, so do many lawyers.

But enough ink has been poured out over Nuremberg, and this work is not intended to be yet another legal critique of that morally one-sided and legally dubious but in other ways useful and perhaps politically significant event. There is no need now, fifty years later, for further comment on the hypocrisies of trying defeated enemies before tribunals composed in part of representatives of victorious allies some of whose leaders had in fact committed acts possibly as atrocious as some of the acts for which some of the accused paid with their lives.

"Universal crimes/universal jurisdiction" seems to have become part of the false "conventional wisdom" of the most influential international lawyers today. But as I view the philosophical and historical evidence, the model on which at least the "universal jurisdiction" part of the phrase is currently based has shallow roots nurtured by emotional reactions to United States activities in Viet Nam more than twenty years ago; it does not reflect the practice of states or the distribution of authority that has characterized the international legal order for some 350 years (indeed, for some 3,000 years, as shall be seen).

The other tributary to this stream of thought is more superficial. In 1986 I was invited by the Carnegie Council on Ethics and International Affairs to give a talk at Notre Dame University on the function of international law in determining the shape of humanitarianism. I expected that the responsible people at the Carnegie Council and the jurists at Notre Dame would want a paper confirming the common notion that the substantive rules of international law are rules of conscience transferred to the legal arena by the intuitions of statesmen, judges and scholars strongly influenced by social pressures and the writings of theologians and moralists. Eventual publication as a chapter in a book of similar papers was envisaged. I made it clear that I could not support the notion that rules of "law," or at least the substantive rules of public international law, are a sort of crystallized and universally

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binding set of moral imperatives. I was nonetheless invited. I accepted with pleasure.

The paper that I first drafted set out the conclusions of a fundamentally "positivist" model that I believe reflects the realities of current international society far better than the moral "naturalist" model that has characterized a major part of the scholarly literature of law since the days of Cicero, and of international law in recent years, particularly some writings dealing in principle with so-called "human rights." To support this draft before an audience that I knew would disagree with its jurisprudential assumptions, I found that considerably more explanation was needed; simply setting out a controversial model without more support than a mere assertion that it seemed consistent with my own observations and prejudices was not likely to be useful or persuasive to anybody else. Before I knew it, I was grappling with basic questions of jurisprudence and the legal tradition, and my thirty-page draft had turned into the concluding section of a 150-page monograph.

At the end of an enjoyable visit to Notre Dame in March 1987, it was clear that my concluding section would not suit the editors of the planned book. On a whim, I submitted the entire monograph to the 1987 Lon L. Fuller Jurisprudence competition run by the Institute of Humane Studies in Fairfax, Virginia. It won Honorable Mention and a cash award about equivalent to what would have been paid had the chapter been accepted for the book planned by the sponsors of the Notre Dame session.

Until now, I have found that monograph to be unpublishable either as a long article or short book. The rejections were in only one case accompanied by substantive comments. In that one case, the negative comments did not go to the substance of the piece (which seemed to escape much of any comment), but to some details and to its organization. I now think the reviewers were right about that last. Publication was recommended by both reviewers, but without much enthusiasm. The prospective publisher decided against it.

No doubt the original introduction was more confusing than helpful to those who had not read the conclusion first; an absurdity for which I was solely responsible. I have rewritten both the introduction and the conclusion and much else, seeking the unattainable clarity that alone can overcome entrenched orthodoxy. In taking a long-range historical approach to the evolution of doctrine and its relation to reality I do not know if I have seen farther than others of my own generation. But it has been in all ways rewarding to try. Whether I have succeeded at least in part is for others to decide.

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Acknowledgments

Thanks are due to my fellow panelists at the 1973 meeting of the American Society of International Law and to the Carnegie Council on Ethics and International Affairs for the pushes that started this work; to Notre Dame University and the Kellogg Foundation for a stimulating session that spurred it on; and to the Institute of Humane Studies for an award that convinced me that the work was worthwhile despite its being dismissed elsewhere.

I owe thanks also to too many colleagues to mention, even, perhaps especially, to those who in private conversations have disagreed with my reading of the historical texts and the jurisprudential lessons I have drawn from the analysis. Particularly stimulating sessions were organized by Professor Jost Delbrück at the Kiel Institute of International Law in 1992 and 1994. The second was precisely to the issue; its proceedings were published as Volume 117 in the *Veröffentlichungen des Instituts für Internationales Recht an der Universität Kiel* in 1995 under the title *Allocation of Law Enforcement Authority in the International System*.

As with most works with elaborate footnotes, much time was spent in library research. Without the resources and cheerful help of the staffs of the libraries of The Fletcher School of Law and Diplomacy, Tufts University, and Harvard University, the research would have been impossible. I thank them all.

The Fletcher School of Law and Diplomacy gave me a sabbatical semester in Spring 1995 to work on this book, and Tufts University invited me to be Scholar in Residence at their European Center in Talloires, France, in June. A great deal of useful work was done then and I am very grateful for the time and inspiration.

Finally, I owe a debt to those anonymous scholars who reviewed the semi-final typescript for Cambridge University Press. Their suggestions for

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improving the text were perceptive and I have made several changes and additions as a result.

Of course, I alone am responsible for this work's errors.

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Abbreviations

ABAJ	*American Bar Association Journal*
AILC	*American International Law Cases*, Francis Deàk, ed.
AJIL	*American Journal of International Law*
AN	*The American Neptune*
ATTGO	*Attorney Generals' Opinions*
BFSP	*British and Foreign State Papers*
BJIL	*Brooklyn Journal of International Law*
CLR	*Chicago Law Review*
CWILJ	*California Western International Law Journal*
CLR	*Connecticut Law Review*
CTS	*Consolidated Treaty Series*
DJILP	*Denver Journal of International Law and Policy*
D&S	*Diplomacy & Statecraft*
FFWA	*The Fletcher Forum of World Affairs*
FRUS	*Foreign Relations of the United States*
HAN	T. C. Hansard, *The Parliamentary History of England from the Earliest Period to the Year 1803*
HILJ	*Harvard International Law Journal*
HLR	*Harvard Law Review*
HRD	US House of Representatives, Committee on Foreign Affairs, *Human Rights Documents* (September 1983)
ICLQ	*International and Comparative Law Quarterly*
IL	*The International Lawyer*
ILM	*International Legal Materials*

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IYBHR	*Israel Year Book on Human Rights*
MJIL	*Michigan Journal of International Law*
NI	*The National Interest*
NILR	*Netherlands International Law Review*
OLR	*Oregon Law Review*
PILR	*Pace International Law Review*
PP	*Parliamentary Papers*
PROC	*Proceedings of the American Society of International Law*
RdC	*Recueil des Cours, Académie de droit international de la Haye*
TER	*Terrorism: An International Journal*
TILJ	*Texas International Law Journal*
TSA	*Thesaurus Acroasium*
UCLALR	*University of California at Los Angeles Law Review*
YLJ	*Yale Law Journal*
UNRIAA	*United Nations Reports of International Arbitration Awards*
UNTS	*United Nations Treaty Series*

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