

Hersch Lauterpacht and Early Formulations of Crimes Against Humanity

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Introduction

Crimes against humanity first emerged in international law in 1945, when the allied powers that won World War II—the United States, United Kingdom, the Soviet Union, and France—granted the International Military Tribunal at Nuremberg jurisdiction to prosecute German leaders for ‘crimes against peace,’ ‘war crimes,’ and ‘crimes against humanity.’¹ Since the Nuremberg trials, the concept of crimes against humanity has expanded dramatically, which other essays in this volume describe. Most notably, as highlighted in the next essay in this volume, international law has now affirmed that, unlike war crimes, crimes against humanity may be committed in times of formal peace. As William Schabas has put it, many colloquially view crimes against humanity as being analogous to serious violations of human rights, but ‘in the case of breaches of international human rights law, it is the state that is held responsible, whereas in the case of crimes against humanity, individuals are the perpetrators and they are the ones who are held criminally responsible.’² Thus, violations of human rights might trigger orders to cease certain actions or compensate victims, but violations of crimes against humanity can lead to the imprisonment of state officials, and even heads of state.

The emergence of crimes against humanity in the 20th century as a crime under international law was a watershed moment in the history of the modern international system of states. Together with the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide, the formulation of crimes against humanity in the Nuremberg Charter marked the first moment when states themselves formalized exceptions to the rule that state sovereignty shielded leaders of states, including heads of state, from individual criminal prosecution for how they treated their own citizens and populations within their borders. Both legal instruments, moreover, did away with the expectation that it was the sole sovereign right of states to prosecute crimes committed within their own borders or by their own citizens.³ Indeed, crimes against humanity may be punished by the national courts of countries, other than where the crime took place, or by international courts brought into existence by the cooperation of several states, or by international organizations such as the United Nations.

At the centre of all these developments stood two jurists: Raphaël Lemkin and Hersch Lauterpacht. Both were of Jewish and Polish background, both studied law in Jan Kazimierz University in Lwów with many of the same professors, both discovered in the middle of the Nuremberg tribunal that their parents and any number of close and extended family were murdered by the Nazis, and both found different paths to international influence through the very different social and professional networks of their adopted cities after World War II, New York and London. I have written a full length intellectual biography of Lemkin, and I do not wish to belabour the point in this essay.⁴ Both of these jurists' ideas formed the pillars of the 20th century's international criminal justice regime, which redefined the scope and sweep of international law. Lemkin's conception of genocide, and Lauterpacht's conception of crimes against humanity, marked the beginning of what Philippe Sands calls the gradual demise of the doctrine of absolute immunity of any individuals involved in grave violations of human rights. It was Luaterpacht's life long effort to infuse human rights principles into international law, which found various articulations in specific legal instruments, that brought into existence the idea that international criminal law should protect individuals on the basis of irreducible, universal, and enforceable rights through any number of human rights instruments, including international criminal tribunals.⁵

There is, of course, great debate as to whether the conception of crimes against humanity was *sui generis* in this historical legal moment after World War II, as if crimes against humanity were an entirely new crime created through a multilateral legislative act to establish a tribunal in Nuremberg and Tokyo and prosecute German and Japanese war criminals. The other perspective is that the Nuremberg Charter, in outlining crimes against humanity, had merely formulated the concept for the first time in positive law, when the basic idea had already taken hold in customary international law, albeit with other names.⁶ Legal historians are generally of the persuasion that the conception of crimes against humanity—not necessary the specific phrase—has a long genealogy and history before 1945, with some even tracing its origins to the 17th century philosopher and diplomat Hugo Grotius.⁷

Schabas has asserted that the first use of the phrase crimes against humanity was in the context of the French Revolution, in 1792, when Maximilien Robespierre described Louis XVI as a "*criminel envers l'humanité*" and argued that the deposed king should be executed.⁸ In 1890, the African American lawyer George Washington Williams wrote to the U.S. Secretary of State, informing him that King Leopold's regime in the Congo Free States was responsible for "crimes against humanity," which seems to be the first

reference to the phrase in English.⁹ According to Nora Nunn, Williams was furthermore the first public critic of the king, writing a letter to the Belgian court charging Leopold with 'deceit, fraud, robberies, arson, murder, slave-raiding, and [a] general policy of cruelty' and concluding that 'Your Majesty's Government has sequestered their land, burned their towns, stolen their property, enslaved their women and children, and committed crimes too numerous to mention in detail.'¹⁰

Within a decade, the phrase crimes against humanity began to make its way into the language of international relations and international law. First, in the preamble to the Hague Conventions of 1899 and 1907, the famous Martens clause invoked 'the usages established between civilized nations, from the laws' and referred to the concept of 'laws of humanity.' However, it was not until the Joint Declaration of May 28, 1915, when the specific phrase entered the discourse of international relations as a serious legal concept. In the joint declaration, France, Great Britain and Russia condemned massacre of Armenians in Turkey as crimes against humanity and civilization.¹¹ Specifically, the declaration read:

In the presence of these new crimes of Turkey against humanity and civilization, the allied Governments publicly inform the Sublime Porte that they will hold personally responsible for the said crimes all members of the Ottoman Government as well as those of its agents who are found to be involved in such massacres.

The United States did not join in the declaration, Schabas notes, as U.S. Secretary of State Robert Lansing referred to the killings as 'the "more or less justifiable" right of the Turkish government to deport the Armenians to the extent that they lived 'within the zone of military operations'.'¹² In 1919, a report prepared for the Commission on the Responsibility of the Authors of War recommended the creation of an international tribunal that could bring to trial individuals who were guilty of 'offences against the laws and customs of war or the laws of humanity.'¹³ Decades later, the drafters of the Nuremberg Charter in 1945 referenced the Hague Conventions of 1899 and 1907, the Joint Declaration of May 28, 1915, and the 1919 report to the Commission on the Responsibility of the Authors of War, when they were developing a definition of crimes against humanity and attempting to describe a set of crimes that did not fit the traditional definition of war crimes because they were committed against civilians and not enemy nationals.¹⁴

On 10 August 1920, the allied powers of World War I and the Ottoman Empire signed the Treaty of Sèvres, ceding large parts of Ottoman territory to France, the United Kingdom, Greece, and Italy, and creating occupation zones within the Ottoman Empire. The Treaty of Sèvres, which marked the beginning of the partitioning of the Ottoman Empire, also contained obligations to surrender Turkish Ottoman officials who were responsible for deportations and massacres of Armenians, and it contained stipulations that the former Ottoman territories not inhabited by ethnic Turkish people be ceded to the Allied powers. It gave life to Turkish nationalism, and the Turkish War of Independence. Turkish nationalist forces soon overthrew the Ottoman government and signed the 1923 Treaty of Lausanne, which included stipulations granting amnesty for the deportations and massacres between 1914 and 1922 outlined in the Treaty of Sèvres.

When Lauterpacht suggested the Nuremberg tribunal use the concept of “crimes against humanity” in 1945, there was no academic field called “Crimes Against Humanity Studies.” So, it is mistaken to locate the origins of an entire doctrine of crimes against humanity in Lauterpacht’s thought in 1945, and thereby reduce to one voice the depth and diversity of 80 years’ worth of legal and philosophical debate. In this context, when considering the genesis of crimes against humanity, it is useful to refer to Lauterpacht’s own understanding of the tradition he considered to be working in. Lauterpacht placed himself into the Grotian tradition of international law, although he acknowledged that this tradition cannot be found in the texts and treatises Grotius wrote, but rather it can be intuited through the way later writers, statesmen, and jurists used Grotius’ works ‘not only as a source of evidence of the law as it is, but also as a well-spring of faith in the law as it ought to be.’¹⁵ As Lauterpacht defines it, the Grotian tradition as such includes the following:

1. The subjection of the totality of international relations to the rule of law;
2. The acceptance of the law of nature as an independent source of international law;
3. The affirmation of the social nature of man as the basis of the law of nature;
4. The recognition of the essential identity of states and individuals;
5. The rejection of “reason of State”;
6. The distinction between just and unjust war;
7. The doctrine of qualified neutrality;
8. The binding force of promises;
9. The fundamental rights and freedoms of the individual;
10. The idea of peace; and
11. The tradition of idealism and progress.

In his article on Grotius, published in 1946, as the trials at the International Military Tribunal at Nuremberg were concluding, Lauterpacht wrote that some of these eleven 'elements of the Grotian tradition have now become part of the positive law; others are still an aspiration.'¹⁶

In assessing Grotius's contributions to international law, Lauterpacht reminds his readers explicitly that 'Grotius did not create international law. Law is not made by writers.' What Grotius did, however, 'was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code.'¹⁷ Perhaps we can say the same thing of Lauterpacht with regards to the specific legal formation of crimes against humanity as it was articulated in his lifetime by the Nuremberg charter and the Nuremberg judges. Holistically, Lauterpacht's writings did a great deal to shape international law in the same manner he describes Grotius' influence.

Lauterpacht, perhaps, was not totally the Grotian theorist that he claimed to be. His writing sparked a movement to revise the Grotian tradition in international law, moving the law away from Grotius's model of viewing international relations as the relations between states and toward an understanding that international politics was shaped by individuals and social and political movements within states.¹⁸ For both Lauterpacht and the Grotian tradition, both states and individuals could be the subject of international law; and Lauterpacht upheld the Grotian vision that it was always in one's self-interest to act morally and that the object of international law should point toward a law of love and charity.¹⁹ However, on the point that the actions of states, and indeed the entire interplay of international relations, could be explained by the sentiments and needs of individuals and social and political movements within states—on this point Lauterpacht broke with the Grotians. He saw state sovereigns as often acting to preserve their own power, directing the foreign relations of states according to the interests of ruling elites and not the abstract interests of "the state" as it were. He saw state actions that violated the human rights of individuals—whether those individuals were classified as subjects, citizens, or populations—as choices that were ultimately made by individuals in positions of leadership and authority within state institutions. And, finally, at the same time, Lauterpacht believed that because all these state actions were choices carried out by individuals, social movements and normative shifts within societies could affect the decisions of state leaders and ultimately lead to different actions undertaken by the state and agents of the state. Neither the state, nor agents of the state, had to murder journalists, had to assassinate or massacre political dissidents, had to systematically persecute and mass murder minorities. These things could be changed.

Philippe Sands has done careful work to contextualize Lauterpacht's thinking on crimes against humanity.²⁰ For Sands, Lauterpacht's importance lays 'in the melding of ideas and actions.'²¹ As he was researching and writing *An International Bill of the Rights of Man*, between 1942 and 1945 when it was published, Lauterpacht was working hand in hand with British and United States jurists who were establishing the frameworks of the post-war international legal regime, first at the Nuremberg and Tokyo tribunals, and later at the United Nations. Lauterpacht's self-described political project was the 'enthronement of the rights of man' into international law and to bring about an end to the 'omnipotence of the State.'²² In proposing an International Bill of Rights of Man, Lauterpacht sought a legally binding document that could 'constrain what States could do to those within their jurisdiction—whether citizen or foreigner.'²³ The text provided inspiration for the 1948 Universal Declaration of Human Rights and the legally binding 1950 European Convention on Human Rights, and the incipient notions of crimes against humanity as they were adopted at Nuremberg. But this brings us to a larger question: what was the larger context of crimes against humanity that shaped and was shaped by Lauterpacht?

The Armenian case, and Colonial Entanglements

The deportations and massacres of ethnic Armenians by Turkish Ottoman forces are part of a historical event we now call the Armenian genocide. However, as historians are quick to remind their students, the unfolding of events in their time, and the way people thought and talked about such events, are rarely as simple as the moralizing narratives that people in later generations, including scholars, condense and crystalize. Indeed, there is a rich if complicated history of how these events came to be known as the Armenian *genocide* instead of crimes against humanity. It is a story that involves forces of social and political identity-making, geo-politics and a good deal of realpolitik, diaspora politics and movements, contentious human rights social movements, and the competing international legal significance and global cultural significance of both terms, genocide versus crimes against humanity.²⁴ It is important to note that Lauterpacht and Lemkin did not consider the Armenian case to be the case that inspired their works. Lauterpacht was always deeply concerned about crimes against humanity committed in Western states, such as "Jim Crowism" in the US, and Lemkin wrote extensively about genocide committed by the British, French, and the United States, especially with regard to these states' colonial administrations.

The reason why the concept of crimes against humanity is discussed as originating in relation to the Armenian case is because the first formal documents in international relations that used this phrase were written by British, French, and Russian statesmen who used the phrase to describe Ottoman atrocities—but for obvious reasons were not about to use the phrase to describe their own governments’ murderous actions. That the Armenian genocide is called a genocide and not crimes against humanity is more an accident of history than anything inherent within the two concepts—for it was the word genocide, not crimes against humanity, that was enshrined as the first international criminal law of the United Nations system. Thus, for people seeking formal designations to describe the atrocities, such as the survivors of the violence, there has always been more legal, political, and cultural incentives to have a particular case referred to as “genocide” than there are to have a case be known as a “crime against humanity.” (Had there been a United Nations convention on crimes against humanity, instead of a genocide convention, we can easily imagine the reverse would be true).

Alas, we see that the early articulations of both conceptions—crimes against humanity and genocide—were entangled in the unfolding massacres and deportations that marked the collapse of the Ottoman Empire in the wake of World War I (WWI). With the term genocide, this entanglement was primarily idiosyncratic, and more a reflection of the individual personality and proclivities of Lemkin. By contrast, the phrase crimes against humanity, already had a long history by the time Lauterpacht began to use it, having been connected to the violence of the French Revolution and colonial violence in Belgian Congo. Indeed, there was a clear normative link between the massacres and deportations that occurred in the context of the fall of the Ottoman empire and WWI, and the emergence of the phrase crimes against humanity in international treaties and early diplomatic relations discussing the establishment of international criminal tribunals and international war crimes tribunals. In what Darryl Robinson describes as an attempt to encapsulate these emerging norms, the drafters of the Nuremberg Charter settled on a definition of “crimes against humanity” in Article 6(c) as:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated.

As the London Conference of 1945 concluded, it was Jackson who acted on Lauterpacht's suggestion and proposed to the military tribunal that it should try Nazi leaders for crimes as outlined in the Martens clause of the Hague Conventions, under the rubric of crimes against humanity.²⁵ Jackson was clear that the tribunal should consider the prosecution of humanitarian crimes only when they were linked to the crime of aggression against other populations.²⁶ In Jackson's words,

the way Germany treats its inhabitants, or any other country treats its inhabitants, is not our affair any more than it is the affair of some other government to interpose itself into our problems.²⁷

Jackson went on to make clear that the 'program of extermination of Jews and destruction of the rights of minorities' falls under the purview of international law only when it is 'part of a plan for making an illegal war.'²⁸ Thus, the Nuremberg Tribunals famously linked crimes against humanity to the crime of aggressive war.

The drafters of the Nuremberg Charter divided crimes against humanity into two categories of punishable behaviour. The first, Schabas writes, comprised crimes that were recognized by virtually all domestic criminal law systems in the world—such as murder, extermination, enslavement, and inhumane acts, and killing, assault, rape, and kidnapping or forcible confinement.²⁹ The second category Schabas describes as 'persecutions on discriminatory grounds,' frequently fell short of criminal behaviour in most country's domestic legal systems. What elevated these acts to crimes against humanity according to the drafters of the Nuremberg Charter and the court itself, Schabas has noted, 'is their commission as part of a widespread or systematic attack on a civilian population, although this is not stated explicitly in the Nuremberg Tribunal's definition.'³⁰

As has been well discussed by historians and legal scholars, the Nuremberg Tribunal interpreted the Nuremberg Charter's provision that crimes against humanity be committed in execution of, or in connection with, any crime within the jurisdiction of the Tribunal as meaning that any offenses committed before the outbreak of war in September 1939 were not punishable as an international crime.³¹ While the judges recognized that political opponents were murdered and Jews were persecuted, and acknowledged the existence of concentration camps before the outbreak of war, they found that to constitute a crime against humanity these acts had to be committed after 1939 in connection with an aggressive war. As Schabas notes, moreover, this interpretation was consistent with what was intended by those who established the Nuremberg Tribunal.³² At the London Conference, Jackson spoke of 'some regrettable

circumstances at times in our own country in which minorities are unfairly treated,' but these acts did not fall within the scope of crimes against humanity because they were not committed in a nexus with aggressive war.³³

The international frustration with the way the Nuremberg Charter and judgement established that an element of crimes against humanity was a nexus with aggressive war was a significant reason why, in 1946, there was a great deal of interest at the United Nations in Raphaël Lemkin's conception of genocide—which Lemkin explicitly formulated as an international crime of war *and* peace. In all of Hersch Lauterpacht's work, there was no explicit formulation that crimes against humanity had to be a crime committed in connection to aggressive war. In fact, Lauterpacht and previous jurists such as George Washington Williams had invoked the concept to signify offenses committed by sovereign governments against their individual subjects—regardless of whether the offenses were committed in connection to colonization and enslavement (Williams) or during times of formal peace (Lauterpacht, who was quite willing to contemplate “Jim Crowism” in the US as a crime against humanity). However, as Lauterpacht famously wrote, ‘the law is not made by writers.’³⁴ The law was made by the representatives of states at the London Conference who defined crimes against humanity and set that definition down into international law through the Nuremberg Charter, and then finally by the Nuremberg judges who interpreted and applied the definition. Indeed, The Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on 9 December 1948, stated that genocide could be committed “in time of peace or in time of war” in order to draw a contrast with crimes against humanity.³⁵

It is important to note that, in the course of the negotiations over the definition of genocide, the definition of genocide was severely restricted in the final text of the UN Genocide Convention. The legal definition of genocide covers only a *certain* element of actions as committed against only four types of social groups (national, ethnic, racial, or religious groups), and stipulates that the actions against these groups be committed with the intent to destroy the groups ‘in whole or in part,’ as such. The delegates representing the major powers at the United Nations were not even willing to outlaw a crime as broad and sweeping in scope as crimes against humanity, as it was established by the Nuremberg tribunals, which had already restricted the definition of crime against humanity by establishing the nexus to aggressive war. It is little wonder, therefore, that so many of the UN member states were not willing to entertain Lemkin's definition of genocide, which was even more expansive than crimes against humanity and contained no nexus to aggressive war.

Lemkin's first definition of genocide, as proposed in *Axis Rule in Occupied Europe*, would have had sweeping ramifications had it been outlawed, verbatim, criminalizing an entire way that states treated their populations, without stipulating which specific kinds of actions were illegal and which were permissible. Through his first formulation, Lemkin was essentially proposing to fundamentally change the way states interacted with the human beings living within the geographical sovereign borders of states, withdrawing the state's unqualified right to treat those within its jurisdiction however it wished, while simultaneously withdrawing the state's right to draw categorical distinctions between people, such as determining who is a citizen and who is not.

When one reads his definition of genocide proposed in *Axis Rule in Occupied Europe*, it is plainly self-evident that genocide could have been applied to a great portion of the domestic affairs and colonial administrations of every one of the UN member states. In Lemkin's word:

Genocide has two phases: one, destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain or upon the territory alone, after removal of the population and the colonization by the oppressor's own nationals.³⁶

Compare this to the legal definition of genocide as enshrined under the United Nations Genocide Convention:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

There are at least three key differences. First, Lemkin's first definition in *Axis Rule* proposed the victims of genocide could be any "oppressed group" or "oppressed population." This sweeping formulation was narrowed to specifically "national, ethnical, racial, or religious" groups in the UN treaty. Under international law, therefore, an attempt to destroy, in whole or in part, a gender identity group through any of the five prohibited acts is not legally genocide—but it would have been genocide in Lemkin's first formulation. It is important to remember that Lemkin did not define "national groups" in the way we tend to define them today. The concept of a nation, in Lemkin's definition, was so broad that he considered "card players" and "criminals" to be kinds of nations. Lemkin was, quite literally, proposing that the state had no right to persecute, oppress, or attempt to eliminate any social group from the fabric of society. Second, one notices the severe restrictions on the kinds of actions that genocide legally is. Forced removal of one of the protected groups, even if committed with the intent to destroy one of the four protected groups, is not legally genocide in a strict sense. Yet, in *Axis Rule in Occupied Europe*, there is no requirement that genocide is a crime of mass violence, or even that it must necessarily involve direct violence. Indeed, for Lemkin, genocide could be committed entirely through actions that did not involve direct violence, but rather what we would now call today "structural" or "indirect" violence.³⁷ Third, there is no mention in the UN Genocide Convention of the crime of genocide being a crime of colonization. That Lemkin in other written works explicitly linked the German genocide of the Jewish people to both Soviet empire-building and Western European colonization in the Americas, Africa, and Asia only affirmed that such a definition would never make it out of a drafting committee at the United Nations in the 1940s—which was still very much an international organization that worked to prop up an international system of states premised on European colonialism. What is more, it does not take much imagination to figure out why UN member states would not want to outlaw an even broader and more sweeping crime than crimes against humanity, especially one that could be committed during times of formal peace.

To outlaw genocide in Lemkin's original formulation and to accept genocide as an international crime of war during peacetime, would have likely exposed individuals in the governments of every UN member state to prosecution in international tribunals. The compromise, to preserve genocide as a crime that did not require a nexus with aggressive war, was to severely restrict what genocide was.³⁸ In the meanwhile, the delegations at the United Nations in the 1940s and 1950s were more than happy to let die the idea of an international covenant outlawing crimes against humanity.

Tangling, Untangling, and Tangling: The Intertwined Histories of Genocide and Crimes Against Humanity³⁹

Lauterpacht's and Lemkin's concepts are often presented as competing ideas, with crimes against humanity taken as protecting individuals and genocide as protecting groups.⁴⁰ While Lauterpacht was opposed to Lemkin's concept of genocide as he saw it as emphasizing the notion of the group over the individual, Lemkin considered genocide to be a crime against humanity, and he saw himself as working in the same tradition as Lauterpacht to limit the absolute sovereignty of the state.

The important point for this essay is that both Lauterpacht's and Lemkin's legal thinking 'presupposed a fundamental transformation of the concept of sovereignty.'⁴¹ As Richard King comments,

What made both the genocide convention and crimes against humanity possible, as it were, was that after the Second World War international law was no longer just "between states": it also became "the law of mankind". Put another way, crimes against humanity had to do with what had happened to individuals.⁴²

By proposing to hold individual leaders of states accountable for state offenses committed against individuals (including citizens and non-citizens, i.e., populations, which would have signified both persecuted minorities and colonial subjects in the context of the 19th century), not only was the traditional notion of state sovereignty turned on its head, but the legal formulations eliminated the defense of sovereign immunity for heads of state, and the defense of superior orders for those agents of the state who followed the orders.⁴³

Both Lemkin and Lauterpacht believed that international law could be used to overturn the "theology of the state" or the "deification" of the state that protected the state and its leaders from the rule of law.⁴⁴ Importantly, both Lauterpacht and Lemkin's visions sought to divorce the nation from the state within the modern conception of the nation-state, and thereby unravel the kinds of intractable and deeply rooted conflicts that emerged with group competitions over access and belonging in the state. This was especially so, because the instruments of governance in modern states were highly effective for suppressing and oppressing, or even massacring and exterminating, certain groups while empowering others. Their goal was to remove nationality as a criterion for citizenship and belonging, and ultimately to remove citizenship as a criterion for an individual being able to enjoy and exercise irreducible, universal, and enforceable rights.

Concluding Thoughts

It is important to contextualize the law, legal concepts, and legal ideas historically, so that we may strike a balance between two extremes—to show that legal ideas are not immanent in history as if the ideas are “out there” waiting to be written down, but neither are they inherent in the writings of various legal thinkers and jurists who might have circled around the basic contours of an idea but failed to specifically name it. To take the 1945 formulation of crimes against humanity as an example, it does us no good to say that Lauterpacht simply coined the phrase out of thin air in 1945 in order to articulate a new idea that was only thinkable after the experience of World War II. Clearly, this legal term had precursors and its own history. Yet, we cannot reduce the conception of crimes against humanity to its history alone, and thus we cannot say that Lauterpacht was the sole originator of the concept, nor can we say that the idea of crimes against humanity really did emerge in Lauterpacht’s life work before 1945.

There is the historical curiosity that crimes against humanity has, since 1945, expanded in definition to cover many of the offenses and abuses that Lemkin originally envisioned genocide as encompassing. In many ways, crimes against humanity as it is laid out in the Rome Statute of the International Criminal Court, is closer to Lemkin’s original definition of genocide. If anything, this development is yet another reason why theorists and historians should be cautious to avoid teleological theorizing. Lemkin and Lauterpacht were not prophets, their actions and writings did not await the future to formulate their meanings. And, the arch of how their ideas were taken up, changed, adapted, reinterpreted, and changed again has more to do with changing sociological, cultural, political, and legal currents than anything preordained or inherent in their ideas.

Notes

¹ The three categories of crimes were established in *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 8 August 1945, also known as the London Agreement. The London Agreement enabled an International Military Tribunal to prosecute German war criminals, and the Nuremberg Charter establishing the IMT was attached as an annex. I refer to the charter establishing the Nuremberg Tribunal as the Nuremberg Charter. The formulation of crimes against humanity was first established by the Nuremberg Charter, and later adapted into the Charter for the Tokyo war crimes tribunal.

- ² William Schabas, "Crimes Against Humanity." In Dinah Shelton, ed. *Encyclopedia of Genocide and Crimes Against Humanity*, Vol. 3, pp. 209-216 (Macmillan: Cengage, 2005). Available online from Cengage Learning: <https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/crimes-against-humanity>
- ³ Schabas, "Crimes Against Humanity." N.p.
- ⁴ Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (United States: University of Pennsylvania Press, 2017).
- ⁵ Philippe Sands, "Introduction: On the Occasion of the Its Republication." In Hersch Lauterpacht, *An International Bill of Rights of Man*, pp. vii-xxv (United Kingdom: Oxford University Press, 2013 [1945]), vii.
- ⁶ Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference," *The American Journal of International Law*, Vol. 93, No. 1 (1999): 43-57. The debate is long running, but legal historians are generally of the persuasion that the conception of crimes against humanity has a long genealogy and history before 1945. See, Kevin R. Chaney, "Pitfalls Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials," *Penn State International Law Review* Vol. 14, No. (1995): 57-94; and see Cherif M. Bassiouni, *Crimes Against Humanity in International Criminal Law* (Netherlands: Springer, 1992).
- ⁷ Robert Dubler and Matthew Kalyk, *Crimes Against Humanity in the 21st Century : Law, Practice, and Threats to International Peace and Security* (Netherlands: Brill/Nijhoff, 2018).
- ⁸ Schabas, "Crimes Against Humanity." N.p. See the original text: Maximilien Robespierre, Opinion de Maximilien Robespierre, député du département de Paris, sur le jugement de Louis XVI; imprimé par ordre de la Convention nationale (3 décembre 1792). Available from Project Gutenberg: <https://www.gutenberg.org/files/29887/29887-h/29887-h.htm>.
- ⁹ Schabas, "Crimes Against Humanity." N.p.
- ¹⁰ Nora Nunn, "The Unbribeable Witness: Image, Word, and Testimony of Crimes against Humanity in Mark Twain's King Leopold's Soliloquy (1905)," *Genocide Studies and Prevention*, Vol. 12, No. 2 (2018): 84-106. And see: John Hope Franklin, *George Washington Williams: A Biography* (United States: Duke University Press, 1998), 253.
- ¹¹ United Nations War Crimes Commission, *History Of The United Nations War Crimes Commission And The Development Of The Laws Of War* 35 (1948); and see Egon Schwelb, "Crimes Against Humanity," *British Yearbook of International Law*, Vol. 23, No. 1 (1946): 178-226.
- ¹² William Schabas, "Crimes Against Humanity." In *Encyclopedia of Genocide and Crimes Against Humanity*, Vol. 3, edited by Dinah Shelton, pp. 209-216. New York: Cengage, 2005. Available online from <https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/crimes-against-humanity>

- ¹³ See Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, pp. 553-65. Robinson notes that “the U.S. representatives objected to the creation of an international criminal tribunal and to the references to the laws of humanity on the grounds that these had not been sufficiently ascertained.” See Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference,” p. 44.
- ¹⁴ Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference,” 44. And see Bassiouni, *Crimes Against Humanity in International Criminal Law*.
- ¹⁵ Lauterpacht, “The Grotian Tradition in International Law,” 51.
- ¹⁶ Lauterpacht, “The Grotian Tradition in International Law,” 51.
- ¹⁷ Lauterpacht, “The Grotian Tradition in International Law,” 51.
- ¹⁸ Renee Jeffery, “Hersch Lauterpacht, The Realist Challenge and the ‘Grotian Tradition’ in 20th Century International Relations,” *European Journal of International Relations* Vol. 12, No. 2 (2006): 223–250.
- ¹⁹ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001), 410.
- ²⁰ See for example, Sands, *East West Street*.
- ²¹ Sands, Sands, “Introduction: On the Occasion of the Its Republication,” vii.
- ²² Hersch Lauterpacht, *An International Bill of Rights of Man* (United Kingdom: Oxford University Press, 2013 [1945]), v. And see Sands, “Introduction: On the Occasion of the Its Republication,” vii.
- ²³ Sands, “Introduction: On the Occasion of the Its Republication,” vii.
- ²⁴ Thomas de Waal, *Great Catastrophe: Armenians and Turks in the Shadow of Genocide* (United Kingdom: Oxford University Press, 2015).
- ²⁵ Martti Koskenniemi, “Hersch Lauterpacht and the Development of International Criminal Law,” *Journal of International Criminal Justice* Vol. 2 (2004), 819-825.
- ²⁶ Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 140-141.
- ²⁷ Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 140-141.
- ²⁸ Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 140-141.
- ²⁹ Schabas, “Crimes Against Humanity.” N.p.
- ³⁰ Schabas, “Crimes Against Humanity.” N.p.
- ³¹ Schabas, “Crimes Against Humanity.” N.p.
- ³² Schabas, “Crimes Against Humanity.” N.p.
- ³³ Quoted in Schabas, “Crimes Against Humanity.” N.p.

³⁴ Lauterpacht, "The Grotian Tradition in International Law," 51.

³⁵ See Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, Chapter 5 and Chapter 6.

³⁶ Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (United States: Carnegie Endowment for International Peace, 1944), 79.

³⁷ For a growing body of working linking Lemkin's theory of genocide to theories of structural and cultural violence from the field of Peace Studies, see: Fiona Greenland and Fatma Müge Göçek, "Introduction." In Fiona Greenland and Fatma Müge Göçek, eds. *Cultural Violence and The Destruction* (United Kingdom: Routledge, 2020); Jonathan Hobson, "Three Theoretical Approaches to Lemkin's Definition of Genocide," *Genocide Studies and Prevention*, Vol. 13, No. 1 (2019); Douglas Irvin-Erickson, "Genocide, Cultural Violence, and Community Destruction." In Fiona Greenland and Fatma Müge Göçek, eds. *Cultural Violence and The Destruction* (United Kingdom: Routledge, 2020); and Douglas Irvin-Erickson, "Raphaël Lemkin, Genocide, Colonialism, Famine, and Ukraine," *East/West: Journal of Ukrainian Studies* Vol. 8, No. 1 (2021): 193-215.

³⁸ See Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, Chapter 5 and Chapter 6.

³⁹ Portions of this section are drawn across Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*.

⁴⁰ This paragraph is drawn from Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, Chapter 5.

⁴¹ Richard H. King, "The law and The Holocaust," *Patterns of Prejudice*, Vol. 51, No. 5, (2017): 439-452, at 449.

⁴² Richard H. King, "The law and the Holocaust," 449.

⁴³ Henry T. King, Jr., Benjamin B. Ferencz, and Whitney R. Harris, "Origins of the Genocide Convention," *Case Western Reserve Journal of International Law* Vol. 40, No. 3 (2007): 13–24, at 21.

⁴⁴ Hersch Lauterpacht, "Westlake and Present Day International Law," *Economica* Vol. 15 (November, 1925): 307–326.