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# Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law

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## Abstract

2008 marked the sixtieth anniversary of the adoption of the Genocide Convention and Universal Declaration of Human Rights by the UN General Assembly. These two instruments adopted and proclaimed by the then newly formed world body on successive days, 9 and 10 December 1948 respectively, represent two sides of one coin. Born of the horrors of the 1930s and 1940s, the United Nations Charter speaks of human rights and to the importance of the rule of law. The Genocide Convention and UDHR are integral to the pursuit of these aims. The work of two international lawyers, Hersch Lauterpacht and Raphael Lemkin, whose personal and familial histories traverse the tragedies of 20th century Europe, was instrumental in the realization of these twin efforts. This article examines their respective contributions to contemporary international law by concentrating on their European experience from their youth in Central Europe and the early days of the League of Nations to their mature work up to and including the Nuremberg Judgment.

*Important events – whether serious, happy or unfortunate – do not change a man’s soul, they merely bring it into relief, just as a strong gust of wind reveals the true shape of a tree when it blows off all its leaves. Such events highlight what is hidden in the shadows; they nudge the spirit towards a place where it can flourish.<sup>1</sup>*

## 1 Introduction

To say that a single individual’s work has profoundly shaped a discipline such as international law is a statement that is rarely made. Such assessments have been made

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<sup>1</sup> I. Némirovsky, *Suite Française* (2006), at 170.

of Hersch Lauterpacht (1897–1960) and Raphael Lemkin (1900–1959) by those not predisposed to exaggeration.<sup>2</sup> The modalities of their respective contributions were starkly contrasting. In a field of law which overtly relies on scholarly writings as one of its sources, Lauterpacht was the consummate publicist. The articulation and recognition of human rights in international law was integral to his systematic defining and refining of the discipline through his academic and professional writings, which actively engaged contemporary legal theory and international relations debates. His corpus covered the breadth of international law through his authorship of major monographs and hundreds of articles and reviews; his editorship of a leading textbook on international law, an academic journal, a digest of case law, and related developments; and his presentation of the general and specialist courses on public international law four times at The Hague Academy.<sup>3</sup> In addition, Lauterpacht held the Whewell Chair of International Law, University of Cambridge (1937–1955), was a member of the *Institut de droit international* (1949–1960) and the International Law Commission (1953 and 1954), and judge of the International Court of Justice (1954–1960).

Lemkin's output was no less remarkable.<sup>4</sup> However, his efforts were singularly and consistently confined to the development and codification of international criminal law generally and genocide in particular. While he took various academic and advisory positions in Europe and the United States, these were used to facilitate the realization of these aims. Within nascent international organizations, especially the United Nations, he proved to be one of the earliest and most successful examples of the ability of non-governmental organizations to effect change in international law.

Lemkin's legacy is embodied in one instrument, the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).<sup>5</sup> By contrast, Lauterpacht's legacy is more diffuse and all-encompassing. The part of Lauterpacht's contribution which this article focuses upon, human rights, is similarly not confined

<sup>2</sup> See Koskeniemi, 'Hersch Lauterpacht (1897–1960)', in J. Beatson and R. Zimmerman (eds), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (2004), at 601, 603: '[s]o close is the parallel between the emergence of modern international law and the stages of Lauterpacht's life that one loses track of which is reality and which is metaphor'.

In respect of Lemkin, Kofi Annan, UN Secretary-General, provided the following assessment: '[h]e . . . almost single-handedly drafted an international multilateral treaty declaring genocide an international crime . . . Lemkin's success in this endeavour was a milestone in the United Nations' history': UN Doc.SG/SM/7842, 13 June 2001.

<sup>3</sup> For a list of published works see *International Law, being the Collected Papers of Hersch Lauterpacht* (ed. E. Lauterpacht, 2004), v, at 745 (hereinafter *CP*); and Jenks, 'Hersch Lauterpacht – The Scholar as Prophet', 36 *BYIL* (1960) 1.

<sup>4</sup> For a list of published works see J.T. Fussell, *Comprehensive Bibliography: Writings of Raphael Lemkin*, at [www.preventgenocide.org/lemkin/bibliography.htm](http://www.preventgenocide.org/lemkin/bibliography.htm) (viewed 12 Dec. 2008). Drafts of Lemkin's autobiography and a complete historical survey of genocide are contained in the Raphael Lemkin papers, Manuscripts and Archives Division, The New York Public Library, Astor, Lenox and Tilden Foundations (hereafter Lemkin papers, NYPL).

<sup>5</sup> GA Res 260A(III), 9 Dec. 1948, in force 12 Jan. 1951, 78 UNTS 277.

to a single instrument and has influenced the development of all aspects of international law in the modern era.

This project considers the work of Hersch Lauterpacht and Raphael Lemkin in the promotion of human rights and the criminalization of genocide in international law respectively, and how these initiatives have shaped contemporary international law. The year 2008 marked the 60th anniversary of the adoption of the Genocide Convention and Universal Declaration of Human Rights (UDHR) by the UN General Assembly.<sup>6</sup> These two instruments adopted and proclaimed by the then newly formed world body on successive days, 9 and 10 December 1948, represent two sides of one coin. Born of the horrors of the 1930s and 1940s, the United Nations Charter speaks of human rights and to the importance of the rule of law. The Genocide Convention and UDHR are integral to the pursuit of these aims.

The lives of Lauterpacht and Lemkin were as entwined as the instruments the birth of which they facilitated. Though there is no concrete evidence that Lauterpacht and Lemkin ever met, their personal, familial, and professional histories had significant commonalities and parallels. Both men were born into Jewish families in *fin de siècle* Central Europe. Both completed part of their legal education at the renowned Jan Kazimierz University, Lwów. Their earliest writings engaged the new possibilities presented to international law during the inter-war period, but were also imbued with the anxiety of living on the periphery of collapsing empires. Both were affected by increasingly overt manifestations of rising anti-Semitism and would lose most of their extended families to the Shoah. Yet, both remained steadfast to the pursuit of responses to these tragedies through law and particularly international law. They were both intimately involved in the trial of the major Nazi officials at Nuremberg, and the early work of the United Nations and its organs in the aftermath of World War II. As I will show, their experiences shaped their responses to the role of law in society and their respective contributions to international law, which have had an ongoing impact to the present day.

Lauterpacht and Lemkin's work is worth revisiting at this moment for another important (related) reason. Both men bore witness to and critiqued the dystopic role of law and lawyers as it manifested itself in continental Europe in the 1920s to the 1940s. Yet they were unwavering in their promotion of a positive and imperative role for law in defining international society and protecting individuals and groups within states.

This article is Part I of a two-part project which examines the contribution of the work of Hersch Lauterpacht and Raphael Lemkin to contemporary international law. In Part I, I concentrate on their European experience by examining their respective outputs from their youth in Central Europe and the early days of the League of Nations to their mature work up to and including the Nuremberg Judgment. Part II of the project focuses on their US experience and their efforts to realize a new international legal order in the aftermath of World War II.

<sup>6</sup> GA Res 217A(III), 10 Dec. 1948, and 43(supp.) *AJIL* (1949) 127.

Part I is divided into four sections. First, I provide an overview of their early personal histories. Secondly, I consider their earliest critiques of state sovereignty and the notion of international law as a system of law which served as a prelude to their mature work. Next, their seminal works are examined against the backdrop of the rise of National Socialism in the 1930s and the Shoah. The fourth and final section explains how they put this work into practice at the Nuremberg trials of the major Nazi officials in 1945–1946.

## 2 Early Histories: Lwów and Beyond

Three characteristics of the formative years of Lauterpacht and Lemkin bear specific reference – the location of their birthplace, the historical period spanning their youth, and the cultural and religious group into which they were born – for each in their own way profoundly affected their life choices and the tenor of their professional work.<sup>7</sup>

In the light of the promise generated by the foundation of the League of Nations and its organs, the writings of many inter-war international lawyers were marked by a deep-seated scepticism of legal positivism's privileging of states and the doctrine of sovereignty. Lauterpacht and Lemkin's respective *œuvres* replicated this bias. However, their ambivalence toward states in international law was reinforced by their own personal experiences. Both Lauterpacht and Lemkin were born into parts of central Eastern Europe the configurations and status of which changed hands successive times during the course of their relatively short lives. Lauterpacht was born in 1897 in Zolkiew on the outskirts of Lwów, Eastern Galicia, then part of the Austro-Hungarian empire.<sup>8</sup> By the time of Lauterpacht's death in 1960, his birthplace had been part of the Austro-Hungarian Empire, the Second Polish Republic, under German occupation (twice), under Soviet occupation, and today is the city of Lviv, Ukraine. Lemkin was born in 1900 in the village of Bezwodne, part of Grodno Province which formed part of the Russian empire.<sup>9</sup> By the time of his death in 1959, his birthplace and family home had been under Russian czarist rule; it then shifted repeatedly between Germany and Belarus (except for a period during the inter-war when it formed part of the Second Polish Republic). For Lauterpacht and Lemkin, whose families remained in these territories even after they themselves had left, the notion of a state with fixed borders or a state which existed continuously was far from the norm.

The close proximity and contact with a multiplicity of ethnic and religious groups resulting from this continual redrawing of territorial boundaries and attendant population movements fuelled tensions and unrest. Yet, it was equally amenable to fostering a cosmopolitan outlook. It is perhaps not surprising that such a milieu nurtured polyglots, and Lemkin and Lauterpacht were outstanding examples. Lemkin studied

<sup>7</sup> Lauterpacht himself alluded to the impact of 'personal circumstances' on Grotius's writings: 'The Grotian Tradition in International Law', 23 *BYIL* (1946) 1, at 43.

<sup>8</sup> See McNair, 'Tribute to Sir Hersch Lauterpacht', 10 *ICLQ* (1961) 3.

<sup>9</sup> H. Maza, *Neuf meneurs internationaux: de l'initiative individuelle dans l'institution des organisations internationales pendant le XIXe et le XXe siècle* (1965), at 347.

philology at university, where he added Sanskrit and Arabic to the seven major European languages he already knew.<sup>10</sup> This skill would serve him well as a comparative lawyer during the inter-war period, and proved essential when he prepared his key work which would be used during the Nuremberg Trial. Lauterpacht was no less proficient. As a young man, he had knowledge of Polish, Ukrainian, German, and Hebrew, and some French, Italian, and English.<sup>11</sup> This attribute not only enriched their writings in international law because of their ability to traverse a broad range of European traditions; it also proved vital to opening up opportunities for them in the years that followed.

Lauterpacht and Lemkin's birthplaces were located on territories which had attracted minority protection articulated in multilateral instruments since the early 19th century.<sup>12</sup> These minority guarantees were reaffirmed and elaborated upon in various peace treaties following World War I.<sup>13</sup> The guarantees were formulated and incorporated following significant lobbying from leading Jewish organizations.<sup>14</sup> The implementation of these obligations on states toward their own citizens was supervised by the League of Nations and the Permanent Court of International Justice.<sup>15</sup> Lauterpacht and Lemkin were born into middle class Jewish families in parts of Central Europe with significant Jewish populations and a thriving Yiddish culture, and when anti-Semitism was on the rise and Zionism grew in response to it.<sup>16</sup> Although their families were devout, and both men studied the Torah and learned Hebrew and Yiddish, they themselves were not overly religious.<sup>17</sup> Nonetheless, they were involved in various Jewish organizations in their youth.<sup>18</sup> Likewise, Lauterpacht and Lemkin experienced first hand the mounting tensions between the various national groups and ensuing pogroms following World War I which effectively halved the Jewish populations in parts of Galicia.<sup>19</sup> Both men would explicitly affirm the importance of minority protections in international law in their mature writings, even after 1945

<sup>10</sup> W. Korey, *An Epitaph for Raphael Lemkin* (2001), at 7.

<sup>11</sup> McNair, *supra* note 8, at 4; Lauterpacht was an interpreter for the Curzon Boundary Commission in 1919 between Poland and the Russian Soviet Federative Socialist Republic.

<sup>12</sup> See C. A. Macartney, *National States and National Minorities* (2nd edn, 1968), at 296–297.

<sup>13</sup> Treaty between the Principal Allied and Associated Powers and Poland, 28 June 1919, 223 *Parry's CTS*, vol. 223, at 412 (Treaty with Poland), Art. 2: 'Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion'.

<sup>14</sup> See Lauterpacht, 'The Persecution of the Jews in Germany' (1933), reprinted in *CP*, *supra* note 3, v, at 728, 731; and C. Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878–1938* (2004), at 257–264.

<sup>15</sup> See Arts 12–14, Treaty with Poland, *supra* note 13. Poland renounced the minority guarantee in Sept. 1934.

<sup>16</sup> See W. Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (2008), at 12–15.

<sup>17</sup> See Koskeniemi, *supra* note 2, at 604; and Korey, *supra* note 10, at 6 and 19.

<sup>18</sup> McNair, *supra* note 8, at 4; and Cooper, *supra* note 16, at 16.

<sup>19</sup> Lauterpacht gave evidence to a fact-finding commission led by US Ambassador Morgenthau following a pogrom during the Second Polish Republic: McNair, *supra* note 8, at 4. Lemkin's brother died of influenza during the pogroms: Cooper, *supra* note 16, at 13.

when it was distinctly ‘unfashionable’.<sup>20</sup> In addition, as explained below, this support of minorities implicitly ran through their promotion of human rights and international criminal law, particularly crimes against humanity and genocide.

Lauterpacht and Lemkin received their early legal education at Jan Kazimierz University, Lwów. At the time, a third of Lwów’s quarter of a million inhabitants were Jewish and the academic population of its renowned university reflected this ethnic mix. Lauterpacht enrolled in 1915, initially showing an interest in history and philosophy, but he was persuaded by his parents to study law.<sup>21</sup> By 1918, with the occupation of the city by Polish forces, Polish–Jewish relations had deteriorated to the point that *numerus clausus* against Jews was instituted at the University. These events fuelled Lauterpacht’s decision to move to Vienna to complete his legal studies.<sup>22</sup> Having taken his first degree in philology, Lemkin commenced a law degree at Jan Kazimierz University in the early 1920s, and later moved to Warsaw to continue his legal studies and start his professional career. There is no evidence that Lauterpacht and Lemkin knew each other during these early years in Lwów.

### 3 Early Writings: States under International Law

Hersch Lauterpacht’s and Raphael Lemkin’s earliest writings in the field of international law reflected disquiet toward the ‘deification’ of the state and any suggestion that it could be shielded from the reach of the law.<sup>23</sup> Their critiques of sovereignty became a central platform of their subsequent promotion of human rights and the criminalization of genocide at the international level.

With international bodies like the League of Nations and Permanent Court of International Justice (PCIJ) in their infancy, it was no coincidence that Lauterpacht and Lemkin turned to domestic law sources as a means of ensuring the realization of international law as a whole system of law. It also rendered them acutely attuned to threats against the fragile inter-war peace and dangers posed to individual freedoms with the rise of fascism during the 1920s onwards.

#### *A Lauterpacht: ‘International Mandates’ (Vienna) and ‘Private Law Sources and Analogies’ (London)*

Following his relocation to the University of Vienna, Hersch Lauterpacht received his doctorate in law in 1921. The next year, in the department of political science where international law was taught, he successfully defended his dissertation entitled ‘*Das völkerrechtliche Mandat in der Satzung des Völkerbundes. Zugleich ein Beitrag zur Frage der Anwendung von privatrechtlichen Begriffen in Völkerrecht*’.<sup>24</sup> A central concern of the

<sup>20</sup> See H. Lauterpacht, *An International Bill of the Rights of Man* (1945), at 151–153; and R. Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress* (1944), at 93.

<sup>21</sup> Koskenniemi, *supra* note 2, at 605.

<sup>22</sup> See Lauterpacht, ‘Editorial’, in *CP*, *supra* note 3, iii, at 121.

<sup>23</sup> Lauterpacht, ‘Westlake and Present Day International Law’, 15 *Economica* (1925) 307, at 324.

thesis, the use of private law analogies in the development of international law, was revisited by Lauterpacht for his doctorate at the London School of Economics and Political Science (LSE), which he completed in 1925 after migrating to the United Kingdom in 1923. The LSE dissertation was published two years later as *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)*.

In his earliest work, Lauterpacht established a formula which he would follow repeatedly throughout his career. He used the critical analysis of a significant (and topical) doctrinal issue as a springboard to examine the theoretical and practical underpinnings of the discipline, thereby gradually consolidating his perspective of international law as a whole.<sup>25</sup> The two dissertations, which reflect Lauterpacht's evolving attitude to the use of private law concepts and principles in international law, at their root contained themes which permeated his *œuvre*. These included debunking the sanctification of the state and sovereignty, the conviction that human beings (and not states) were the foundational unit of all law including international law, the role of law in protecting human rights and guaranteeing peace, the struggle between power and the rule of law in which the completeness of international law as a system of law was to be accepted, and the essential role of the judiciary in the attainment of these objectives.

While loosely connected to each other in these early writings, by the end of World War II they would form essential elements of a unified vision of international law, of which the protection of human rights was an intrinsic component. When Lauterpacht's contribution to the development of international law was assessed following his death, his mentor, Arnold McNair observed: '[W]e can be sure that we can trace to the period, say, from 1914 to 1922, one of his main characteristics as a lawyer, namely, his insistence on the vital necessity of the legal definition and protection of human rights'.<sup>26</sup>

There is no doubt that the topic of his Viennese dissertation had an immediate personal interest for Lauterpacht, covering as it did the question of the fate of Palestine and the 're-establishment of a Jewish national home'.<sup>27</sup> More broadly, it enabled him to examine the potential role of law (beyond the state) in protecting human beings from state action and interests, as an alternative to the League of Nations' minorities guarantees which were usually examined for this purpose.<sup>28</sup> Former Israeli President Chaim Herzog noted that Lauterpacht's ideas on human rights were reflected in the topic he had chosen for his dissertation.<sup>29</sup>

<sup>24</sup> The copy of the dissertation housed at the University was destroyed during the Nazi occupation. A copy of a text with the same title located in the Lauterpacht Archives was translated and published as 'The Mandate under International Law in the Covenant of the League of Nations', *CP*, *supra* note 3, iii, at 29.

<sup>25</sup> See Lauterpacht, *supra* note 24, at 31. Cf. Lauterpacht, 'Editor's Note', in *CP*, *supra* note 3, ii, at 173 (noting Hersch Lauterpacht's opposition to addressing 'topical' international law issues).

<sup>26</sup> McNair, *supra* note 8, at 4.

<sup>27</sup> While in Vienna. Lauterpacht was a founder, drafted the statute, and was elected the first President of the World Federation of Jewish Students: *ibid.*, and Koskenniemi, *supra* note 2, at 606.

<sup>28</sup> See Lauterpacht, 'International Law and Colonial Questions, 1870–1914', in *CP*, *supra* note 3, ii, at 95, 101.

<sup>29</sup> Herzog, 'Sir Hersch Lauterpacht: An Appraisal', 8 *EJIL* (1997) 299.

The crux of ‘*Das völkerrechtliche Mandat*’ fell squarely within one of the recurring concerns of Lauterpacht’s life’s work: the struggle between ‘sheer power’ and rule of law in international relations.<sup>30</sup> As he elaborated, there was no more politicized and volatile a realm of international relations during the 19th and early 20th centuries than the global struggle for colonial advantage between states.<sup>31</sup> If colonialism was capable of ‘legal description’, however imperfect, within an international framework like the League of Nations, then nothing in the international community should be left to the whim of states’ political and economic aspirations, nor beyond the ‘reign of law’.<sup>32</sup>

Despite its clear limitations, for Lauterpacht, the inter-war mandate system was a step forward in the promotion of two vital purposes of international law: peace and the protection of human beings. By taking a historical perspective, Lauterpacht surmised that, in contrast to prior colonial regimes in which the colonial territory was an extension of the state, Article 22 of the Covenant of the League of Nations legally circumscribed the powers of the administering state in two important respects.<sup>33</sup> First, to reduce potential friction caused by the political and economic rivalry for colonial territory between states, the administering power was required to ‘secure equal opportunities for the trade and commerce of other Members of the League’ (and, by agreement, the United States).<sup>34</sup> Lauterpacht maintained that the provision was designed to prevent *de facto* annexation, promote substantive – not merely formal – equality between states over trade and resources, and ensure that ‘the well-being of the population [was] the guiding consideration’.<sup>35</sup>

Next, for Lauterpacht, the administering power’s obligations to the mandated territory’s populations were equally crucial to the maintenance of the post-war ‘peace-order’.<sup>36</sup> He recalled that European colonialism, marred by brutality and violence toward the local inhabitants, had repeatedly sacrificed their ‘basic cultural and health obligations’ in the ‘most ruthless’ pursuit of the interests of ‘private commerce and the capitalists’.<sup>37</sup> Lauterpacht maintained that the mandate system was formulated not for states and their interests, but the local inhabitants and the protection of their interests.<sup>38</sup> It spoke, he wrote, not of states’ rights but to their duties.<sup>39</sup> Conscious that ‘legal’ rights meant little without an effective enforcement mechanism, Lauterpacht examined the reporting and complaints procedure entrusted to the League of Nations’ Council and PCIJ.<sup>40</sup> While he acknowledged that the core ‘cultural-ethical requirement’

<sup>30</sup> Lauterpacht, *supra* note 24, at 84.

<sup>31</sup> *Ibid.*, at 38 and 39.

<sup>32</sup> *Ibid.*, at 37; and H. Lauterpacht, *Private Law Sources and Analogies of International Law (with Special Reference to International Arbitration)* (1927), at 304.

<sup>33</sup> *Ibid.*, at 31–40 and 84. Covenant of the League of Nations, 28 June 1919, in force 10 Jan. 1920, 225 *Parry’s CTS* 195; 112 *BFSP* 13; and 13 (supp.) *AJIL* (1919) 128.

<sup>34</sup> Art. 22(5), *ibid.* See Lauterpacht, *supra* note 24, at 40–42.

<sup>35</sup> Lauterpacht, ‘The Interpretation of Article 18 of the Mandate for Palestine’, in *CP*, *supra* note 3, iii, at 85, 95.

<sup>36</sup> *Ibid.*, at 39.

<sup>37</sup> *Ibid.*, at 39–40. Cf. Carty, ‘Hersch Lauterpacht: A Powerful Eastern European Figure in International Law’, 7 *Baltic Yrbk Int’l L* (2007) 83.

<sup>38</sup> *Ibid.*, at 48.

<sup>39</sup> *Ibid.*, at 42.

<sup>40</sup> *Ibid.*, at 77–81.



of Article 22 was preserved, he concluded that it had been significantly circumscribed by the concessions afforded to 'the power principle'.<sup>41</sup> Despite its limitations, the scheme proved an important precursor for Lauterpacht's later advocacy of an international bill of rights.

While at first glance, Lauterpacht's Viennese and LSE dissertations appear diametrically opposed in respect of the use of municipal law sources, there is a fundamental consistency throughout. As the 1920s progressed, he advocated a deeper role particularly for domestic judgments in the progressive development of international law as a whole system of law. What ambiguities existed related to the relationship between the domestic and international legal spheres, and the influence of positivist theory on the discipline.

While Lauterpacht's promotion of municipal law sources strengthened throughout the decade, he always cautioned against its uncritical use. His rejection of the 'taboo' practice in '*Das völkerrechtliche Mandat*' (1922) was fuelled by domestic interpretations of the international mandate scheme which bolstered annexation claims by the administering power.<sup>42</sup> He dismissed such direct ('derivative') grafting of domestic law principles on to a legal concept developed at the international law level because 'these two legal systems, their sources, their subject and object, are so different'.<sup>43</sup>

Yet, Lauterpacht did not reject the borrowing in reverse by international law from domestic law sources; far from it. He recognized the important and positive role that concepts and principles developed in municipal law had in filling the gaps in international law to make it a whole system of law.<sup>44</sup> Indeed, this became the core purpose of *Private Law Sources* (1927). However, even here he counselled caution against abuses.<sup>45</sup> Nonetheless, for Lauterpacht, the inclusion of 'general principles of law recognized by civilized nations' as a source of international law in the Permanent Court's Statute in 1920 was 'revolutionary'.<sup>46</sup> Article 38(3) served as the impetus for his analysis.<sup>47</sup> His ensuing shift in outlook was manifested in his detailed examination of this practice in *Private Law Sources*, the establishment of the *Annual Digest of Public International Cases* with Arnold McNair,<sup>48</sup> and his editorship of Oppenheim's treatise. Lauterpacht hoped that these initiatives would benefit international lawyers and judges alike and lessen the propensity of publicists to 'fall back upon political explanations of doubtful value'.<sup>49</sup>

<sup>41</sup> *Ibid.*, at 41.

<sup>42</sup> Lauterpacht, *supra* note 24, at 30–31 and 61.

<sup>43</sup> *Ibid.*, at 59.

<sup>44</sup> *Ibid.*, at 61 and 53.

<sup>45</sup> *Ibid.*, 84.

<sup>46</sup> Lauterpacht, *supra* note 32, at p.viii.

<sup>47</sup> *Ibid.*, at pp.viii–ix.

<sup>48</sup> A. McNair and H. Lauterpacht (eds), *Annual Digest of Public International Law Cases. Being a Selection from the Decisions of International and National Courts and Tribunals given during the Years 1925 and 1926* (1929). This first volume contained extracts from some 200 cases from Europe, North and South America, the Middle East, China, Japan, and Russia.

<sup>49</sup> Lauterpacht, *supra* note 32, at p.ix.

By the close of the decade, Lauterpacht had moved beyond advocating that the decisions of domestic courts when interpreting international law were ‘only [a] supplementary’ source under Article 38(3).<sup>50</sup> Instead, he elevated them to a ‘direct’ source as customary international law under Article 38(2), because they evidenced not only general practice but *opinio juris* also.<sup>51</sup> From here, he went further still. The ‘rudimentary’ nature of the legislative capabilities of the League and the limitations placed on the PCIJ, he argued, meant the role of domestic judgments in formulating international law needed to be analysed because ‘perhaps only there, the unity of international and municipal law reveal[ed] itself’.<sup>52</sup> Consequently, domestic judges need to make their decisions with ‘that special care . . . conscious that states, on whose behalf they administer international law, are the guardians of the international legal order which is at yet in a stage of minority’.<sup>53</sup>

Like many of his inter-war contemporaries, Lauterpacht rejected the omnipotent conception of the state as being unsupported in reality and counterproductive to the effective development of the law. In ‘*Das völkerrechtliche Mandate*’, this attack was launched circumspectly through the then heated debate about who held sovereignty over the mandated territories.<sup>54</sup> His intervention in the debate is instructive because he rejected the notion that it lay either with the mandatory state or the mandated territory, arguing instead that it was held by the League of Nations.<sup>55</sup> In so doing, he recognized that the League as an international organization had legal personality which was distinct from that of its member states.<sup>56</sup> Therefore, according to Lauterpacht, legal sovereignty lay with the League, and the relevant mandatory state exercised this sovereignty under the League’s authority and supervision.<sup>57</sup> For Lauterpacht, the mandate system was a central pillar of the League of Nations and ‘the idea of world sovereignty of the international legal order’; to sacrifice it would be to sacrifice its possibilities to ‘the constant reiteration of the victory of sheer power’.<sup>58</sup>

This veiled attack on state sovereignty was transformed into a full frontal assault in *Private Law Sources*, with legal positivism squarely in the firing line.<sup>59</sup> Lauterpacht

<sup>50</sup> *Ibid.*, at p. viii.

<sup>51</sup> Lauterpacht, ‘Decisions of Municipal Courts as a Source of International Law’, 10 *BYIL* (1929) 65, at 66–67, 80–83.

<sup>52</sup> *Ibid.*, at 92.

<sup>53</sup> *Ibid.*, at 93.

<sup>54</sup> Lauterpacht noted that the concept of sovereignty was dealt with extensively in German legal theory: *supra* note 24, at 47, n. 2. He singled out for special reference G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882) and H. Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer Reinen Rechtslehre* (1920). The latter was published when Lauterpacht was at the University of Vienna, where he took Kelsen’s classes in General Theory of the State and Austrian Constitutional Law: Kelsen, ‘Hersch Lauterpacht’, 10 *ICLQ* (1961) 2. Lauterpacht’s initial disapproval of *Das Problem der Souveränität* gave way later to approval: *supra* note 32, at 55.

<sup>55</sup> Lauterpacht, *supra* note 24, at 66–69; and Lauterpacht, *supra* note 32 at 196.

<sup>56</sup> *Ibid.*, at 198–199.

<sup>57</sup> Lauterpacht, *supra* note 24, at 69; and Lauterpacht, *supra* note 32, at 199.

<sup>58</sup> Lauterpacht, *supra* note 24, at 84.

<sup>59</sup> Lauterpacht, *supra* note 32, at p.ix.

made clear that his attack on positivism was not a rejection of the 'science of international law' or a plea for a return to natural law.<sup>60</sup> Indeed, he used the methodology of positivism and its reliance on state practice to bolster his case. He found that the 'dogma' of sovereignty as propounded by positivists rejected any broad use of legal analogy which extended the obligations of states or subjected them to rules to which they had not expressly consented.<sup>61</sup> He took this further when he stated that the doctrine promoted the 'widely accepted notion of the absolute value of the State as the exclusive subject of international law, and of the absolute character of the interests protected by it'.<sup>62</sup> This was far from a neutral position, aiding as it did the notion that the state's actions were without fetters.<sup>63</sup> Lauterpacht concluded that, because of these inbuilt prejudices, many contemporary international law texts could not provide a basis for 'a coherent system of international law'.<sup>64</sup>

Lauterpacht observed that even leading positivists were gradually accepting that international law-making could not be confined to states' will.<sup>65</sup> The inclusion of Article 38(3) and the rejection of *non liquet* by the majority of the Committee of Jurists which drafted the Court's statute in 1920 represented a 'definite rejection of the dogmatic positivist view'.<sup>66</sup> The extensive use to which private law was being put in international law was, Lauterpacht maintained, crucial to ensuring its realization as a whole system of law, something which was impossible with contemporary positivism.<sup>67</sup>

In contrast to his Viennese dissertation, Lauterpacht optimistically concluded *Private Law Sources* thus: '[t]he notion of the fundamental difference of the two spheres of law in respect of their subjects is now being gradually abandoned, as also is its inevitable corollary, namely, the artificial personification of the metaphysical State'.<sup>68</sup> Further, he maintained that there was growing legal acceptance that 'behind the personified institutions called States there [was] in every case individual human beings to whom the precepts of international law [were] addressed'.<sup>69</sup> Therefore, human beings were the foundational unit of all legal orders, include the international legal order, and states were mere instruments within this order. Accordingly, what rights and powers states did have existed because of the legal order, and not the other way around, as argued by positivists.<sup>70</sup>

<sup>60</sup> *Ibid.*, at p. x.

<sup>61</sup> *Ibid.*, at 43–87.

<sup>62</sup> *Ibid.*, at 298.

<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.*, at 53–54 and 298.

<sup>65</sup> *Ibid.*, at 68.

<sup>66</sup> *Ibid.*, at p. viii, and 91–296.

<sup>67</sup> Lauterpacht, *supra* note 51, at 88.

<sup>68</sup> Lauterpacht, *supra* note 32, at 299.

<sup>69</sup> *Ibid.*, at 305–306.

<sup>70</sup> See Lauterpacht, 'Règles générales du droit de la paix', 62 *Hague Recueil* (1937, I) 99 and translated in CP, *supra* note 3, i, at 181, 367–377.

It was not by chance that Lauterpacht chose to analyse the work of John Westlake, whom he described as the ‘philosopher amongst English international lawyers’, for his first extended English-language publication.<sup>71</sup> This 1925 article marked a consolidation of the primary concerns of this first phase of his writings and the shift they had undergone with the transition from Vienna to London.<sup>72</sup> In drawing a line from the recent developments on the theoretical foundations of international law, namely, its subjects, sources, and sovereignty, to Westlake’s views enunciated decades before, Lauterpacht sought to expose the weaknesses (and regressive impact) of positivist thought. He drew inspiration from Westlake’s teachings to facilitate the dissolution of any barrier between domestic and international legal systems, thereby promoting the notion of international law as a whole system of law reigning over states and individuals alike, bestowing upon them rights and responsibilities. For Lauterpacht, the ‘chasm’ was bridged by Westlake’s first principle of international law:

The society of states . . . is the most comprehensive form of society among men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and rights of states are only the duties and rights of men who compose it.<sup>73</sup>

Lauterpacht would return time and again to this sentiment, referencing Westlake’s words explicitly and implicitly on numerous occasions, including at the commencement of the chapter in *Private Law Sources* critiquing the positivist ‘dogma of sovereignty’,<sup>74</sup> on the dedication page of the first volume of the *Annual Digest*, and the closing speech of the British chief prosecutor at the Nuremberg trials in 1946.

### **B Lemkin: Crimes of Barbarity and Vandalism (1933)**

During the 1920s, Lemkin was engaged in his own efforts to lift the seemingly impenetrable veil of state sovereignty through his academic work, first in comparative criminal law and then international criminal law. His earliest writings on comparative criminal law corresponded with the overhaul of domestic criminal codes in various European states with the rise of communism and fascism. These new codes reflected the reconfigured relationship between the individual and the state demanded by these new regimes. As Lemkin’s work attested to, the growing legal ‘personification’ of the state manifested a concomitant and systematic diminution of human rights and

<sup>71</sup> Lauterpacht, *supra* note 23, at 308.

<sup>72</sup> Lauterpacht observed that, unlike in British universities, public international law was a compulsory unit in legal curricula in Vienna and legal philosophy was more abstract and theoretical: ‘The Teaching of Law in Vienna’ [1923] *J Soc Public Teachers in L* 43, reprinted in *CP*, *supra* note 3, v, at 711, 713–714. There are arguably three discernible ‘periods’ in Lauterpacht’s *œuvre* which are accompanied by articles dedicated to analysing the impact on international law of a particular legal philosopher: (1) ‘Westlake’, *supra* note 23 (the early inter-war period and his exposition of domestic law analogies), (2) ‘Spinoza and International Law’, 8 *BYIL* (1927) 89 (during the rise of fascism and his work on non-justiciability), and (3) ‘The Grotian Tradition’, *supra* note 7 (in the immediate aftermath of World War II and his writings on human rights).

<sup>73</sup> Lauterpacht, *supra* note 23, at 312–315.

<sup>74</sup> Lauterpacht, *supra* note 32, at 43.

freedoms. Such developments piqued Lemkin's existing interest in developing legal responses to atrocities committed by states against their own inhabitants.<sup>75</sup>

At Jan Kazimierz University, while taking seminars on Polish criminal law conducted by Juliusz Makarewicz and Waclaw Makowski, Lemkin exhibited an interest in comparative criminal law.<sup>76</sup> Upon his graduation in 1926, he commenced working as a secretary at the Warsaw Appellate Court while continuing to participate in Makowski's criminal law seminars at Warsaw University.<sup>77</sup> A year later, Lemkin translated the new Soviet Penal code.<sup>78</sup> He observed how the code defined a 'state of threat' to encompass not only persons who had allegedly committed acts which were a 'threat to public security' but also persons deemed dangerous because of past activities.<sup>79</sup> Lemkin translated other penal codes including the draft Fascist Penal Code which came into force in Italy in 1931.<sup>80</sup> He was critical of the scope of 'crimes against the personality of the state' in the draft code, which included 'any insult to Mussolini committed by foreigners abroad'.<sup>81</sup> This 'exaggerated nationalism', for Lemkin, was irreconcilable with 'the principles of justice and purposefulness of criminal law, and by no means [could] it contribute to strengthening friendly relations with other countries'.<sup>82</sup>

From 1927 to 1939, Lemkin was a senior assistant at the Free Polish University, Warsaw, where he taught comparative criminal law and developed a close working relationship with Emil Rappaport.<sup>83</sup> Rappaport facilitated his appointment as referendary to the Codification Committee of the Second Polish Republic (1931–1932) and Secretary General of the Polish section of the *Association internationale de droit pénal*.<sup>84</sup> Lemkin collaborated with Rappaport, and another Supreme Court judge, in the preparation of the first commentary on the 1932 Polish criminal code.<sup>85</sup> In 1934, Lemkin published an extensive comparative study of national criminal codes entitled *Sędzia w obliczu nowoczesnego prawa karnego i kryminologii*.<sup>86</sup> Penal codes, he wrote, were a 'negatively determined borderline of the sphere of an individual's freedom'.<sup>87</sup> He observed that in the new fascist and communist regimes

<sup>75</sup> Anon, 'Summary, "Totally Unofficial"' (Draft autobiography), Box 1/35, Lemkin papers, NYPL.

<sup>76</sup> See R. Lemkin and T. Kochanowicz, *Kodeks karny Republik Sowieckich z 1922 r.* (The Penal Code of the Soviet Republics 1922) (1926).

<sup>77</sup> Szawłowski, 'Raphael Lemkin (1900–1959), The Polish Lawyer Who Created the Concept of "Genocide"', *2 Polish Q Int'l Affairs* (2005) 98, at 105.

<sup>78</sup> R. Lemkin, *Kodeks karny Rosji Sowieckiej 1927* (The Penal Code of Soviet Russia 1927) (1928).

<sup>79</sup> *Ibid.*, at 10, translated in Szawłowski, *supra* note 77, at 106–107.

<sup>80</sup> R. Lemkin, *Kodeks karny faszystowski* (Fascist Penal Code) (1929).

<sup>81</sup> *Ibid.*, at 14, translated in Szawłowski, *supra* note 77, at 108.

<sup>82</sup> *Ibid.*

<sup>83</sup> Szawłowski, *supra* note 77, at 110; and Cooper, *supra* note 16, at 21.

<sup>84</sup> Anon., 'Who Knows – And What', P-154, Box 1/2, Raphael Lemkin Collection, American Jewish Historical Society, New York, NY (Lemkin collection, AJHS) and 'Summary of the Activities of Raphael Lemkin', 23, Box 2/33, Lemkin papers, NYPL.

<sup>85</sup> J. Jamontt and E. S. Rappaport, with R. Lemkin, *Kodeks Karny z 1932 r. Komentarz* (Commentary of the Polish Penal Law of 1932) (1932).

<sup>86</sup> R. Lemkin, *Sędzia w obliczu nowoczesnego prawa karnego i kryminologii* ('The Judge in the Face of the Modern Penal Law and Criminology') (1934).

<sup>87</sup> *Ibid.*, at 5, translated in Szawłowski, *supra* note 77, at 111.

‘the group prevails over the individual’, and legislators defined the ‘bounds of the protection of the rights of the individual with less precision’ in order to protect ‘social’ interests.<sup>88</sup>

By the early 1930s, Lemkin began participating in various conferences on the unification of criminal law and contributing to multilateral efforts to codify international criminal law. The first International Conference for the Unification of Criminal Law under the auspices of the League of Nations was held in Warsaw in 1927.<sup>89</sup> However, it was the fifth International Conference held in Madrid in 1933 which proved a watershed for Lemkin. At the invitation of the organizing committee, he prepared a report entitled *Les actes constituant un danger general (interetatique) consideres comme delist de droit des gens*, where he listed five crimes of international law and differing rationales for their repression by the international community.<sup>90</sup> He noted that some crimes under the law of nations, like slavery and the trade in women and children, were contrary to humanitarian principles. These crimes were an affront to the protection of individual freedom and dignity because of their commodification of individuals. He argued that the protection of these individual rights was of importance to the international community as a whole. On the other hand, he noted that there were other crimes which undermined peaceful relations between groups and between a group and an individual. The prohibition against aggressive war propaganda was an example of such a crime.

Lemkin observed that certain crimes which threatened an individual as a member of a group were a combination of these two elements. These crimes targeted not only the individual but harmed the group to which she or he belonged. Lemkin argued that acts of extermination, like massacres, pogroms, or acts designed to destroy their economic existence, which were directed against ‘ethnic, religious or social groups’ irrespective of the motive, went beyond relations between individuals because ‘they sh[ook] the very basis of harmony in mutual relations between particular collectivities. Such acts directed against collectivities constituted a general transnational danger.’<sup>91</sup>

Two crimes on his proposed list of crimes to be codified in international law fell into this category: the crimes of barbarity and vandalism. It is worth replicating verbatim his definition of these two crimes enunciated in 1933. He defined the crime of barbarity as follows:

<sup>88</sup> *Ibid.*

<sup>89</sup> *Conférence Internationale d’Unification du Droit Pénal (Varsovie, 1–5 Novembre 1927), Actes de la Conférence (1929)*; and Lemkin, ‘La protection de la paix par le droit penal interne’, 1 *RIDP* (1938) 95.

<sup>90</sup> R. Lemkin, *Les actes constituant un danger general (interetatique) consideres comme delits de droit des gens, Rapport spécial présenté à la V-me Conférence pour l’Unification du Droit Pénal à Madrid (14–20.X.1933) (explications additionnelles)*, (Acts Constituting a General (Transnational) Danger considered as Crimes under the Law of Nations) (1933), P-1 54, Box 1/11 and Box 5/3, Lemkin Collection, AJHS. See *Actes de la Conference Internationale pour l’Unification du Droit Pénal* (1935), at 48–56.

<sup>91</sup> *Ibid.*, at 1.

*Quiconque, par haine à l'égard d'une collectivité de race, de confession ou sociale, ou bien en vue de l'extermination de celle-ci, entreprend une action punissable contre la vie, l'intégrité corporelle, la liberté, la dignité ou l'existence économique d'une personne appartenant à une telle collectivité, est passible, pour délit de barbarie d'une peine de . . .*<sup>92</sup>

The crime is extended to include acts against persons who have declared solidarity with the targeted group or have intervened on their behalf. The second crime of vandalism was articulated thus:

*Quiconque, soit par haine contro une collectivité de race, de confession ou sociale, soit en vue de l'extermination de colle-ci, détruit ses oeuvres culturelles ou artistiques, est passible, pour délit de vandalisme, d'une peine de . . .*<sup>93</sup>

A decade later, Lemkin would fuse these two crimes into his definition of the crime of genocide in his book *Axis Rule in Occupied Europe*.

The third significant aspect of Lemkin's 1933 report bears reflection. He proposed that because of the nature of these crimes and their threat to the international public order they should attract universal jurisdiction. Offenders would be prosecuted and punished according to the laws of the state where they were apprehended, regardless of where the offence was committed or their nationality.<sup>94</sup> Universal 'repression', he wrote, was a manifestation of the 'solidarity' of the international community's 'interdependent struggle' against 'criminality'.<sup>95</sup> Accordingly, not all violations of international law would attract universal jurisdiction; only those 'so particularly dangerous as to present a threat to the interests, either of a material or moral nature, of the entire international community'.<sup>96</sup> He argued that the crimes of barbarity and vandalism were 'aimed not only against human rights but also, and above all, against the public order'.<sup>97</sup>

At the time of the Madrid conference, Lemkin was employed as a public prosecutor at the district court in Warsaw. He was advised informally by Rappaport that the government had blocked his attendance for fear that his proposal would antagonize the new Nazi regime and fuel an anti-Semitic backlash in the Polish popular press.<sup>98</sup> Nonetheless, Lemkin forwarded his text to the organizers. While his proposal was circulated, discussed, and tabled at the conference, it was not put to a vote.<sup>99</sup> He later maintained

<sup>92</sup> *Ibid.*, at 4 and 6 ('Whosoever, out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, undertakes a punishable action against the life, bodily integrity, liberty, dignity or economic existence of a person belonging to such a collectivity, is liable, for the crime of barbarity, to a penalty . . .'), translated in Lemkin, 'Genocide as a Crime under International Law', 41 *AJIL* (1947) 145, at 146.

<sup>93</sup> *Ibid.*, at 5–6 ('Whosoever, either out of hatred towards a racial, religious or social collectivity, or with a view to the extermination thereof, destroys its cultural or artistic works, will be liable for the crime of vandalism, to a penalty. . .').

<sup>94</sup> *Ibid.*, at 6. See H. Donnedieu de Vabres, *Les Principes Modernes de Droit Pénal International* (1928), at 135–166; V. V. Pella, *La Criminalité Collective des États et le Droit Pénal de l'Avenir*, (1925), at 157–159; and E. S. Rappaport, *Unification International du Droit Pénal* (1929), at 19–21.

<sup>95</sup> *Ibid.*, at 1.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.* Lemkin referred to V.V. Pella, *La repression des crimes contre la personnalité de l'Etat* (n.d.).

<sup>98</sup> Anon, *supra* note 75, at 22; and Elder, 'What You See before Your Eyes: Documenting Raphael Lemkin's Life by Exploring his Archival Papers, 1900–1959', 7 *Journal of Genocide Research* (2005) 469, at 475.

<sup>99</sup> Anon, *supra* note 75, at 22.

that this missed opportunity rendered it more difficult to prosecute the major war criminals at Nuremberg.<sup>100</sup> However, Lemkin observed, ‘Although, I could not win the battle in Madrid, I had at least started a movement of ideas in the right direction’.<sup>101</sup>

#### 4 Seminal Works: The Role of Law in International Society

Six years after the publication of *Private Law Sources*, while still a lecturer at the LSE, Hersch Lauterpacht produced his key work, *The Function of Law in the International Community* (1933),<sup>102</sup> in the year of Hitler’s installation as German Chancellor. A decade later, at the close of World War II in Europe with the surrender of Nazi Germany, Raphael Lemkin’s own groundbreaking work, *Axis Power in Occupied Europe* (1944) was published. For Lauterpacht and Lemkin the calamity visited upon humanity with the advent of fascism was not confined to the war years. Their respective works, framing as they did the rise and coming defeat of National Socialism, at their core focussed upon the role of law in international society.

Both writers were fully cognizant of the dystrophic purposes to which law could be and was being deployed. A substantive portion of Lemkin’s book was devoted to evidencing the methods by which the systematic discrimination, exclusion, and final elimination of whole groups was achieved by co-opting the legal system to this task. Lauterpacht’s work was driven equally by the awareness of the dangers of unchecked state power. Yet, Lauterpacht and Lemkin remained unflagging in their adherence to articulating and promoting the role of international law in curtailing and countering these forces in national and international communities.

##### *A Lauterpacht: The Function of Law in the International Community (1933)*

Professionally for Lauterpacht 1933 marked not only the publication of his second significant monograph; it was also the year he took up the editorship of *Oppenheim’s International Law*, a leading international law treatise firmly conceived by its originator in the positivist vein.<sup>103</sup> He may have taken on Lassa Oppenheim’s mantle but *The Function of Law* encapsulated his own distinguishable theoretical mindset and conception of international law. Where *Private Law Sources* had highlighted the limitations placed on the formulation of international law by positivist doctrines, especially state sovereignty, *The Function of Law* traverses their impact on the effective functioning of courts at the international level.

<sup>100</sup> Lemkin, *supra* note 92, at 146. The Eighth International Conference of the American States, in 1938, examined the criminalization of ‘persecution for racial or religious motives’: ‘Final Act of the Eighth Interamerican Conference’, in J. B. Scott (ed.), *The International Conference of the American States* (1940), at 260.

<sup>101</sup> Anon, *supra* note 75 at 22.

<sup>102</sup> See Koskenniemi, ‘The Function of Law in the International Community: 75 years later’, Cambridge University, July 2008 (copy on file with author).

<sup>103</sup> See Schmoeckel, ‘The Internationalist as Scientist and Herald: Lassa Oppenheim’, 41 *EJIL* (2000) 699; and Jenks, *supra* note 3, at 66–68.



Again, Lauterpacht used a doctrinal issue, the non-justiciability of disputes in international law, and the perceived inherent weakness in the international legal order it embodied as a platform for his broader promotion of the rule of law in the international community. The gradual movement from the late 19th century onwards toward judicial adjudication was aligned with the prohibition on the use of force as a legitimate mode of settling disputes at the international level.<sup>104</sup> For Lauterpacht, the attainment of these twin goals was crucial for the evolution of international law. However, just as the struggle between the humanitarian and cosmopolitan purpose and power principle within the mandate system had led to concessions and disappointment, so too the newly established Permanent Court of International Justice was afflicted with compromises. The distinction between justiciable and non-justiciable disputes and voluntary submission to the Court's jurisdiction betrayed the continued deference to states' will and the fragility of the rule of law in international society.

Lauterpacht commenced his 1933 monograph once again with a return to the limitations of the doctrine of state sovereignty, this time upon judicial processes. He noted that according to strict positivist interpretations it was states which determined the content of international law and were bound by it only if they expressly or tacitly accepted the obligation. This limitation was further exacerbated by the state's right to determine the content of existing international law in a given case. Lauterpacht noted that this meant that 'the State [was] in principle the sole judge of the existence of any individual rules of law, applicable to itself'.<sup>105</sup> In addition, it was a central tenet of international law that states voluntarily submit to the jurisdiction of a court or arbitral tribunal. The rejection of compulsory judicial adjudication meant that the arbitration of disputes was not 'a fundamental duty . . . but was a self-imposed concession, conditioned by the nature of the present and future relations [with the state to which it was granted]'.<sup>106</sup> Even the operation of the so-called optional clause had become tainted by such machinations through reservations which enabled a signatory unilaterally to determine whether the Court would have jurisdiction.<sup>107</sup>

Lauterpacht argued that positivists had internalized and transformed into legal rules the contemporary deficiencies of international society and had given them the imprimatur of compatibility with the rule of law.<sup>108</sup> As in *Private Law Sources*, he maintained that these machinations were propelled by positivists 'anxious to give legal expression to the State's claim to be independent of law'.<sup>109</sup> In so doing, they subordinated the place of law and courts in international society to the will of states. The division between justiciable and non-justiciable, or legal and political nature of disputes, was little more than a ruse

<sup>104</sup> H. Lauterpacht, *The Function of Law in the International Community* (1933), at 434–438; and Lauterpacht, *supra* note 23, at 307. Cf. Kelsen, 'Compulsory Adjudication of International Disputes', 37 *AJIL* (1943) 397.

<sup>105</sup> Lauterpacht, *supra* note 104, at 3.

<sup>106</sup> *Ibid.*, at 4.

<sup>107</sup> See Lauterpacht, 'British Reservations to the Optional Clause', 29 *Economica* (1930) 137, at 170–171.

<sup>108</sup> Lauterpacht, *supra* note 104, at 6; and see Lauterpacht, 'The Doctrine of Non-Justiciable Disputes in International Law', 24 *Economica* (1928) 277, at 278.

<sup>109</sup> Lauterpacht, *supra* note 104, at 6.

whereby states at their will quarantined themselves beyond the reach of law, thereby bringing ‘international law to the vanishing point of law’.<sup>110</sup>

For Lauterpacht, this phenomenon of shielding the state beyond the realm of legal sanction had become more than an academic enquiry. In 1933, he prepared a memorandum with a draft Resolution for the Council of the League of Nations concerning the recent German legislation concerning its Jewish population.<sup>111</sup> In it he warned that there was a ‘danger that the anti-Jewish policy in Germany w[ould] become systematized in accordance with a pre-conceived plan of relentless attrition of German Jewry’.<sup>112</sup> This marked the commencement of the passage of a raft of discriminatory laws in Germany (and Axis and occupied countries) during the 1930s and 1940s. As I will explain below, it was Lemkin’s collection, collation, and translation of these laws which proved invaluable to the Nuremberg tribunal.

If Lemkin meticulously relayed the systematic discrimination and gradual elimination of a group by the state through the promulgation and enforcement of laws, Lauterpacht followed a different tactic. This second phase of this writing was heralded by his critical analysis of the contribution to international law of Baruch Spinoza.<sup>113</sup> It signalled Lauterpacht’s deconstruction of those lines of political thought which had been co-opted or had aligned themselves with the rise of fascism. He observed that, while for some philosophers a negative attitude to international law was ‘merely a link in the chain’ in their theory of the state, for others it was ‘justification of an attitude of nationalism’ and conscious negation of an international community under the reign of law.<sup>114</sup> He traced a pattern of thought from Machiavelli, to Hobbes and Spinoza, to Herder, Fichte, and Hegel which promoted a state of nature in international relations – where the ‘reason of state’ prevailed and war was a necessary and legitimate tool in a state’s arsenal.<sup>115</sup> He noted that some publicists used this strain of political philosophy to rationalize the ‘omnipotence’ of the state and emasculation of international law through their denial of ‘a body of rules . . . independent of the will of the state’.<sup>116</sup> In his closing speech at Nuremberg, parts of which Lauterpacht drafted, Hartley Shawcross reiterated the words of Acton: ‘[t]he greatest crime is homicide. The accomplice is no better than the assassin; the theorist is the worst.’<sup>117</sup>

Lauterpacht argued that such political theories had led to the promotion of the ‘specificity’ of international law.<sup>118</sup> He rejected explanations of the legal character of international law based on theories of self-limitation and coordination as being little more than

<sup>110</sup> *Ibid.*, at 166.

<sup>111</sup> Lauterpacht, *supra* note 14, at 728.

<sup>112</sup> *Ibid.*, at 728–729.

<sup>113</sup> Lauterpacht, *supra* note 72.

<sup>114</sup> *Ibid.*, at 91.

<sup>115</sup> Lauterpacht, *supra* note 72, at 102–106.

<sup>116</sup> *Ibid.*, at 91 and 104.

<sup>117</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946* (42 vols., 1947–1949), xix, at 447.

<sup>118</sup> Lauterpacht, ‘The Nature of International Law and General Jurisprudence’, 37 *Economica* (1932) 301, at 301 and 320; and Lauterpacht, *supra* note 104, at 399–407.

the denial of international law *qua* law.<sup>119</sup> He approved of the ‘realist and constructive’ monism espoused by Alfred Verdross, Hans Kelsen, and George Scelle as being conducive to the transition toward the eventual realization of *civitas maxima*.<sup>120</sup> Nonetheless, he found Verdross and Kelsen’s interpretation of the principle of *pacta sunt servanda* as a law beyond states’ will was merely a ‘synthesis of words’ and not ‘one of substance’.<sup>121</sup> He rejected the notion that modern states were like ‘primitive tribes’, thereby condemning international law eternally to a ‘comprehensively diluted *genus proximum*’.<sup>122</sup> It was eminently preferable to concede that international law was in a state of transition to the ‘attainable ideal of a society of states under the binding rule of law’.<sup>123</sup>

The solution, for Lauterpacht, was the acceptance of ‘the rational and ethical postulate, which is gradually becoming a fact, of an international community of interests and functions’.<sup>124</sup> This stance also explained his examination of Spinoza’s writings. He asked, ‘Why should not the same motive which prompts men to live under the reign of law [within a state] apply to whole nations? Are not the perils which beset them equally great? . . . The inducement to leave the state of lawlessness is here, in the long run, not smaller than in the case of individuals.’<sup>125</sup> Lauterpacht argued the defect lay not in Spinoza’s thinking but in his application.<sup>126</sup> He maintained that Spinoza’s rationale for the application of the ‘law of reason’, which he had expounded as driving individuals to establish a ‘good’ state, was equally applicable to relations at the international level.<sup>127</sup>

Lauterpacht defined such an international community in his draft 1933 Council resolution calling for international action. In it he argued that German laws offended the ‘principle of non-discrimination on account of race or religion [which was] part of the public law of Europe’, and consequently were a threat to international peace.<sup>128</sup> He called on the League to exercise its authority ‘in defence of the rights of human personality whose protection is the ultimate object of international law’. Finally, it appealed to all Members of the League of Nations to ‘observe scrupulously [these] principles in their treatment of the racial and religious minorities subject to their sovereignty’.<sup>129</sup>

It was Lauterpacht’s sober appreciation of the deficiencies of the contemporary legal order which led him to embrace the vital importance of the role of judges in pronouncing on and protecting these common interests. As long as the rule of law was recognized as being applicable to the international community, he argued, all international disputes regardless of their subject matter could be adjudicated on with the application of legal rules.<sup>130</sup> He maintained that the ‘completeness of the rule of law’ was an ‘*a priori*

<sup>119</sup> Lauterpacht, *supra* note 118, at 306–312; Lauterpacht, *supra* note 104, at 407–416; and Lauterpacht, *supra* note 70, at 207–213.

<sup>120</sup> Lauterpacht, *supra* note 118, at 316; and Lauterpacht, *supra* note 70, at 214–215.

<sup>121</sup> Lauterpacht, *supra* note 104, at 422.

<sup>122</sup> Lauterpacht, *supra* note 118, at 318.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, at 317.

<sup>125</sup> Lauterpacht, *supra* note 22, at 97–98.

<sup>126</sup> *Ibid.*, at 98.

<sup>127</sup> *Ibid.*, at 97.

<sup>128</sup> Lauterpacht, *supra* note 14, at 735–776.

<sup>129</sup> *Ibid.*, at 736.

<sup>130</sup> *Ibid.*, at 421.

assumption of every system of law', and not something bestowed by positive law.<sup>131</sup> He acknowledged that there could be gaps in existing statutes and custom, but there were 'no gaps in the legal system as a whole'.<sup>132</sup> To concede such gaps in the law or accept that certain claims were beyond the realm of adjudication, Lauterpacht suggested, was tantamount to 'abandoning' the primary function of the international legal order: 'the preservation of peace', and permitting 'the reign of force'.<sup>133</sup>

Lauterpacht maintained that courts had always been able to adjudicate on and find a legal answer to disputes of a 'political' nature.<sup>134</sup> In order to stymie arguments that the question of non-justiciability arose because of the immature nature of international law and its gaps, he fell back upon the methodology he had employed in *Private Law Sources*. He showed that domestic systems of law have addressed similar concerns about the incompleteness of the legal order, and argued that Article 38(3) could serve the same function in the international sphere.<sup>135</sup>

According to Lauterpacht, in a system of law with no effective legislature such as international law the role of the judiciary became centrally important to ensuring the rule of law in the international community.<sup>136</sup> He maintained that the question whether a judge could refuse to give a decision because of *non liquet* had been answered 'with decisive determination, in the negative . . . by the very fact of the establishment of a community under the reign of law'.<sup>137</sup> He recognized that judicial settlement may be 'imperfect in an imperfect system of law', but once it was accepted as a fundamental principle of law there was a duty on judges to adjudicate in every case.<sup>138</sup> To come to a contrary conclusion based on the 'special character of international law' was no more, or less, than the breakdown of the rule of law.<sup>139</sup>

## B *Lemkin: Axis Rule in Occupied Europe (1944)*

Raphael Lemkin ascribed an equally central role to judges and lawyers in the international legal order he envisaged following World War II. In a presentation to the North Carolina Bar Association at their annual meeting on 16 May 1942, he informed the audience how the legal system, including lawyers and judiciary, was deliberately targeted by Nazi Germany in occupied countries.<sup>140</sup> He maintained that:

The lawyers of free countries must find in this picture of destruction of law and in this unbelievable humiliation of the human race an inspiration for the understanding of the lawyer's role

<sup>131</sup> Lauterpacht, *supra* note 104, at 64.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, at 437–438.

<sup>134</sup> *Ibid.*, at 110–135 and 145–153. See H. Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934); and Lauterpacht, 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals', 11 *BYIL* (1930) 134.

<sup>135</sup> Lauterpacht, *supra* note 104, at 60–63.

<sup>136</sup> *Ibid.*, at 438; and Lauterpacht, *supra* note 108, at 308.

<sup>137</sup> Lauterpacht, *supra* note 104, at 61–62. The exchange between Lauterpacht and Julius Stone in 1958–1959 on this point is addressed in Part II of this project.

<sup>138</sup> *Ibid.*, at 68–69.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Proceedings of the Forty-fourth Annual Session of the North Carolina Bar Association* (1942), at 108–115.

in this present struggle. . . It means for the idea of law as a regulator of relations between man and man, man and state, nation and nation. . . [I]nternational law is going to play a great part after this war.<sup>141</sup>

During the meeting, Lemkin recapitulated his 1933 proposal for the criminalization of barbarity and vandalism.<sup>142</sup> Yet, by 1942 he was well advanced in the preparation of his book, *Axis Rule in Occupied Europe*, in which he was to launch his newly conceived term: genocide.<sup>143</sup>

Much had transpired since the Madrid conference to bring Lemkin to the United States. Following the Nazi invasion and occupation of Poland in 1939, he escaped to Lithuania and then Sweden, where he taught law at the University of Stockholm.<sup>144</sup> He made his way eastwards through the Soviet Union to the United States, arriving in mid-1941. He was sponsored by Malcolm McDermott of Duke University Law School, with whom Lemkin had collaborated on the English translation of the Polish criminal code in the 1930s.<sup>145</sup> While in Stockholm, Lemkin had imposed upon the Swedish Foreign Ministry to instruct its various diplomatic missions to collect official records and reports which were more readily available in a neutral country.<sup>146</sup> The dossier was expanded upon in 1941–1942 while he taught at Duke and worked as a consultant for the Board of Economic Warfare in Washington DC.<sup>147</sup>

A central concern of Lemkin's mature work was the detailing of the malign purposes to which the law could be deployed by states and their organs. He wrote in the preface of *Axis Rule*:

This régime is totalitarian in its method and spirit. Every phase of life, even the most intimate, is covered by a network of laws and regulations which create the instrumentalities of the most complete administrative control and coercion. . . . German law . . . is bereft of moral content and of *respect for human rights*. . . [It] adopted a unilaterally utilitarian conception of law – law is that which is useful to the German nation . . .<sup>148</sup>

Lemkin's *Axis Rule* was conceived first and foremost as 'undeniable and objective evidence regarding the treatment of subjugated peoples of Europe by the Axis Powers'.<sup>149</sup> In his book review, Lauterpacht wrote that '[i]t will be invaluable to all those concerned with the liquidation of German legislation in Europe'.<sup>150</sup>

<sup>141</sup> *Ibid.*, at 116.

<sup>142</sup> *Ibid.*, at 112–113.

<sup>143</sup> The initial inquiry from the publisher, the Carnegie Endowment for International Peace came in mid 1942: Finch to Jessup, 9 July 1942, Folder 57.6, Carnegie Endowment for International Peace Archives, Rare Book and Manuscript Library, Columbia University, New York, NY (CEIP). Publication was delayed until 1944 because of a contractual dispute between Lemkin and CEIP.

<sup>144</sup> Anon., 'Who Knows', *supra* note 84.

<sup>145</sup> R. Lemkin and M. McDermott, *The Polish Penal Code of 1932 and the Law of Minor Offences* (1939).

<sup>146</sup> Korey, *supra* note 10, at 14.

<sup>147</sup> Lemkin, *supra* note 20, at p. ix.

<sup>148</sup> *Ibid.*, at pp. ix–x.

<sup>149</sup> *Ibid.*, at p. ix.

<sup>150</sup> 9 *Cambridge LJ* (1945), 140.

The content and organization of *Axis Rule* were designed to convey how the discrimination, segregation, and eventual elimination of groups were systematically implemented through laws and decrees.<sup>151</sup> It is divided into three parts. Part I covered German techniques of occupation with particular reference to civil administration, police, legal system and courts, property, and finance. Part II synthesized similar practices in other Axis countries and occupied territories. Part III made up two-thirds of the book's content and was composed of translations of 330 of 'the more representative' laws from Germany, Italy, and Axis satellite countries and puppet governments through to late 1942.

Buried in the midst of this documentation and analysis were two chapters, one entitled 'The Legal Status of the Jews', followed by another headed 'Genocide'. Lemkin had rejected terms like 'denationalisation',<sup>152</sup> 'race murder', and his previous term of 'barbarity' – suggesting that none of these existing terms conveyed the true nature and gravity of the crime.<sup>153</sup> For Lemkin, genocide was not simply the act of physical killing of members of a group but a process of systematic discrimination, exclusion, and destruction of the group and its outward cultural and religious manifestations. Quoting Lauterpacht, Lemkin explained, 'There may, in effect, be little difference between executing a person and condemning him to a slow death . . . by depriving him of shelter and means of sustenance.'<sup>154</sup> He used domestic law analogies to define this new crime in international law, writing:

[A]s in the case of homicide, the natural right of existence for individuals is implied: by the formulation of genocide as a crime, the principle that every national, racial and religious group has a natural right of existence is claimed.<sup>155</sup>

In essence, he used the method championed by Lauterpacht to fill perceived gaps in existing international law. However, in mid-1946, Lauterpacht was not favourably disposed to the new concept, fearing that 'if one emphasises too much that it is a crime to kill a whole people, it may weaken the conviction that it is already a crime to kill one individual'.<sup>156</sup> Both the definition of genocide and the method designed legally to address it articulated by Lemkin in *Axis Rule* underscored the legacy of the inter-war minority guarantees (and their limitations) and distinguished it from the individualized, human rights approach which would be championed by Lauterpacht.

Lemkin maintained that this crime of genocide did not 'necessarily mean the immediate destruction of the nation except when accomplished by mass killings of all members of a nation'.<sup>157</sup> Instead, it was 'a coordinated plan' covering the political, social, economic,

<sup>151</sup> Anon, *supra* note 75, at 6.

<sup>152</sup> See Report of Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, 14 *AJIL* (1920) 95; and Lauterpacht, 'The Nationality of Denationalized Persons', 1 *Jewish Yrbk Int'l L* (1948) 164.

<sup>153</sup> Lemkin, *supra* note 20, at 79–80.

<sup>154</sup> Lemkin, 'Crimes against Humanity' (unpublished paper), P-154, Box 6/4, Lemkin collection, AJHA.

<sup>155</sup> Lemkin, 'Genocide', 15 *The American Scholar* (1947) 227, at 229.

<sup>156</sup> Letter Schwelb to Humphrey, 19 June 1946, PAG-3/1.3, Box 26, United Nations War Crimes Commission 1943–1949, Predecessor Archives Group, United Nations Archives, New York (UNWCC Archives).

<sup>157</sup> Lemkin, *supra* note 20, at 79.

biological, physical, religious, and moral fields, with the purpose of destroying ‘the essential foundations of the life of a national group’.<sup>158</sup> Nor did he confine genocide to physical or biological annihilation. It could be achieved through the destruction of national or ethnic institutions, and cultural structures including language, religion, and psychology were targeted for elimination.<sup>159</sup> As in 1933, Lemkin emphasized that the purpose was the ‘annihilation of the groups themselves’.<sup>160</sup> Individuals were not targeted for death in their individual capacity but because of their membership of a particular group.<sup>161</sup> Lemkin maintained that ‘nations are an essential element of the world community’ and their destruction resulted ‘in the loss of its future contribution to the world’.<sup>162</sup>

Lemkin propounded that because genocide was an affront to the whole of humanity it should be criminalized in international law and attract universal jurisdiction through the adoption of uniform domestic laws.<sup>163</sup> He argued that recognition of universal jurisdiction was crucial, because ‘by its very nature [genocide] is committed by the state or by powerful groups which have the backing of the state. A state would never prosecute a crime instigated or backed by itself.’<sup>164</sup> Furthermore, although many of these acts were already prohibited during armed conflict and belligerent occupation by existing international humanitarian law, he stressed that they needed to be outlawed during peacetime also. Lemkin argued, ‘Attacks upon such groups are in violation of th[eir] right to exist and to develop within an international community . . . Thus genocide is not only a crime against the rules of war, but also a crime against humanity.’<sup>165</sup> As explained below, these points were contested as the Nuremberg trial unfolded.

In *Axis Rule*, Lemkin called for a multilateral instrument for the protection of minorities against oppression because of their nationality, religion, or race to be incorporated into the constitutions and penal codes of each state.<sup>166</sup> Lemkin maintained that the minority protections provided under the auspices of the League of Nations reflected international concern about the treatment of citizens by their own governments. This purpose, he argued, was replicated in the UN Charter when it provided for the protection of human rights. Lemkin consciously promoted the mutually reinforcing relationship between the protection of minorities and human rights and the criminalization of genocide.<sup>167</sup>

## 5 Nuremberg Trials and Individual Responsibility

Hersch Lauterpacht and Raphael Lemkin were called upon to put their academic work into practice by the mid-1940s. Both men played a vital role in the preparatory work

<sup>158</sup> *Ibid.*

<sup>159</sup> *Ibid.*, at 84–85.

<sup>160</sup> *Ibid.*

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*, at 91.

<sup>163</sup> *Ibid.*, at 93–94.

<sup>164</sup> Lemkin, *supra* note 155, at 228.

<sup>165</sup> *Ibid.*, at 229.

<sup>166</sup> Lemkin, *supra* note 20, at 93.

<sup>167</sup> Lemkin, *supra* note 155, at 228.

for and trial of the major Nazi officials at Nuremberg in 1945–1946. Their writings on the role of the law and judges in international society and the notion of individuals as bearers of rights and responsibilities in international law came to the fore during the trial. The personal experience of both men gave the judgment added poignancy. Lauterpacht's entire family, his parents, siblings, and their children (except a niece) had been murdered by 1942 in the Shoah.<sup>168</sup> Lemkin's parents and 49 members of his extended family were killed in the Warsaw ghetto, the concentration camps, or on the death marches. Although painfully aware of the dire conditions faced by Jews in occupied Europe, Lemkin did not learn about their fate until 1945.<sup>169</sup> For both men, it was crucial that the judgment acknowledged that these crimes were not just war crimes, that is acts conducted in violation of the rules of war.<sup>170</sup>

Through their respective formulations of crime against humanity and genocide, Lauterpacht and Lemkin stressed that these acts contravened values underpinning the international public order. In 1951, when the United States commenced its policy of granting amnesties to convicted Nazi war criminals, Lauterpacht wrote to Supreme Court Justice Robert H. Jackson, the former US Chief Prosecutor at Nuremberg. He argued that the amnesties were contrary to 'the principles of international law and order'.<sup>171</sup> They not only undermined the lessons of Nuremberg but were an 'indignity inflicted upon the memory of those who suffered death and martyrdom at the hands of the released war criminals'.<sup>172</sup>

### A *Crimes against Humanity*

In his work with the British and US contingents in the lead-up to the Nuremberg trial and his ongoing counsel to British officials during the prosecution of the main Nazi officials during 1945–1946, Lauterpacht revisited and reaffirmed foundational elements of his academic writings on international law.<sup>173</sup> Through these efforts he facilitated the realization of individual criminal responsibility in international law and the formal recognition and prosecution of crimes against humanity by the international community. At the trial's conclusion, the British Chief Prosecutor, Sir Hartley Shawcross, wrote to Lauterpacht: 'I hope you will always have the satisfaction in having had this leading hand in something that may have a [lasting?] influence on the future conduct of international relations.'<sup>174</sup>

<sup>168</sup> Koskenniemi, *supra* note 2, at 639.

<sup>169</sup> Anon, 'Summary', *supra* note 84, at 24.

<sup>170</sup> See Joint Declaration of the United Nations dated 17 Dec. 1942, HL Debs, 17 Dec. 1942, vol. 125, cols 607–612; and Report to the President from Justice Robert H. Jackson, Chief Counsel for the United States in the Prosecution of Axis War Criminals, 7 June 1945, 39(supp.) *AJIL* (1945) 179, at 184–185.

<sup>171</sup> Lauterpacht to Jackson, 16 Feb. 1951, extracted in Lauterpacht, 'Editor's Introduction', *CP*, *supra* note 3, v, at 485–486.

<sup>172</sup> *Ibid.* In his reply, Jackson cited the political situation created by the Cold War which also prohibited him from participating in the public debate on the issue: Jackson to Lauterpacht, 20 Feb. 1951, in *ibid.*, at 479.

<sup>173</sup> *Ibid.*; and Koskenniemi, 'Hersch Lauterpacht and the Development of International Criminal Law', 2 *J Int'l Criminal Justice* (2004) 810.

<sup>174</sup> Shawcross to Lauterpacht, 11 July 1946, *supra* note 171, at 484.



Lauterpacht had turned his mind to the legal practicalities of war crimes trials as early as 1941. While on a lecture tour of US law schools<sup>175</sup> in late 1941 he was consulted by then US Attorney-General, Robert H. Jackson, about a speech he was preparing on the prosecution of war crimes.<sup>176</sup> In the same year, Cambridge University's Committee on Crimes against International Public Order headed by Arnold McNair was established. Lauterpacht prepared a memorandum for the Committee,<sup>177</sup> which he later expanded and published as 'The Law of Nations and the Punishment of War Crimes' (1944).<sup>178</sup> In 1944, Lauterpacht became a member of the British War Crimes Executive, and in this capacity he travelled repeatedly to Nuremberg and drafted significant portions of the opening and closing speeches for the British Chief Prosecutor, Hartley Shawcross.<sup>179</sup>

Lauterpacht's disdain for the deification of the state was incorporated into Shawcross's closing speech on 26 and 27 July 1946, where he targeted not only Nazi policies but German statehood itself. His draft sentence commencing: '[t]he mystical sanctity of the sovereign State . . . is arraigned before the judgment of the law', was not included in the final text.<sup>180</sup> However, his long-held arguments that state responsibility and individual responsibility were part of existing law did.<sup>181</sup> Shawcross stated that the defendants could not 'rely on the metaphysical entity which they create[d] and control[ed] when . . . that state sets out to destroy that very comity on which the rules of international law depend'.<sup>182</sup> For, he explained, the principle of collective responsibility of government members is 'an essential protection of the rights of man and the community of nations; international law is fully entitled to protect its own existence by giving effect to it'.<sup>183</sup> Arguments to the contrary, which would permit impunity, were 'more appropriate to the spheres of power politics than to that in which the rule of law prevails'.<sup>184</sup>

Lauterpacht had dismissed positivist arguments against individual responsibility because either the state or its organs could not possess criminal intent or because international law was not addressed to individuals but to states alone.<sup>185</sup> Drawing inspiration from Westlake's words, he wrote in 1944:

<sup>175</sup> Letter N. M. Butler, Director, Division of Intercourse and Education, 4 Apr. 1941, in CEIP Archives, Box 57, Folder 57.4.

<sup>176</sup> Lauterpacht to Jackson, 15 Jan. 1941, extracted in Lauterpacht, *supra* note 171, at 484. See Jackson, 'Challenge of International Lawlessness', 27 *American Bar Association J* (1941) 690.

<sup>177</sup> See Lauterpacht, 'Memorandum: Punishment of War Crimes', Committee on Crimes against International Public Order, Nov. 1941, Cambridge Commission on Penal Reconstruction and Development, Department of Criminal Science, University of Cambridge (copy on file with author).

<sup>178</sup> Lauterpacht, 'The Law of Nations and the Punishment of War Crimes', 21 *BYIL* (1944) 5.

<sup>179</sup> Shawcross to Lauterpacht, 30 Nov. 1945, extracted in Lauterpacht, 'Editor's Introduction', *CP*, *supra* note 3, v, at 483.

<sup>180</sup> Cited in Koskeniemi, *supra* note 2, at 821.

<sup>181</sup> See Lauterpacht, *supra* note 70, at 280–282 and 390–393; Lauterpacht, *supra* note 177, at 2; and Lauterpacht, *supra* note 178, at 60–68.

<sup>182</sup> *Trial Proceedings*, *supra* note 117, xix, at 463. As advisor to the US team, Lemkin contributed to the drafting of Count One (Conspiracy) of the Indictment: Cooper, *supra* note 15, at 62–65.

<sup>183</sup> *Ibid.*, at 465.

<sup>184</sup> *Ibid.*, at 464.

<sup>185</sup> Lauterpacht, *supra* note 178, at 64.

The rules of warfare, like any other rules of international law, are binding not only upon impersonal entities, but upon human beings. The rules of law are binding not upon an abstract notion of Germany, but upon members of the German government, upon German individuals exercising governmental functions in occupied territory, upon German officers, upon German soldiers.<sup>186</sup>

This sentence was reworked and incorporated into the Nuremberg Judgment – becoming one of its most oft quoted extracts.<sup>187</sup>

In 1941 Lauterpacht prepared a reply to the realist challenge to *The Function of Law* mounted by E. H. Carr in his *The Twenty Years' Crisis, 1919–1939*.<sup>188</sup> He denounced the notion of double morality, that different norms applied between individuals and within a state from those between states, and the realist presumption that the moral standards in international society were lower or non-existent.<sup>189</sup> Lauterpacht argued that the insertion of the 'metaphysical' state between individuals and the rule of international law weakened the application of 'general principles of law as adopted by civilized communities and, in particular, of generally accepted standards of ethics'.<sup>190</sup> To explain the rationale for his position, Lauterpacht returned again to the realm of legal philosophy. In this third phase of his writings he evoked Grotius, who had influenced his work from the outset. Lauterpacht embraced the Grotian analogy of legal and moral rules encompassing the actions of states and individuals equally. He wrote:

The analogy – nay, the essential identity – of rules governing the conduct of states and of individuals is not asserted for the reason that states *are like* individuals; it is due to the fact that states *are composed of* individual human beings; it results from the fact that behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely, individual human beings.<sup>191</sup>

This theoretical position had also led Lauterpacht to read down the absolute nature of the defence of superior orders and dismiss its application in respect of acts illegal according to international law and the dictates of humanity.<sup>192</sup>

Lauterpacht's quest for an international community under the rule of law and realization of the human being as its foundational unit required the protection of the human rights, particularly the right to a fair trial, of the defendants at Nuremberg.<sup>193</sup> As Jackson observed, '[c]ourts try cases, but cases also try courts'.<sup>194</sup> Similarly, Lauterpacht maintained that there needed to be just punishment in fact and in appearance – 'in accordance with the law as the result of the effective provision of practicable measures of impartiality and mutuality'.<sup>195</sup> This included the right of

<sup>186</sup> *Ibid.*

<sup>187</sup> 41 *AJIL* (1947) 172, at 221; and Lauterpacht, *supra* note 7, at 28, n. 2.

<sup>188</sup> Lauterpacht, 'Professor Carr on International Morality', in *CP*, *supra* note 3, ii, at 67.

<sup>189</sup> Lauterpacht, *supra* note 70, at 280–282.

<sup>190</sup> *Ibid.*, at 281.

<sup>191</sup> Lauterpacht, *supra* note 7, at 27 (emphasis in the original).

<sup>192</sup> Lauterpacht, *supra* note 178, at 69–74; L. Oppenheim, *International Law: A Treatise* (ed. H. Lauterpacht, revd 6th edn, 1944), at 452, para. 253. Cf. H. Kelsen, *Peace Through Law* (1944), at 107. See Lauterpacht, *supra* note 171, at 488; Jenks, *supra* note 3, at 84–85; and Lemkin, *supra* note 20, at 23–24 and 93.

<sup>193</sup> Note by Arnold McNair, 18 Aug. 1944, Doc.C.43, UNWCC Archives, PAG-3/1.1.0, Box 6.

<sup>194</sup> Jackson, 'The Rule of Law Among Nations', 39 *ASIL Proc.* (1945) 10, at 19.

<sup>195</sup> Lauterpacht, *supra* note 178, at 59.

appeal, elimination of summary procedures, publicity of trials, appointment of lay judges from allied, neutral, and even enemy countries, and even trying before the tribunal members of the victor's armed forces accused of war crimes.<sup>196</sup>

By mid-1945, the United States had decided to proceed with the prosecution of the major Nazi officials, and Jackson went to London to prepare the work plan with the Allied representatives. During this process he consulted Lauterpacht.<sup>197</sup> He later acknowledged that the advice for the tripartite division of crimes in Article 6(c) of the Charter of the International Military Tribunal of 8 August 1945 (the London Charter) and the specific inclusion of 'crimes against humanity' was received from an 'eminent scholar of international law'.<sup>198</sup> Lauterpacht was this scholar.<sup>199</sup> Article 6(c) put asunder many of the positivists' strictures on international law which Lauterpacht had critiqued ceaselessly. It established the supremacy of the London Charter over domestic laws. Further, it extended the competence of the court to determine acts perpetrated against 'any civilian population' including Germany citizens and those of its satellites. Finally, it extended its *ratione temporis* to periods 'before or during the war'.<sup>200</sup>

Whilst Lauterpacht was not in Nuremberg for the delivery of the closing speech by the British Chief Prosecutor, he was present for the Judgment.<sup>201</sup> This text, much of it attributed to Lauterpacht by Shawcross, contains our most tangible evidence of his thoughts concerning crimes against humanity. Consequently, two points raised by Shawcross should be underscored because of their relation to Lauterpacht's lifelong concerns. First, Shawcross accepted that international law normally 'conceded' that how a state treated its own nationals was a domestic concern.<sup>202</sup> However, even if the defendants' acts accorded with 'the laws of the German state' which they had 'created and ruled', when they affected the international community they became 'not mere matters of domestic concern but crimes against the law of nations'.<sup>203</sup> He then evoked the words of Westlake and Grotius in support.<sup>204</sup> In his General Course at The Hague in 1937, Lauterpacht had argued that when a state abused the right to 'full autonomy with regard to the treatment of its nationals', it was no longer a right and 'the competence of international law to protect the individual is fully restored'.<sup>205</sup> He returned to this point in 1946 when he

<sup>196</sup> Oppenheim, *supra* note 192, at 458, para. 257a; and Lauterpacht, *supra* note 178, at 80–86.

<sup>197</sup> Robinson, 'The International Military Tribunal and the Holocaust: Some Legal Reflections', 7 *Israel L Rev* (1972) 1, at 3.

<sup>198</sup> R. Jackson, *International Conference on Military Trials* (1949), at 416. In *Private Law Sources*, *supra* note 32, at 68, Lauterpacht had referred to the 'compromise' contained in Art. 38(3) of the PCIJ Statute. During negotiations of the Statute, Deschamps' proposal to extend the Court's jurisdiction to include 'the demands of public conscience [and] the dictates of the legal conscience of civilized nations' was defeated: Permanent Court of Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee* (1920), at 306.

<sup>199</sup> W.E. Jackson to J. Robinson, 31 May 1961, cited in Lauterpacht, *supra* note 171, at 483.

<sup>200</sup> See Robinson, *supra* note 197, at 4; and Schwelb, 'Crimes Against Humanity', 23 *BYIL* (1946) 178.

<sup>201</sup> Lauterpacht, *supra* note 171, at 483–484.

<sup>202</sup> *Trial Proceedings*, *supra* note 117, xix, at 470–471.

<sup>203</sup> *Ibid.*

<sup>204</sup> *Ibid.*

<sup>205</sup> Lauterpacht, *supra* note 70, at 303.

explained that Grotius permitted ‘wars of intervention’ only in extreme instances where ‘the king reveals himself as an enemy of his people’.<sup>206</sup>

Shawcross noted in his closing speech that the European powers had intervened on behalf of Christians in Turkey following World War I.<sup>207</sup> He then asked, ‘[C]an intervention by judicial process then be illegal?’. After acknowledging the importance his assertion had for political and legal thought, he continued.<sup>208</sup> The principle embodied by the London Charter, he stated, was also a warning for the future to ‘dictators and tyrants masquerading as a state that if . . . they debase the sanctity of man in their own country they act at their peril, for they affront the international law of mankind’.<sup>209</sup>

Next, the rationale upon which Shawcross based his proposition had imbued Lauterpacht’s writing for decades:

[I]nternational law has in the past made some claim that there is a limit to the omnipotence of the state and that the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the state tramples upon his rights in a manner which outrages the conscience of mankind.<sup>210</sup>

In 1937, Lauterpacht maintained that, ‘[i]f the fundamental rights of human personality [are] part of the international system . . . then humanitarian intervention is both a legal and a political principle of the international society’.<sup>211</sup> However, he acknowledged that existing international practice and political climate did not support his position.<sup>212</sup> By 1946, the tide had turned. Shawcross concluded by referring to the Economic and Social Council’s preparatory work for an international bill of human rights and the League’s Covenant and UN Charter in support of his position.<sup>213</sup> Lauterpacht later reiterated the significance of the recognition of crimes against humanity in international law to affirming ‘the existence of fundamental human rights superior to the law of the State and protected by international criminal sanction even if violated in pursuance of the law of the State’.<sup>214</sup>

Accordingly, Lauterpacht contended that, when prosecuting these acts, the Allied Powers were not exercising jurisdiction because they violated legal obligations relating to their soldiers, civilians, or territory. Rather, they were acting to punish crimes against the international public order which encompassed human rights.<sup>215</sup> He wrote in 1941, ‘[T]he punishment of war criminals is required for the sake of the restoration and of the maintenance of the authority of international law’.<sup>216</sup> It was these principles which aligned crimes against humanity so closely with genocide.

<sup>206</sup> Lauterpacht, *supra* note 7, at 46, adding in n. 2, ‘[b]ut this would not apply to the cruel treatment of a minority’.

<sup>207</sup> *Trial Proceedings*, *supra* note 117, xix, at 471. See Lauterpacht, *supra* note 7, at 46.

<sup>208</sup> *Ibid.*

<sup>209</sup> *Trial Proceedings*, *supra* note 117, xix, at 471. See Lauterpacht, *supra* note 70, at 304.

<sup>210</sup> *Trial Proceedings*, *supra* note 117, xix, at 471. See Lauterpacht, *supra* note 23, at 312–315.

<sup>211</sup> Lauterpacht, *supra* note 70, at 303.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Trial Proceedings*, *supra* note 117, xix, at 471.

<sup>214</sup> See H. Lauterpacht, *International Law and Human Rights* (1949), at 35–37; and L. Oppenheim, *International Law: A Treatise* (ed. H. Lauterpacht, 7th edn, 1952), at 579, para. 257, n. 5.

<sup>215</sup> Lauterpacht, *supra* note 178, at 58–67. See L. Oppenheim, *supra* note 192, at 137, paras 52f.

<sup>216</sup> Lauterpacht, *supra* note 177, at 2.

## B Genocide

Raphael Lemkin had consciously prepared his book *Axis Rule* as a dossier of evidence for the war crimes trials envisaged at the close of the war. Its timely publication in 1944 provided a readily accessible litany of laws and orders signed by senior Nazi officials, which proved invaluable for US and British prosecutors at Nuremberg.<sup>217</sup> It was, Lauterpacht recognized, 'a documentary and critical account of German occupation measures'.<sup>218</sup> If Lemkin had largely designed the text as an aid in the prosecution and sentencing of the perpetrators of these horrors, he was alert also to the window of opportunity that the trials provided for the recognition of the crime of genocide in international law.

By late 1945, Lemkin was working as foreign affairs advisor to the War Department, in which capacity he assisted Robert Jackson in London with the drafting of the indictment.<sup>219</sup> The London Charter did not explicitly include genocide. However, the indictment issued on 6 October 1945 incorporated genocide via the third category of crimes: crimes against humanity. All 24 defendants were indicted for conducting 'deliberate and systematic genocide, viz., the extermination of racial and national groups, against civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial or religious groups, particular Jews, Poles and Gypsies and others'.<sup>220</sup> Lemkin had lobbied widely for the inclusion of his new term in the indictment, approaching the World Jewish Congress<sup>221</sup> and UN War Crimes Commission (UNWCC),<sup>222</sup> among others. A leading US prosecutor, Telford Taylor, recalled that US officials included Lemkin's newly devised term in the final text over the objections of Briton Geoffrey D. Roberts.<sup>223</sup>

Thereafter, Lemkin worked tirelessly for the inclusion of the term in the Nuremberg Judgment. On 25 June 1946, the British Deputy Chief Prosecutor, Sir David Maxwell Fyfe, when cross-examining Constantin von Neurath, the former Reich Protector of Bohemia and Moravia, quoted from the 'well-known book by Professor Lemkin'.<sup>224</sup> Lemkin wrote to Maxwell Fyfe conveying his appreciation for his 'great and so effective support . . . lent to the concept of Genocide'.<sup>225</sup> He implored that it be used in the Tribunal's Judgment as this 'would contribute to the creation of a preventative atmosphere against similar acts of barbarity'.<sup>226</sup> The term 'genocide' was included in the concluding speeches of the British and French prosecutors.<sup>227</sup> However, Lemkin knew

<sup>217</sup> Folder 83.8, Box 83, CEIP Archives; and Reminiscences of Robert H. Jackson, at 1211, Oral History Collection, Columbia University, New York.

<sup>218</sup> Oppenheim, *supra* note 214, at 440, para. 172a, n. 1.

<sup>219</sup> Anon, 'Who Knows', *supra* note 84.

<sup>220</sup> *Trial Proceedings*, *supra* note 117, i, at 11–30.

<sup>221</sup> Untitled (draft autobiography), at 3, Box 2/33, Lemkin papers, NYPL.

<sup>222</sup> Docs.M.80 and 9/45, PAG-3/1.0.2, Box 5, UNWCC Archives.

<sup>223</sup> T. Taylor, *The Anatomy of Nuremberg: A Personal Memoir* (1992), at 103.

<sup>224</sup> *Trial Proceedings*, *supra* note 117, xvii, at 61.

<sup>225</sup> Lemkin to Maxwell Fyfe, 26 Aug. 1946, P-154, Box 1/18, Lemkin Collection, AJHA.

<sup>226</sup> *Ibid.*

<sup>227</sup> *Trial Proceedings*, *supra* note 117, xix, at 493 and 497–498 (Shawcross, 27 July 1946), and xxii, at 299 and 320 (Champetier de Ribes, 30 Aug. 1946).

that its use by the International Military Tribunal itself would herald its acceptance in international law.<sup>228</sup> But it was not to be. When Lord Justice Geoffrey Lawrence delivered the court's Judgment on 30 September and 1 October 1946 the word 'genocide' was absent.

In his response to this silence, Lemkin acknowledged that the method by which genocide had been inserted into the original indictment, via the count on crimes against humanity, proved a double-edged sword.<sup>229</sup> Discrepancies in the French, English, and Russian texts had led the Tribunal to take a restrictive interpretation of the *ratione temporis*, confining its findings to acts committed 'during or in connection with the war'.<sup>230</sup> Lemkin lamented that the court had missed its opportunity to set a precedent 'to the effect that a Government [was] precluded from destroying groups of its own citizens'.<sup>231</sup> The Tribunal's interpretation of its jurisdiction in respect of crimes against humanity was widely criticized, and the Allied Powers sought to remedy the drafting error for later trials.<sup>232</sup>

The relationship between crimes against humanity and genocide remained problematic and confused.<sup>233</sup> This lack of clarity was recognized by Lauterpacht.<sup>234</sup> The concepts shared so many common attributes that some, like Egon Schwelb, counselled their amalgamation.<sup>235</sup> Yet, as Counts Three and Four of the Nuremberg Indictment highlighted, what distinguished them was equally significant. Where genocide referred to atrocities committed against groups, crimes against humanity spoke of acts committed against its individual members.<sup>236</sup> Although Lemkin's and Lauterpacht's concepts had a direct lineage from the inter-war minority guarantees, Lauterpacht had long resisted any notion of a personality for a group. To do so would simply replicate or bolster the ills visited upon international law by the personification of the state.<sup>237</sup> It explained why minorities cases appeared in the chapter entitled 'The Individual in International Law' of the *Annual Digest* and his championing of the protection of minorities within an international bill of human rights.

However, Lemkin's term was used by the Supreme National Tribunal of Poland in the trial of Artur Greiser.<sup>238</sup> In a judgment authored by Emil Rappaport and delivered

<sup>228</sup> Lemkin, *supra* note 93, at 147.

<sup>229</sup> *Ibid.*, 148.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> See Robinson, *supra* note 197, at 7–12; and Art. II(1)(c), Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 Dec. 1945, *Official Gazette of the Control Council of Germany*, No. 3, 31 Jan. 1946, at 50–55.

<sup>233</sup> Lemkin, *supra* note 154. Cf. *US v Greifelt and others* (US Military Tribunal, Nuremberg), 13 Law Reps of Trials of War Criminals (LRTWC) (1949) 1, at 36–42.

<sup>234</sup> Schwelb to Humphrey, 19 June 1946; and Schwelb to Humphrey, 7 June 1947, PAG-3/1.3, Box 26, UNWCC Archives.

<sup>235</sup> *Ibid.*

<sup>236</sup> *Trial Proceedings*, *supra* note 117, i, at 11–30.

<sup>237</sup> Lauterpacht, *supra* note 70, at 283–283.

<sup>238</sup> *Poland v. Greiser* (Supreme National Tribunal of Poland), 13 LRTWC (1949) 70.

on 7 July 1946, the court found that the defendant had ordered and facilitated crimes against the person and property of thousands of inhabitants in German-occupied Polish territory. When detailing the systematic nature of these crimes, the judgment echoed the structure of Lemkin's *Axis Rule*.<sup>239</sup> Like Lemkin's text, the summary of the proceedings noted, '[t]he basic weapon used by Hitlerism in its struggle to exterminate the Polish element in the "incorporated" territories was legislation'.<sup>240</sup> The tribunal determined that Greiser had been 'concerned in bringing about in that territory the general totalitarian genocidal attack on the rights of small and medium nations to exist, and to have an identity and culture of their own'.<sup>241</sup> Poland became the first state to use the word 'genocide' in its domestic criminal proceedings.<sup>242</sup>

Lemkin appreciated that the acceptance of the crime of genocide in international law could not rely solely on the courts, and so expended much energy in pursuit of codification to achieve his goal. Consequently, he took his campaign from the Nuremberg Tribunal to the Paris peace negotiations and the United Nations. Lemkin was not present at the delivery of the Nuremberg Judgment. Instead, he had gone to Paris to press for the inclusion of a provision in peace treaties with the defeated Axis countries requiring their domestic criminal codes to be amended to include the crime of genocide and to enable prosecution of the perpetrators of such acts.<sup>243</sup> The final form of the treaties included provision for the prosecution of crimes against humanity, but not genocide, as his proposal was submitted too late.

Lemkin had commenced his lobbying efforts for codification by the United Nations early. In May 1946, he wrote to UN Secretary General, Trygve Lie, emphasizing that the inclusion of the term 'genocide' in the Nuremberg Indictment amounted to a proclamation of the principle that 'a national, racial or religious group as an entity ha[d] the right to exist', and the trial was a precedent for 'the intervention in internal affairs of other countries on behalf of persecuted minorities'.<sup>244</sup> During this period, he published a series of articles in leading international law journals in various countries with the now reformulated aim of having the United Nations adopt a treaty on the prevention and punishment of genocide.<sup>245</sup> In August 1946, he presented this proposal at the International Law Association conference held at Cambridge University.<sup>246</sup>

<sup>239</sup> *Ibid.*, at 71–102.

<sup>240</sup> *Ibid.*, at 78.

<sup>241</sup> *Ibid.*, at 114. This passage was replicated verbatim by Lauterpacht in a summary of the decision in 15 *Annual Digest* (1946) 387, at 389.

<sup>242</sup> W. S. Schabas, *Genocide in International Law: The Crime of Crimes* (2000), at 388. In its decision in *Poland v. Goeth*, 7 LRTWC (1946) 4, at 7, the Supreme National Tribunal of Poland explicitly attributed the term 'genocide' to Lemkin.

<sup>243</sup> 'The Protection of Basic Human Rights of Minorities in the Forthcoming Peace Treaties', P-154, Box 7/2, Lemkin Collection, AJHS. See Lemkin, *supra* note 92, at 151; and Lemkin, 'Le Crime de Génocide', 17 *RIDP* (1946) 371.

<sup>244</sup> Letter Lemkin to Trygve Lie, 20 May 1946, Raphaël Lemkin Papers, MC-60, Box 1/3, American Jewish Archives, Cincinnati, Ohio.

<sup>245</sup> Anon, 'Summary of Activities', *supra* note 84, at 6.

<sup>246</sup> *Ibid.*, at 3; and International Law Association, *Report of the 41st Conference Cambridge 1946* (1948), at 25–27.

By mid-October, Lemkin had returned to the United States and set about garnering support among UN officials and delegates.<sup>247</sup>

On 11 December 1946, less than two months after the Nuremberg Judgment, the UN General Assembly adopted Resolution 96(I). The preamble states in part that ‘genocide is a denial of the right of existence of entire human groups . . . and is contrary to moral law and to the spirit and aims of the United Nations’. It recognized that the punishment of this crime was of ‘international concern’, and invited states to enact appropriate domestic legislation and requested the Economic and Social Council to prepare studies to facilitate the drafting of a convention. The importance of the Nuremberg trial, despite its limitations or because of them, to the realization of this UN Resolution cannot be underestimated.

## 6 Conclusion

It is significant to recall that the Judgment of the International Military Tribunal was delivered in Nuremberg, and the Genocide Convention and Universal Declaration of Human Rights were adopted by the UN General Assembly in Paris. For, as Lauterpacht’s and Lemkin’s lives and work expose, these developments in international law owe much to the European experience. If Nuremberg evidenced the failings of the League of Nations’ ‘experiment’ to protect groups and individuals alike, then Paris redeemed its core purpose: human rights. As Lauterpacht presciently noted in 1925, ‘[T]he influence of the new ideas was facilitated by the depressing consciousness, strengthened by bitter experience’.<sup>248</sup> Yet, in formulating and substantiating their thinking, Lauterpacht and Lemkin drew on legal traditions from every corner of the globe and historical period. Accordingly, the relevance of their contributions to modern international law is not confined spatially to Europe or temporally to the mid-20th century.

In 1941, Lauterpacht wrote that ‘[t]he disunity of the modern world is a fact; but so, in a truer sense, is its unity. This essential and manifold solidarity . . . constitutes a harmony of interest which has a basis more real and tangible than the illusions of the sentimentalist or the hypocrisy of those satisfied with the existing *status quo*.’<sup>249</sup> Neither Lauterpacht nor Lemkin could be accused of being a ‘sentimentalist’ or ‘satisfied’ with the *status quo*. From their earliest forays into the field, they persistently strove to deconstruct the artifice of the state, as an entity beyond the reach of the law. Through their dedication to the rule of law in the international community, they promoted the conception of international law as a coherent system of law the purpose of which was the protection of human rights and the preservation of peace. After 1945, Lauterpacht and Lemkin continued their campaign through their respective championing of an international bill of human rights and a treaty for the prevention and punishment of genocide. These initiatives would fundamentally define the new international legal order.

<sup>247</sup> ‘Biographical summary of Raphael Lemkin’s career’, P-154, Box 1/1, Lemkin Collection, AJHS.

<sup>248</sup> Lauterpacht, *supra* note 23, at 316.

<sup>249</sup> ‘The Reality of the Law of Nations’ (1941), in *CP*, *supra* note 3, ii, at 22–51.