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Liza Gellerman December 4, 2018

Prosecuting Mass Murderers at Nuremberg: The *Einsatzgruppen* Trial
Between Genocide and Crimes Against Humanity

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An abstract of
a thesis submitted to the Faculty of Emory College of Arts and Sciences
of Emory University in partial fulfillment
of the requirements of the degree of
Bachelor of Arts with Honors

Department of History

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Abstract

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This thesis analyzes the charges of genocide and crimes against humanity in the context of the Nuremberg *Einsatzgruppen* trial (1947-48) and the role that each charge played in the formation of modern international criminal law. Prior to the International Military Tribunal at Nuremberg (1945-46), international law was designed to govern the laws and customs of combat between sovereign states. However, the atrocities committed by the Nazis during World War II prompted contemporary legal thinkers to consider expanding the purview of international law in order to protect the human rights of civilians. On the eve of the International Military Tribunal, Hersch Lauterpacht minted the concept *crimes against humanity* for use in the courtroom. The new legal phrase was used to prosecute Nazis who had committed atrocities against civilians as part of a state-sponsored campaign. Around the same time, Raphael Lemkin devised the word *genocide* to refer to the intent to destroy an ethnic, racial, or religious group in whole or in part.

The legal basis for the main Nuremberg Trial, Control Council Law No. 10, enabled each victorious Allied country to conduct their own series of trials against Nazi war criminals. American prosecutors conducted a series of twelve additional trials between 1946-49, which are now known as the subsequent Nuremberg proceedings (SNT). The *Einsatzgruppen* trial was the ninth SNT where American lawyers prosecuted twenty-two high-ranking officials who oversaw the murder of Polish and Soviet Jews by way of mass shootings.

In this thesis, I argue that the *Einsatzgruppen* trial represented the most apparent legal confrontation with the crime of genocide to date. However, the processes and politics surrounding the Nuremberg trials made the formal prosecution of genocide virtually impossible during the time that the trial was taking place. Instead, crimes against humanity was used as the principle charge during the *Einsatzgruppen* trial. The difficulties encountered by American lawyers at Nuremberg provide a reflection of the challenges faced by modern-day human rights lawyers in securing convictions for the charge of genocide.

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Acknowledgements

First and foremost, I express my sincere gratitude to my advisor, Dr. Eckert, for her unwavering support. Over the course of two years, she has helped me construct a research project that I've come to be so proud of. Dr. Eckert is a constant source of incredible ideas and scholarship, and her generosity with her time and knowledge is a quality that should be admired by all academicians. Dr. Eckert's occasional strict warnings kicked me right back into shape when my dedication towards my project had started to waver, and her high expectations challenged me to work harder than I ever have before. Dr. Eckert has undoubtedly shaped me into a better writer and researcher and I am so grateful to have had the opportunity to work with her on this thesis.

I would also like to thank Dr. Deborah Lipstadt, my former professor and my second reader on this thesis committee. Dr. Lipstadt's class, Seminar on the Holocaust, exposed me to the importance of her field of expertise. Additionally, her own experiences outside of the classroom piqued my interest in studying the relationship between law and Holocaust history.

The Rose Library's Bradley Currey, Jr. Seminar and the Tam Institute for Jewish Studies' Waxman Fund provided me with travel grant money to conduct archival research for my thesis. This experience not only helped me access more information to use in my project, but also strengthened my academic research skills. I sincerely thank Mr. Bradley Currey, Jr. and the Waxman family for their generosity and commitment to promoting advanced undergraduate research.

Ever since I declared myself a history major at the end of my second year at Emory, Becky Herring has provided me with endless advising and encouragement. I thank her for guiding me through the ins and outs of the history department and for offering her warm hugs whenever she knew I needed one.

None of this would have been possible without my friends and family. I'm thankful to "the camp friends," who have expressed so much interest in my research and have lovingly cheered me through my final semester at Emory.

My parents have shown me endless support throughout the entire honors process. They listened when I was too stressed about my work to do anything besides complain, watched me write at the kitchen table while they cooked dinner, and read my work whenever I sent them excerpts of my unfinished chapters. Thank you for always reminding me of how proud you are and for making me even more proud to be your daughter. My sister, Carly, always encourages me with her love and keeps me positive with her awesome sense of humor. Carly was the first person to read my completed introduction and remained patient as I hovered over her shoulder the entire time.

Finally, I thank my grandfather for calling me each week to discuss my progress on my thesis. PopPop has offered me continuous advice on the researching and writing process and he can hardly wait to read the finished product.

Table of Contents

Introduction

COLONEL JOHN HARLAN AMEN: In what respects, if any, were the official duties of the Einsatz groups concerned with Jews…?

OTTO OHLENDORF: On the question of Jews…, the *Einsatzgruppen* and the commanders of the *Einsatzkommandos* were orally instructed before their mission.

COL. AMEN: What were their instructions with respect to the Jews…?

OHLENDORF: The instructions were that in the Russian operational areas of the *Einsatzgruppen* the Jews…were to be liquidated.

COL. AMEN: And when you say "liquidated" do you mean "killed"?

OHLENDORF: Yes, I mean "killed".

COL. AMEN: Do you know how many persons were liquidated…under your direction?

OHLENDORF: … the *Einsatzkommandos* reported 90,000 people liquidated.[1]

On January 3, 1946, the twenty-sixth day of the International Military Tribunal (IMT) at the Nuremberg Palace of Justice, Otto Ohlendorf was called as a witness by the prosecution. Ohlendorf operated as the head of *Einsatzgruppe D* between June 1941 and July 1943. As an SS-*Gruppenführer*, he was tasked with overseeing one of the "special task forces" deployed to kill Jews through mass shootings upon the German invasion of the Soviet Union (Operation Barbarossa) starting in June 1941. When Ohlendorf was called to the witness box during the IMT, he did not know that his trial testimony would later be used to implicate him during a separate trial. Unaware of possible repercussions for himself, he spared no details during his testimony before the IMT. When American investigators later discovered *Einsatzgruppen* reports, the convergence of oral and written

[1] "Nuremberg Trial Proceedings Volume 4: Twenty-Sixth Day, Thursday 3 January 1946, Morning Session," *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed June 4, 2018. Colonel Amen was Associate Trial Counsel for the United States.

accounts of *Einsatzgruppen* crimes provided evidence that, as historian Hilary Earl writes, was "simply too damning to ignore" before the law.[2]

The *Einsatzgruppen* were initially deployed to assist in the German invasion of Poland. These "mobile killing units" are infamous for their role in the implementation of the "Final Solution" both in Poland and in the Soviet Union. *Einsatzgruppen* task forces were responsible for providing "security" to troops in the *Wehrmacht* (German army) as they invaded Polish and Soviet territories.[3] In theory, their duties ranged from "intelligence-gathering" to "[eliminating] perceived political and racial enemies of the Reich, particularly…Jews and communists, the mentally ill, the infirm, and Gypsies."[4] In practice, the *Einsatzgruppen* were primarily responsible for the latter task. Their assignment as agents of "security" was at most a euphemism to cover up their real purpose: murdering innocent civilians, predominantly Jews. The removal of those deemed threatening to the security of the Reich was carried out by way of mass shootings, in which *Einsatzgruppen* squad members would round up members of the undesirable groups, lead them to open fields, have them lie down in graves that had already been dug, and shoot them, normally in the back of the head or neck.[5] *Einsatzgruppen* squads were divided into four groups, A-D, and during killing procedures, members would be given different functions and assigned to different stations throughout the process in order to minimize individual responsibility.[6] The *Einsatzgruppen* operated with the intent of making Poland and the Soviet Union *judenfrei*

[2] Hilary Earl, *The Nuremberg SS-Einsatzgruppen Trial, 1945-1958: Atrocity, Law, and History* [Cambridge: Cambridge University Press, 2010], 47.
[3] *Ibid*., 4.
[4] *Ibid*., 5.
[5] Richard Rhodes, *Masters of Death: The SS-Einsatzgruppen and the Invention of the Holocaust* [New York: Alfred A. Knopf, 2002], 244; Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* [New York: HarperCollins, 1992), 59-60.
[6] *Earl, The Nuremberg-SS Einsatzgruppen Trial*, 6.

("free of Jews") and are considered responsible for approximately two million of the six million Jewish lives claimed by the Nazis during World War II.[7]

After the conclusion of the International Military Tribunal at Nuremberg in October 1946, Control Council Law No. 10 gave the Allies permission to conduct their own series of legal proceedings against Nazi war criminals. The Americans remained at Nuremberg and staged twelve more trials, the so-called subsequent Nuremberg proceedings (SNT) that brought to justice military personnel, physicians, bureaucrats, industrialists, and "race experts." In one of these trials, Case Number 9, an American legal team prosecuted twenty-two high-ranking *Einsatzgruppen* officials between September 1947 and April 1948. The indictment served to the *Einsatzgruppen* defendants during SNT9 was composed of three counts: crimes against humanity, war crimes, and membership in criminal organizations. One of these counts – crimes against humanity – was an innovation in international criminal law. The charge had been developed by legal scholar Hersch Lauterpacht and was designed to defend before international law individual civilians who were victims of large-scale, state-sponsored atrocity. The introduction of this new count, first at the IMT and again during the SNTs, reflected the urgent desire of the Allied prosecutors to capture the unprecedented scope and quality of the crimes committed by the Nazi regime. The IMT was first and foremost designed to prosecute Nazi Germany's waging of aggressive war, but the later *Einsatzgruppen* trial existed solely to punish those whose job it had been to oversee and commit mass murder. Therefore, Hersch Lauterpacht's vision to hold state actors accountable for perpetrating atrocities against civilians was upheld while addressing the atrocities committed by the

[7] Raul Hilberg, *The Destruction of the European Jews* [Chicago: Quadrangle Books, 1961], 256; see also Browning, *Ordinary Men*, xv.

Einsatzgruppen. During SNT9, crimes against humanity was employed as the fundamental charge against the *Einsatzgruppen* defendants.

Hersch Lauterpacht occupied an important position within a circle of legal thinkers who were tasked with framing the trials at Nuremberg. In coining the charge crimes against humanity, Lauterpacht addressed the aspect of mass murder perpetrated by the Nazis and expanded the scope of prosecution beyond traditional war crimes; that is, violations of the laws and conduct of war between combatants. The charge of crimes against humanity did not go uncontested, however: there was also the option to use the charge of genocide, which was introduced by Polish lawyer Raphael Lemkin in 1944. Lemkin derived the term genocide from the Greek word *génos*, meaning "race" or "tribe", and the Latin suffix *–cide,* describing the act of killing. He intended for genocide to refer to the persecution and destruction of racial, religious, or ethnic groups and developed the neologism in consideration of the Nazi policies against European Jews. While Lauterpacht's *crimes against humanity* dealt generally with atrocities perpetrated against civilians, Lemkin's *genocide* referred more specifically to aggressive acts committed against cultural groups with the intent to eliminate that group.

This thesis is concerned with Count I of the *Einsatzgruppen* trial, crimes against humanity, and the reason why this charge was chosen for official use over the crime of genocide. I analyze the origins of the criminal charges of crimes against humanity as well as genocide and discuss why the distinction between these two counts is important in the realms of law and history, especially in the case of the *Einsatzgruppen* trial. I also consider the biographies of Hersch Lauterpacht and Raphael Lemkin and explore their aims in advancing their respective legal terms. Furthermore, I describe the process of the

Einsatzgruppen trial by focusing on the aims and responsibilities of the American prosecution team, led by chief prosecutor Benjamin Ferencz. The difficulties faced by the SNT9 prosecution at Nuremberg will provide insight into the complexities posed by prosecuting crimes against humanity and genocide in courts of international law. The prosecution's decision to charge *Einsatzgruppen* officials with crimes against humanity rather than genocide is also telling of how much Nuremberg prosecutors knew about the nature of Nazi criminality at the time of the trial. That is, convicting generalized mass murder rather than "race murder" speaks to the claim that in the immediate aftermath of World War II, the international community did not yet see Nazi crimes specifically as anti-Jewish atrocities.[8] While genocide may have been most discernible in the case of the *Einsatzgruppen* and the nature of their crimes, presenting a new charge in one trial that was otherwise part of an unprecedented legal process would have imposed additional challenges and questioned the legitimacy of the prosecution. I argue that the *Einsatzgruppen* trial represents the most apparent confrontation with the crime of genocide in a court of law up to this point in history, but for political and logistical reasons, charging defendants with Lemkin's concept was not yet possible. I therefore explain why crimes against humanity emerged as the principle charge utilized at the *Einsatzgruppen* trial instead. In doing so, I aim to distinguish between the charges of genocide and crimes against humanity in order to explain the legal and historical implications of convicting *Einsatzgruppen* defendants with Lauterpacht's concept instead of Lemkin's.

[8] Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* [Oxford: Oxford University Press, 2001], ix.

As legal theorists, Hersch Lauterpacht and Raphael Lemkin were both concerned with the war of aggression the Nazis unleashed. They both deliberated over the power of the law to accomplish the two-fold task of bringing Nazi perpetrators to justice, as well as ensuring that no event of a similar nature would go unpunished in the future. The two scholars differed, however, in their opinions over who should be protected before the law. In devising crimes against humanity as a new legal concept to be used by the IMT prosecution, Hersch Lauterpacht proposed that, "The individual human being … is the ultimate unit of all law."[9] Thus, a crime against humanity deals with the murder of an individual civilian as part of a larger group targeted by state-sponsored tactics of aggressive war. On the other hand, genocide is a charge designed to prosecute state agents who deliberately aim to destroy a group based on race, religion, or ethnicity. While genocide is indeed classified as a crime against humanity, it is a more specific crime of aggression in that it denotes a cultural group as the targeted entity, and therefore seeks to protect that group before the law.[10]

Historian Donald Bloxham has analyzed the validity of the claim that the Nuremberg trials placed "genocide on trial." Bloxham was among the first to pick up on the dissonance between the common idea that the Nuremberg trials had truly prosecuted genocide when, in fact, the legal concept of that name hardly played a role. He argues that scholars in the following decades were the ones responsible for accrediting Nuremberg as the first legal event to address the atrocities associated with the crime of genocide. In his groundbreaking research on the crimes of reserve police battalions

[9] Hersch Lauterpacht, 1943, cited in Philippe Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* [London: Weidenfeld and Nicolson, 2017], 63.
[10] Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide* [Philadelphia: University of Pennsylvania Press, 2017], 2.

during World War II, Christopher Browning considers the role of mass shootings of Jews that preceded mass murder by gas in the death camps. Browning urges his audience to recognize mass shootings by *Einsatzgruppen* and police units as an integral step in the progression of the Final Solution and a major element of what we recognize today as the Holocaust. Given that the *Einsatzgruppen* murdered whole communities of Jews, the concept of genocide seems to lend itself as a suitable legal concept to cover these crimes at trial. However, historian Hilary Earl shows that even though the crimes of *Einsatzgruppen* defendants were aimed at eradicating a religious group, genocide still did not become a count of the indictment at SNT9 but instead remained in a role subordinate to that of crimes against humanity. And yet, just months after the conclusion of the *Einsatzgruppen* trial, the United Nations passed the Genocide Convention, marking the international breakthrough of the concept. International human rights lawyer Philippe Sands has analyzed the legal and historical differences regarding crimes against humanity and genocide and considers how each term was applied at Nuremberg. However, Sands' work is more focused on the role that each term played at the International Military Tribunal, specifically during the judgment of Nazi leader Hans Frank. No historian, however, has sought to distinguish between the charges of crimes against humanity and genocide in the context of the *Einsatzgruppen* trial specifically.

Today, the word genocide would almost certainly be applied to describe the activities of the *Einsatzgruppen*, and the perpetrators would likely be charged as such. But in 1947, genocide was still considered as a sub-count of crimes against humanity. Lemkin's term was used to articulate the crimes of the SNT9 defendants, which demonstrated evidence of murder on the basis of belonging to a religious group. But the

concept remained in the shadow of Lauterpacht's term *crimes against humanity* that was designed to prosecute generalized mass murder against civilians, not racial or religious groups. While crimes against humanity was utilized as a formal indictment count during the *Einsatzgruppen* trial, genocide was employed solely as a descriptive term. My thesis engages in a legal debate between the charges of crimes against humanity and genocide. I seek to demonstrate that of all the trials conducted at Nuremberg, the *Einsatzgruppen* trial represented the most apparent encounter with atrocities constituting genocide up to this point in history. SNT9 therefore serves as an inflection point from the subordinate role that the legal concept of genocide played at Nuremberg to its international recognition as an appropriate charge for crimes that seek to destroy ethnic or religious groups in whole or in part.

Examining the relationship between the legal concepts of crimes against humanity and genocide in the context of the *Einsatzgruppen* trial engages the consideration of the processes and politics surrounding the Nuremberg trials. The legal restrictions placed on Nuremberg prosecutors demonstrate an example of the challenges lawyers face in securing criminal convictions for crimes under international law. By prosecuting Nazi perpetrators for the crimes of the Third Reich, the International Military Tribunal at Nuremberg set major precedents in international law, and the Americans followed the IMT model while conducting the subsequent trials in the following three years. The legal concepts introduced by the Nuremberg trials posed many difficulties for the prosecution and scrutiny amongst the defense, and adding genocide as a charge within the Nuremberg framework later on would have likely weakened prosecution efforts. Although the proceedings and the verdict did not formally recognize genocide as a crime during SNT9,

historians working with the benefit of hindsight have accredited the *Einsatzgruppen* trial with being one of the first cases to deal directly with the type of crimes that merit the charge of genocide. It is here that we can note the tension between law and history: while a shortcoming of the legal process at Nuremberg was the failure to convict perpetrators under the charge of genocide, historians have recognized Nuremberg, and more specifically the *Einsatzgruppen* trial, as the first attempt to confront the crime and evidence of genocide in a legal setting. As my thesis demonstrates, history has at times substituted the role that the law played at Nuremberg, assigning the trials' importance of prosecuting genocide prior to the Genocide Convention. By illustrating the confluence of law and history, I show how the *Einsatzgruppen* trial was an important milestone that contributed to a greater understanding of crimes against humanity and genocide in international criminal law.

This thesis provides insight into the legal and historical factors that led Hersch Lauterpacht and Raphael Lemkin to develop their respective terms of crimes against humanity and genocide, and the crimes' subsequent application in international law. In chapter one I present the origins of modern international law and consider its authority over the international community prior to the Second World War. I also discuss the formation of the International Military Tribunal at Nuremberg and regard it as a turning point in the evolution of international criminal law. In chapter two, I examine both Lauterpacht and Lemkin's biographies and trace the events that led them to conceive of the concepts of crime against humanity and genocide. Furthermore, I distinguish between crimes against humanity and genocide by using legal, philosophical, and historical interpretations of each crime. Chapter three then evaluates the role assigned to crimes

against humanity and genocide at the *Einsatzgruppen* trial. Finally, in chapter four, I consider the legacies of Lauterpacht and Lemkin's terms, using the establishments of the 1948 Convention on the Punishment and Prevention of the Crime of Genocide and the Universal Declaration of Human Rights to assert that the influence of their concepts persisted far beyond the Nuremberg trials. This will bring me to my final discussion of how the role of international human rights law remains as a contentious feature of the world order in the present day.

Chapter I: ***Modern International Law and the Evolving Concept of War Crimes***

"Never before in legal history has an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events." – Robert H. Jackson, United States Chief Prosecutor at the International Military Tribunal[11]

In order to understand the legal innovations generated by the International Military Tribunal and the subsequent proceedings, it is necessary to recognize the state of international law prior to the Nuremberg trials. By analyzing the legal principles that aimed to prosecute international crimes before the IMT, one can note their crucial shortcomings and in turn observe the elements that Nuremberg aimed to challenge. In this chapter I examine early milestones in modern international law that regulated the conduct of war before Nuremberg. I then evaluate the set of laws that contributed to the legal format of the IMT, and later, the SNTs. I identify a major shift in international law upon the eve of the Nuremberg proceedings, when legal concepts were introduced to represent civilian human rights. Previously, the laws had only been designed to govern methods of waging war and primarily served the sovereign state on the assumption that individual nations would protect their citizens, a notion that had already been proven wrong during the First World War but was utterly shattered during the Second. This chapter will trace the evolution of international criminal law from the late nineteenth century to the aftermath of World War II and thereby introduce the legal framework of the *Einsatzgruppen* trial.

Industrialization and the rise of modern technology not only changed the ways in which Europeans produced and consumed goods, but also changed the way they

[11] Robert H. Jackson,"Opening Statement before the International Military Tribunal," *The Robert H. Jackson Center* Online, November 21, 1945, accessed August 30, 2018.

conducted war. For example, the Franco-Prussian War (1870-71) saw a significant rise in the amount of troops mobilized on both sides and higher amounts of weaponry being used in battle due to an increase in gun production.[12] Whereas warfare changed in keeping with the availability of new weaponry, the laws ruling warfare did not keep up with technological developments. Concerned by the development of modern weapons technology, Tsar Nicholas II requested the creation of international laws to regulate the conduct of war.[13] In 1899 and 1907, the Hague Conventions were established to codify the original laws of war. The Hague Conventions placed a ban on certain methods of combat and restricted the use of poisonous weapons. With regard to belligerents and wartime volunteers, the Hague Conventions outlined moral treatment of prisoners of war and the protection of neutral parties. The most significant element of the Hague Conventions came from the Martens Clause, which was recorded in the preamble of the 1899 Convention, and after a slight modification, reappeared in the 1907 Convention preamble as well. The final statement of the Martens Clause reads:

> *Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.*[14]

The Martens Clause appealed to humanitarian consciousness during wartime, but the ambiguity of the references to the "laws of humanity," "principles of international law" and "public conscience" made it nearly impossible for nations to be legally bound by it. It

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[12] Robert M. Epstein, "Patterns of Change and Continuity in Nineteenth-Century Warfare," *The Journal of Military History* 56, no. 3 (1992): 375-88. 388.
[13] Theodor Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," *The American Journal of International Law* 100, no. 3 (2006): 551-79. 553.
[14] "Convention With Respect To The Laws And Customs Of War On Land", *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed July 23, 2018.

proposed the idea of taking further steps to create legislation protecting against "uncivilized" conduct during wartime, but held out the prospect to be devised later in time. In addition, the Hague Conventions did not declare violations of the Martens Clause or any other outlawed practice of war *criminal,* per se. Instead of levying individual criminal responsibility on those who violated the Hague principles, the Conventions designated that the chief form of punishment would be a fine imposed on the state accused, an amount that the state could then negotiate.[15] The Martens Clause, and the Hague Conventions as a whole, required signatories to observe moral principles during wartime, but the treaties did not have the ability to enforce its humanitarian ideals or prosecute individuals who violated the Hague principles.

Tsar Nicholas II's concerns about developments in modern warfare were certainly vindicated during World War I, an event that demonstrated a level of aggression never before seen on such a grand scale.[16] Following its conclusion in 1918, the victorious Allied powers issued the Treaty of Versailles one year later in order to punish the Central Powers for starting the Great War. Of the 440 clauses contained in the peace treaty, 414 addressed Germany's violations of various methods of warfare deemed illegal by the Hague Conventions. Noteworthy are articles 227 and 228, which proposed the creation of an ad hoc tribunal to prosecute Kaiser Wilhelm II for starting the Great War and called for bringing German war criminals to trial, respectively:

> *The German Government shall hand over to the Allied and Associated Powers…all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.*[17]

[15] Meron,"Reflections on the Prosecution of War Crimes by International Tribunals," 554.
[16] Arthur Leon Horniker, review of *Axis Rule in Occupied Europe*, by Raphael Lemkin, *Military Affairs* 9, no. 1 (1945): 69-73. 70.
[17] The Treaty of Versailles, 28 June 1919, Article 228. *The Library of Congress*, accessed July 25, 2018.

The Treaty of Versailles demonstrated the first modern instance in which an international law body suggested trying not only individuals, but also a head of state for violating the conduct of war. According to the Allied victors of World War I, the Germans, led by Kaiser Wilhem II, had violated elements of the Hague Conventions in the following ways: committing abuses during the "Rape of Belgium,"[18] using poison gas as a weapon, mistreating prisoners of war, engaging in unrestricted submarine warfare, and conducting air raids against Britain.[19] Together, the atrocities committed by the Germans were called "war crimes," or violations of the laws and customs of war.[20] The Treaty of Versailles demonstrated the first attempt to implement the ideas initially formulated by the Hague Conventions in its call to prosecute violations of the laws of war. It was also the first instance in which individuals could be held accountable for committing wartime atrocities, defending the idea that neither state agents, nor their leaders were exempt from prosecution under international law.

The proposals laid out by the Treaty of Versailles, however, went largely unfulfilled: no tribunal prosecuted the Kaiser, and only twelve Germans were tried and minimally punished for war crimes during the Leipzig Trials of 1921. Although the Treaty of Versailles proposed an international tribunal to prosecute German war criminals, the Germans negotiated and conducted the trials in their own courts.[21] The Leipzig Trials were conducted by a German prosecution team, followed the German process of law, and only allowed participation from the Allies as co-prosecutors and

[18] The Rape of Belgium atrocities included: rape and murder of civilians, destruction of civilian property, looting of civilian property, destruction of cultural heritage, and opening hostilities against a neutral party.
[19] Reinhard Doerries, "Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War (review)," *The American Historical Review* 90, no. 4 (1985): 961.
[20] *Ibid.,* 961.
[21] Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," 557.

observers.[22] Many of the indicted perpetrators used the defense that they were following superior orders, which was recognized by the German tribunal judge as a legitimate defense.[23] At the time of the Leipzig Trials, when no one had yet challenged the superior orders plea, "the defense of simply 'doing the job' was in itself flawless."[24] Of the twelve defendants, six were convicted of war crimes and received little to no sentencing.[25] Preparation for the Leipzig Trials involved a brief debate on the "laws of humanity," but the proceedings dealt mainly with "classic violations of the law governing the conduct of hostilities."[26] In other words, the Leipzig Trials did not focus on crimes that violated humanitarian principles, but instead on prosecuting those who violated the customs of war outlawed by the Hague Conventions. Legal scholar Theodore Meron argues that the legal endeavor at Leipzig did not significantly contribute to the criminalization of illegal war under international law: "In a sense, war crimes law had not yet truly become a form of criminal law."[27] Contemporaries in the Allied countries regarded the trials as a failure.[28] Today, the Leipzig Trials represent a precursor, however unsuccessful, to the organization of the Nuremberg trials and the effort to combat atrocities by means of the law.

Moral outrage was not only directed towards the Germans in the aftermath of the Great War, but also towards the Turkish government for perpetrating the Armenian

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[22] *Ibid., 558.*
[23] George A. Finch, "Superior Orders and War Crimes," *The American Journal of International Law* 15, no. 3 (1921)*:* 440-445. 440.
[24] Bloxham, *Genocide on Trial,* 202.
[25] If found guilty of war crimes, the defendants' prison sentences ranged from a minimum of six months to a maximum of four years.
[26] Meron, "Reflections on the Prosecution of War Crimes by International Tribunals," 560.
[27] *Ibid.,* 559.
[28] Jürgen Matthäus, "The Lessons of Leipzig: Punishing German War Criminals After the First World War," in *Atrocities on Trial: Historical Perspectives on Politics of Prosecuting War Crimes,* ed. Patricia Heberer and Jürgen Matthäus [Lincoln: University of Nebraska Press, 2008]: 3-22. 16.

Massacre (1915-1917).[29] In 1919, the new Turkish government established a court martial to bring low-level perpetrators to justice within the Turkish system. As was the case during the Leipzig Trials, the martialed Young Turks stood trial but got off with minimal punishments.[30] The 1920 Treaty of Sevres permitted the Allies to prosecute high-ranking officials who acted as instrumental agents in the annihilation of the Armenians. However, the Treaty of Sevres never went into effect.[31] The next piece of legislation having to do with the accountability of former Turkish officials in the Armenian Massacre was a Declaration of Amnesty, issued in 1921. The moral response to the Armenian Massacre was so limited that it led Hitler to ask the infamous rhetorical question to the audience of his 1939 *Obersalzberg* speech: "Who, after all, speaks today of the Armenians?"[32]

Founded during deliberations over the Treaty of Versailles after World War I, the League of Nations represented the first modern supranational organization. Its goal was to "enforce [peace] by more than vapid moral pronouncements" and "entrench international law and mediation as the instruments of global harmony."[33] Between 1924 and 1930, the League of Nations launched the Committee of Experts for the Progressive Codification of International Law, which intended to represent "the main forms of civilization and the principal legal systems of the world."[34] Yet after six years, the committee had failed to come up with a system to identify and govern state responsibility

[29] Although the historical affair is now known as the Armenian Genocide, I do not use the term in this case because the word "genocide" had not yet been coined at the time of the event.
[30] Meron,"Reflections on the Prosecution of War Crimes by International Tribunals," 558.
[31] *Ibid*.
[32] Speech File, 1981-1991: Lecture; Genocide: Rutgers, April 1986, Benjamin B. Ferencz Collection, Box 159, Folder 5, United States Holocaust Memorial Museum, Washington, D.C.
[33] Mark Mazower, *Governing the World: The History of an Idea, 1815 to the Present* [New York: Penguin Books, 2013], 87.
[34] United Nations, "League of Nations Codification Conference," *United Nations* website, September 22, 1924, accessed July 28, 2018.

(for waging war, for example), largely because of the "unwillingness of sovereign states to accept the compulsory jurisdiction of any international tribunal."[35] In addition, the League was not created with the abilities to create or impose international laws.[36] Again, despite the degree of power the League of Nations had, or intended to have at least over its member states in order to enforce international law in at least a moral sense, individual countries declined to accept the supremacy of a supranational governing force over their own respective politics. However, according to historian Mark Mazower, the legacy of the League is one that we should appreciate: "It is not the League's failures that we should focus on, but its enduring influence. A vehicle for world leadership based on moral principles and the formal equality of sovereign states, it preached the beginning of a new internationalist dispensation."[37] The League of Nations represented the first supranational executive that sought to further develop and enforce international law. Its failure ignited future deliberations over how to properly implement a body to oversee nations' adherence to its laws that "greatly expanded and refined" after World War II.[38]

In each of the preceding cases, international criminal law was devised to govern the laws of war between nations and punish the perpetrators who violated them. In every instance, however, loopholes created by ambiguous legal rhetoric, trial defenses, and international law bodies appeasing individual states allowed perpetrators of war crimes to escape justice with merely a slap on the wrist. Also detrimental to the further development of international law was the claim by individual countries that the proposed

[35] Benjamin Ferencz, "War Crimes Trials: The Holocaust and the Rule of Law," in *In Pursuit of Justice: Examining the Evidence of the Holocaust*, ed. Kevin Mahoney [Washington, D.C.: United States Holocaust Memorial Council, 1997], 13-29. 14.
[36] Mazower, *Governing the World*, 96.
[37] *Ibid*., 153.
[38] *Ibid*.

laws violated their national sovereignty. Sovereignty permitted a state to "treat its citizens as it wished," and contemporary international law "allowed a state to do [exactly] what it wished."[39] Before Nuremberg, the aspect of sovereignty allowed nations to place the authority of their own laws before those governing the international community, which prevented the creation of tribunals to prosecute state actors who perpetrated war crimes.[40] Therefore, prior to World War II, the legal realm had very little authority to punish those who violated international law in service of their state ideologies.

The charter enacting the International Military Tribunal aimed to address and amend the previous shortcomings of international law with a two-fold purpose in mind: punishment and prevention, two sides of the same coin. By prosecuting the perpetrators of war crimes, the IMT brought judgment against Nazi criminals in an effort to re-educate postwar Germany by pacific means. Doing so, trial officials hoped, would restore a moral consciousness shared by the international community to forestall similar wartime atrocities in the future, as well as issue a civil warning to future state officials who tried to infringe upon the humanitarian principles of international law.[41] The International Military Tribunal was built on the foundation of previous international laws, but set precedents by exceeding the limitations of their governing powers.

The United Nations Commission for the Investigation of War Crimes was created in 1943 in response to reports of human rights abuses and mass atrocities being committed by the Nazis. Operating solely as a "fact-finding" agency, the Commission was tasked with collecting evidence on the crimes of the Nazis and reporting back to the

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[39] Philippe Sands, *East West Street*, 152.
[40] Jana Maftei, "Sovereignty in International Law," *Acta Universitatis Danubius Juridica* 11, no. 1 (2015): 54-65. 55.
[41] Mary Jean Lopardo, "Nuremberg Trials and International Law," *University of Baltimore Law Forum* 8, no. 2 (1978): 34-37. 34.

United Nations.[42] The information was collected in anticipation of conducting trials against Nazi war criminals. The Moscow Declaration of 1943 then set forth a plan to establish Nazi war crimes trials. The Moscow Conference's Statement on Atrocities, signed by the leaders of the United States, United Kingdom, and Soviet Union, declared:

> *Those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the … atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished … Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.*[43]

The establishment of the United Nations Commission for the Investigation of War Crimes and the Moscow Agreement in 1943 demonstrates the commitment of the anti-Hitler coalition to prosecuting Nazi perpetrators after the war. The use of the word "innocent" in the above statement underscores the Allies' emphasis on prosecuting those who committed atrocities against civilians, rather than only targeting those who violated the standard laws of war against other combatants. Such advanced preparation to try war criminals on an individual basis had never before been initiated, much less by an allied collaboration.

After German defeat in May 1945, the American, Soviet, British and French governments signed the London Agreement to allow for the official establishment of the International Military Tribunal. The London Agreement also sought to clarify the clause in the 1943 Moscow Declaration that demanded for war criminals to be returned to stand trial in the countries where they committed their crimes: Nazi perpetrators were allowed

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[42] "Summary of AG-042 United Nations War Crimes Commission (UNWCC) (1943-1948)" *United Nations Archives and Records Management Section*, accessed July 5, 2018.
[43] "The Moscow Conference", *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed July 5, 2018.

to be indicted by the IMT even if their "offenses [had] no particular geographical location."[44] Thus, the London Agreement assumed the responsibility of prosecuting war criminals whose crimes spanned multinational platforms, and in addition did not attempt to impede the efforts by individual countries to prosecute those who had committed crimes within their state's territories.

The London Agreement introduced an attached Charter, which outlined the process by which the International Military Tribunal would be set up and conducted. The IMT Charter designated the judicial responsibilities of the Allied powers. The Charter also invalidated the defense of superior orders that was so commonly used in the Leipzig Trials: "The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility."[45] This clause reframed the responsibility of the individual within a larger organization, seeking to render the superior orders plea illegitimate and hold individual state agents responsible for their actions that served their state's nationalistic sentiments.[46] The International Military Tribunal therefore imposed stricter principles on its defendants in comparison to earlier war crimes trials, which underscored the Allies' moral stance on Nazi humanitarian violations and the joint commitment to prosecuting their atrocities.

The IMT Charter charged twenty-four high-ranking Nazi officials with a) crimes against peace b) war crimes and c) crimes against humanity. The actual IMT indictment added another charge as Count I: "The Common Plan or Conspiracy" to commit crimes

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[44] "The London Agreement," *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed July 6, 2018.
[45] "Charter of the International Military Tribunal," *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed July 7, 2018.
[46] To clarify, many Nuremberg defendants still used the superior orders plea during trial, likely grasping at straws for any viable defense.

against peace, war crimes, and crimes against humanity (indictment counts II-IV, respectively).[47] According to historian Donald Bloxham, the Americans submitted the conspiracy count as a prosecution strategy to prove war guilt and intent across the board, "a practical way to reach diverse defendants."[48] The charge of conspiracy to commit crimes against peace, war crimes, and crimes against humanity acknowledged the degree of planning and organization that went into the Nazis' murderous operations, as well as the idea that high-ranking Nazis actively supported Hitler's vision regardless of how aggressively he pursued it.

The IMT indictment presented two new legal terms that dealt with the Nazi murder of civilians: crimes against humanity and genocide. At this time the prosecution of mass murder of noncombatants during wartime was a novelty in international law, so the legal concepts to do so were yet unsettled. Theoretically, the prosecution team at Nuremberg had two concepts available. They could turn to Hersch Lauterpacht's "crimes against humanity," which referred to a large-scale, state-sponsored attack against civilians, primarily defending the individual before the law.[49] Or they could avail themselves of Raphael Lemkin's term "genocide," which differed from Lauterpacht by emphasizing the persecution of racial and religious groups. As chapter two will discuss further, Lauterpacht's concept eventually prevailed because it was more general and encompassed the full scope of civilian victimhood in a single title.[50] Crimes against

[47] "Nuremberg Trial Proceedings Vol. 1, Indictment: Count 1," *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed July 7, 2018.
[48] Bloxham, *Genocide on Trial*, 20.
[49] Patricia M. Wald, "Genocide and Crimes Against Humanity," *Washington University Global Studies Law Review* 6, no. 3 (2007): 621-33. 623.
[50] Sands, *East West Street,* 115.

humanity appeared as an official charge at Nuremberg, while genocide was employed solely as a descriptive term.

At the end of the International Military Tribunal, 21 of the 24 indicted defendants received sentences ranging from acquittal to the death penalty.[51] Each defendant was found guilty of some or all of the indictment counts. Whereas the IMT was responsible for emphasizing the Nazis' atrocities committed against civilians, including groups such as European Jews and Gypsies, as crimes against humanity, the word genocide did not appear anywhere in the IMT judgment.[52] Following the conclusion of the trial in 1946, tensions ushering in the Cold War broke apart the wartime anti-Hitler coalition that had launched the IMT. An Allied collaboration to conduct more post-war trials was no longer possible, but each victorious power was permitted to hold their own series of trials under Control Law Council No. 10.[53] It was under the authority of this law that the United States established the twelve subsequent Nuremberg trials, the ninth of which was the *Einsatzgruppen* trial.

Before the creation of the International Military Tribunal in 1945, international law had essentially failed to bring war criminals to justice. Non-binding treaties and the laws of sovereignty protected perpetrators of war crimes from being tried and punished before an international court. The milestones in international law, such as the Hague Conventions, "state[d] general principles on the rules of war" but "remain[ed] silent as to the means of enforcement and proscribed penalties."[54] Early war crimes trials also indicated weaknesses in the international legal framework. The shortcomings of the

[51] *Ibid*.
[52] *Ibid*., 357.
[53] Earl, *The Nuremberg SS-Einsatzgruppen Trial*, 8.
[54] Lopardo, "Nuremberg Trials and International Law," 34.

Leipzig Trials "showed that Germany could get away with failing to comply to the Treaty of Versailles," and in hindsight, "kept wartime passions from cooling and… galvanized the German right…"[55] Stated frankly by lawyer and international humanitarian advocate Benjamin Ferencz, "When the Germans were allowed to try their own war criminals at Leipzig following the First World War, the tragic comedy which resulted contained a lesson which could hardly be ignored."[56] The lack of legal proceedings against perpetrators of the Armenian Massacre also contributed to the idea that those who committed war crimes on a large scale would escape punishment. The IMT transformed international criminal law by updating, strengthening, and following through with holding individual Nazis who operated in service of Hitler's Third Reich accountable before an Allied tribunal, and the Americans aimed to follow suit during the subsequent Nuremberg proceedings. The trials of Nazi war criminals extended the authority of international criminal law to protect not only belligerents but also civilians, thereby calling into question the legal methods by which mass murder should be prosecuted.

[55] Gary Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* [Princeton: Princeton University Press, 2000], 115-116.
[56] Benjamin B. Ferencz, "Nurnberg Trial Procedure and the Rights of the Accused," *Journal of Criminal Law and Criminology* 39, no. 2 (1948): 144-51. 145.

Chapter II: ***Lauterpacht and Lemkin: Considering Mass Atrocity and Civilian Representation Under International Law***

"*New conceptions require new terms*." – Raphael Lemkin[57]

The roots of the legal concepts of crimes against humanity and genocide lie in the period before World War II, but scholars Hersch Lauterpacht and Raphael Lemkin refined their ideas during the time leading up to the International Military Tribunal. In this chapter I examine Lauterpacht and Lemkin's biographic and professional backgrounds in order to draw a connection between their personal experiences and their commitments to innovating international law after the fall of the Third Reich. Furthermore, I analyze the key works of Lauterpacht and Lemkin and provide examples of scholarly interpretations of their contributions to international law. As this chapter shall demonstrate, Hersch Lauterpacht and Raphael Lemkin both introduced necessary and significant legal rhetoric to the Nuremberg trials, igniting inquiries into the nature of mass atrocity for decades to follow.

Both Lauterpacht and Lemkin grew up in the early twentieth century against the politically unstable backdrop of Eastern Europe. In fact, at one point they were both residents of Lviv, a city in present-day Poland that witnessed at least eight transfers of governing authority between 1914 and 1945. Legal scholar Philippe Sands sees in Lviv "a microcosm of Europe's turbulent twentieth century."[58] In his study of Lauterpacht and Lemkin, Sands explores how the conditions in Lviv shaped the intellectual development of each scholar. As witnesses to local demonstrations of violence against minorities and

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[57] Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, [Washington, D.C.: Carnegie Endowment for International Peace, Division of International Law, 1944], 79.
[58] Sands, *East West Street,* 8.

examples of nationalistic strife, Lauterpacht and Lemkin both considered the means by which the law could prevent the exercise of such injustices in the future. While Lauterpacht and Lemkin's ideas derived inspiration from similar experiences, their scholarship diverged on the question of who should be protected before the law: the individual or the group?

During his adolescence, Raphael Lemkin heard of pogroms and other instances of anti-Jewish violence that were taking place in neighboring villages around his home. Lemkin viewed these instances, such as the 1906 pogrom in Bialystok in which one hundred Jews were killed, as examples of conflict between groups.[59] Meanwhile, in response to a 1918 pogrom in Lviv that claimed the lives of 1,100 Jews, Hersch Lauterpacht expressed concern over the lack of laws designed to protect minority citizens from maltreatment by their nation-states. "Each country, old or new, was free to treat those who lived within its borders as it wished. International law offered…no rights for individuals."[60] Lauterpacht viewed the threat posed by various state actors, who were fueled by vehement nationalism and acted in the name of their state's ideology, as a situation that left minority victims with no opportunities to legally defend themselves. While the pogroms of 1906 and 1918 fade in comparison to the later events of the Holocaust, they provided the occasion for the development of Lemkin and Lauterpacht's differing views on how victims should be protected in instances of ethnic violence. Was the answer to promote more legal representation for entire cultural groups, such as Lemkin suggested? Or should individuals who are under threat for being members of a

[59] Samantha Power, *A Problem From Hell: America and the Age of Genocide* [New York: Harper Perennial, 2007], 20.
[60] Sands, *East West Street*, 75.

minority possess the power to legally defend their rights against the sovereign state, like Lauterpacht believed?

Central to both Lauterpacht and Lemkin's arguments for more civilian protection under international law was a criticism of contemporary understandings of state sovereignty, a principle designed to give nation-states legal autonomy. When it came to crimes against minority individuals or groups, however, sovereignty was enlisted to shield perpetrators of atrocity from the judgment of international law because they operated in the name and interest of their state. In other words, international law prior to WWII maintained that a state could be held accountable for its actions, but the state agents who executed national policy could not. Such was the case in the aftermath of the Armenian Massacre. Lauterpacht and Lemkin viewed state sovereignty with skepticism, seeing it as a veil of protection for perpetrators and an impediment to justice for victims.[61] They wished to protect civilians from persecution by state actors who should have to face legal consequences themselves. According to historian Ana Vrdoljak, "[Lauterpacht and Lemkin's] critiques of sovereignty became a central platform of their subsequent promotion of human rights and the criminalization of genocide at the international level."[62]

The 1920s saw more deliberations over the power of the law and its ability to secure rights for underrepresented populations. Lauterpacht and Lemkin's respective legal educations caused their scholarship to diverge further with regard to ideas for protecting individual civilian populations or threatened ethnic groups. In 1921, Hersch Lauterpacht was studying international law at the University of Vienna when his

[61] Ana Filipa Vrdoljak, "Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law," *The European Journal of International Law* 20, no.4 (2010): 1163-1194. 1166.
[62] *Ibid.,* 1168.

professor, Hans Kelsen, was appointed as a judge on the Austrian Constitutional Court. Kelsen's influence caused Lauterpacht to explore the elements of Austria's constitutional law. In Austria, individuals were considered the "heart of the legal order" and had "inalienable constitutional rights" which they could defend before the Austrian court.[63] Compared to the "conservative world of international law," in which the law was created to represent the sovereign state, Austrian law afforded many more judicial rights to the individual.[64] Lauterpacht's intellectual curiosity and engagement with international law won him recognition by the university's legal faculty, a doctorate in political science, and high-ranking leadership roles in Jewish student life such as the chairman of the World Union of Jewish Students.[65] Therefore, Lauterpacht's experience as a student not only exposed him to the intricacies and challenges of international law to meet the needs of the individual, but also afforded him the opportunity to forge relationships with esteemed faculty. Lauterpacht's professionalism and high regard in the legal community would later afford him "insider" status at Nuremberg.

Around the same time that Lauterpacht was completing his legal education, Lemkin was also enrolled in law school. The timing of his education coincided with the aftermath of the Armenian Massacre, which directed Lemkin's attention more towards justice for cultural groups. In a portion of his incomplete autobiography, utilized extensively by scholars including Philippe Sands, Samantha Power and Douglas Irvin-Erickson to piece together Lemkin's early life, Lemkin includes conversations with professors about the trial of Soghomon Tehlirian. Tehlirian was an Armenian man put on

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[63] Sands, *East West Street*, 81.
[64] *Ibid*.
[65] R.H. Graveson, R.Y. Jennings, Hans Kelsen, Lord McNair, Maurice Bourquin, P.H.W. Verzijl, Philip C. Jessup, Gerald Fitzmaurice, R.R. Baxter, and Helge Klaestad, "Hersch Lauterpacht," *The International and Comparative Law Quarterly* 10, no. 1 (1961): 1-17. 2-4.

trial for murdering a former Ottoman official who was responsible for the death of his family and neighbors during the Armenian Massacre. Tehlirian's trial for his act of vengeance against an enemy of the Armenians was a highly publicized affair, and Lemkin was shocked to learn that the Ottoman official who Tehlirian targeted had never faced any type of prosecution. In conversations with his professors, when Lemkin expressed frustration over the lack of justice handed down to the Ottoman official, he was told that state sovereignty made it acceptable for the official, a representative of the state, to go unpunished.[66] "Amazingly, there was no treaty to prevent Turkey for acting as it had, from killing its own citizens. Sovereignty meant sovereignty, total and absolute."[67] Lemkin frequently invoked Tehlirian's trial as one that changed his life, making him want to further explore why it was a crime for Tehlirian to kill one man, but not a crime for state authorities to kill one million.[68]

Hitler's rise to power in January 1933 led Lemkin and Lauterpacht to review and reconsider the domestic laws designed to protect civilians and the power of international law to combat Hitler's rising fascist influence. During this time, Lauterpacht, who was now a member of the legal faculty at the London School of Economics, made a mission of appealing to the League of Nations in order to secure the same rights for individuals at the international level of the law as they were guaranteed at the domestic level. His 1933 Council Resolution disputed the creation of German policies designed to discriminate against racial and religious groups. Lauterpacht argued that the new laws (such as the April 7, 1933 Law for the Restoration of the Professional Civil Service which outlawed Jews from holding positions in German civil service) represented a threat to international

[66] Power, *A Problem From Hell,* 19.
[67] Sands, *East West Street*, 152.
[68] Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide,* 36.

peace and called on the League of Nations to "exercise its authority 'in defense of the rights of human personality whose protection is the ultimate object of international law.'"[69] That same year, Lauterpacht published *The Function of Law in the International Community* with the similar agenda of raising awareness about Hitler's regime in order to secure the basic rights of civilians at an international level.[70] It was in this monograph that Lauterpacht addressed the issue of state sovereignty, lamenting over the fact that international law was determined by states themselves, and that states were only obligated to follow these laws if they themselves accepted their jurisdiction.[71] Like many other scholars of his day, Lauterpacht saw Hitler's appointment as chancellor of Germany as a cause for international concern. Using the occasion as a strategy to appeal to the League of Nations as well as fellow legal contemporaries, Lauterpacht went to work advocating for the rights of individual civilians before international law.

Lemkin, on the other hand, continued his studies over the nature of group conflicts. While Lauterpacht viewed Hitler's policies as a threat to individuals as subjects of the German state, Lemkin was troubled by Hitler's views toward groups that he deemed racially inferior, like Jews. Lemkin recognized that domestic laws already had institutions in place for protecting individual civilians and was thus "more concerned with the legal protection of cultural collectives than with individual members, for whom other legal instruments already existed."[72] In 1933, he presented two crimes to an international law conference in Madrid that encompassed the German threat to ethnic minorities: *barbarity* and *vandalism*. According to Lemkin's definitions, *barbarity*

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[69] Hersch Lauterpacht, cited in Vrdoljak, "Human Rights and Genocide," 1181.
[70] *Ibid.,* 1178.
[71] *Ibid*., 1179.
[72] A. Dirk Moses, "The Holocaust and Genocide" in *The Historiography of the Holocaust*, ed. Dan Stone [New York: Palgrave Macmillan, 2004], 533-55. 540.

referred to "an action 'taken out of hatred towards a racial, religious or social collectivity or with the goal of its extermination…'" while *vandalism* denoted "an action, taken with the same motive, which 'destroys works of cultural or artistic heritage.'"[73] Lemkin argued that the offenses of *barbarity* and *vandalism* "must be regarded as offenses against the law of nations," thereby declaring to the participants at the Madrid conference that he wished for the crimes to be codified under international law.[74] To his regret, in 1933 Hitler's potential for "Aryanizing" Europe by violent means did not present to other participants at the Madrid conference as urgent a situation as Lemkin then deemed it. His points on *barbarity* and *vandalism* were put aside.[75]

Throughout the remainder of the 1930s and into the 1940s, Hersch Lauterpacht continued to disseminate his ideas regarding the protection of individuals under international law before audiences at universities and legal conferences in Western Europe and the United States. Lauterpacht's legal prowess caught the attention of U.S. attorney general Robert H. Jackson. The two men, who first met in 1941 to discuss ways in which to provide aid to victims of the war, kept in touch and followed one another's trajectory in the following years.[76] Lauterpacht's ideas on the protection of the individual made their way into some of Jackson's speeches, and in 1942, when Jackson was appointed as an associate justice on the U.S. Supreme Court, Lauterpacht "now had a supporter for his ideas at the highest level of American government."[77] At this point, the United Nations, the supranational successor to the League of Nations, had already

[73] Raphael Lemkin, "1933 Madrid Proposal," in *Totally Unofficial: Raphael Lemkin and the Genocide Convention*, ed. Adam Strom and the Facing History and Ourselves Staff [Unknown: Facing History and Ourselves, 2007], 13-15. 14.
[74] Raphael Lemkin, "Acts Constituting a General (Transnational) Danger Considered as Offense against the Law of Nations," *Prevent Genocide International* Website, October, 1933, accessed July 22, 2018.
[75] Bechky, "Lemkin's Situation," 558.
[76] Vrdoljak, "Human Rights and Genocide," 1187.
[77] Sands, *East West Street*, 102.

assembled the War Crimes Commission to investigate Nazi atrocities. With a trial of Nazi war criminals looming at the eventual end of World War II, Lauterpacht persistently explored "emerging ideas on the rights of man" and looked for "practical ways of putting the individual at the heart of a new legal order."[78]

In 1944, Raphael Lemkin published *Axis Rule in Occupied Europe*. The most influential of Lemkin's writings, *Axis Rule* begins by detailing the techniques and politics of German occupation in Europe and analyzing the means by which the Nazis were able to achieve European domination. After providing an overview of the nature of Nazi Germany's grip on Europe, Lemkin introduced the crime of genocide in chapter IX. Derived from the ancient Greek word *genos* (meaning race or tribe) and the Latin suffix *cide* (killing), Lemkin hoped that *genocide*, a word that could only be used to refer a specific type of crime, would get the reception that his earlier concepts of *barbarity* and *vandalism*, which can carry different meanings in different contexts, did not. Lemkin defined genocide in the following sentences:

> *By genocide we mean the destruction of a nation or of an ethnic group…Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of a national group.*[79]

[78] *Ibid.,* 108.
[79] Lemkin, *Axis Rule in Occupied Europe*, 79.

In the creation of a new term, "genocide thus [brought] together elements of Lemkin's *barbarity* and *vandalism* in a single new concept."[80] Lemkin hoped to establish the term genocide to denote the Nazis' treatment of Jews throughout occupied Europe, as he was "well aware that the Jews were 'to be destroyed completely.'"[81] He was inspired to create a neologism depicting the crime of race murder by entrepreneur George Eastman, who invented the word Kodak for the camera. *Kodak*, according to Eastman, was "rigorous and distinctive in personality," and Lemkin wanted the public to have the same kind of recognition for a word denoting the crime at hand.[82] After Winston Churchill referred to the Nazis' exterminatory tactics as "a crime without a name" in 1941, Lemkin made it his goal to prevent future mass killings by actually naming the crime.[83] Genocide sees the ethnic group as the targeted entity, not individual civilians as Lauterpacht would have it. In addition, genocide requires that perpetrators must express intent to destroy the population being harmed. The whole population does not have to be annihilated, but the determination by another party to do so must be evidenced for the crime to be deemed genocide. Lauterpacht's conception of crimes against humanity concerns harm done to civilians, but efforts to destroy noncombatant groups on the basis of their ethnicity is an offense unique to the crime of genocide. In Lemkin's efforts to establish the concept, he might not have realized that his insistence on intent would make the prosecution of genocide in a court of law a very tenuous proposition. In chapter IX Lemkin also pitches the view that the practice of genocide should be seen as the "antithesis" of The Hague

[80] Bechky, "Lemkin's Situation," 560.
[81]Lemkin, *Axis Rule in Occupied Europe*, 81. Cited in Moses, "The Holocaust and Genocide," 540.
[82] Raphael Lemkin (ed. Steven Leonard Jacobs), *Lemkin on Genocide* [Plymouth, UK: Lexington Books, 2012], 24.
[83] Winston S. Churchill, *The Churchill War Papers: The Ever-Widening War* (ed. Martin Gilbert), vol. 3: 1941, [New York: W.W. Norton, 2000]. Cited in Power, *A Problem From Hell*, 29.

principles maintaining that war is to be waged between sovereign nations, not against civilians.[84] Genocide is drastically different than traditional wars between belligerent parties, and Lemkin's invention of the crime contributed to a rethinking of the role of international law by prioritizing the protection of human rights above state sovereignty. According to Saul Mendlovitz and John Fousek, "In other instances…war is waged in pursuit of political objectives, from gaining control of the state to conquering territory to protecting foreign markets or investments. Genocide, by contrast, is a distinctive behavior, a singularly grave and egregious violation of human rights aimed at destroying an ethnic, national, racial, or religious group…and targeting individuals solely on the basis of their membership in the group."[85] In *Axis Rule*, Lemkin suggested that genocide should be considered a crime under international law whether or not it takes place during a period of armed conflict.

Carrying major humanitarian implications, *Axis Rule* was reviewed by one contemporary academic as a work that "as a whole must impress the reader with the need to have regard to fundamentals rather than to purely legal principles."[86] That is, while Lemkin's term contributed significantly to the historical record and moral outrage directed at the Nazis' treatment of Jews, it was unclear whether genocide would have an impact on the law itself. Hersch Lauterpacht had a similar reaction to *Axis Rule*. According to Lauterpacht, Lemkin's book "may be 'a scholarly historical record'…but it 'cannot be accurately said that the volume is a contribution to the law.'"[87] Additionally,

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[84] *Ibid*., 80.
[85] Saul Mendlovitz and John Fousek, "Enforcing the Law on Genocide," *Alternatives Global, Local, Political* 21, no. 2 (1996): 237-58. 242-43.
[86] H.B., review of *Axis Rule in Occupied Europe*, by Raphael Lemkin, *Journal of Comparative Legislation and International Law* 27, no. 3/4 (1945): 112-13.
[87] Sands, *East West Street*, 109-110.

Lauterpacht feared that in legal practice, "the protection of groups would undermine the protection of individuals."[88] Douglas Irvin-Erickson identifies the differences between Lauterpacht and Lemkin's envisioned legal designs for their respective ideas regarding the individual or the group: "Lauterpacht … introduced an individual rights-based approach to international law, and [believed] that the concept of genocide did not follow in this tradition because it did not explicitly protect individuals…The goal of outlawing genocide, Lemkin argued, was not to make the right of groups to exist inviolate but to prohibit people from attempting to destroy entire ways of life and ethnic traditions…"[89] Despite the various forms of opposition Lemkin received about his term, he relentlessly lobbied for the adoption of genocide under the law. The publishing of *Axis Rule* on the eve of the IMT at Nuremberg provided new rhetoric to the investigation of Nazi crimes. As genocide was introduced as a new type of crime, Lemkin advocated for its adoption as the talks about an international military tribunal unfolded.

Lauterpacht was in the process of working on an "international bill of rights" when he was asked by Robert Jackson to assist in the creation of the International Military Tribunal. The Allies were having trouble formulating a list of crimes to charge the Nazis with.[90] The International Military Tribunal was, after all, an unprecedented event in history and carried major historical and legal implications. The IMT lawyers and lawmakers should therefore place heavy weight on the charges handed down to the defendants. There were suggestions for violations of the laws and customs of war, which were listed as "war crimes" and "crimes against peace" (i.e. aggressive war) on the Nuremberg documents. Eventually, Lauterpacht suggested including another criminal

[88] *Ibid*., 110.
[89] Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide*, 2-3.
[90] *Ibid., 112*.

count, introducing the term "crimes against humanity" to reference mass atrocities committed against civilians and to protect individual victims before the law.[91] Crimes against humanity, as it would now be called, was not only a subject of personal interest to Lauterpacht, but was also a phrase that could be deployed to meet the legal specifications of the Nazi crimes against noncombatants and "aimed at the protection of individuals."[92] The idea was well received, and on August 8, 1945, crimes against humanity became an official crime under international law when it was defined in the Nuremberg Charter.[93] The document described crimes against humanity as

> *Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*[94]

Crimes against humanity therefore referred to extreme maltreatment of civilians, regardless of whether the acts occurred during wartime or not. However, the IMT prosecution focused more heavily on the crimes that were committed during the war, that is after September 1, 1939, since the charge was developed in connection with armed conflict.[95] Yet while the IMT placed more emphasis on crimes against humanity committed during the course of WWII, it still established a legacy of acknowledging that crimes against civilians can occur outside of war. In the case of crimes against humanity,

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[91] Vrdoljak, "Genocide and Crimes Against Humanity,"113.
[92] Sands, *East West Street*, *115*.
[93] *Ibid*.
[94] "Charter of the International Military Tribunal." *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed August 23, 2018.
[95] Steve R. Ratner, B.G. Ramcharan, Payam Akhavan, and Delissa Ridgway, "The Genocide Convention after Fifty Years," *Proceedings of the Annual Meeting (American Society of International Law)* 92 (1998): 1-19. 2.

agents of the state can face prosecution if they were part of a "campaign against a civilian population."[96]

It is worth noting that the Nuremberg Charter additionally acknowledged a crime against humanity as one that could be related to ethnicity. Linking the charge to "persecution on political, racial, or religious grounds" sought to defend the groups that comprised Nazi victimhood. What was missing from the Nuremberg definition of crimes against humanity was any emphasis placed on the *destruction* of the European Jewish population. In international law, "genocide differs from…crimes against humanity by the intention to completely or partly destroy a certain group of people. Other crimes against humanity do not require this specific intent to destroy a group."[97] The fact that the IMT did not officially acknowledge the Nazis' efforts to exterminate the Jews reveals a few things about the aims and the timing of the Nuremberg tribunal. Firstly, the IMT was designed as a war crimes trial: it was an effort between the Allies to prosecute the Nazis for committing violations of the laws of war on a grand scale, hence the indictment charges of war crimes and crimes against peace. Crimes against humanity addressed the fact that the Nazis committed crimes against civilians, but the charge was by no means the focus of the IMT. As explained by Robert Jackson, "The reason that this program of … destruction of the rights of minorities becomes an international concern is this: it was part of a plan for making an illegal war."[98] The charge of crimes against humanity got the job done at the IMT, but it was intended to go hand in hand with the charges dealing with

[96] Steven R. Ratner, "Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity," *Washington University Global Studies Law Review* 6, no. 3 (2007): 583-89. 585.
[97] United Nations Task Force for International Cooperation on Holocaust Education. Remembrance, and Research. "Teaching about the Holocaust, Genocide and Crimes Against Humanity." Accessed September 19, 2018. 9.
[98] Robert H. Jackson. *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*. [Washington, D.C.: US Government Printing Office, 1949], 331. Cited in *Ibid*.

traditional war crimes and was utilized to further substantiate the prosecution of aggressive war. In the words of Emory senior Michael Bennett Williams, the charge of crimes against humanity was given a "secondary role" at the IMT.[99] In addition, the failure to account for the Nazi intent to destroy Europe's Jewish population brings into question how much the Nuremberg prosecutors knew about Nazi criminality immediately after the war and how they interpreted that knowledge. For example, the IMT defendants were prosecuted for committing aggressive war (war crimes and crimes against peace) and for committing crimes against civilians, many of whom were Jews (crimes against humanity). However, IMT prosecutors did not see the Nazi crimes as an exterminatory campaign against the Jews, or what we know today as the Holocaust. Holocaust historian A. Dirk Moses argues, "While the term 'genocide' was coined during the Second World War… the Holocaust as a specifically Jewish tragedy did not become an object of consciousness until almost two decades later."[100] Crimes against humanity fit within the scope of charges at the IMT, then, because it was contemporarily considered a war crimes trial. Only later on, first during the subsequent Nuremberg proceedings (1946-1949) and then at the trial of Adolf Eichmann in Jerusalem (1961-1962), did people start to consider the crimes of the Nazis an example of genocide against Europe's Jews.

Still, Raphael Lemkin persisted in his efforts to have his concept included in the Nuremberg trials. He secured a job in the War Crimes Office to assist in the gathering of information for American prosecution efforts, but he also tried to take personal advantage of his insider position. In attempting to increase the use of genocide as a crime at the

[99] Michael Bennett Williams. "Anti-Semitism on Trial: The Case of Julius Streicher Before the International Military Tribunal at Nuremberg." Honors Thesis. Emory University, Electronic Theses and Dissertations, 2009. 40.
[100] Moses, "The Holocaust and Genocide," 533.

IMT, Lemkin was criticized by his team members as being "impractical," inappropriate in "style and temperament," not "up to the task," and "unmanageable."[101] The complaints reached Telford Taylor, the American chief prosecutor at the IMT, and the core staff decided to remove Lemkin from the "inner circle." Lemkin was demoted to performing "background tasks."[102] Working in what would essentially be seen as mailroom duty for the IMT, Lemkin and his idea faded from the forefront of the trial. His efforts at the IMT did not go to waste entirely, however. While the term "genocide" did not make it into the Nuremberg Charter, as crimes against humanity did, the word was included in the IMT indictment under the count of war crimes, asserting that in occupied Axis territory, the Nazi defendants "conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."[103]

The fact that genocide appeared as a sub-count of the charge of war crimes is interesting for two reasons. Firstly, genocide is, and always has been, more closely aligned with the concept of crimes against humanity (despite the differences in whom each term aims to protect before the law). Genocide appeared under the war crimes count at the IMT because it was conducted in connection with waging an aggressive war. Lauterpacht's influence likely had something to do with it as well, as he disagreed with genocide's emphasis on group victimhood and did not want the word to appear in connection with his concept of crimes against humanity at its outset. Secondly, in

[101] Sands, *East West Street*, 186-188.
[102] *Ibid*., 187
[103] "Nuremberg Trial Proceedings, Indictment: Count Three" *The Avalon Project*, Lillian Goldman Law Library, Yale University, New Haven, CT, accessed August 28, 2018.

appearing as a sub-count in the IMT indictment (and not at all in the Nuremberg Charter), genocide was not legally recognized as an international crime. To be clear, crimes against humanity became codified under international law when it was listed as an official charge in the Nuremberg legislation. Lauterpacht's term was further legitimized when nineteen of the IMT defendants were charged with crimes against humanity and sixteen were convicted for it. Genocide, on the other hand, was simply a word used in the depiction of another charge. Lemkin's term made its way into public consciousness as a result of press coverage of the trial, some of which praised the scholar's suggestion to codify genocide under international law.[104] Within the official setting of the IMT, however, genocide was employed as no more than a descriptive term that was occasionally utilized by the prosecution to define the scope of what Donald Bloxham calls "Nazi criminality."[105] It is for this reason that historians such as Bloxham consider Nuremberg as somewhat of a legal failure. Bloxham instead credits the body of scholarship after Nuremberg as the vehicle that more effectively portrays the Holocaust as a genocide.[106]

Shortly before the beginning of the International Military Tribunal, Raphael Lemkin and Hersch Lauterpacht presented new rhetoric that would sooner (in the case of crimes against humanity) or later (in the case of genocide) become solidified as crimes under international law. The introduction of new terms served not only a punitive purpose for the perpetrators on trial, but also played a didactic function for lawyers and the general public alike.[107] Lemkin and Lauterpacht's concepts provided Nuremberg prosecutors with innovative legal terms that helped to secure guilty verdicts for the

[104] See, for example: Waldemer Kaempffert, "Genocide Is the New Name for the Crime Fastened on the Nazi Leaders," *The New York Times*, October 20, 1946.
[105] Bloxham, *Genocide on Trial*, ix.
[106] *Ibid*., 2.
[107] Sands, *East West Street*, 113.

defendants. Nazi perpetrators were tried as individuals who committed crimes, not as representatives of the state acting upon higher orders. More importantly, the terms crimes against humanity and genocide became lodged in the minds of those who shared in a "public hunger to build a new international legal order committed to collective security and human rights" after WWII.[108] Both crimes against humanity and genocide sought justice for those whose experience at the hands of the Nazis went beyond the scope of traditional war crimes, resembling atrocities that "[carry]…a heavier component of international shame than war crimes."[109] The difference between crimes against humanity and genocide in response to the question of how the law can prevent instances of mass atrocity remains profound, however: "Protect the individual, says Lauterpacht. Protect the group, says Lemkin."[110]

[108] Bechky, "Lemkin's Situation," 561.
[109] Wald, "Genocide and Crimes Against Humanity," 626.
[110] Sands, *East West Street*, 281.

Chapter III: ***Genocide in the Courtroom: Convicting Race Murder at the Einsatzgruppen Trial***

"'*We were all extremely busy. This new idea of [Lemkin's] was not something we had time to think about…We wanted him to just leave us alone so we could convict these guys of mass murder.'"* – Benjamin Ferencz, Chief Prosecutor of the *Einsatzgruppen* trial[111]

Historian Hilary Earl calls the *Einsatzgruppen* trial (SNT9) "the biggest murder trial in history," in which twenty-four high-ranking SS leaders were charged with crimes against humanity, war crimes, and membership in organizations acknowledged as criminal by the IMT (such as the SS).[112] Operating as "mobile killing units," battalion leaders instructed members of the *Einsatzgruppen* to liquidate all Jews and other "undesirables" in the eyes of Hitler, starting in Poland (1939) and continuing in the Soviet Union (1941-1943). The *Einsatzgruppen* can be seen as the initial agents of the Final Solution, carrying out mass killings in the German-occupied Poland and the USSR prior to the construction of death camps and gas chambers. Otto Ohlendorf's witness testimony at the IMT, in which he admitted to being responsible for the deaths of approximately 90,000 people (most of whom were Jews), was the first instance in which the Americans were exposed to information on *Einsatzgruppen* atrocities. After the establishment of Control Law Council No. 10, which gave each of the Allied powers permission to conduct their own series of legal proceedings against Nazi war criminals, the American prosecutorial teams began looking for evidence that would serve as a basis for indictments in further trials. The American subsequent proceedings (SNTs) required that "indictments…be based strictly on documented evidence of criminal wrong-doing,

[111] Interview with Benjamin Ferencz. In Power, *A Problem From Hell*, 50.
[112] USHMM, RG 50.030*629, Oral History, BBF, August 26, 1994, tape 2. Cited in Earl, *The Nuremberg SS-Einsatzgruppen Trial*, 49.

that is to say on evidence unearthed by…researchers."[113] While going through the ruins of the burnt-down Gestapo headquarters in Berlin, one investigator came across some remaining *Einsatzgruppen* reports, which would later serve as the basis of evidence in SNT9 (1947-48).[114] In extreme detail, these reports covered the daily operational activities of the *Einsatzgruppen* in the Soviet Union. One such report reads:

> *In the course of a routine Security Police screening of an additional part of the civilian population around Leningrad, 140 more people had to be shot. The reasons for this were as follows:*
> *a) Active participation in the Communist Party before the arrival of the German troops;*
> *b) Seditious and provocative activity since the arrival of the German Army;*
> *c) Partisan activity;*
> *d) Espionage;*
> *e) Belonging to the Jewish race.*[115]

Of the many *Einsatzgruppen* reports employed as evidence by the prosecution at SNT9, Operational Report 173 exemplifies not only the meticulousness used to document the units' daily activities, but also the genocidal intent of the *Einsatzgruppen*.[116] The *Einsatzgruppen* were evidently tasked with eliminating alleged partisans, political opponents and Jews. This chapter is concerned with *Einsatzgruppen* atrocities committed against Jews, and how the Nuremberg SS-*Einsatzgruppen* trial demonstrates the clearest legal confrontation with physical genocide to date. During the SNT9 trial, however, genocide had not yet been classified as a crime under international law. It had been conceived by Raphael Lemkin to describe the nature of Nazi crimes against Jews, but

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[113] Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* [Toronto: Little, Brown and Company, 1992]. Cited in *Ibid*.
[114] Nuremberg Supplementary Materials, 1949-1990, Benjamin B. Ferencz Collection, Box 13, Folder 4, United States Holocaust Memorial Museum Archives, Washington, D.C.
[115] "The Einsatzgruppen: Operational Situation Report USSR No. 173," *Jewish Virtual Library: A Product of Aice*, accessed August 31, 2018.
[116] United States National Archives and Records Service, "Nuernberg War Crimes Trials: Records of Case IX, United States of American v. Otto Ohlendorf et al." 1978. Retrieved from the Digital Public Library of America, accessed August 31, 2018.

was employed sporadically and only as a descriptive term at the International Military Tribunal. The SNTs produced charges from a list of crimes that had already been employed in the IMT and were thereby "punishable under preexisting laws."[117] Instead of adding a new crime to an already complicated legal procedure, the Americans charged *Einsatzgruppen* defendants with crimes against humanity, which at the time encompassed murder on the basis of religion.

According to Hilary Earl, the *Einsatzgruppen* trial provided an opportunity for the international community to identify separate definitions for genocide and crimes against humanity.[118] That is, the crimes committed by the *Einsatzgruppen* against Jews denoted the Nazi intent to destroy the Polish and Soviet Jewish populations. It was more than just state-sponsored mass murder, which is what the charge of crimes against humanity denoted: it was *race* murder. Despite the inability of the law to formally prosecute the *Einsatzgruppen* defendants for genocide, SNT9 can be seen as a noteworthy step in the narrative of the crime's influence on international law. The *Einsatzgruppen* trial underscored the importance of establishing genocide as a crime under international law, elevating its influence as solely a description of criminality at the IMT to a crime meriting categorization under the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

Christopher Browning's research on Police Battalion 101 speaks to the crucial role played by perpetrators of mass shooting against Polish Jews. While much of Browning's work examines perpetrator motivation amongst battalion shooters, his study also contributes to a fundamental aspect of Holocaust historiography. Browning argues

[117] Ferencz, "Nurnberg Trial Procedure and the Rights of the Accused," 144.
[118] Earl, *The Nuremberg SS-Einsatzgruppen Trial*, 49.

that Jewish deaths by mass shooting are a largely overlooked element of the Holocaust compared to the more infamous method of killing by gas, contending that these shootings should be given more attention when studying the implementation of the Final Solution. He substantiates this argument by demonstrating the demographic changes that took place across Poland during the war as a result of the police battalions' killing spree. "In mid-March of 1942, some 75 to 80 per cent of all victims of the Holocaust were still alive, while some 20 to 25 per cent had already perished. A mere eleven months later, in mid-February 1943, the situation was exactly the reverse. Some 75 to 80 per cent of all Holocaust victims were already dead, and a mere 20 to 25 per cent still clung to a precarious existence. At the core of the Holocaust was an intense eleven-month wave of mass murder."[119] Some of this mass murder was carried out through the "industrial" process of gassing, but most killings were achieved by way of mass shootings. Browning explains that major urban populations of Polish Jewry were first imprisoned in ghettoes (such as those in Warsaw and Lodz) and died after they were sent to concentration camps or, if they were too weak to be relocated, were shot on the spot. However, most Polish Jews lived in smaller cities or rural communities that did not experience ghettoization. Instead these towns, with populations that ranged from 30 to 90 percent Jewish, were to be cleared of Jews by way of mass shooting.[120] Outside of major cities, therefore, mobile killing squads murdered the majority of Polish Jewry right in their home communities, a fact that stands in contrast to the commonly held conception that deaths during the Holocaust were mainly a result of Zyklon B gassing. The statistics that Browning

[119] Christopher Browning, "One Day in Jozefow: Initiation to Mass Murder," in *Nazism and German Society, 1933-1945*, ed. David F. Crew [London and New York: Routledge, 1994], 300-15. 301.
[120] Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* [New York: HarperCollins Publishers, 1993], 1.

employs suggest that the *Einsatzgruppen* mobile killing units played an instrumental role in the extermination of Jews in Poland and deliberately committed acts that constitute the crime of genocide in order to make the newly-acquired German territory *judenfrei*.

Historian Richard Rhodes elucidates the nature and speed at which *Einsatzgruppen* battalions carried out the Final Solution in the Soviet Union. Over the course of Operation Barbarossa, *Einsatzgruppen* executioners would boast figures to one another such as three kills per minute.[121] Perhaps the most infamous example of the *Einsatzgruppen*'s genocidal acts against the Jews in the Soviet Union is the Babi Yar Massacre in Kiev, during which more than thirty thousand Jews were killed in just two days. The *Einsatzgruppen* report from the event stated, "*Sonderkommando* 4a in collaboration with the group staff and two commandos of Police Regiment South on 29 and 30 September 1941 executed 33,771 Jews in Kiev."[122] The shift away from mass shooting as the primary method of executing enemies of the Reich and the subsequent transition to the use of gas chambers initially came at the request of Heinrich Himmler, who witnessed a shooting in Minsk in August 1941. Watching members of *Einsatzgruppe* B shoot unarmed men, women and children led Himmler to become concerned over the psychological impact the killings would have on his men.[123] Ironically, the truly inhumane aspect of this procedure, the coldblooded murder of thousands of civilians at a time, did not trouble him at all. Himmler concluded that mass shootings were neither humane for perpetrators to endure, nor the most effective method to execute Reich enemies, which brought about the switch to the use of Zyklon B poison gas. Thus, while gas chambers are the more commonly portrayed elements of Nazi wholesale murders,

[121] Rhodes, *Masters of Death*, 211.
[122] IMT No. 3137. Cited in *Ibid*., 210-211.
[123] *Ibid*., 185-186.

they represent a later step in the implementation of the Final Solution. It is also harder to narrow criminal responsibility in the case of deaths caused by poison gas since the Nazis did not have direct contact with their victims, per se. *Einsatzgruppen* atrocities, on the other hand, had something archaic about them: "at the most basic level individual human beings killed other human beings in large numbers over an extended period of time."[124] What's more, these murders were evidenced by a paper trail of operational reports and a traceable chain of command between the battalion leaders who ordered the mass shooting executions and the SS members who conducted them. The *Einsatzgruppen* trial employed the evidence produced by the battalions' atrocities and sought justice for the leaders who orchestrated the initial steps of the Final Solution in Poland and the Soviet Union.

Today, the acts committed by the *Einsatzgruppen* and their established intent to do so would likely be identified as genocide by the public and by international law. In 1947, however, three years after Lemkin had introduced the concept of genocide in *Axis Rule*, the neologism was no more than a descriptive term employed sparingly by Nuremberg prosecutors.[125] It was neither a crime under international law nor a charge that appeared in Nuremberg official documents. However, the *Einsatzgruppen* trial magnified the importance of establishing genocide as an official crime by focusing on an aspect of Nazi criminality that directly addressed what Lemkin described in *Axis Rule* as a subset of physical genocide, mass killings.[126] The *Einsatzgruppen* defendants were brought to trial for their "deliberate, systematic, and physical slaughter of Soviet Jewry."[127] According to the opening of the SNT9 transcript, "the *Einsatzgruppen*'s major activity

[124] Browning, *Ordinary Men,* xvii.
[125] Hilary Earl, "Prosecuting Genocide Before the Genocide Convention: Raphael Lemkin and the Nuremberg Trials, 1945-1949," *Journal of Genocide Research* 15, no. 3 (September 2013): 317-37. 319.
[126] Lemkin, *Axis Rule in Occupied Europe*, 89.
[127] Earl, "Prosecuting Genocide Before the Genocide Convention," 318.

and prime cause of their members' indictment was the extermination of persons considered dangerous by the Nazi leadership, including large numbers of Jews and gypsies."[128] This sets SNT9 apart from the post-WWI Leipzig Trials as well as the more recent ones that had been conducted at Nuremberg: the *Einsatzgruppen* trial did not concern war crimes in their traditional sense (for example, classic violations of the laws and customs of war). At the International Military Tribunal, those considered the highest-ranking Nazi officials were prosecuted on four indictment counts that were designed to be all encompassing to address war crimes and crimes committed against civilians. However, the defendants at the IMT occupied quite different positions in the Nazi bureaucracy and the charges brought against them were not necessarily fitted to the nature of each of their crimes. For example, in his honors thesis Michael Bennett Williams argues that Julius Streicher, a key figure in Nazi propaganda, was difficult to prosecute at the IMT because his incitement of anti-Semitism didn't quite fit the verdict of crimes against humanity.[129] In the end, Streicher's crimes drew the same conviction as many other IMT defendants (for example, those of Hans Frank, the overseer of the General Government of Poland who ordered the deaths of all Polish Jews) but they were, in reality, drastically different in nature. SNT9, on the other hand, prosecuted *Einsatzgruppen* leaders who were all responsible for organizing and implementing the shootings of Jews and others in Poland and the Soviet Union. The *Einsatzgruppen* trial was more centralized on one type of crime than the IMT. It addressed the criminal activities of the *Einsatzgruppen*, which dealt not only with the murder of civilians, but

[128] United States National Archives and Records Service, "Nuernberg War Crimes Trials: Records of Case IX, United States of American v. Otto Ohlendorf et al." 1978. Retrieved from the Digital Public Library of America, accessed September 6, 2018.
[129] Williams, "Anti-Semitism on Trial," 11.

murders on the basis of race and religion as evidenced by *Einsatzgruppen* daily operational reports. Thus, although part of the American endeavor to further prosecute Nazi war crimes, the *Einsatzgruppen* trial can be seen not only as a war crimes trial, but also an "atrocity trial."[130]

Of the three indictment charges brought upon defendants at the *Einsatzgruppen* trial, SNT9 was primarily concerned with Count I, crimes against humanity. Unlike the IMT indictment, which mentioned the word genocide under the count of "war crimes," the SNT9 indictment vindicated Lemkin and his concept by including genocide as a subset of crimes against humanity.[131] Count I of the *Einsatzgruppen* trial indictment was described as follows:

> 1. *Between May 1941 and July 1943 all of the defendants herein committed Crimes against Humanity, as defined in Article II of Control Council Law No. 10 in that they were principals in, accessories to, ordered, abetted, took a consenting part in… atrocities and offenses including by not limited to persecutions on political, racial and religious grounds, murder, extermination, imprisonment, and other inhuman acts committed against civilian populations…*
> 2. *The acts, conduct, plans and enterprises charged in paragraph 1 of this Count were carried out as part of a systematic program of genocide, aimed at the destruction of foreign nations and ethnic groups by murderous extermination.*[132]

The *Einsatzgruppen* indictment, therefore, finally invoked genocide under a sub-count in the context of its most closely related crime, crimes against humanity, to refer to the murder of civilian ethnic groups. Hilary Earl notes, "The way the indictment was crafted in the *Einsatzgruppen* trial suggests that prosecutors agreed with [Lemkin's] views; the

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[130] Kim Christian Priemel, "War Crimes Trials, the Holocaust and Historiography, 1944-2014," in *The Wiley Blackwell Companion to the Holocaust*, ed. Simone Gigliotti and Hilary Earl [Forthcoming 2017]. Cited in Hilary Earl, "Legacies of the Nuremberg SS-*Einsatzgruppen* Trial After 70 Years," *Loyola of Los Angeles International and Comparative Law Review* 39, no. 1 (2017): 95-115. 96.
[131] Earl, "Prosecuting Genocide Before the Genocide Convention," 326.
[132] Library of Congress, Trials of War Criminals before Nuernberg, "Amended Indictment for the *Einsatzgruppen* Case, 3 July 1947," accessed September 6, 2018.

crimes against humanity committed by the *Einsatzgruppen* leaders were part of a larger project of systematic murder…[the] intention of which was to 'exterminate' entire groups. The indictment thus charged the defendants with both murder and, implicitly, genocide."[133] By the time the *Einsatzgruppen* trial was under way, genocide had taken a more definitive hold on the legal minds of those who were present at Nuremberg. SNT9 helped to solidify the definition of genocide in an official legal setting and set the stage for its further establishment under international law.

Nevertheless, the new level of importance given to genocide in the context of the *Einsatzgruppen* trial still did not explicitly legitimize Lemkin's concept as a punishable crime under the law. The safe legal framework of the subsequent proceedings, in which the list of punishable crimes merely copied the IMT structure, did not allow room for a new charge to be incorporated into any of the trials, much less a single one of the SNTs. Prosecutors at the *Einsatzgruppen* trial simply did not have time to listen to Lemkin, a man whom they later described as "crazy," resembling someone "more like a homeless refugee than the legal innovator that he was" when he was roaming the hallways of the Palace of Justice at Nuremberg.[134] Trying to convict defendants of a charge that lacked "independent legal status" at the time would have delegitimized prosecutorial efforts in what was already a difficult legal process to secure convictions that lacked any precedent besides the IMT.[135] The SNT9 prosecution engaged the word genocide to describe the type of crime the *Einsatzgruppen* had committed, but using it as a *sui generis* crime was

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[133] Earl, "Prosecuting Genocide Before the Genocide Convention," 330.
[134] Earl, interview with Ferencz, 24 April 1997, cited in *Ibid*., 12; Henry King Jr., "Genocide and Nuremberg," in *The Criminal Law of Genocide: International, Comparative and Contextual Aspects*, ed. Ralph Henham and Paul Behrens [Burlington: Ashgate, 2007], 29-35. 29.
[135] Lawrence Douglas, "The NMT Program and the Emergence of a Jurisprudence of Atrocity," *Opinio Juris* Website, November 17, 2011, accessed September 9, 2018.

out of the realm of their authority.[136] The *Einsatzgruppen* defendants were charged within a legal paradigm that was ultimately too narrow to produce a conviction of genocide.

The atrocities committed by the *Einsatzgruppen* demonstrate the first steps of the Nazi program of physical genocide against European Jews. During the years that the *Einsatzgruppen* operated, the mobile killing squads murdered about two million Jews, therefore making the units responsible for roughly a third of Jewish deaths during the Holocaust. The crimes committed by the *Einsatzgruppen* resemble a key element of genocide, but the failure to convict genocide in the official legal setting of SNT9 represents not only the limitations of the law, but also the ability of history to identify important milestones where the law cannot. In other words, the Nuremberg trials were not truly responsible for placing "genocide on trial" because, in a literal sense, it was impossible to do so given that genocide was not yet enshrined as crime. Additionally, while perpetrators such as the *Einsatzgruppen* targeted Soviet Jews for mass murder, the goal at Nuremberg was not to highlight the discriminatory aims of Hitler's Third Reich. Instead, the Nuremberg project intended to successfully prosecute war crimes for the first time in history, what Elizabeth Borgwardt calls "an exercise in didactic legality."[137] In other words, the trials represented a legal endeavor to re-educate postwar Germany and aimed to set a precedent for punishing war criminals by means of the law. With the benefit of hindsight historians have been able to identify Nuremberg, especially SNT9, as an inflection point in the prosecution of genocide under international law. However, at the time during which the trials were actually taking place, Nuremberg prosecutors didn't consider that the Nazis were targeting Jews in particular. Hypothetically, even if they did,

[136] Earl, "Prosecuting Genocide Before the Genocide Convention," 6.
[137] Elizabeth Borgwardt, "A New Deal for the Nuremberg Trial: The Limits of Law in Generating Human Rights Norms," *Law & History Review* 26, no. 3 (2008): 679-705. 703.

genocide was not a palpable crime to be used in charging Nazi defendants. In the case of the *Einsatzgruppen* trial, while the majority of the battalion units' victims were indeed Soviet Jews, *Einsatzgruppen* defendants were not prosecuted on the grounds of being perpetrators of genocide. "What emerged at trial, instead, was a more traditional prosecution of murder, an approach that by necessity overlooked the complexities of genocide…in the murder of Soviet Jewry, but one that nonetheless ensured that individual leaders of the *Einsatzgruppen* would be found guilty of crimes against humanity as laid out in the indictment."[138]

The failure to put genocide on trial at SNT9 does not minimize the importance of the *Einsatzgruppen* trial. In historiographical terms, the exposure of *Einsatzgruppen* atrocities in courtroom proceedings contributed to a deeper understanding of the timeline of the Final Solution.[139] Like other post-WWII trials, the *Einsatzgruppen* trial collected important evidence that allowed historians to follow suit and expand upon the significance of Nuremberg. Hilary Earl and Christopher Browning, for example, found the majority of the information employed in their monographs within postwar trial records and evidence and used those materials to construct their respective historical arguments.[140] Legally, the *Einsatzgruppen* trial highlighted Nazi genocidal tactics to the fullest extent: "It was the first and perhaps only trial to prosecute a group of men whose sole job it was to execute Nazi genocidal policy against the Jews: what today we refer to as the Holocaust. Although all the Nuremberg trials had an element of this in it…the *Einsatzgruppen* trial was exclusively about the murder of [Poland and] Russia's civilian

[138] Earl, *The Nuremberg SS-Einsatzgruppen Trial*, 297-298.
[139] *Ibid*., 18.
[140] See, for example: Browning, *Ordinary Men*, xvi; Earl, *The Nuremberg SS-Einsatzgruppen Trial*, xiii.

(mainly Jewish) population…"[141] In that sense, the *Einsatzgruppen* trial prosecuted genocide before the establishment of the Genocide Convention. It identified genocide as a crime against humanity. It called attention to the aspect of Jewish victimhood years before Nazi atrocities became known as the Holocaust. Looking ahead, the *Einsatzgruppen* trial set the stage for the formal prosecution of genocide in international criminal courts and was an early example of the complexities the legal system faces in adjudicating Lemkin's law.

[141] Earl, *The Nuremberg SS-Einsatzgruppen Trial*, 17.

Chapter IV: *Hope for the Future: The Genocide Convention and the Universal Declaration of Human Rights*

"*We would say to him: Lemkin, what good will it do to write mass murder down as a crime; will a piece of paper stop a new Hitler or Stalin?*

Then…his face stiffened.

'Only man has law. Law must be built, do you understand me? You must build the law!'"[142]

The trials conducted at Nuremberg alerted the international community to atrocities committed by the Nazis that not only violated the laws of war, but also defied the rules of mankind. The new terms employed at Nuremberg to articulate and prosecute atrocities against civilians, crimes against humanity and genocide, led to a rethinking of the future role of international law. Previously serving as a set of guiding principles for the conduct of war, the post-WWII order additionally called upon international law to promote and protect fundamental human rights. In this chapter I will evaluate the aftermath of the Nuremberg trials and consider the influence of Raphael Lemkin and Hersch Lauterpacht's legal innovations on international human rights law.

While we know that genocide was not employed in any official capacity at the International Military Tribunal or the subsequent proceedings, it does not mean that the idea of outlawing genocide was being rejected in all legal realms. In 1946, shortly after the founding of the United Nations, the new supranational executive heard Raphael Lemkin's argument to pass a resolution against the crime of genocide. Many diplomats had read or at least heard of his book *Axis Rule in Occupied Europe* and recognized Lemkin as the man who had already been pushing for the adoption of a law against

[142] A.M. Rosenthal, "On My Mind: A Man Called Lemkin," *The New York Times,* October 18, 1988.

genocide for a number of years. In early debates between U.N. delegates regarding the passage of a resolution against genocide, the British representative "pointed out…the League of Nation's failure to accept Lemkin's Madrid proposal" in which he advocated for the adoption of *barbarity* and *vandalism* as crimes under international law.[143] It was now up to the United Nations to codify and enforce Lemkin's ideas. According to Samantha Power, in the immediate aftermath of WWII, "The United Nations was new; it was newsworthy; and if you wanted something done, it was the place to bring your proposal."[144] That year, the U.N. General Assembly adopted Resolution 96, which represented the first piece of international legislation to recognize genocide as a crime.[145] As of December 1946, the U.N. defined genocide as "the denial of the right of existence of entire groups," a crime that "shocks the conscience of mankind" and acts "contrary to moral law and to the spirit and aims of the United Nations."[146] The U.N. kept Lemkin's term despite various proposals to rename the crime "extermination." Ultimately, "the term genocide was preferred to extermination in order to ensure that national destruction was not limited to mass killing."[147] This guaranteed that genocide could also refer to the destruction of culture and the considerable weakening of a population. In other words, Resolution 96 confirmed that there were other ways to commit genocide than mass murder. But the U.N.'s adoption of Resolution 96 still did not outlaw genocide: a resolution does not have the same effect as a law. Although the United Nations recognized Lemkin's term as a crime, it could not yet enforce policy against genocide and the resolution did not permit for the prosecution of genocide under international law.

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[143] Power, *A Problem From Hell*, 52.
[144] *Ibid*.
[145] Sands, *East West Street*, 361.
[146] Power, *A Problem From Hell,* 52.
[147] Moses, "The Holocaust and Genocide," 541.

Theoretically, if it had, Control Law Council No. 10 still required defendants in the subsequent Nuremberg proceedings to be charged with the preexisting list of crimes utilized at the IMT. As of 1946, genocide was available neither to Nuremberg prosecutors nor to other forces in international law as a tangible crime up for prosecution because the U.N.'s resolution was not legally binding. No legal architecture existed to enforce the prevention of genocide. Lemkin would have to do more to see a legal policy against genocide implemented under international law. For the next two years, he worked alongside a U.N. committee tasked with creating a treaty to officially outlaw genocide.[148]

Hersch Lauterpacht did not encounter the same uphill battle as Lemkin in getting his term recognized by the U.N. Following the conclusion of the IMT, the International Law Commission of the United Nations codified the legal principles and concepts recognized in the Nuremberg Charter and judgments under what would now be known as the Nuremberg Principles.[149] In Article 6 of the U.N. Nuremberg Principles, crimes against humanity appeared alongside crimes against peace and war crimes as an offense "herein punishable…under international law."[150] Thus, Lauterpacht's "insider status" at Nuremberg paved the way for the codification and prosecution of crimes against humanity at the IMT and the subsequent proceedings, which consequently earned the term's immediate recognition under international law by the U.N.

After the United Nations General Assembly passed Resolution 96, which recognized and condemned the crime of genocide, Lemkin began working on compiling a history of genocide in order to substantiate his argument to categorize it as an

[148] Power, *A Problem From Hell*, 54.
[149] Moses, "The Holocaust and Genocide," 541.
[150] United Nations, "Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal," in *Yearbook of the International Law Commission* 2 [1950]: 189. Part III.

international law.[151] He worked on drafting his own version of a convention against genocide and presented it to various governments around the world to advocate for its adoption by the U.N.[152] During this time, Lemkin was relentless in his pursuit of support for a Genocide Convention but, despite his many years of experience with lobbying, he still lacked the professional conduct that was expected from him as a distinguished legal scholar. Lemkin grew "increasingly paranoid in his single-minded devotion to outlaw genocide, seeing enemies of the Genocide Convention around every corner."[153] He "walked the corridors of the U.N. He stopped journalists, took junior delegates by the arm and hung on until they listened, at least a moment."[154] While those at the U.N. did not enjoy Lemkin's presence, they didn't disagree with his points. The post-WWII Western world shared in a like-mindedness to uphold human rights, and Lemkin had achieved high regard as a humanitarian thinker despite his irritating temperament.

The U.N. officially adopted the Convention on the Prevention and Punishment of the Crime of Genocide on December 9, 1948. The Convention represented "the United Nations' first concrete legal response to the Holocaust."[155] Article II of the Convention provides the U.N.'s official definition of genocide:

> *In the present convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
> *A) Killing members of the group;*
> *B) Causing serious bodily or mental harm to members of the group;*
> *C) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *D) Imposing measures intended to prevent births within the group;*

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[151] See, for example: Research Index Cards, Greek-Turkish Relations (Undated), Raphael Lemkin Collection, Box 9, Folder 5, American Jewish Historical Society Archives, New York, NY.
[152] Sands, *East West Street*, 361.
[153] Douglas Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide,* 8.
[154] Rosenthal, "A Man Called Lemkin."
[155] Ratner, Ramcharan, Akhavan, and Ridgway, "The Genocide Convention after Fifty Years," 1.

E) Forcibly transferring children of the group to another group.[156]

Focusing on Lemkin's element of physical genocide, the U.N. Convention defined genocide as the deliberate attempt to exterminate a group. Like Lemkin's definition of genocide in *Axis Rule in Occupied Europe*, the Convention acknowledged that aiming at the complete destruction of a group is not necessary to constitute genocide, but still requires the aspect of intent. The passing of the Convention was a political process, however, and concessions had to be made in order to gain support for its passage. For example, delegates from Western states rejected the idea of a "cultural genocide," which they claimed didn't amount to the severity of physical genocide. During revisions of the Convention draft, the clause on cultural genocide was thus removed when delegates agreed that protection against cultural destruction would fit better in the Universal Declaration of Human Rights that was being developed simultaneously.[157] Additionally, genocide against political groups was dismissed from the Convention to get the support of the Soviets, who were preoccupied with waging an internal war against opponents of communism.[158] Following the articles that defined the parameters of genocide, the Convention also laid out provisions for preventing and prosecuting the new crime. The idea of pledging to prevent genocide represents "a normative legal basis for the behavior of states toward their own people," which elevates the protection of human rights above

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[156] UN General Assembly, "Convention on the Prevention and Punishment of the Crime of Genocide," 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, accessed September 22, 2018.
[157] Johannes Morsink, "Cultural Genocide, the Universal Declaration, and Minority Rights," *Human Rights Quarterly* 21, no. 4 (1999): 1009-060. 1028-1029. The countries that rejected the idea of including cultural genocide as part of the Convention, in favor of mentioning it instead in the Human Rights Declaration, are listed as follows: Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominican Republic, France, Greece, India, Liberia, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Peru, Siam, South Africa, Sweden, Turkey, the UK, the USA.
[158] Michael Ignatieff, "The Genocide Convention – A Crime against Humanity," *RSA Journal* 148, no. 5492 (2000): 60-65. 63.

the principle of sovereignty.[159] However, Samantha Power argues, "the convention's enforcement mechanisms were more explicit about punishment than prevention."[160] That is, the Genocide Convention presented more guidelines for how to prosecute perpetrators of genocide after it had already occurred, but did not necessarily secure adherence to the law inhibiting genocide in the first place. Nevertheless, the punishment clauses in the Convention demonstrate the international commitment posed by the document to hold individual state actors accountable for perpetrating the crime.

Over the course of the next two years, countries were invited to become signatories to the Genocide Convention. By the time the Convention entered into force on January 12, 1951, 39 countries had signed but only thirteen accepted ratification before objecting to one or more of its clauses.[161] The United States joined as a signatory as of December 11, 1948, but due to reservations about how the power of the Convention could potentially infringe upon its national sovereignty, it did not fully ratify the convention until 1986.[162] The timing of individual countries to ratify the Genocide Convention is significant in a general sense as well as in the case of the United States specifically. Generally, the slow process for ratification of the Genocide Convention is a reminder of the difficulties faced by international law to convince sovereign nations to adhere to its supranational principles. Chapter 1 has demonstrated that international law before World War II was considerably weakened by the unwillingness of nation states to accept its jurisdiction. Although the Convention entered into force less than a decade

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[159] Anson Rabinbach, "The Challenge of the Unprecedented: Raphael Lemkin and the Concept of Genocide," *Simon Dubnow Institute Yearbook* 4 (2005): 397-420. 401.
[160] Power, *A Problem From Hell,* 58.
[161] United Nations Treaty Collection, *Convention on the Prevention and Punishment of the Crime of Genocide* (Status as of 9/22/2018), accessed September 22, 2018.
[162] Nigel S. Rodley, review of *The United States and the Genocide Convention,* by Lawrence J. LeBlanc, *The International and Comparative Law Quarterly* 41, no. 4 (1992): 952-53. 952.

after the worst humanitarian crisis of the modern era, many states still failed to cooperate with a treaty that sought to expand the influence of international criminal law beyond post-WWII war crimes trials.[163] After the United States' collaborative role in the International Military Tribunal and demonstrated world leadership in conducting the subsequent proceedings, the country declined to accept the authority of the Genocide Convention over its own national sovereignty. If the United States aimed to set an international example with its role at Nuremberg, the country certainly undermined its own previous efforts upon its failure to immediately ratify the Genocide Convention. The most recent state to ratify the treaty was the African country Benin, which did so as of November 2, 2017.[164] The international community's slow response to committing to the principles of the Genocide Convention demonstrates an unfortunate, yet significant continuity in the history of international humanitarian law from the 1899 Hague Convention to the present day.

Another weakness demonstrated by the Genocide Convention upon its entry into force in 1951 was the absence of an international court designed to prosecute genocide. While a major principle of the Convention was the vow to prosecute genocidal perpetrators, there was hardly any legal establishment in place to do so. An international court was not an immediate objective for Lemkin or the United Nations. "Although Lemkin was determined to see genocidal perpetrators prosecuted, he did not believe the genocide convention should itself create a permanent international criminal court. The world was 'not ready,' he said, as the court would mark too great an affront to state

[163] Ratner, "The Genocide Convention after Fifty Years," 1.
[164] United Nations Treaty Collection, *Convention on the Prevention and Punishment of the Crime of Genocide* (Status as of 9/22/2018).

sovereignty."[165] While realistic at the time, Lemkin's attitude, which was shared by member countries of the United Nations, greatly impeded the judicial process to prosecute atrocities. In the words of Benjamin Ferencz, "Abhorrent acts were condemned as international crimes but no international court was created to try the criminals. World leaders were unwilling to accept the rule of law as laid down at Nuremberg."[166] Instead, each country was able to decide for itself whether or not to prosecute genocide, a crime "that could hardly be committed without the complicity of the state."[167] The expectation for countries to try their own state actors for perpetrating genocide was highly unrealistic. International human rights legal scholar William Schabas has asserted that "state involvement, in the form of some plan or policy, is virtually inseparable from the crime of genocide…States were not going to punish themselves, or rather their own high functionaries, for crimes that were in fact official policy in one form or another."[168] We can recall the failure of the post-WWI Leipzig trials, in which the German government was allowed to prosecute its own war criminals and punished them far less severely than an Allied tribunal likely would have. Similarly, the United Nations could not expect the principles of the Genocide Convention to be upheld if countries were expected to prosecute their own citizens.

Lemkin devoted his life to the singular cause of engraining genocide into international law, and his legacy lies in the Genocide Convention. Lauterpacht, on the other hand, had a more "diffuse and all-encompassing" legal career in the field of human

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[165] Power, *A Problem From Hell*, 56.
[166] Speech File, 1981-1991: Lecture; Genocide: Rutgers, Apr 1986, Benjamin B. Ferencz Collection, Box 159, Folder 5, United States Holocaust Memorial Museum Archives, Washington, D.C.
[167] *Ibid*.
[168] William A. Schabas, "Prosecuting Genocide," in Stone, *The Historiography of Genocide*, 12.

rights.[169] That is, Lauterpacht had a more traditional academic career, which allowed him to influence legal thinking more than Lemkin through teaching, congresses and publications. Lauterpacht's book titled *An International Bill of the Rights of Man*, published in 1945, insisted upon the necessity of the rights of the individual to serve as a basis of international law.[170] The work inspired the Universal Declaration of Human Rights, which was adopted by the United Nations in 1948. While the Declaration of Human Rights was not legally binding, it did lead to the establishment of the European Convention on Human Rights in 1950 and the European Court of Human Rights in 1959. The latter represented the "first international human rights court to which individuals would have access."[171] The influence of Lauterpacht's ideas on various human rights doctrines indeed reflects the triumph of individual rights in international law. However, Philippe Sands argues that between Lemkin and Lauterpacht, Lemkin was more victorious in the propagation of his ideas because "no treaty on crimes against humanity has yet been adopted to parallel Lemkin's Genocide Convention."[172] Lauterpacht was originally more successful by having the concept of crimes against humanity utilized as a charge at Nuremberg, but Sands contends that Lemkin achieved more in the long run because the U.N. established an entire treaty to protect against genocide.

Additionally, time has shown that Lauterpacht was correct in being concerned that genocide would overshadow crimes against humanity as a more deplorable offense. Genocide has emerged with the reputation as "the crime of crimes." In a legal and philosophical approach to comparing genocide and crimes against humanity, Steven

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[169] Vrdoljak, "Human Rights and Genocide," 1164.
[170] P.M.B., review of *An International Bill of the Rights of Man*, by Hersch Lauterpacht, *World Affairs* 108, no. 4 (1945): 284. 284.
[171] Sands, *East West Street*, 362.
[172] *Ibid*.

Ratner argues, "the [Genocide] Convention succeeded in criminalizing a particularly evil crime against humanity, one with special intent directed at destruction of groups based on immutable traits."[173] In a court of law, it is easier to prove that state agents committed crimes against humanity than it is to prove that they perpetrated genocide, because rarely does there exist any evidence that proves a state had the *intent* to destroy a group of people. "Victims of all massacres feel cheated when a court or commission finds that their perpetrators have only committed a crime against humanity and not genocide. Eventually the popular will…ha[s] to be accommodated and some term found that will satisfy the understandable yearning for the ultimate condemnation of mass killings."[174] Recently, that "intermediate" crime has taken on the phrase "ethnic cleansing" when it has not been proven that genocide, i.e. intent to *destroy* the ethnic population has occurred, but it is clear that state agents have forcibly displaced that population outside of national boundaries.[175] Recent refugee crises have yielded accusations of ethic cleansing and subsequent inquiries into whether the state authorities responsible committed genocide. However, no "specific legal instrument" aimed at ethnic cleansing exists at this time: the term is merely used as a label in the way that genocide was employed at Nuremberg.[176] Public opinion has therefore determined genocide, a subset of crimes against humanity, to be a worse crime under international law than others in the same category, causing the emergence of an "informal hierarchy" of atrocity.[177]

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[173] Ratner, "Can We Compare Evils?" 584.
[174] Wald, "Genocide and Crimes Against Humanity," 633.
[175] Jennifer Jackson Preece, "Ethnic Cleansing as an Instrument of Nation-State Creation: Changing State Practices and Evolving Legal Norms," *Human Rights Quarterly* 20, no. 4 (1998): 817-42. 818.
[176] *Ibid.,* 841.
[177] Sands, *East West Street,* 364.

It should be recognized that Lauterpacht and Lemkin's ideas contributed to a new era of international law. Prior to Nuremberg, international law was imposed to govern the conduct of war and to protect combatants, with its primary subject being sovereign states. The concepts of crimes against humanity and genocide secured representation for civilians under international law and maintained that citizens possessed rights separate from those of the state. The legislation that outlawed crimes against humanity and genocide under the United Nations defended that individual state actors could be tried as perpetrators of those crimes regardless of whether they were operating under the notion of superior orders or not. Those guilty of crimes against humanity or genocide could be tried if they committed the atrocities during wartime or peacetime.[178] While it took a horrific event like the Holocaust to bring about these modifications in international law, the legal response to the destruction wrought by the Nazis contributed to a more informed and safeguarded world order.

Raphael Lemkin and Hersch Lauterpacht's legacies of legally defending the rights of civilians persisted long after the Nuremberg war crimes trials. In devising the term crimes against humanity to protect individuals from mass atrocity, Hersch Lauterpacht inspired the Universal Declaration of Human Rights, the European Convention on Human Rights and the European Court of Human Rights, while Raphael Lemkin's legacy is most apparent in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Despite the difficulties faced by today's legal institutions to enforce the laws on genocide and crimes against humanity, the enduring relevance of the terms

[178] Power, *A Problem From Hell,* 58.

coined by Lemkin and Lauterpacht support the assertion that Nuremberg set a precedent in defending civilian human rights under international law.

Conclusion: *The Nuremberg Promise?*

The U.N.'s codification of the ideas of Lemkin and Lauterpacht under international treaties represents an optimistic moment for the protection of human rights in the post-WWII period. While the legal breakthroughs at Nuremberg certainly brought about a new era in the field of international criminal law, the weaknesses that plagued early treaties such as the Hague Convention remain prevalent in the new international legal order. The principle of state sovereignty continues to impede prosecutions against perpetrators of mass atrocity. Despite the legal breakthroughs of Nuremberg, it would take another fifty years to form an international court of justice. The International Criminal Court (ICC) was founded in 1998 as the permanent legal institution designed to prosecute the gravest international crimes such as genocide, crimes against humanity, and war crimes. However, individual countries still decline to accept the court's jurisdiction and the ICC can only legally bind those that are signatories.[179] For example, as of 2018, the United States still abstains from involvement in the ICC.[180] The U.S. is not a member of the international court out of fear that "American forces committed to peacekeeping or other overseas missions could be targeted for inappropriate indictments and unfair trials."[181] Just a few months ago, in September 2018, President Donald Trump "threatened tough action" against the ICC should it try to indict Americans for committing war crimes in Afghanistan.[182] President Trump's outspoken criticism of the International Criminal Court demonstrates the power of national unilateralism over the

[179] David H. Jones, "Human Rights Law," in *The Oxford Handbook of Holocaust Studies*, ed. Peter Hayes and Jonathan K. Roth [Oxford: Oxford University Press, 2010], 1-14. Accessed using *Oxford Handbooks Online*.
[180] Jonathan K. Roth, "Prosecution, Condemnation, and Punishment: Ethical Implications of Atrocities on Trial," in Matthäus, *Atrocities on Trial*, 286.
[181] *Ibid*., 287.
[182] Steve Holland, "Trump administration takes aim at International Criminal Court, PLO," *Reuters News,* September 9, 2018.

international legal system. Furthermore, human rights historian Dan Plesch sees the ICC as a "last resort" court that only interferes in judicial affairs "if nations are unwilling or unable to bring their own nationals to trial," and has therefore had limited opportunities to exercise its authority since its founding in 1998.[183] Plesch has noted that military tribunals conducted a total of 1,993 trials to address the crimes committed in connection with WWII, yet the ICC has held only eleven.[184] Philippe Sands, on the other hand, argues that the ICC was nonetheless a step forward. It is true that the ICC has produced convictions against authorities, including heads of state, for committing genocide and crimes against humanity.[185] However, it is indisputable that while there is now a formal and permanent institution in place to prosecute the crimes devised by Lemkin and Lauterpacht, the International Criminal Court remains underutilized, even belittled by individual nations. It is therefore up for debate whether the ICC has the potential to be a powerful governing force over the international community, or simply a theoretical symbol of justice in a world order that favors national sovereignty over the exercise of international law.

The weaknesses of the ICC represent a microcosm of the unfulfilled "Nuremberg Promise." Following World War II and the courtroom proceedings at Nuremberg, the international community pledged to penalize perpetrators of atrocity and human rights violations. According to human rights professor James Loeffler, Nazi crimes shaped a new governing attitude: "The ultimate wartime atrocity yielded a postwar bounty of

[183] Dan Plesch, *Human Rights After Hitler: The Lost History of Prosecuting Axis War Crimes* [Washington, D.C.: Georgetown University Press, 2017], 53.
[184] *Ibid*., 49 (Figure 2.1).
[185] Sands, *East West Street*, 363.

human freedom."[186] The world committed to the idea that the legal concepts established at Nuremberg "would frame the duties of all governments."[187] Although this was an idealist outlook with aspirational goals, the institutions put in place following the conclusion of the Nuremberg trials, such as the Genocide Convention and the Universal Declaration of Human Rights, seemed to confirm that the world was preparing to adhere to new humanitarian principles. The problem, which ethics professor David H. Jones argues has existed from the initial establishment of these institutions until the present day, has to do with the enforcement of international criminal laws. Jones contends that there is a "lack of effective human rights law enforcement and crime prevention," making Nuremberg "look more and more like an historical aberration…not likely to be repeated."[188] Therefore, the Nuremberg Promise, upheld through international legislation and judicial establishments, requires an executive power to make sure its principles are enforced. It is not enough that semi-functional legal institutions are in place to consider prosecuting violators of human rights after they commit their crimes.

This thesis has illustrated the progression of international criminal law, which advanced considerably in the context of the Nuremberg trials after the Second World War. Modern international laws were created in the late nineteenth century in response to the development of new weapons technology in an increasingly industrialized world. Yet before WWII, the laws regarding the conduct of war had no enforcement mechanisms and were rejected if they threatened to infringe upon individual national sovereignty. Additionally, there were no laws in place to protect civilians from the policies of their

[186] James Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* [New Haven: Yale University Press, 2018], v.
[187] Richard Falk, "A Barbaric View," *Foreign Affairs* 78, no. 3 (1999): 159-60. 159.
[188] Jones, "Human Rights Law," 5-6.

country: state sovereignty allowed nations to treat their own citizens by whatever means their government wished. That is why the developments of crimes against humanity and genocide are so crucial to our understanding of international law in the post-WWII world order. Raphael Lemkin and Hersch Lauterpacht's charges not only revolutionized international criminal law and expanded it to defend civilians, but also drew increased attention to the protection of human rights worldwide.

The *Einsatzgruppen* trial at Nuremberg should be seen as the first legal event in which prosecutors confronted acts associated with the crime of genocide. In addressing the Nazis who supervised mass murders across Poland and the Soviet Union during World War II, American lawyers came face to face with those who sought to clear German-occupied countries of all Jews. The high-ranking *Einsatzgruppen* officials on trial at SNT9 therefore committed crimes within the scope of what Raphael Lemkin deemed *genocide* – large-scale murder based on race, religion, or ethnicity that aims to destroy that cultural group in whole or in part. While Lemkin conceived of the term in 1944, genocide was not codified as an official crime prosecutable under international law until the adoption of the 1948 Convention on the Punishment and Prevention of Genocide. Lemkin had approached lawyers at Nuremberg in order to get them to utilize his term in the trials, but genocide was virtually inaccessible as an official crime while the proceedings were taking place.

Instead what transpired at the *Einsatzgruppen* trial in view of the pressures to gain convictions was a more conservative approach to prosecuting state-sponsored mass murder by employing the charge of crimes against humanity. When Hersch Lauterpacht launched the term for use in the indictment at the main International Military Tribunal,

his aim under international law was to defend civilians against perpetrators who had committed atrocities in the name of their state. A crime against humanity served as an extension of the crime of aggressive war, but referred to offenses committed against a civilian population rather than other wartime combatants. While Lauterpacht's term covered the mass atrocities committed at the hands of the Nazi regime, it did not address the intent to eliminate people based on their affiliation with racial or religious groups and thus was never in a position to capture the essence of the crime we now call the Holocaust.

At Nuremberg, crimes against humanity and genocide were still new legal concepts that needed to be absorbed and understood by the international community. The principle aim of the International Military Tribunal was to prosecute the Nazis for their waging of an illegal and aggressive war, so crimes against humanity was a more appropriate charge to levy upon the defendants who had harmed Europe's civilian populations in various ways. At the *Einsatzgruppen* trial, however, American lawyers were dealing with a more specialized type of war criminal: the officials who oversaw the mass shootings of European Jewish populations. From the evidence of *Einsatzgruppen* reports employed at SNT9, we know that these mobile killing units were responsible for roughly two million of the six million Jewish deaths that made up the Holocaust. The *Einsatzgruppen* trial, then, represents an implicit confrontation with Nazi genocidal criminality, but the courtroom proceedings took place before the adoption and ratification of the Genocide Convention. Crimes against humanity was again utilized as the principal charge at SNT9 because it was the closest category available to address the atrocities committed by the defendants against Polish and Soviet Jews.

Months after the conclusion of the *Einsatzgruppen* trial at Nuremberg, the United Nations adopted the Convention on the Prevention and Punishment of Genocide as well as the Universal Declaration on Human Rights. The Genocide Convention invited all nations to adhere to its international treaty, which demonstrated a commitment to condemning the crime of genocide and prosecuting those who perpetrated it. Lemkin's law had finally reached the level of recognition that he had always intended for it to deserve. The Universal Declaration on Human Rights advocated for the protection of the rights of all peoples, matching Lauterpacht's beliefs on the defense of civilians, regardless of their identity, under international law. Yet the declaration was "not a treaty and has no force of law."[189] It represented an international commitment to upholding human rights, but does not legally engage any countries that violate it. The Genocide Convention, while legally binding, has no force in place to prevent the crime from being committed and abides by extremely strict guidelines of how to punish those who perpetrate it, making it unlikely that it would come to bear on even the most heinous criminals. It is interesting that the concept of genocide was still shunned from the late Nuremberg trials, including the *Einsatzgruppen* trial, but was then adopted on an international level just a few months later. This is worth explaining. At Nuremberg, genocide was not employed as an official crime out of practicality: genocide could not be "stuck in" in the middle of the proceedings out of fear that such a change would undermine prosecution efforts. Additionally, the international community had not yet worked out a suitable definition for genocide. At the U.N., on the other hand, the Genocide Convention was more of a theoretical consideration, and those who formed it

[189] Jones, "Human Rights Law," 4.

knew that the Convention's policies would not be implemented any time soon. The Genocide Convention officially recognized Lemkin's term as an international crime, but did not outline the means by which it would be prevented or prosecuted.

In August 2018, the United Nations released a statement demanding for Myanmar military leaders to be indicted for atrocities committed against Rohingya Muslims, acts that exhibit the "hallmarks of genocide."[190] However, we must remember that the crime of genocide necessitates established intent to destroy an ethnic population. While the Genocide Convention is in place to combat instances such as those occurring in Myanmar, international legal authority to enforce anti-genocide laws and prosecute offenders remains limited. Journalists Jonah Blank and Shelly Culbertson view the current Rohingya crisis as a new chance to demonstrate the force of the Genocide Convention, which they claim has been undermined, especially by the United States, in previous cases of genocide such as in Bosnia and Serbia, Rwanda and Darfur.[191] The United Nations has started to assemble investigative bodies for Myanmar, but it is still unclear whether the military leaders will be held legally responsible in the following years for their atrocities committed against the Rohingya population. Based on historic precedent, the Rohingya case may prove yet again that genocide is available as an argument, but not as a criminal charge that secures convictions.

David H. Jones estimates that since the Nuremberg trials, more than 15 million civilians have been murdered by state-sponsored mass killings.[192] Nuremberg established a precedent by outlawing large-scale crimes committed by states against civilian

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[190] Camilla Siazon and Kate Cronin-Furman, "The Rohingya Crisis and the Meaning of Genocide," *Council on Foreign Relations*, May 8, 2018, accessed October 9, 2018.
[191] Jonah Blank and Shelly Culbertson, "How the U.S Can Help Resolve the Rohingya Crisis," *Foreign Affairs*, January 4, 2018, accessed October 10, 2018.
[192] Jones, "Human Rights Law," 5.

populations in defense of human rights. The proceedings also demonstrated the difficulty faced by lawyers who are tasked with prosecuting the offenders that commit such grave humanitarian violations. The *Einsatzgruppen* trial demonstrates a clash between the charges of crimes against humanity and genocide, when American lawyers were dealing with what Raphael Lemkin deemed "race murder," but only had a term depicting generalized mass murder at their disposal. Nuremberg was a unique moment in history when multiple nations exhibited a willingness to innovate and uphold international criminal law and contributed to a new world order framed in part by the "Nuremberg Promise." Whether that promise remains upheld today is a matter of debate. The human rights deficit reminds us that it is not our duty to simply preach the post-Holocaust catchphrase 'Never again,' but instead to take action to create the type of world that the phrase envisions.

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