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# Historical Origins of International Criminal Law: Volume 1

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PURL: http://www.legal-tools.org/doc/854d2f/

**E-Offprint:**

Kerstin von Lingen, "Defining Crimes Against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944–1947", in Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors), *Historical Origins of International Criminal Law: Volume 1*, FICHL Publication Series No. 20 (2014), Torkel Opsahl Academic EPublisher, Brussels, ISBN 978-82-93081-11-1. First published on 12 December 2014.

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## Defining Crimes Against Humanity: The Contribution of the United Nations War Crimes Commission to International Criminal Law, 1944–1947

**Kerstin von Lingen**[*]

### 15.1. Introduction

Until the Second World War, legal theory provided that war crime trials could involve only atrocities which had been committed in a state's own territory or against its own nationals.[1] However, many crimes perpetrated by the Axis Powers in the Second World War were of a novel nature, either attacking minorities of their own state or annexing territories without even declaring war at all. As these crimes did not fall within the hitherto accepted notion of war crimes, the call for a new definition of war crimes was already being discussed during wartime, and the need to form an internationally accepted standard in dealing with mass atrocities was advocated. One result of the political impact of these debates was the foundation of the United Nations War Crimes Commission ('UNWCC') in 1943, which assumed its duties in early 1944.[2] It formed an

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[1] Arieh J. Kochavi, "Britain and the Establishment of the United Nations War Crimes Commission", in *English Historical Review*, 1992, vol. 107, no. 423, p. 325.

[2] For an overview of the UNWCC, see Dan Plesch, *America, Hitler and the UN: How the Allies Won World War II and Forged a Peace*, I.B. Tauris, London, 2011; and Dan Plesch and Shanti Sattler, "A New Paradigm of Customary International Criminal Law: The UN



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internationally accepted advisory body and was concerned with formulating a minimum standard in dealing with mass atrocities while the war still raged. It brought together legal scholars from different countries, among them most prominently from the European exile governments, and furthered discussions about justice for war crimes.

When assessing the concepts that emerged from these debates, the notion of 'crimes against humanity' – as laid down within the London Charter for the International Military Tribunal at Nuremberg in 1945 – is one of the results of debates within the UNWCC and its predecessors that still has significance today.[3] The concept of crimes against humanity confirmed that "citizens are under protection of international law even when they are victimized by their own compatriots".[4] As a legal tool, it is among the most known and has acquired "enormous resonance in the legal and moral imaginations of the post-World War II world".[5]

It is less known that the term 'crimes against humanity' was not an invention of the tribunal at Nuremberg,[6] but it was likely to have been already defined in various legal commissions during the war years in Britain. This chapter argues how the UNWCC's Legal Committee, based in London and chaired by the Czech representative Bohuslav Ečer (1893–1954) and with Egon Schwelb (1899–1979) as its influential secretary, played a key role in codifying this concept and thus broadened international criminal law in general. The first appearance of the term in the Charter for the Nuremberg Tribunal ('Nuremberg Charter'), set up during the London Conference in the summer of 1945, seemed to follow in large part the recommendations of the legal circles around the UNWCC, although it is not completely possible to prove the link between Justice Robert Jackson advocating the term during the conference,[7] and the

War Crimes Commission of 1943–1948 and Its Associated Courts and Tribunals", in *Criminal Law Forum*, 2014, vol. 25, nos. 1–2, pp. 17–43.

3 For an overview on the history of the term, see Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, Allen Lane, New York, 1999.

4 Beth Van Schaack, "The Definition of Crimes Against Humanity: Resolving the Incoherence", in *Columbia Journal of Transnational Law*, 1998/99, vol. 37, p. 791.

5 David Luban, "A Theory of Crimes Against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 85, p. 86.

6 *Ibid.*, p. 86, where Luban points out that "no record exists of how the term crimes against humanity came to be chosen by the framers of the Nuremberg Charter", see *supra* note 5.

7 Robert Jackson, in his report to the government as well as in the conference session of 2 August 1945, is cited: "I may say that the term was suggested to me by an eminent scholar



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earlier works of both the London International Assembly ('LIA') and the UNWCC, as no written record exists. It is very feasible that Hersch Lauterpacht could be the missing link,[8] as he convened with Jackson before the London Conference and proposed the term.[9] However, this chapter argues that by suggesting the term to a powerful conference member, to whom the lawyers from smaller European exile communities had no access, Lauterpacht might have summed up the ongoing debates he had had with his colleagues in various legal circles over the previous three years, where he was a member together with Ečer and Schwelb. This argument is further bolstered by the fact that Lauterpacht, in his earlier memorandum on the "Punishment of War Crimes" given to the LIA in 1942, had not mentioned the term 'crimes against humanity' at all.[10]

The time was ripe to finally codify the concept, which had been debated for many years already, "because it was feared that under the traditional formulation of war crimes, many of the acts of the Nazis would go unpunished".[11] It attempted to address such diverse crimes as the persecution of political opponents, including Communists and Social Democrats within Germany, the persecution of German Jews, and the crimes committed against occupied civilians like the Czechs during the so-called Sudetenland crisis in 1938. Further, the concept was equally

of international law", in Robert H. Jackson, *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials*, London, 1945, part LIX, Minutes of Conference Session of 2 August 1945, p. 416.

8 Maarti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2001, draws on Lauterpacht's decisive role within the British prosecution, for which he drafted the opening and closing speeches. See the chapter "Lauterpacht: The Victorian tradition in international law", pp. 388–89.

9 William Schabas strongly underlines the fact that an eminent academic, whom he identifies as Lauterpacht, had suggested the term to Jackson. See William Schabas, *Unimaginable Atrocities: Justice, Politics and Rights at the War Crimes Tribunals*, Oxford University Press, Oxford, 2012, p. 51; this claim is underscored by Elihu Lauterpacht, *The Life of Hersch Lauterpacht*, Cambridge University Press, Cambridge, 2010, p. 272.

10 National Archives UK, LCO 2/ 2973, Papers of the Cambridge Commission, Committee of Crimes against International Public Order, Memorandum of H. Lauterpacht on 'Punishment of War Crimes', 52 pages, n.d. but probably July 1942.

11 Van Schaack, 1998/99, p. 789, see *supra* note 4. M. Cherif Bassiouni also observes that the term 'crimes against humanity' was the "product of exigent historical circumstances"; see M. Cherif Bassiouni, "'Crimes Against Humanity': The Need for a Specialized Convention", in *Columbia Journal of Transnational Law*, 1994, vol. 31, no. 3, p. 472.



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applicable for crimes committed against Chinese nationals by Japanese troops in Manchuria in 1932. All these were crimes committed by a state against its own citizens, on its own territory, prior to an official state of war. In short, statutory definitions of crimes against humanity underline "that they criminalize atrocities and severe persecutions inflicted on civilian populations as part of an organized plan by a state or a state-like organization".[12] While the war still raged, the Allies, after the discovery of countless atrocities by the Axis Powers, found themselves under tremendous public pressure to speedily hold those responsible for the atrocities to account. Thus they desired a joint international tribunal to set a new legal precedent, in order to constitute a "building block for the evolution and development of international criminal law".[13] To cite William Schabas, what was new in Nuremberg was "a genuine and determined attempt to hold individuals criminally accountable for such behaviour", meaning, "atrocities [which] went beyond the sovereign authority of states", even "if it had not previously been codified in a formal sense".[14]

However, during the trials of the Nuremberg era, the concept of crimes against humanity did not manifest itself in the full meaning as it has today. Rather, it became bound to the conventional concept of war crimes at the time. The term appeared first in UNWCC meetings in 1944 and was coined to address criminal responsibility of the Nazi leaders for internal atrocities, mainly against German Jews, but – for the sake of legal expediency and in order to avoid criticism of retroactive law – it had then been associated with one of the other two criminal concepts, as war crimes and crimes against peace.[15] This formed a nexus between crimes against humanity and international armed conflict, which was initially not intended, but seen during the Nuremberg era as the only way to make it judiciable and to incorporate it into national jurisdictions. As Schabas observes, this "restrictive terminology requiring a nexus with armed conflict continues to haunt the international prosecution of human rights atrocities, many of which are actually committed during peacetime".[16]

[12] Luban, 2004, p. 91, see *supra* note 5.

[13] Bassiouni, 1994, p. 472, see *supra* note 11.

[14] Schabas, 2012, p. 53, see *supra* note 9.

[15] William Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 2011, p. 42.

[16] *Ibid.*



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The Charter, which set the frame for the International Military Tribunal ('IMT') at Nuremberg, was set up at a conference in London during the summer of 1945. It gave a first definition of the term in Article 6(c), stating that crimes against humanity should address prohibited acts committed against a civilian population.[17] It responded thus to the "horrific novelty of the twentieth century: politically organized persecution and slaughter of people under one's own political control".[18] Thus, for the first time protection by means of international criminal law was extended to civilians of the same state as the perpetrators, pushing aside the dictates of national law shielding perpetrators from accounting for their individual criminal responsibility.[19] At the International Military Tribunals at Nuremberg and Tokyo,[20] as well as in the following war crimes trials, crimes against humanity were a highly contested concept. This mirrored the earlier scepticism of the UNWCC lawyers who feared not only the criticism of retroactive law but also the problem of sovereignty, which was touched on by enabling the prosecution of crimes against any population, including a non-national population. But together with the other term coined at the London Conference in 1945, 'crimes against peace', crimes against humanity also reflected an emerging rule of customary international law.[21]

Today, crimes against humanity has found its place in international criminal law, namely in the Statute of the International Criminal Court ('ICC'), and developed into "a precise, if not entirely unequivocal legal term in national and international penal law".[22] The main features of crimes against humanity, as laid down in the ICC Statute in Article 7, are still the same as discussed in the UNWCC: these crimes are punishable, no matter whether they occurred in war or in peace, and a country is entitled to prosecute these crimes if members of its own national as well as "any civilian population" are concerned. In short, the concept goes beyond national jurisdiction and enables prosecution of atrocities which

[17] Van Schaack, 1998/99, p. 789, see *supra* note 4.

[18] Luban, 2004, p. 94, see *supra* note 5.

[19] Bassiouni, 1994, p. 465, see *supra* note 11.

[20] In the Charter for the Tokyo trial, it is Article 5(c), see Bassiouni, 1994, p. 459, *supra* note 11.

[21] Bassiouni, 1994, p. 461, see *supra* note 11.

[22] Michael Geyer, "Crimes Against Humanity", in Gordon Martel (ed.), *The Encyclopedia of War*, Wiley Online Library, Blackwell, 2012.



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may have occurred (or started) before an official outbreak of war. The concept of crimes against humanity thus represents an important legal tool in the Nuremberg era, especially with regard to Holocaust-related crimes in Europe. It is an important landmark and a changing point in legal thinking.

The debate about the concept of crimes against humanity is most interesting, as demonstrated in the discussion here. It reflects the development of international criminal law during the war years and the significant contribution European exiled lawyers made to it. By analysing the memoranda and meeting transcripts of the UNWCC and its predecessors, it becomes clear, even at first glance, that the term stood at the centre of the UNWCC debates: the term 'crimes against humanity' turned up in the headlines in 29 meetings, and the notions of the two concepts together – crimes against humanity and crimes against peace – were discussed in 72 meetings. It is therefore crucial to take a closer look at these debates in order to understand the provenance of the term.

## 15.2. Predecessors of a Concept: The Idea of Civilised Warfare

The idea of civilised warfare started as a kind of by-product to the foundation of the International Red Cross in 1863. Its core aim was to relieve wounded or imprisoned soldiers as well as civilians from the horrors of war. Important in this regard were the two Peace Conferences at The Hague (1899 and 1907), where a Convention on the Laws and Customs of Warfare was agreed. To fill the gap with regard to the legality of certain acts or actors of violence, which had not yet been codified,[23] Fyodor F. Martens (Friedrich von Martens), the foremost Russian international lawyer of the Tsarist period, suggested the following preamble (which later became known as the Martens Clause):

> 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

[23] *Ibid*.



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> the laws of humanity, and the requirements of the public conscience.[24]

This was the first attempt to codify the notion "that international law encompassed transcendental humanitarian principles that existed beyond conventional law".[25] However, there had been ongoing debates since the mid-nineteenth century[26] to enforce what we would today term human rights standards, with Britain holding an influential position due of its consideration of imperial responsibility.[27]

The Hague Convention did not aim at giving a complete code of the rules of warfare, as it left this preamble open to amendments.[28] Sheldon Glueck interpreted the Martens Clause as "a precautionary statement".[29] It was thus debatable in legal circles whether the preamble itself constituted a law.[30] It was after all purposely placed "within a document which dealt with war crimes in the narrowest and technical sense", which no doubt gives the preamble authority as a legal guideline.[31] Although the clause had been intended as a diplomatic solution to the 'deadlock' of the Hague Peace Conferences − until a more complete set of laws of armed conflict could be decided upon − in order to affirm "that the community of nations was not to assume that the law was silent on matters that were not

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[24] Rupert Ticehurst, "The Martens Clause and the Laws of Armed Conflict", in *International Review of the Red Cross*, 1997, vol. 37, no. 317, p. 125.

[25] Van Schaack, 1998/99, p. 796, see *supra* note 4.

[26] Schabas, 2012, p. 52, see *supra* note 9; Robertson, 1999, pp. 17–22, see *supra* note 3.

[27] Michelle Tusan, "'Crimes Against Humanity': Human Rights, the British Empire, and the Origins of the Response to the Armenian Genocide", in *American Historical Review*, 2014, vol. 119, no. 1, p. 47.

[28] Bohuslav Ečer, "Scope of the Retributive Action of the United Nations According to Their Official Declaration: The Problem of 'War Crimes' in Connection with the Second World War", UNWCC III/4(a), 27 April 1944, at p. 3 (https://www.legal-tools.org/doc/6335bd/). Ečer underlined that "[i]t would mean that acts which are not expressively forbidden by the Hague Regulations are legitimate".

[29] *Ibid*. Reference is made to a report by Sheldon Glueck of Harvard to the LIA meetings, December 1943, p. 7.

[30] *Ibid*. Ečer emphasised that "Lord Cave in his article 'War Crimes and their punishment' designated the laws of humanity and the requirements of the public conscience of the Preamble as *lex non scripta*, i.e. as law, and says expressly that this law is to be extracted", and concluded that the preamble was a part of international law.

[31] Schwelb in his report "Material for the Preparation of a Definition of 'Crimes against Humanity'", compiled by Egon Schwelb, III/33, 1946, at p. 1 (https://www.legal-tools.org/doc/c52df5/).



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codified in treaty form", it was elevated to the rank of a legal notion by repetition: in the Hague Convention of 1907, the Geneva Convention of 1929 on the Sick and Wounded,[32] as well as the Geneva Conventions of 1949.[33] The Martens Clause reflects nineteenth-century humanitarian thinking and the interest in crimes of general international concern, such as piracy and slave trade. As Geyer notes, the concept is a "longstanding feature of the western legal tradition", and he concludes that "[t]he notion of a set of crimes against all has prevailed, even as the idea of a 'standard of civilization' has receded".[34] Bassiouni, in the wake of the Yugoslav wars, emphasises that the idea of humanity not only emerged out of the history of the long and bloody twentieth century, but had for centuries been shared "within laws and writings throughout Western, Judeo-Christian, Islamic and other civilizations", which expressed the values and beliefs "that life, liberty, physical integrity and personal dignity are the fundamental rights of humanity".[35] However, the central point was the translation of nineteenth-century humanitarianism − often rooted in "strident evangelicalism and moralizing liberalism" − into "twentieth-century modes of representation".[36]

Tusan makes the point that Britain's perceived double role as a "defender of oppressed Christian peoples" on the one hand and a "tolerant global empire made up of many faiths" on the other had come under pressure during the First World War, and thus "influenced thinking about an international justice at the moment when the world's attention first turned to the Armenian massacres".[37] The first diplomatic document to use the term 'crimes of humanity' was a joint Allied declaration of May 1915, which accused the Ottoman Empire "of crimes against humanity and civilization" with regard to atrocities against the Armenians.[38] There

32 Bassiouni, 1994, p. 461, see *supra* note 11.

33 Emily Crawford, "The Modern Relevance of the Martens Clause", in *ISIL Yearbook of International Humanitarian and Refugee Law*, vol. 6, Sydney Law School Research Paper No. 11/27, 2006, pp. 1–18. See also Fabian Klose, "The Colonial Testing Ground: The International Committee of the Red Cross and the Violent End of Empire", in *Humanity*, 2011, vol. 2, no. 1, p. 108.

34 Van Schaack, 1998/99, p. 796, see *supra* note 4; Geyer, 2012, see *supra* note 22.

35 Bassiouni, 1994, p. 488, see *supra* note 11.

36 Tusan, 2014, p. 50, see *supra* note 27.

37 *Ibid.*, pp. 51–52.

38 Schabas, 2011, p. 41, see *supra* note 15; Geyer, 2012, see *supra* note 22.



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had been some controversy around the term "civilization", which the Russians wanted to replace with "Christianity".[39] However, when the war was over, the perceived need to amend international law vanished under the demands of *Realpolitik*.

In 1919, during the Paris Peace Conference, a group of experts from 15 Allied states convened in a Commission on the Responsibility of the Authors of War and on Enforcement of Penalties ('the Paris Commission') and provided some recommendations. In its report, the Commission stated that "in spite of the explicit regulations, of established customs and the clear dictates of humanity, Germany and her Allies have piled outrage upon outrage".[40] It further observed that the defendants were "guilty of offences against the laws and customs of war, or the laws of humanity" and therefore "liable to criminal prosecution".[41] Schwelb observed that this constituted for the first time a juxtaposition of offences against the laws and customs of war corresponding to the later Articles 6(b) and 6(c) of the Nuremberg Charter.[42]

Under the heading of "Offences against the laws of humanity", the Paris Commission compiled a long list of atrocities committed during the First World War (which later became known as 'the Versailles list').[43] Although the Versailles list represents a first step in coining a legal definition of a minimum standard in warfare, there was considerable resistance to using the term 'crimes against humanity' in the Commission's report from one of the major powers.[44] The US representative Robert Lansing feared a "confusion of moral precepts and legal writ", and saw a "lack of legal precedence" and "subjective definition of the dictates of humanity".[45] Although Lansing confirmed that the First World War had shown a new class of crimes, which he termed "wanton acts which cause needless suffering" and "perpetrated without adequate military reason", he underlined that the prosecution of

[39] Geyer, 2012, see *supra* note 22.

[40] Schwelb, 1946, p. 2, see *supra* note 31.

[41] *Ibid*.

[42] *Ibid*.

[43] Van Schaack, 1998/99, p. 796, see *supra* note 4; Geyer, 2012, see *supra* note 22.

[44] Bassiouni, 1994, p. 458, see *supra* note 11.

[45] Geyer, 2012, see *supra* note 22.



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such "crimes against civilization" must follow principles of legality rather than general principles of humanity.[46] He stated:

> The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.[47]

As a consequence, the term 'crimes against humanity' was not mentioned in the relevant provisions.[48] But Article 227 of the Versailles Peace Treaty underlined that Kaiser Wilhelm II should be brought before an international court, "for a supreme offence against international morality and the sanctity of treaties". However, this did not take effect as the emperor had sought asylum in the Netherlands.[49] Schwelb observed that this article can nevertheless be seen as a predecessor to the later Article 6(a) of the Nuremberg Charter (charge for crimes against peace), if one understands that crimes against peace are not "merely contraventions of a moral code, but violations of legal provisions".[50]

With Articles 228 to 230, the Versailles Peace Treaty laid the ground for the establishment of the first war crimes tribunal to try German war criminals.[51] These trials were held in Leipzig in the early 1920s and resulted in only a handful of convictions, thus constituting a grave setback for the idea of international criminal justice. Nevertheless, the trials at least emphasised the existence of war crimes under international criminal law.[52]

With regard to the Armenian cause, it was agreed in the Peace Treaty of Sèvres to form an Allied Court to punish Turkish atrocities (without mentioning – on request of the US delegation – the terms 'crimes against humanity' or 'laws of humanity' at all), but it never came into force.[53] Instead, several trials were held between 1919 and 1922 under the Ottoman government, acting under British pressure, which resulted in the

[46] *Ibid*.

[47] Van Schaack, 1998/99, p. 797, see *supra* note 4.

[48] *Ibid*. See also Schwelb, 1946, p. 2, see *supra* note 31.

[49] Schwelb, 1946, p. 1, see *supra* note 31.

[50] *Ibid*., p. 2.

[51] William Schabas, "International Justice for International Crimes: An Idea Whose Time Has Come", in *European Review*, 2006, vol. 14, no. 4, p. 421.

[52] Schabas, 2011, p. 52, see *supra* note 15.

[53] Van Schaack, 1998/99, p. 797, see *supra* note 4.



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execution of three minor officials for 'crimes against humanity'.[54] In short, the idea of an Allied high court to prosecute war crimes, discussed during the 1919 Paris Peace Conference negotiations, failed with regard to both German and Ottoman defendants. Bassiouni emphasises that the leading powers thus allowed the period after the First World War to become a "bypassed occasion to establish definitive law".[55]

## 15.3. Debates Within the UNWCC About 'Crimes Against Humanity'

The unprecedented Nazi war of aggression and occupation of half of Europe after the breakout of war in September 1939 formed the basis for growing concerns among the governments of nine states forced into exile,[56] and the call was made to set up new norms and to establish guidelines for trials after the end of the conflict.[57] In particular, the Czech and Polish exiled government representatives, echoed by their Belgian and Dutch counterparts, hoped that by establishing rigorous legal guidelines, the Nazis could be deterred from committing further crimes. In analysing the scholars' contributions to meetings and memoranda, it becomes clear that although they had to act according to the expectations of their respective governments in exile, they acted in the first place as legal scholars deeply marked by personal experience of forced exile, in the sober attempt to find a viable solution to bring criminals to trial, and thus answered the political demands of their officials.[58]

In London in the early 1940s, legal circles consisting of exiled lawyers of smaller Allied nations had already started debating how to approach crimes committed in the ongoing war. It was an epistemic

[54] Tusan, 2014, p. 65, see *supra* note 27.

[55] Bassiouni, 1994, p. 466, see *supra* note 11.

[56] The nine countries were: Belgium, Czechoslovakia, France, Greece, the Netherlands, Luxembourg, Norway, Poland and Yugoslavia.

[57] Arieh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, p. 3; Kirsten Sellars, *'Crimes against Peace' and International Law*, Cambridge University Press, Cambridge, 2013, p. 60. The term 'war of aggression' was new, to distinguish the Nazi war from the earlier concept of *bellum iustum*, the just war, which is a war of defence only.

[58] Kerstin von Lingen, "Setting the Path for the UNWCC: The Representation of European Exile Governments on the London International Assembly and the Commission for Penal Reconstruction and Development, 1941–1944", in *Criminal Law Forum*, 2014, vol. 25, pp. 45–76.



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community of lawyers, which can be understood as agents of a new supranational policy.[59] Most of them were already prominent lawyers in their home countries but forced into exile by Nazi politics.[60] Since they first convened in 1941, two forerunners, the International Commission for Penal Reconstruction and Development, emanating from the faculty of law at the University of Cambridge ('Cambridge Commission'), and the LIA − the contents of which overlapped with the debates later pursued by the UNWCC (with many members being present in all three bodies) − advocated new ideas of post-war justice. Thus the work of the UNWCC can be seen as the institutional result of very lively theoretical discussions in semi-official circles, which had been ongoing for some time and involved different groups of experts, lobbyists, exiled politicians and scholars. The circles in which these lawyers acted were, however, backed by politicians and lobbyists (who also took part in the meetings), fighting for recognition of their causes among British and US governmental officials,[61] thus giving the work of these two committees at least a semi-official if not governmental (at least from their exiled governments' perspective) character. Although these predecessors of the UNWCC were powerless to affect outcomes,[62] they were crucial to the war crimes debate, and they helped to coin important concepts.

Two of the most active advocates of international criminal law in London were the Czech representatives Bohuslav Ečer (1893–1954) and Egon Schwelb (1899–1979). Schwelb was later nicknamed "Mr. Human Rights",[63] as he was appointed deputy director of the Human Rights

[59] *Ibid*., p. 46.

[60] The list of positions is impressive: when checking the files of the International Commission of Penal Reconstruction and Development, of 16 members coming from exile countries, five were former ministers of justice, five were high court judges, two were law professors, the others their assistants; see National Archives UK, LCO 2/2973, Papers of the International Commission for Penal Reconstruction and Development, member list.

[61] For an overview on British policy towards the central European governments in exile, see Detlef Brandes, *Großbritannien und seine Osteuropäischen Alliierten: Die Regierungen Polens, der Tschechoslowakei und Jugoslawiens im Londoner Exil vom Kriegsausbruch bis zur Konferenz von Teheran*, Oldenbourg, Munich, 1988; Peter Heumos, *Die Emigration aus der Tschechoslowakei nach Westeuropa und dem Nahen Osten, 1938–1945*, Oldenbourg, Munich, 1989, pp. 28–54.

[62] Kochavi, 1998, p. 23, with a special reference on the Czech position, see *supra* note 57.

[63] Apparently, he earned the nickname from a conference introduction in 1970, where he was presented under this heading, see Foreword to the article Egon Schwelb, "The Teaching of



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Division of the UN in 1947. Both can be perceived as transnational legal actors who were highly interested in formalising how war crimes committed in Europe during the Second World War – and beyond – should be handled. As this discussion will show, legal scholars like Ečer and Schwelb contributed to the eventual coining of the term 'crimes against humanity' during their years in exile.

When Allied lawyers met in 1943 and 1944 to prepare a viable war crimes prosecution after the armistice, their first concern was to agree on the notion that a community of nations, often called the "united nations",[64] was *entitled* to "intervene juridically against crimes committed against any civilian population, before and during the war, and whether it was irrelevant whether or not such crimes were committed in violation of the domestic law of the country where perpetrated".[65] This was especially important in that civilian populations would be "protected against violations of international criminal law also in cases where the alleged crimes have been committed against their own subjects".[66]

The debate in the predecessor organisations broadened the academic understanding of what constitutes a war crime. Until 1939, legal theory maintained that war crimes must be dealt with in military courts, or in civilian courts applying the laws of war – a line the British Foreign Office still adhered to during the 1940s – and could only involve cases which had been committed within a state's own territory or against its nationals.[67] Many scholars considered it "legally unsound to hold the Nazis responsible for crimes committed against Germans within the borders of Germany".[68] However, the unprecedented record of crimes committed by Nazi forces against both the civilian populations of occupied countries and some of their own nationals made it necessary to

the International Aspects of Human Rights", in *American Journal of International Law*, 1971, vol. 65, no. 4, pp. 242–46.

64 The term 'United Nations' was the formal name for 'the Allies' following the "Declaration by United Nations" of 1 January 1942. See *Yearbook of the United Nations 1946–47*, Department of Public Relations, United Nations, New York; Plesch, 2011, see *supra* note 2.

65 Egon Schwelb, "Crimes Against Humanity", in *British Year Book of International Law*, 1946, vol. 178, no. 23, p. 179.

66 *Ibid*.

67 Kochavi, 1992, p. 325, see *supra* note 1.

68 Schabas, 2011, p. 42, see *supra* note 15.



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extend the definition of war crimes from a strict sense to a larger context, which was initially termed "war crimes and analogous offences".[69] For this reason, defining the term 'war crimes' proved crucial.

War crimes, as observed by the Belgian Judge Marcel de Baer in a meeting of the LIA in 1942, could include offences against national laws, and were therefore punishable by national courts, or – in a wider sense – war crimes could be seen as "offences against the *ius gentium*, or against international agreements (such as The Hague and Geneva Conventions) or unwritten internationally recognised ethical rules, and for some of these offences no sanctions have hitherto been designed".[70] The need to formulate a new legal category to fit these needs, which later became known as crimes against humanity, was already mirrored in the second definition. In its report of 28 September 1943, de Baer suggested that "at the earliest possible moment, a protocol should be agreed between the Governments of the United Nations, defining what acts should be punishable as war crimes, and setting up machinery for the prosecution and punishment of such crimes, to take effect immediately after the armistice".[71] This task was taken on by the UNWCC.

As an organisation the UNWCC was composed of three committees, of which the Legal Committee in London seems to have provided the most important inputs towards the development of contemporary international law.[72] The Facts and Evidence Committee (Committee I), chaired by de Baer, was to establish whether the submitted evidence was legally sufficient to open a case. The Committee on Means and Methods of Enforcement (Committee II) would recommend the adoption of methods and machinery, while the Legal Committee (Committee III), chaired by the Czech representative Ečer and his secretary Schwelb, carried out advisory functions within the UNWCC. In this regard, the Legal Committee spearheaded the legal debate as "it was active in the

69 Schwelb, 1946, p. 185, see *supra* note 65.

70 National Archives UK, TS 26/873, London International Assembly, Reports on Punishment of War Crimes; proposal of M. de Baer "Suggestions for the scope of work for the commission, provisional plan of work", April 1942.

71 United Nations War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, His Majesty's Stationery Office, London, 1948, p. 99.

72 On structure and core process of UNWCC, see Plesch and Sattler, 2014, p. 28, *supra* note 2.



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clarification of legal issues, the gradual elimination of uncertainties in the spheres of the laws of war and the promotion of rules, many of which were to become part of contemporary penal law".[73]

In 1944 the UNWCC, especially its Legal Committee, was concerned with finding a viable solution to bring atrocities that were not connected to military action to trial – especially crimes against political opponents, occupied civilians or European Jews. The UNWCC chairman, Sir Cecil Hurst, underlined in a letter to the British foreign secretary Anthony Eden in May 1944 that the UNWCC was struggling with a definition of war crimes and had come to the conclusion that a number of crimes fell outside of the hitherto accepted definitions, as they had been committed on racial, religious or political grounds in enemy territories.[74] The Lord Chancellor, Viscount Simon, replied on 23 August 1944, emphasising that the task of the UNWCC was limited to observing and advising, which did not include the coining of new law. "This would open a very wide field", Simon stated, and warned the UNWCC that it should not concern itself with these "serious difficulties" unless a position of the British government was adopted.[75] This exchange of letters was the result of ongoing debates − following a notion of the US representative Herbert Pell in March 1944 − referring to the use of the new term 'crimes against humanity' with regard to Jewish victims and internal reports submitted by Ečer in the spring 1944.[76]

Ečer had submitted a proposal to the UNWCC on 27 April 1944, dealing with the problem of aggressive war and advocating the use of the term 'crimes against humanity' in an international criminal court.

[73] United Nations War Crimes Commission, p. 169, see *supra* note 71.

[74] Schwelb, 1946, p. 3, see *supra* note 31.

[75] *Ibid*.

[76] Pell's UNWCC note of 18 March 1944 runs: "It is clearly understood that the words 'crimes against humanity' refer, among others, to crimes committed against stateless persons or against any person because of their race and religion; such crimes are judiciable by the United Nations or their agencies as a war crime" (https://www.legal-tools.org/doc/2aa8b6/). Pell had used the term already in February in a private letter to his friend, President Franklin D. Roosevelt, where he seems to connect even Roosevelt himself to coining the term: "What are we to do about the Jews in Germany … the offences against them certainly seem to be described in your phrase 'crimes against humanity'". Herbert C. Pell, Letter to the President, February 16, 1944. Roosevelt, FD 1936–45, General Correspondence, Papers of Herbert Claiborne Pell, FDR Library. I am grateful to my colleague Graham Cox, Texas, for pointing this out to me.



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However, the British UNWCC representative Arnold McNair, as chairman of a four-person sub-committee dealing with questions of *ius ad bellum* and *ius in bello*, rejected this proposal as too far-reaching, pointing out that the existing laws had to be respected, and the issue went back for debate.[77] McNair – following his earlier criticism when he was the chair of the Cambridge Commission – was especially against Ečer's idea of holding heads of states accountable and applying what McNair saw as retroactive law. Ečer, in return, felt it was unacceptable that those who had broken the law so many times should go unpunished simply because established national codes were not sufficient to deal with them. He held the position that the expansive nature of the Second World War had created a new situation − with war crimes incomparable to earlier conflicts − to which new legal responses had to be formulated. He stressed that the Nazis "had stepped outside international intercourse and exempted themselves from the protection afforded belligerents by humanitarian law".[78] Ečer wrote that "[p]reparation and launching of the present war must be punished as a crime against peace", and "if there are gaps in law, it is our duty to fill them".[79]

In a memorandum submitted to the UNWCC in May 1944, entitled "Scope of the Retributive action of the United Nations according to their official Declarations – The Problem of War Crimes in connection with the second World War", Ečer amended his earlier report, following a two-fold argumentation. First, he underlined that it was not a transgression of competencies of the UNWCC when it suggested further handling of the war crimes problem including broadening the whole concept; and second, he advocated the use of the term 'crimes against humanity' by drawing on its prior use in international criminal law.[80] He agreed with the views of Hurst who stated that the scope of the UNWCC had to be enlarged "when new facts and especially cases submitted by the governments demonstrated that it would be desirable to recommend to the Allied governments a wider and larger conception of war crimes".[81] In assessing

[77] Sellars, 2013, pp. 58–64, see *supra* note 57.

[78] *Ibid*., p. 61.

[79] National Archives UK, FO 371/39005, UNWCC, Minutes of 36th meeting, 17 October 1944 (https://www.legal-tools.org/doc/3d0ae8); see also Sellars, 2013, p. 63, see *supra* note 57, on the connection with the Russian legal scholar Aron Trainin.

[80] Ečer, 1944, p. 5, see *supra* note 28.

[81] *Ibid*., p. 2.



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the historical record of Nazi crimes, Ečer stated that the UNWCC had received several accounts on the planned nature of Nazi warfare especially in Eastern Europe, where not only Jews but also members of the Soviet intelligence services, burgomasters, controllers of commerce, engineers and officers were slaughtered by Schutzstaffel ('SS') troops without prior trials.[82] The Polish government had emphasised in these reports that a considerable number of crimes committed in occupied Poland had not even "a remote connection with military necessity", and proposed the new term 'crimes against humanity' to cover these offences. The French delegation, together with the Polish scholars, also raised the question of collective responsibility to address certain formations such as the Gestapo or SS which were involved in these new crimes on a regular basis. Ečer suggested that since political leaders of the Allies had referred to justice being delivered on several occasions, it was important to "adapt the task of the Commission to the Allied declarations and to the public opinion which is relying on these declarations".[83]

By debating the Martens Clause and the Versailles achievements, Ečer underlined that the Preamble of the Hague Convention – the Martens Clause – was of immense value for the work of the UNWCC, as the Martens Clause referred to the term 'humanity'.[84] He also questioned the tendency of UNWCC documents to speak of the Nazis as a "gangster regime" or a "pathological system" (at the suggestion of Glueck), as these terms "involved an element of irresponsibility which I would avoid, [as I] wished to underline the criminal responsibility of the Nazi rulers".[85] After debating the various legal achievements, referring to debates within the Cambridge Commission and the LIA, citing also the (unratified) Geneva Protocol for the Pacific Settlement of Disputes of 1924 and the report of Lauterpacht before the Cambridge Commission, Ečer asked in conclusion:

> The question is, shall we go back? Is the standard of 1924 in this question too advanced in the light of the experience of 1939/1944? Should we be more reactionary than the League of Nations in 1924 and in 1937? Or in other words, shall we go backwards when social change requires progress?[86]

[82] *Ibid*.
[83] *Ibid.*, p. 3.
[84] *Ibid.*, p. 4.
[85] *Ibid.*, p. 5.
[86] *Ibid.*, p. 7.



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He made the point that, in his view, crimes against humanity were the most important concept of all, as they had been committed "as the real cause of all the other crimes, as the source of the war, the *malum in se*".[87]

Ečer recalled in his memoirs his deep personal commitment: "The atmosphere was charged with high voltage, being – in my opinion – at stake the whole point of this war in the assessment of international law; our work absolutely must result in the victory of justice over the dark forces of evil and the fact that those who started the war shall face deserved punishment".[88] It seems that his initiative focused heavily on Holocaust crimes, which until then had been dealt with among the bulk of Nazi occupation crimes, an act that minimised their uniqueness. Ečer was therefore seen as a friend of the Jewish cause.[89] But the UNWCC, in its meeting of 10 October 1944, took a different stand. Ečer maintained his minority opinion, questioning whether the foundation and enactment of the present war represented crimes that fell within the jurisdiction of the UNWCC.

The British government was still reluctant to respond to the new term. In a debate in the House of Commons on 4 October 1944, referring to the killings of political prisoners at the Buchenwald concentration camp, Eden stated that "[c]rimes committed by Germans against Germans, however reprehensible, are in a different category from war crimes and cannot be dealt with under the same procedure".[90] This notion was reaffirmed in a debate on 31 January 1945.[91] There was still some way to go to include the concept crimes against humanity in international law. The time came when the war was over and the first international tribunal was set up.

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[87] *Ibid*.

[88] Bohuslav Ečer, Jak jsem je stíhal, ed. by Edwarda Cenka, Naše vojsko, Prague, 1946, p. 162 (my translation).

[89] Apparently, Herbert Pell made this comment in a message to his government, when Ečer threatened to resign from the UNWCC in September 1944. See Jan Lanicek, *Czechs, Slovaks and the Jews, 1938–1948: Beyond Idealization and Condemnation*, Palgrave Macmillan, New York, 2013, p. 99.

[90] Schwelb, 1946, p. 5, see *supra* note 31.

[91] *Ibid*.



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### 15.4. 'Crimes Against Humanity' in Court: The Nuremberg Era

The International Military Tribunal at Nuremberg, 1945–1946 ('Nuremberg Tribunal') followed the statute drawn up at the London Conference in the summer of 1945. The statute set up the structure and basis for the prosecution of the major war criminals,[92] and its main achievement consisted in formulating the first legal definition of 'crimes against humanity'.[93] Article 6(c) of the Nuremberg Charter defined crimes against humanity as

> a distinct set of crimes, namely murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial and 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]

The last part of the definition was decisive in so far as it established the supremacy of international law over municipal law.[95]

Article 6(c) of the Nuremberg Charter found its equivalent in Article 5(c) of the Tokyo Charter, and both Charters were clearly connected through defining 'crimes against humanity', 'aggression' and 'war crimes'.[96] Article 6(c) of the Charter reflected the desire of the Allies not to be restricted "to bringing to justice those who had committed war crimes in the narrower sense … but that also such atrocities should be investigated, tried and punished as have been committed on axis territory, against persons of axis nationality".[97] The Nuremberg Tribunal could now, simply by using the new tool, also address "acts committed by Nazi

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92 Bassiouni, 1994, p. 4, see *supra* note 11.

93 Wolfgang Form underlines the similar wording of the definition to crimes against humanity in both the UNWCC and the London Charter as proof. See Wolfgang Form, "Strategies for 'Genocide Trials' after World War II: How the Allied Powers Deal with the Phenomenon of Genocide in Occupied Germany", in Christoph Safferling and Eckart Conze (eds.), *The Genocide Convention 60 Years after its Adoption*, Asser, The Hague, 2010, p. 77.

94 Nuremberg Charter, Article 6(c). See Geyer, 2012, see *supra* note 22.

95 Van Schaack, 1998/99, p. 791, see *supra* note 4.

96 Bassiouni, 1994, p. 463, see *supra* note 11.

97 Schwelb, 1946, p. 183, see *supra* note 65.



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perpetrators against German victims, who were thus of the same nationality as their oppressors, or against citizens of a state allied with Germany".[98]

According to David Luban, five features can be distinguished that characterise the laws of crimes against humanity in all its subsequent embodiments:[99] crimes against humanity are typically committed against fellow nationals; they are international crimes; they are committed by politically organised groups acting under the colour of 'policy'; they consist of the most severe acts of violence and persecution; and they are inflicted on victims "based on their membership in a population rather than on individual characteristics".[100] As Luban notes: "The distinguishing feature of the crime against humanity is not the actor's genocidal intent, but the organized, policy-based decision to commit the offences".[101]

However, the meaning of the term has met with considerable scepticism and has been "plagued by incoherence" even since this formulation.[102] Schwelb tried to set the path very clearly in his "Report on the Meaning of 'Crimes against Humanity'", which he submitted to the UNWCC in March 1946. He stated that crimes against humanity had (a) been committed by defendants from the Axis states or their allies, could (b) be committed by individuals as well as by members of an organisation, and were (c) distinguished into "crimes of the murder-type" and "persecution".[103] In this regard, it was irrelevant whether a crime of the "murder-type" had been committed before or during the war. "Persecutions", Schwelb argued, had to be committed on political, racial or religious grounds and in connection with any crime within the jurisdiction of the tribunal (crimes against peace, war crimes, or even crimes against humanity of the murder type).[104] Hence, the crimes would not only be committed on a personal level but also be connected to the

[98] Van Schaack, 1998/99, p. 790, see *supra* note 4.
[99] Luban, 2004, pp. 93, 108, see *supra* note 5.
[100] *Ibid.*, pp. 103, 108.
[101] *Ibid.*, p. 98.
[102] Van Schaack, 1998/99, p. 792, *supra* note 4; Diane F. Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", in *Yale Law Journal*, 1991, vol. 100, no. 8, p. 2585.
[103] Schwelb, 1946, p. 6, see *supra* note 31.
[104] *Ibid.*, p. 7.



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above-mentioned crimes. For example, "by enacting legislation which orders or permits crimes against humanity", the charge could be met.[105]

Schwelb even formulated a "distinction between crimes against humanity and ordinary common law", pointing out "that 'inhumane' common crimes become crimes against humanity, if, by their purpose or magnitude, they become the concern of Foreign Powers and, consequently, the concern of International Law".[106] He also rejected the notion that crimes against humanity were connected to violation of domestic laws and stated, in the view of possible defence strategies:

> Compliance with municipal law is no defence to a charge for a crime against humanity. It is submitted that it is the only one application of the general rule permeating the modern law of war crimes that superior order is no defence, when the order is illegal.[107]

Schwelb thereby underlined that the Nuremberg Charter laid down explicitly the supremacy of international law over municipal law.

In this regard, the Nuremberg Charter not only "broadened the jurisdictional scope of a pre-existing category of crimes" but also represented "an expansion of international law beyond clear prior precedent",[108] and this "jurisdictional extension of normative proscription to a different context, irrespective of the diversity of citizenship, posed a fundamental question". It should be observed that there was considerable preoccupation as to the point of whether this constituted new law or was based on legal precedents. Only when the Nuremberg trials were concluded did it become apparent that the term had made "judiciable what had been general principles".[109] In 1946 the UN General Assembly stated its opinion, that the crimes against humanity as defined by the Nuremberg Charter and the judgments of the Nuremberg Tribunal were crimes according to international law.[110] This UN resolution was reaffirmed in 1950[111] and worked into the Draft Code of Offences against the Peace and

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[105] *Ibid*., p. 14.

[106] *Ibid*., p. 10.

[107] *Ibid*., p. 8.

[108] Bassiouni, 1994, p. 466, see *supra* note 11.

[109] Geyer, 2012, see *supra* note 22.

[110] *Ibid*.

[111] The International Law Commission had in 1950 reaffirmed the Nuremberg Principles. See Bassiouni, 1994, p. 464, see *supra* note 11.



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Security of Mankind of 1954, which was, however, left incomplete by the International Law Commission of the UN due to Cold War constraints following the Korean War.[112]

The judges at the Nuremberg Tribunal were nevertheless quite cautious in applying the new concept and treated it for the most part as a subsidiary crime connected to other war crimes.[113] The fact that crimes against humanity were only addressed as a subsidiary charge alongside conventional war crimes, or crimes against peace, has become known as the 'war nexus'.[114] The war nexus allowed the Allied legal staff to "condemn specific inhumane acts of Nazi perpetrators committed within Germany without threatening the entire doctrine of state sovereignty".[115] The French judge Henri Donnedieu de Vabres expressed his criticism of the concept, when he stated, looking back at the Nuremberg Tribunal:

> The theory of crimes against humanity is dangerous; dangerous for the people by the absence of precise definition; dangerous for the States because it offers a pretext to intervention by a State, in the internal affairs of weaker states.[116]

By contrast, Justice Jackson underlined that it was not the concept of sovereignty which was at stake here, but a duty of free people to call for justice for the victims of Nazi barbarism. He made the war nexus connection of crimes against humanity very clear:

> It has become a general principle of foreign policy of our government from time immemorial that the internal affairs of another government are not ordinarily our business; that is to say, the way Germany treats its inhabitants … is not our affair any more than it is the affair of some other government to interpose itself in our problems. The reason that this program of extermination of Jews and destruction of

[112] Geyer, 2012, see *supra* note 22. For the end of the work of the Law Commission see M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, Kluwer Law International, The Hague, 1999.

[113] Schwelb, 1946, *supra* note 31; Geyer, 2012, see *supra* note 22.

[114] Van Schaack, 1998/99, p. 791, see *supra* note 4.

[115] *Ibid*.

[116] Cited in Joseph Y. Dautricourt, "Crime Against Humanity: European Views on Its Conception and Its future", in *Journal of Criminal Law and Criminology*, 1949, vol. 40, no. 2, pp. 170–75. The original can be found in *Revue de droit pénal et de criminologie*, 1946/47, p. 813.



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> the rights of minorities becomes an international concern is this: it was a part of a plan for making an illegal war. Unless we have a war connection as a basis for reaching them, I would think we have no basis for dealing with atrocities. They were a part of the preparation for war or for the conduct for the war insofar as they occurred inside of Germany, and that makes them our concern.[117]

The French jurist André Gros objected to the war nexus, noting that there was no need to tie the prosecution of atrocities to acts of aggression. He feared that it would be very difficult for prosecutors to prove persecutions in pursuit of aggression, as "even the Nazi plan against the Jews [shows] no apparent aggression against other nations".[118] In contrast, the British prosecutor David Maxwell Fyfe underlined that he saw no difficulties in linking anti-Jewish measures to a general plan of aggression.[119] The British prosecutor Hartley Shawcross agreed with the US stand and pointed to the practical use of the war nexus, when he observed in his summation that "the crime against the Jews, insofar as it is a crime against humanity and not a war crime as well, is one which we indict because of its close association with the crime against the peace".[120]

Only with Control Council Law No. 10 ('CCL 10'), released by the Allies in occupied Germany in 1946, was the link between the state of war and crimes against humanity dropped.[121] Alone within the British Zone of Occupation in Germany, courts applying CCL 10 held around 150 trials "exclusively involving crimes against humanity, committed between 1933 and the end of the war", which addressed crimes against German or stateless victims; many of them were Jewish.[122]

However, the courts treated the concept of crimes against humanity with caution and rejected especially Ečer's initial idea of punishing crimes that occurred prior to the state of war. Also Schwelb had explicitly

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[117] Jackson Report, cited in Van Schaack, 1998/99, p. 799, see *supra* note 4.

[118] *Ibid.*, p. 800.

[119] *Ibid*.

[120] *Ibid.* See also *The Trial of the Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg. Concluding Speeches by the Prosecution*, vol. 19, IMT, Nuremberg, 1947, p. 471.

[121] Bassiouni, 1994, p. 464, see *supra* note 11; Schwelb report on the definition of crimes against humanity, 22 March 1946, p. 8 (https://www.legal-tools.org/doc/c52df5/); see also Geyer, 2012, *supra* note 22.

[122] Form, 2010, p. 80, see *supra* note 93.



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underlined in his report that two groups of crimes – crimes within Germany before and during the war, and crimes in occupied (and therefore temporary Axis territory states) during the war – fell outside the notions of war crimes and had to be addressed otherwise, something that was even admitted by Jackson in his introductory speech at Nuremberg.[123] The US prosecutor agreed, with regard to the extermination of Jews, that although usually how a government treats its own inhabitants is thought to be of no concern to other governments, the mistreatment of the Jews had passed "in magnitude and savagery any limits of what is tolerable by modern civilization", and therefore other nations "by silence, would take a consenting part in these crimes".[124] The Nuremberg Tribunal was nevertheless reluctant, and its judgment stressed that

> [t]he tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the charter, but from the beginning of the war in 1939, war crimes were committed on a vast scale, which were also crimes against humanity.[125]

The result was that all crimes committed, for example in Poland or Czechoslovakia/Sudentenland, prior to the outbreak of the war in September 1939 could not be indicted, due to the lack of a war nexus, as "it has not been satisfactorily proven that they were done in execution of, or in connection with any such crime".[126]

With regard to the Charter of the International Military Tribunal for the Far East at Tokyo ('Tokyo Tribunal'), which was modelled after the Nuremberg Charter, crimes against humanity were also included, although the sentence "persecution on religious grounds" was omitted.[127] However, persecutions on political or racial grounds still remained punishable under crimes against humanity at the Tokyo Tribunal. The term was also debated at the UNWCC Far Eastern and Pacific Sub-Commission in Chungking, China. The Sub-Commission agreed not to address crimes against Taiwanese as crimes against humanity. This was

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[123] Schwelb, 1946, p. 11, see *supra* note 31.

[124] *Ibid*., p. 12.

[125] *The Trial of the Major War Criminals, Proceedings of the International Military Tribunal sitting at Nuremberg. Judgment*, vol. 1, IMT, Nuremberg, 1947, p. 254; also cited in Van Schaack, 1998/99, p. 804, see *supra* note 4.

[126] *Ibid*.

[127] Schwelb, 1946, p. 9, see *supra* note 31.



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logical since the Taiwanese people had been part of the Japanese empire during the war, and they were thus occupied civilians with Japanese citizenship.[128] When looking into the trial records of not only the Tokyo Tribunal but also the national war crimes courts set up in East Asia, whether in the former European colonies or China, it is apparent that the courts were reluctant to use the concept of crimes against humanity. Ongoing scholarship underlines the fact that in the Dutch trials held in the Netherlands East Indies (Indonesia) and French trials in Indochina, there was no mention of the term at all.[129] Lisette Schouten notes with regard to the trials held in the East Indies:

> [I]n contrast to their home country, the Netherlands for the Dutch Indies government decided not to include 'crimes against humanity' in their definition of war crimes. It regarded 'crimes against humanity' primarily as a provision to punish crimes against own nationals and did not want to 'engage' with the crimes Japanese had committed against Japanese. Furthermore they were convinced, unlike in the homeland, that adjudication of the crimes committed in the Indies could take place without an inclusion of 'crimes against humanity'. However, it could well be that this decision was made to prevent Dutch and KNIL [Koninklijk Nederlands Indisch Leger, Royal Netherlands East Indies Army] soldiers being accused of this particular offence during the re-occupation of the Indies.[130]

As the archival record of Chinese trials is not yet complete, it can only be established from a sample of 240 sentences that China used the concept at least once, when it came to the trial of Takashi Sakai, who was

[128] United Nations War Crimes Commission, Minutes of the Thirty-sixth Meeting of the Far-Eastern and Pacific Sub-commission of the United Nations War Crimes Commission, 14 January 1947 (http://www.legal-tools.org/en/go-to-database/record/dc1e12/).

[129] See the chapters by Lisette Schouten, "'From Tokyo to the United Nations': B.V.A. Röling, International Criminal Jurisdiction and the Debate on Establishing an International Criminal Court, 1949–1957", *HOICL*, vol. 2, pp. 177–212; and Ann-Sophie Schoepfel-Aboukrat, "War Court as a Form of State Building: The French Prosecution of Japanese War Crimes at the Saigon and Tokyo Trials", *HOICL*, vol. 2, pp. 119–41.

[130] Lisette Schouten, "Post-war Justice in the Dutch East Indies, 1946–1949", in Kirsten Sellars (ed.), *Trials for International Crimes in Asia: The Evolution of Principles of Liability*, forthcoming 2014.



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tried for the crime of aggression as well as for crimes against humanity committed at Nanking.[131] The tribunal specified that Sakai was guilty of

> [i]nciting or permitting his subordinates to murder prisoners of war, wounded soldiers; nurses and doctors of the Red Cross and other non-combatants, and to commit acts of rape, plunder, deportation, torture and destruction of property, he had violated the Hague Convention concerning the Laws and Customs of War on Land and the Geneva Convention of 1929. These offences are war crimes and crimes against humanity.[132]

In this regard, it is also clear that in the Far East the war nexus prevailed. The verdict against Sakai (who was found guilty and sentenced to be shot) emphasised that he had been convicted for inciting his troops to atrocities. Since he pleaded innocent, as he did not have knowledge of these crimes, he was also found guilty of failing to ensure the discipline of his troops. The sentence stated: "[a]ll the evidence goes to show that the defendant knew of the atrocities committed by his subordinates and deliberately let loose savagery upon civilians and prisoners of war". The "principle that a commander is responsible for the discipline of his subordinates, and that consequently he may be held responsible for their criminal acts if he neglects to undertake appropriate measures or knowingly tolerates the perpetration of offences on their part", was a rule generally accepted by nations and their courts of law in the sphere of the laws and customs of war.[133] The trial against Sakai therefore stands in line with the jurisprudence created with regard to this rule after the Second World War. The most famous instance in Asia was the Tomoyuki Yamashita case, and in the European theatre of war the Wilhelm von Leeb, Erich von Manstein and Albert Kesselring cases.[134]

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[131] See the chapter by Anja Bihler, "Late Republican China and the Development of International Criminal Law: China's Role in the United Nations War Crimes Commission in London and Chongqing", *HOICL*, vol. 1, pp. 507–40. See also Chinese War Crimes Military Tribunal of the Ministry of Defence, Nanking, "Law Report of Trials of War Criminals", case 83 of Takashi Sakai, His Majesty's Stationery Office, London, 1949, vol. 14, p. 2.

[132] *Ibid.*, p. 7.

[133] *Ibid*.

[134] See Kerstin von Lingen, *Kesselring's Last Battle: War Crimes Trials and Cold War Politics, 1945–1960*, University Press of Kansas, Lawrence, 2009.



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After the Nuremberg trials, Schwelb laid down his legal conclusions for the UNWCC from the debates he had witnessed, strongly advocating the idea of crimes against humanity.[135] In an essay Schwelb underlined that the terms war crimes and crimes against humanity may often overlap.[136] However, the concept of crimes against humanity does allow for crimes committed before a military conflict to be brought to justice, but poses some difficulty for labelling crimes inflicted on civilians by their rightful governments. As a concept, crimes against humanity suggest that universally binding ethical and moral principles exist and they are shared by most countries in the world. Schwelb also emphasised, in the view of the later trials, that there was "no defence that the act alleged to be a crime was lawful under the domestic law of the country where it was perpetrated".[137] He argued that "[a] crime against humanity is an offence against certain general principles of law which, in certain circumstances, become the concern of international community, namely, if it has repercussions reaching across international frontiers, or if it passes 'in magnitude or savagery any limits of what is tolerable by modern civilization'".[138]

Schwelb was reluctant to accept that a crime's connection with a war was a deciding factor for the Nuremberg Tribunal to try the crime. He concluded in the following terms:

> The Crime Against Humanity, as defined in the London Charter, is not, therefore, the cornerstone of a system of international criminal law equally applicable in times of war and of peace, protecting the human rights of the inhabitants of all countries of all civilian population against anybody, including their own states and governments.

Rather, crimes against humanity were "a kind of by-product of the war, applicable only in times of war" and designed "to cover cases not covered by norms of the traditional laws and customs of war".[139] The Nuremberg Charter, which implemented the term crimes against humanity for the first

135 Egon Schwelb, Report on the Bearing of the Nuremberg Judgment on the Interpretation of the Term "Crimes against Humanity", 26 October 1946 (https://www.legal-tools.org/doc/4edb22/).
136 Schwelb, 1946, p. 189, see *supra* note 65.
137 *Ibid.*, p. 193.
138 *Ibid.*, p. 195.
139 *Ibid.*, p. 206.



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time, would, in Schwelb's understanding, serve to "make sure that inhumane acts violating the principles of the laws of all civilized nations committed in connection with war should not go unpunished".[140]

## 15.5. Conclusion

The notion of 'crimes against humanity' and the delineation of the charge into its constituent elements took place towards the end of the Second World War, with European exiled lawyers at the Cambridge Commission, the LIA, the UNWCC and other academic circles contributing to it, though attempts to define the term had already been made during the First World War.

As we have seen, the concept of crimes against humanity as laid down in the Nuremberg Charter in Article 6(c) had several components: it defined offences against any civilian populations, consisted always of numerous incidents of the same nature, was perpetrated on the basis of higher orders or state policy, and distinguished between crimes of the murder type and crimes of persecution, the latter if perpetrated on political and racial (in Europe, also religious) grounds.[141] The crimes were "characteristically committed against fellow nationals, or others in occupied territories under the perpetrator's control"; state sovereignty provided no shield from culpability, and the crimes were committed by organised groups.[142] For the sake of avoiding the criticism of applying retroactive law, the new principle became bound to other charges during the Nuremberg trials, namely conventional war crimes, thus connecting it to a state of aggression. This so-called war nexus proved a burden to international criminal law and later significantly limited the use of crimes against humanity in violent acts that occurred during, for example, the Cold War and wars of decolonisation,[143] the crimes of military dictatorships in Latin America or apartheid crimes in South Africa.[144] By

[140] *Ibid*.

[141] Schwelb, 1946, p. 13, see *supra* note 31.

[142] Luban, 2004, p. 117, see *supra* note 5.

[143] Fabian Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria*, University of Pennsylvania Press, Philadelphia, 2013; see also Klose, 2011, *supra* note 33.

[144] Van Schaack, 1998/99, p. 793, see *supra* note 4. It could perhaps have been circumvented by codifying "the classic international law doctrine of humanitarian intervention", as Van Schaack suggests on p. 847. Humanitarian intervention is defined as "the intervention by



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this token, an "unconditional application of sovereignty has the potential to result in impunity for gross human rights violation committed within the boundaries of a state".[145]

It took a while until the concept found its way into national jurisdictions.[146] After the formation of the United Nations Organisation in San Francisco in 1945, several commissions were set up to continue the work of both the UNWCC and other predecessors, especially in framing what would later become the ICC in 2002. The concept of crimes against humanity had first fully been realised at the Eichmann trial in Jerusalem in 1961 (and thus became inextricably linked with Holocaust crimes). The concept gained its wider meaning in the 1990s, as an effect of the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda.[147] Two factors contributed to this outcome: the end of the Cold War and the emergence of a powerful human rights movement, which began "to develop a victim-oriented discourse that required states to ensure that perpetrators of atrocities were brought to justice".[148]

However, it was only half a century after the Nuremberg trials, with the adoption of the ICC Statute in 1998 and foundation of the ICC, that crimes against humanity became the subject of a comprehensive, multilateral convention.[149] Only the ICC Statute offers a consensus definition of crimes against humanity, and thus marks "the welcome culmination of a slow but steady process of erosion of the significance of state sovereignty in the process of international law formation".[150] The

one state into the territorial integrity of another state in order to protect individuals who are the victims of abuses by fellow citizens that the state is unwilling or unable to protect". If the drafters of the IMT Charter would not have been so focused on the principle of sovereignty, but more on the protection of individuals, then the "doctrine of humanitarian intervention suggests that the existence of a widespread or systematic attack against a civilian population provides the hook on which international jurisdiction can hang".

[145] *Ibid.*, p. 846.

[146] On the use of "crimes against humanity as a universal principle at the ICC", see Kerstin von Lingen, "'Crimes Against Humanity': Einer umstrittene Universalie im Völkerrecht im 20. Jahrhunderts", in *Zeithistorische Forschungen/Studies in Contemporary History*, 2011, vol. 8, no. 3.

[147] Geyer, 2012, see *supra* note 22; Robertson, 1999, pp. 446–501, see *supra* note 3.

[148] Schabas, 2011, p. 422, see *supra* note 15.

[149] Van Schaack, 1998/99, p. 792, see *supra* note 4.

[150] *Ibid.*, p. 850.



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long journey from debates within the UNWCC, which was an advisory body that could not establish international law, to the Charters of the Nuremberg and Tokyo Tribunals, which indeed established international law, reflects the permanent tension between the ideas of justice and practical political considerations.

The evolving definition of crimes against humanity since the Nuremberg Tribunal shows that the principles guiding the contemporary codification of international criminal law were shifting. Although they were previously drafted to protect state sovereignty, the new principles have become more concerned with "condemning injurious conduct and guaranteeing the accountability of individuals who subject others, including their compatriots, to inhumane acts".[151] In this regard, Article 6(c) reflects the tension in international law between state sovereignty and human rights as an overarching goal of the international system.[152] In looking back to the achievements of the London Charter,[153] Ečer was quite confident that international law would help to protect peace in future generations. He wrote:

> As far as crimes against humanity are concerned, I see the importance of this particular provision of the Charter and the verdict also in the fact that certain human rights, namely the right to freedom of thought and religious beliefs and the right to pledge allegiance to nation and race, are placed under the protection of the international community and become articles protected under international law. I believe this has special significance for beyond the [Nuremberg] trial. The Charter itself will not protect elementary human rights all over the world, as it is primarily concerned with German crimes, but the Charter indisputably marked the start of the development of international law towards international protection of elementary human rights.[154]

[151] *Ibid*., p. 795.

[152] *Ibid*., p. 846.

[153] Ečer was not present at the negotiations, as all the smaller countries, which had been so important in drafting the war crimes policy, had been excluded from the conference. See William Schabas, "The United Nations War Crimes Commission's Proposal for an International Criminal Court", in *Criminal Law Forum*, 2014, vol. 25, p. 186.

[154] Ečer in his memoirs entitled *Jak jsem je st hal* [How I prosecuted], Prague, 1946, cited by Eduard Stehlik, "Bohuslav Ečer and the Prosecution of War Crimes", in *European*



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Schwelb, after observing the Nuremberg trials followed by the setting up of the Tokyo Tribunal and municipal courts in different European countries, was very eager for a law concerning crimes against humanity to be embedded in national laws, "namely, the principle that the protection of a minimum standard of human rights should be guaranteed anywhere, at any time and against anybody".[155] Schwelb set an agenda for the later UN resolutions when he concluded that legal norm-setting was not enough, if political implementation was missing. As he observed in 1946, "[t]he task of making the protection of human rights general, permanent and effective still lies ahead".[156]

By this token, the criminalisation of 'crimes against humanity' was "intended not only to punish World War II perpetrators, but to deter future human depredations and to enhance the prospects of world peace".[157] The use of crimes against humanity in the tribunals of the 1990s is thus, in the view of Bassiouni, above all "a reaffirmation of the world community's condemnation of such acts, irrespective of the outcome".[158] Or, as Luban puts it, the term is significant because "understanding the twin meanings of 'humanity' means something universal and immensely important". Recognising its worth is "the least we owe the dead".[159]

*Conscience and Communism*, Proceedings of the International Conference, Prague, 2–3 June 2008, p. 59.

[155] Schwelb, 1946, p. 225, see *supra* note 65.

[156] *Ibid.*, p. 226.

[157] Bassiouni, 1994, p. 493, see *supra* note 11.

[158] *Ibid.*, p. 494.

[159] Luban, 2004, see *supra* note 5, p. 161.



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FICHL Publication Series No. 20 (2014):

# Historical Origins of International Criminal Law: Volume 1

Morten Bergsmo, CHEAH Wui Ling and YI Ping (editors)

The historical origins of international criminal law go beyond the key trials of Nuremberg and Tokyo but remain a topic that has not received comprehensive and systematic treatment. This anthology aims to address this lacuna by examining trials, proceedings, legal instruments and publications that may be said to be the building blocks of contemporary international criminal law. It aspires to generate new knowledge, broaden the common hinterland to international criminal law, and further consolidate this relatively young discipline of international law.

The anthology and research project also seek to question our fundamental assumptions of international criminal law by going beyond the geographical, cultural, and temporal limits set by the traditional narratives of its history, and by questioning the roots of its substance, process, and institutions. Ultimately, the editors hope to raise awareness and generate further discussion about the historical and intellectual origins of international criminal law and its social function.

The contributions to the three volumes of this study bring together experts with different professional and disciplinary expertise, from diverse continents and legal traditions. Volume 1 comprises contributions by prominent international lawyers and researchers including Judge LIU Daqun, Professor David Cohen, Geoffrey Robertson QC, Professor Paulus Mevis and Professor Jan Reijntjes.

ISBN 978-82-93081-11-1

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