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Denying denial: a prequel

When he reached Argentina in 1950, Adolf Eichmann was greeted with enthusiasm in Nazi fellow-traveller circles. Though Hitler didn’t end up in Argentina, as rumour used to have it, a lot of former Nazi officials like Eichmann did. Over the next ten years, before his capture, Eichmann wrote several hundred pages setting forth his views on history, race and other aspects of the Nazi Weltanschauung. According to Eichmann, history was a ‘racial-biological struggle’ with the Jews for supremacy. Thus the basic subject of history was the ethnic-racial group not the individual, the class or even the nation-state.¹ In fact, what he wrote fit quite well with Hannah Arendt’s account of Nazi ideology in The Origins of Totalitarianism (1951). But Bettina Stangneth’s research makes Hannah Arendt’s claim in Eichmann in Jerusalem that Eichmann was a careerist rather than a fanatical Nazi, a mediocrity rather than a person capable of planning evil, seem rather questionable. This still doesn’t make Eichmann an exemplar of demonic evil, but it is a

¹ Bettina Stangneth, Eichmann before Jerusalem: The Unexamined Life of a Mass Murderer (London: Bodley Head 2014), 222; Richard H. King, Arendt and America (Chicago: University of Chicago Press 2015), ch. 9 and Conclusion.

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pretty good sign that Eichmann’s Nazism was far more than a means to the end of career advancement.\(^2\)

The pro-Nazi circles in Argentina also included figures who were proto-Holocaust deniers. One of the leading figures was a Dutchman, Willem Sassen, who recorded, analysed and published Eichmann’s writings. Though he had remained a convinced Nazi after the war, he also assumed that the rumours about the extermination of the Jewish people of Europe were blatant propaganda disseminated by anti-Nazis and those hostile to Germany. Nazi fellow-travellers like Sassen were among the first Holocaust ‘deniers’, even though there was a strange sort of innocence about Stassen and his kind. But, as Stangneth concludes, these Holocaust sceptics could find all sorts of ways to cast doubt on this or that piece of evidence, although ‘they couldn’t doubt Eichmann, when he had confirmed the whole thing [the Final Solution] so convincingly. Eichmann was a National Socialist and for that reason a dedicated mass murderer—’.\(^3\) Eichmann sometimes tried to accommodate his opinions to fit the needs of his allies in Argentina, but he always insisted that the reality of the Final Solution was indubitable, not a baseless canard perpetuated by anti-Nazis. Thus, long before English German historian David Irving and the French Holocaust revisionist Robert Faurisson disseminated their case for Holocaust denial in the 1980s and 1990s, Adolf Eichmann had torpedoed any such case. Put another way: if Irving and his supporters had been acting and writing in good faith, they would have had to drop their case after reading Eichmann and paying attention to the testimony of numerous other former Nazis.

Indeed, what is striking is the failure to find many, if any, prominent Nazis, or extermination camp personnel, including the guard force, who denied the reality of the Final Solution. Emory University historian Deborah Lipstadt, author of Denial and the central character in the recent film of the same name, understood the importance of this point when she mentions the ‘devastating testimony’ of ‘perpetrator Hans Stark’. And Richard Rampton, the QC who defended Lipstadt against David Irving’s charge of libel, sardonically suggested that, if Irving doubted the reality of the Holocaust, he should ‘do a word search for the word *Vegasungslager* (gas camps)* in the Eichmann manuscripts recently released by the Israeli government.’\(^4\)

There are also variations on straightforward denial voiced by some of the twenty-one defendants on trial before the International Military Tribunal. Philippe Sands, author of East West Street, notes that probably the best known of the twenty-one men on trial at Nuremberg, Hermann Goering, claimed that he ‘knew nothing’ and never suspected ‘extermination’. Smaller fry such as


\(^3\) Stangneth, Eichmann before Jerusalem, 307.

\(^4\) Lipstadt, Denial, 142, 248.
Rudolph Hess, Otto von Neurath and Albert Rosenberg claimed to be both mere middlemen and also out of the decision-making loop. Albert Speer always denied knowledge of the extermination in the ‘East’, but apparently tried not to find out about it, a complicated form of denial that, of course, implies knowledge of what is being denied. Except for defendant Hans Frank, who claimed he didn’t know anything until late in the war, the standard self-defence of these leading Nazis was not denial of the Final Solution per se, but denial that they personally had had any knowledge of, much less a role in, deciding on or implementing it. For them, ignorance was the best excuse. But they don’t seem to have ever considered what became known as ‘Holocaust denial’.

**Denial and revisionism**

This brief excursus into the tortuous logic of Holocaust denial raises the question of how historians should deal with the ‘intentions’ of historical actors such as Hitler or Himmler and, of course, the intentions of historians such as David Irving, who claimed to know what their intentions and actions were. The first resort is, of course, printed evidence or recorded conversations as the source of Nazi intentions. Yet it is very hard for historians (of any sort) to discover a ‘smoking gun’ that will clearly reveal the intentions of one individual, much less a group of people. For this reason, many historians basically telescope intentions and actions. What counts in determining conscious guilt or innocence is not the discovery of prior (private) intention to authorize, for example, an exterminatory policy at Auschwitz-Birkenau. Rather, the implementation of such a policy itself becomes prima facie evidence of private intentions.

Of course, most of the controversy even about Holocaust denial has been confined to debates among historians at professional meetings, late afternoon seminars and occasionally printed sources. Even before the Irving-Lipstadt trial in London in 1996, Irving had publicly challenged the Emory historian at a lecture she gave at DeKalb College near Atlanta. Even more commonly, historians debate matters in journal articles and books, as Lipstadt clearly had done in her *Denying the Holocaust: The Growing Assault on Truth and Memory* (1993). But Irving upped the ante in 1996, when he filed suit in a UK court against Lipstadt and her British publisher, Penguin, for libel. Irving’s legal claim was that being called a Holocaust denier by Lipstadt adversely affected his reputation and thus diminished the royalties he

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5 Sands, *East West Street*, 344–5. There were twenty-two sentences handed down at Nuremberg, but one defendant, Martin Borman, was tried and sentenced in absentia. *Judgment at Nuremberg* (1961), directed by Stanley Kramer, depicts the importance of the confession of ignorance rather than pure denial in the trial of four, second-tier judges, over which Spencer Tracy presides. Kramer’s film is a fictionalized version of an actual trial of less important Nazi judges.
gained from selling his books. More directly, Lipstadt’s work was libellous because Irving claimed to have followed the facts where they led him. What he had engaged in was not denial but, he claimed, exposing the simple truth of the absence of compelling evidence.

But there was another wrinkle that was brought out in the recent film *Denial*. The film is based on Lipstadt’s account of her own experience of the trial in *History on Trial* (2005), which was reissued as the book under review here, *Denial*, in early 2017. In the British legal system, a person accused of libel, in this case Lipstadt, is responsible for refuting that charge, while in the US system, the burden of proof rests with the alleged injured party (the claimant or plaintiff), in this case David Irving. The trial began on 11 January 2000 and the judgement was announced in a 333-page report by Judge Charles Gray on 11 April of that same year.

**History and the law**

In general, historians are dubious about the compatibility of a historical approach and a legal approach in determining historical truth. Ultimately, all truth may be one, but the way that truth is arrived at and the form it takes are often quite different for historical and legal matters. In the Prologue to *Denial*, Lipstadt writes that, before the trial, ‘I did not believe that courtrooms were the proper venue for historical inquiry’, and went on to contrast the nature of legal truth determined by ‘the blunt edge of the law’ with ‘historical “truth”’ arrived at by ‘objectively determining what happened’. The gist of this position is that where legal argument tends to be narrow and tendentious, historical truth involves judgements among interpretations and evaluation of ‘context and circumstance’. Moreover, all this is potentially subject to the scrutiny of other historians over time. Historians recognize that today’s historical truth ‘may be set aside’ later as more evidence is gathered or new, more plausible perspectives (interpretations) are formulated. A historical argument that relentlessly pursues a thesis and seems bent on pinning blame on, or assigning responsibility to, one particular person or group is said to resemble a ‘lawyer’s brief’. Its goal is to present the best possible case for one side, while ignoring or discrediting evidence that goes against whoever is being defended. David Irving himself tended to write history as a lawyer’s brief, particularly in his capacity as his own lawyer. In the American context, the concept of a ‘hanging judge’ who dispensed ‘frontier justice’ is also familiar. He would, it was said, ‘give the defendant a fair trial’ and then condemn him to death by hanging.

But much as Lipstadt (rightly) admired the lawyers who handled her case, she tended to idealize the ground rules and procedures of professional historians a bit too much. Historians also have audiences to appeal to or placate and

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6 Lipstadt, *Denial*, xxiii.
they dispose over a rhetoric of persuasion that has its own peculiarities. Nor
does the term ‘objective’, as Lipstadt uses it, have much meaning. As
D. D. Guttenplan has noted in The Holocaust on Trial (2001), Lipstadt received
financial and moral support from a variety of sources, some of which were
hardly disinterested in their pursuit of historical truth.7 Working tirelessly
in defence of Lipstadt, Cambridge historian Richard Evans and his team of
young researchers comprehensively discredited Irving’s efforts at making
his charges stick. In fact, the Evans-led effort was probably the key building
block in the successful defence of Lipstadt. But to say that Evans et al. were
not exactly objective either is not to imply that Evans and Irving were both dis-
honest. It is rather that professional historians do not by any means always
stand above the fray when they make a historical case. They do all they can
to make sure the chips fall into this pile and not that one. What they do not
—or should not do—is ‘cook the books’.

It is also important to note that the defence team proposed, and Irving
accepted, that the case be argued before a judge without the involvement of
a jury. Before a judge, the evidence could be presented more directly and
with dispatch, while a jury would likely need to be ‘educated’ about the
real historical and legal issues as the argument unfolded. Beyond that, the
merits of a historical narrative are often judged by how fairly the historian pre-
sents the evidence against her/his own argument. S/he must be an advocate,
but also a judge and jury of the argument. Besides that, historians deal in cir-
cumstantial evidence not apodictic truth, probability and plausibility not cer-
tainty. On the other hand, the lawyer has the harder job than the historian,
since the former must persuade the judge ‘beyond reasonable doubt’, which
is not yet ‘beyond a shadow of a doubt’ but headed in that direction.8

In the specific case of Irving v. Penguin, Limited & Deborah Lipstadt, David
Irving demonstrated once again the old adage that ‘he who defends himself
has a fool for a client’. Not only did Lipstadt retain a QC as council (aided
by a whole team of solicitors, legal advisors and researchers), the defence strat-
egy was to not put her on the stand, thus denying Irving the opportunity to
cross examine her. Instead, that strategy was to pick apart Irving’s own
research systematically and comprehensively, armed as it was with the
work done by the Evans team. Here Guttenplan’s excellent summary of the
task facing Irving as his own defence lawyer is extremely illuminating. He
had to minimize the scale of the murder of European Jewry; to deny the inten-
tion on the part of the Nazis to exterminate systematically European Jewry and
other minority populations, especially in Irving’s case to deny Adolf Hitler’s

7 D. D. Guttenplan, The Holocaust on Trial: History, Justice and the David Irving Libel Case
Question’ and the American Historical Profession (Cambridge and New York: Cambridge
University Press 1988) remains the standard reference on these matters among
historians.

8 In general, someone on trial might hypothetically want to split the difference: chose a
lawyer to defend, but a historian to pass judgement on, him or her.
active complicity in the mass murder; and to cast doubt on the supposed *means* of carrying out the Final Solution at Auschwitz-Birkenau. Because it had become the prototypical site of extermination, discrediting or reaffirming the Final Solution depended on whether an empirical investigation of Auschwitz supported the claims of industrial-level extermination.\(^9\) Put succinctly, if Irving could cast doubt on the centrality of Auschwitz in the Final Solution, then deniers would have a major victory.

On the other side, the case for the defence, argued by Richard Rampton, might have adopted three possible responses to the libel charge against Lipstadt: that her words had been misunderstood; that they were ‘fair comment’; or that Lipstadt’s charges were true and hence not libellous.\(^10\) The defence chose this last and most difficult option, one that involved exposing Irving’s biases and distortions and thus discrediting him. Errors always make their way into print, but what Evans and his team looked for was a pattern of distortions and errors by Irving that pointed in the same direction. Evans and his team succeeded in showing that the distortions of evidence in Irving’s work allowed but a single conclusion: David Irving had intentionally denied the Final Solution in the form of a denial that Hitler could have been responsible for it.

**Philosophical issues 1: facts/interpretations**

Any trial, but particularly this one, is a snake’s nest of matters having to do with epistemology (how do we know what we know?) and interpretation (what is the meaning of what we know?). Those who think philosophy is an irrelevant academic exercise should think again after considering the case in question. As a historian, Deborah Lipstadt was herself not inclined towards philosophical speculation; she was not an intellectual historian. In the 2017 edition of *Denial*, she refers casually to ‘deconstructionism’ as a position that, ‘at its most simplistic level, had fostered an attitude of “the text can mean whatever I think it means”’.\(^11\) Intellectually this is equivalent to saying that philosophical pragmatism just means ‘anything goes’. There is a grain of truth somewhere there but, in general, such a characterization of deconstruction and poststructuralism is seriously inadequate. But Lipstadt’s refusal to debate Holocaust deniers, something for which she had been criticized, did make moral, interpretive and epistemological sense. She was not, as she said, refusing to debate *interpretations* of the Holocaust, that is,

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9 Guttenplan, *Holocaust on Trial*, 140–2, 147. Recent Holocaust historiography is not so insistent on the centrality of Auschwitz to the credibility of the claims of mass extermination. See the late David Cesarani’s *Final Solution: The Fate of the Jews 1933–1949* (London: Macmillan 2016), which is reviewed in these pages.


11 Lipstadt, *Denial*, 252.
questions of meaning and significance.\textsuperscript{12} Holocaust denial wasn’t just a matter of ‘two historians slugging it out over historical interpretations’.\textsuperscript{13} Rather, her refusal to debate the deniers, including Irving, was based on the claim that there was no debate to be had about the \textit{facts} of the matter: the Final Solution had taken place. The deniers had the right to express themselves (the free speech issue), she readily granted. But there was no legal or moral obligation to answer them or to respect, much less accept, their conclusions.

However, the relativism charge needs more airing. First, relativism can have either an epistemological or moral thrust. It can be about how we know \textit{what} we know or how applicable (universal) ethical values are. One might want stronger proof of the existence of gas chambers in Auschwitz without thereby doubting the utter immorality of genocide. (By taking this issue of evidence at Auschwitz seriously, the defence discredited the basis of Irving’s Holocaust denial.) One can propose viewing the Holocaust through a Marxist lens, which another historian may totally reject, even though both historians share access to a common fund of facts. Furthermore, though in the late 1980s Paul De Man, a well-known theorist of deconstruction at Yale, was discovered to have expressed pro-fascist, pro-German, opinions in pre-war Belgium, Jacques Derrida, Michael Foucault and Jacques Lacan had nothing to do with fascism or Nazism. Academic historians have also sometimes charged American philosopher of history Hayden White with claiming that all we have are interpretations, while facts are merely a function of interpretive frameworks. But this isn’t White’s position. He retains the distinction between propositions, namely, statements of fact that are either true or false, and interpretations, that have to do with the \textit{meaning} of historical phenomena and can change over time.

Overall, then, Lipstadt rejected a ‘sceptical approach to scientific fact’ and had no use for the idea, as \textit{Denial’s} screenwriter David Hare observed, that ‘all opinions are equal’.\textsuperscript{14} However, after characterizing historical research as ‘objectively determined’, Lipstadt admitted that ‘new sources and documents’ may lead the ‘truths’ at one point in time to be ‘set aside’ later on.\textsuperscript{15} This is the case in empirical matters (for example, if a new document is found), but not necessarily in conceptual or normative matters (that democracy is the best form of government is not invalidated when a democratic regime is overthrown). The problem is that too many of us academics use paired concepts such as objectivity/relativism or facts/interpretations without realizing how problematic they are. Put succinctly, neither the claim that the ‘facts speak for themselves’ nor the idea that ‘all interpretations are equally tenable’ has much going for it.

\textsuperscript{12} Ibid., 23.
\textsuperscript{13} Ibid., 66.
\textsuperscript{14} David Hare, ‘Foreword’, in Lipstadt, \textit{Denial}, xx, xv. Guttenplan also agrees generally with this position.
\textsuperscript{15} Lipstadt, \textit{Denial}, xxii.
Philosophical issues 2: the Holocaust and the inadequacy of the law

But what if a court of law is not an appropriate site to explore the historical and moral issues to do with the Holocaust because the law is incapable of dealing with the enormity of the Final Solution, especially in the assessment of responsibility and guilt, and in determining the adequacy of punishment imposed on perpetrators? As Hannah Arendt asserted in *The Origins of Totalitarianism* (1951), what had transpired under totalitarian rule were ‘crimes which men can neither punish nor forgive’. Because of this double incommensurability, Arendt originally thought the Nuremberg trials (November 1945–October 1946) would be an exercise in futility. However, by the time of the Eichmann trial of 1961 in Jerusalem, Arendt had changed her mind. She broadly approved of the trial and arranged to cover it for the *New Yorker* magazine. The results were published as five long pieces in the spring of 1963 and, then, as the book *Eichmann in Jerusalem* in May of that same year.

But several things happened to change Arendt’s mind. Of particular importance was that the Jerusalem court had to take into account two newly formulated legal concepts added to the body of international law since the end of the Second World War: ‘crimes against humanity’ and ‘genocide’. For Arendt, crimes against humanity were acts carried out ‘against the human status’ and ‘against the very nature of mankind’. Clearly, there was a substantive dimension to the concept, not just a procedural one. The other concept was ‘genocide’, an idea developed and championed by Polish jurist Raphaël Lemkin. Arendt linked genocide with an ‘attack upon human diversity’ as such, which meant it was ultimately an attack on the concept of humanity.

Law as an instrument of change

‘Crimes against humanity’ became part of international jurisprudence at the International Military Tribunal (IMT) in Nuremberg, 20 November 1945 to 1 October 1946. The charge of crimes against humanity found a ready audience among the various legal teams at Nuremberg and was included in the verdicts against some of the prisoners, a process traced out in some detail by Philippe

18 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, revd edn (New York: Viking Press 1965), 268. It is important to note that the German word Arendt used was ‘Menschheit’ not ‘Menschlichkeit’. The latter term has to do with the quality of a response, roughly equivalent to ‘humaneness’, which was not at issue.
Sands in *East West Street* (2016). ‘Genocide’ had a much harder time gaining any traction with the judges at Nuremberg and was finally defined and codified in the UN Convention on Genocide in 1948 due to the heroic efforts of Lemkin.

Sands’s *East West Street* is an imaginatively conceived effort in the social history of ideas, the history of international law and multi-stranded family history. In it Sands, a legal scholar at University College London and prominent in international law and human rights circles, explores the intersecting personal histories of three key figures in the development of the jurisprudence of crimes against humanity and genocide. While working on his book in 2010, Sands discovered that two of these now well-known figures in twentieth-century jurisprudence, Hersch Lauterpacht (1897–1960) and Raphaël Lemkin (1900–1959), both finished their legal studies at the University of Lviv in the 1920s when it was part of Poland. Lauterpacht, the lesser known but more successful figure in the 1940s, finished his legal studies in 1921, took a position at the London School of Economics in April 1923 and eventually assumed a chair in Cambridge in 1938. Until the war began, Lauterpacht travelled and taught in the United States as well. Lemkin finished at Lviv in 1926 and was active in Polish legal and governmental circles from then until the start of the Second World War. During this time, he refined the idea of genocide—a term he coined himself—and proselytized for its adoption in the United States after he made his way there via Japan in 1941. In 1944 he published his magnum opus, *Axis Rule in Occupied Europe*, even as the existence of the extermination camps was becoming generally known. The third figure was Hans Frank, one-time personal lawyer of Adolph Hitler and governor-general of the Nazi-occupied part of Poland, which included most of the extermination camps. A lawyer and man of no little culture, Frank eventually was one of those Nazi officials put on trial at Nuremberg. Sands’s own family, the Buchholzes, were also from around Lviv. Born in 1938, Sands’s mother Ruth and his grandfather Leon Buchholz, fled Vienna in 1939 for Paris where Sands was born in 1948. Sands uses his extended family to illustrate the horror-filled fate of a stable, successful Jewish family that was devastated by the Final Solution. Most of the Lauterpacht family ended in a mass grave near Lviv, victims of the very same genocide.

Because of his ability and accomplishments as a researcher and legal thinker, Lauterpacht became part of the legal team that made up the British delegation to the IMT. Clearly a gifted man with the social and intellectual skills to rise into the upper echelons of British jurisprudence, his work was crucial in developing the legal idea of crimes against humanity, which first appeared in print on 31 July 1945. But Lauterpacht was suspicious of Lemkin’s idea of genocide, thinking it a symptom of a disease to which it was the response, and reviewed Lemkin’s *Axis Rule* lukewarmly.19 For his part, Lemkin taught law at Duke University after arriving in the United

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States in 1941, and was also active in Washington advising and lobbying various US government bodies during the war. Only late in the war did Lemkin finally make his way to Nuremberg to urge the various national teams to incorporate genocide into the list of charges brought against the twenty-one Nazi defendants. Ironically, he was least successful with the United States delegation and the Chief Prosecutor, Robert Jackson.

Fascinating and moving though this personal and familial dimension of Sands’s *East West Street* is, it is doubtful whether the remarkable coincidence that Lauterpacht and Lemkin attended the same law department in Lviv, and played vital roles in developing two profoundly important legal concepts, is anything more than that. But it does allow Sands to align two contemporaneous legal concepts with quite different personal biographies and thereby illuminate a place, time and set of ideas. It was truly a jurisprudence for what historian Timothy Snyder has called the ‘bloodlands’.

But were the two notions as radically opposed, even contradictory, as Sands wants to make out? The evidence presented in *East West Street* is, I think, inconclusive. Sands clearly sides with Lauterpacht in asserting the primacy of crimes against humanity as a concept. One of the shortcomings of *East West Street*, otherwise so compelling, is that Sands never really draws back to explore the two big ideas in any depth. But it is surely more than the desire to tell a dramatically conflictual story that leads him to take sides, as it were, against Lemkin’s concept of genocide. By the end, Sands confesses to a newly found appreciation of the human need for group-identification and also of the passion that drove Lemkin, who was anything but a team player in contrast with Lauterpacht, who was socially as well as intellectually accomplished.20

In his new book, *Raphaël Lemkin and the Concept of Genocide*, Douglas Irvin-Erickson argues convincingly against the idea that genocide and crimes against humanity are polar opposites. An intellectual historian of international law at George Mason University in the Washington, D.C. area, his position is that each concept needs the other and they are thus complementary, not contradictory. (Arendt had expressed an early version of this in her Eichmann book.) From this perspective, Lauterpacht and Lemkin were ‘working in tandem to advance a rights-based approach to international law’.21 Irvin-Erickson’s valuable, but demanding, work steers clear of the family and social history that Sands uses to enrich his story. He enriches his story of Lemkin, rather, by exploring in detail and depth the way Lemkin developed genocide as a concept and also how he fought both at Nuremberg and in

20 Using Arendt’s typology of *pariah* and *parvenu*, Dirk Moses has suggested that Lemkin represented the outsider or ‘pariah’ mentality, while Lauterpacht was something of a ‘parvenu’. See A. Dirk Moses’s review of *East West Street*, ‘Popularizing the history of international criminal law’, *Lawfare* (blog), 2 June 2016, available at www.lawfareblog.com/popularizing-history-international-criminal-law (viewed 27 October 2017).

21 Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 3.
the deliberations over the 1948 UN Genocide Convention to get his big idea incorporated into international law. As an ‘internalist’ intellectual history, Irvin-Erickson’s book devotes more time and energy to the theoretical arguments surrounding both concepts than does Sands.

For example, both ideas presuppose a fundamental transformation of the concept of sovereignty. Until the 1940s, international law had to do with the complex relationship between sovereign states, which were not supposed to interfere in each other’s internal affairs. What made both the genocide convention and crimes against humanity possible, as it were, was that after the Second World War international law was no longer just ‘between states’: it also became ‘the law of mankind’. Put another way, crimes against humanity had to do with what had happened to individuals. Thus, ‘universal jurisdiction’ overrode national sovereignty. As Irvin-Erickson valuably notes, when Israel captured Adolf Eichmann in Argentina and then placed him on trial in Israel, it was clearly operating on a principle of ‘universal jurisdiction’. It should also be noted, however, that this challenge to absolute state sovereignty is the basis for what some on the liberal left much later came to call ‘military humanism’, an invitation to military intervention.

At first, genocide seems to be the easier of the two ideas to grasp, while the concept of crimes against humanity seems almost wilfully vague. Article 6(c) of the Nuremberg Charter includes among crimes against humanity: ‘Murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war. …’ It also asserts the ‘right to intervene to “protect the rights of man”’. Thus, crimes against humanity derive, by implication, from a tradition of natural and human rights in which the individual, on the one hand, and the universal, on the other, are functionally equivalent as terms of value. There is remarkably little development of the idea of ‘humanity’ in most of the definitions, even though Hannah Arendtgestured towards that in Eichmann in Jerusalem and other of her writings right at the end of the Second World War.

Irvin-Erickson’s book on Lemkin and genocide is particularly valuable for another reason as well. What he shows is how the standard definition of genocide neglects Lemkin’s original intentions. Indeed, one of his important points is that Lemkin saw genocide as a species of crimes against humanity. The prohibition against genocide was a way of protecting the individual’s right to join and participate in a group’s activity, especially when that right was overridden by a state. He did not believe that trans-historical groups were necessarily natural kinds, that is, race-based groups. Although Jewish, Lemkin did not think Jews were necessarily a paradigm case of the groups he had in mind. Group membership could be either ascriptive or elective; one could be born into the group or choose to join it. In his mind, genocide did not depend on

22 Sands, East West Street, 113.
23 Irvin-Erickson, Raphaël Lemkin and the Concept of Genocide, 191.
24 Sands, East West Street, 112, 290–1.
the romantic theory of the organic group identified with Fichte and Herder, as
some have claimed. Nor did Lemkin begin working on genocide with the Nazi
political and intellectual juggernaut underway in the 1930s. Rather, he began
to formulate his thoughts originally to meet the needs of the welter of peoples
affected by the Minority Treaties following the First World War. (Arendt saw
these treaties as great historical failures.) Most surprisingly, perhaps, Lemkin
did not really think of genocide as a single action or cluster of actions within a
relatively circumscribed time and space. Rather it was a ‘process’ that went on
over time, reflected in his emphasis on cultural destruction as much as phys-
ical extermination.

All this makes Irvin-Erickson’s analysis of the long and exhausting trajec-
tory of Lemkin’s life all the more poignant. He offers a succinct, yet powerful,
summary of the fate of Lemkin’s idea of genocide from its formulation in 1944
to its enshrinement in the UN’s Genocide Convention in 1948, following enor-
mous amounts of bargaining, compromising and exhausting politicking. As
Irvin-Erickson writes, genocide
evolv[ed] from an expansive conception of group destruction to a narrower
concept that emphasized destroying particular kinds of groups through physi-
cally violent acts. The drafting committee members also rejected universal jur-
isdiction for the crime of genocide, recognizing only territorial jurisdiction and
the jurisdiction of international tribunals. . . . many of the delegations from the
UN member states also believed that a weak treaty against genocide, or no
treaty at all, was in their best interest.25

What was the big problem with the adoption of these big ideas? How could
anyone be against either or both? One problem with the idea of crimes against
humanity was its vagueness and, as it transpired, its toothlessness. For
instance, Sands notes that, in June 1946, Lauterpacht’s forty-page draft of a
paper on the concept only barely mentioned Hitler and referred to the Jews
only once; nor did he make any reference to genocide, an idea to which he
‘remained implacably opposed’.26 Strangely, by the 1970s, ‘humanity’ and
its accompanying ideology ‘humanism’ became increasingly difficult to
speak for or about. As if fulfilling Arendt’s prophecy in the mid-1940s, human-
ity as a unified entity worried many thinkers who saw it as a way of justifying
western domination of the rest of the globe and of defending colonialism. By
the 1980s, humanism was increasingly seen as a naive ideology of the Renais-
sance and the Enlightenment that was then politicized as a western-inspired
notion imposed on former European colonies: indeed, even as a warrant for
racial, cultural, gender or religious supremacy.

Clearly something like genocide has been a constant in human history and
has more empirical-historical ‘bite’ to it. Lauterpacht’s objection to the

25 Irvin-Erickson, Raphaël Lemkin and the Concept of Genocide, 8.
26 Sands, East West Street, 339.
genocide idea was that it could generate the same sort of mentality that threatened the oppressed group in the first place. In asserting the right to group existence, the oppressed group might come to mirror, for instance, the way the Nazis asserted the primacy of permanent, biologically grounded, group identity. Both ascriptive and elective membership could easily lead to the assertion of essentialist underpinnings. Mimesis in thought entails imitation in action. In addition, Lauterpacht, and later Sands, contended that focusing on groups tended to create a contest over ‘victimhood’. Not only that, when Jews called attention to their own persecution, they made themselves vulnerable to the resentment of non-Jews towards what seemed like special pleading. In fact, this kind of argument led some in the American and British Jewish communities to downplay the centrality of the Jews in the mass murders reported during the last year or so of the Second World War.27

A closely related objection to genocide was, and is, that to bring a charge of genocide against a leader or group may encourage the use of violence against these alleged perpetrators. Who would not be tempted to use violence to justify the ending of genocide? The humanitarian logic that leads to violence is hard to resist once it begins unfolding. In fact, this was the logic that drove the tradition of ‘virtuous’ violence so apparent in the French revolutionary ‘terror’. It also dovetails with Arendt’s discussion in On Revolution of the political violence perpetrated by ‘good’ men, and also analysed by Max Weber in his ‘Politics as a Vocation’ essay, which contrasts the ‘politics of responsibility’ with the ‘politics of conscience’.28 And, yet, it is possible to disrupt the supposedly inexorable logic of virtuous violence as the examples of the freedom struggle of the American Civil Rights Movement, the revolution against Soviet-dominated governments in Eastern Europe and the demolition of apartheid in South Africa show. The explicit prohibition of genocide can hedge in human aggression and violence against groups rather than provoke it. Returning, finally, to the theme of law and the Holocaust, Lemkin had great hopes for the law in general. Specifically, he saw the genocide convention as an example of the way a law can become a form of positive action, an intervention, to change the way people see themselves and others and thus to change the ways groups deal with each other.

Against genocide: a sequel

Particular contempt should be reserved for the way that the great powers, the sponsors of the IMT at Nuremberg and ‘big beasts’ in the UN did their best to torpedo or water down the convention on genocide. The Soviets were able to

27 Ibid., 380–1.
exclude political groups from the list of groups protected by the convention. The colonial powers, Britain and France especially, got the cultural dimension of genocide removed, while the United States feared that the history of slavery and the ongoing existence of segregation would make it particularly vulnerable. As a sign of his desperation, Lemkin argued that segregation was not a violation of human rights but ‘merely’ of civil rights.

- Hans Frank was convicted and hanged on 16 October 1946 at Nuremberg.
- Raphaël Lemkin felt his efforts to be a ‘failure’ and died in a police station in 1959 after collapsing on 42nd Street in New York City.\(^{29}\)
- Hersch Lauterpacht died in 1960 while he was a British judge at the International Court of Justice in The Hague.
- The ABC movie that was interrupted to show films of Alabama state troopers beating civil rights marchers outside of Selma on 7 March 1965 was *Judgment at Nuremberg*.
- The United States finally signed the genocide convention on 4 November 1988, and the first conviction for genocide in an international court was handed down in 1998.


\(^{29}\) Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, 229.