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Twin Peaks: The Hersch Lauterpacht Draft Nuremberg Speeches

*Philippe Sands QC**

During 1945 and 1946, Hersch Lauterpacht was actively engaged in preparing extensive sections of the opening and closing speeches delivered by Sir Hartley Shawcross at the Nuremberg International Military Tribunal. In that role, which focused largely on addressing legal rather than factual issues, he made a singular contribution to the arguments and outcome.

His involvement in the Nuremberg process followed earlier advices he had given to Robert Jackson and Hartley Shawcross on other matters.¹ Even before the Tribunal was proposed, he prepared a scholarly piece on war crimes, and by the summer of 1945 had completed his book on a Bill of International Rights, recognising the role and rights of the individual in international law. In July 1945 he was consulted by Robert Jackson on the crimes to be included in the Nuremberg Statute, and came up with the idea of inserting the phrase “Crimes against Humanity” in Article 6(c). In August 1945, he was asked by the British Foreign Office to join the British War Crimes Executive, a body tasked with planning and preparing for the prosecution of German officials under the London Charter.² In this capacity, he had several meetings with the Chief British and American prosecutors, Attorney General Sir Hartley Shawcross and Robert H Jackson, to discuss how the Trial would proceed.

Lauterpacht attended the Trial on three occasions. He was present in Nuremberg when it opened on November 20th 1945, and reviewed the draft British case that dealt with the planning and waging of a war of aggression (count two on the indictment). He considered the case “was bad to the point of being ridiculous” and was asked to prepare a new draft.³ Lauterpacht spent the period from November 24th to 29th preparing what became Parts I and III

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¹ E. Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge University Press, 2010), at 131–2, 135, 180–2, 188–9.

² *Ibid.*, at 272–3. See also *The Times*, 15 September 1945, at 2, for a full list of members.

³ Lauterpacht, *supra* note 1, at 275–6, HL to RL, 29 November 1945.

of the Shawcross' opening speech.⁴ The speech delivered by Shawcross on 4 December 1945, adopts "[w]ith some changes of language to avoid too obvious a change of style", a great part of Lauterpacht's original text.⁵ As his son, Sir Elihu Lauterpacht has noted, "[a] line-by-line comparison of Hersch's draft with what Shawcross actually said shows that, of the fifteen printed pages of the legal argument, twelve were drawn almost verbatim from Hersch's draft."⁶

On 17 May 1946, Shawcross wrote to Lauterpacht requesting assistance on the preparation of the British closing speech.⁷ Further correspondence took place and, on 29 May, Lauterpacht travelled to Nuremberg to consult with Sir David Maxwell Fyfe before reporting to Sir Hartley on 3 June.⁸ On 6 June 1946, Sir Hartley once again wrote to Lauterpacht and asked him to prepare a draft speech that would "deal with the legal and historical part of the case, which I want to make the main feature of the speech."⁹ Lauterpacht subsequently prepared a draft and sent 76 pages of typed foolscap to Shawcross on the 10 July 1946 (the original handwritten manuscript runs to 109 pages).¹⁰ Shawcross delivered his final speech on 26 and 27 July 1946, adopting significant portions of Lauterpacht's draft. Of the sixteen pages devoted to the law in the final speech (sixty-one pages were devoted to the facts, of which Hersch was specifically asked not to deal with), "twelve pages (three-quarters) were drawn from Hersch's draft."¹¹

Shawcross expressed his gratitude for the assistance:

Now that the Nuremberg trial is finally over I should like, both officially and personally, to thank you for the important part which you played in it. For your help to me personally, in regard to the speeches and other matters, I shall always remain most grateful.

I hope that you will always feel some satisfaction in having had this leading hand in something which may have a real influence on the future conduct of international relations...¹²

⁴ *Ibid.*, at 276.

⁵ *Ibid.*

⁶ *Ibid.*, at 277.

⁷ *Ibid.*, at 293, Sir Hartley Shawcross to HL, 17 May 1946.

⁸ *Ibid.*, at 294.

⁹ *Ibid.*, Sir Hartley Shawcross to HL, 6 June 1946.

¹⁰ *Ibid.*, at 295, HL to Sir Hartley Shawcross, 10 July 1946.

¹¹ *Ibid.*, at 278.

¹² *Ibid.*, at 297, Sir Hartley Shawcross to HL, 8 October 1946.

The originals of the drafts have remained, since Lauterpacht's death, in the Hersch Lauterpacht Archives at 7 Herschel Road, Cambridge. These have been seen by only a small number of scholars, and have never before been published in full. The speeches are a source of great inspiration. They enable the reader to gain an insight not only into the law and politics of the tribunal, but also into the mind of a great international lawyer who learnt, between his first and second attendance at the Trial, that he lost every member of his family that remained in Lwow (Lemberg), with the exception of his niece Inka Katz. It is a remarkable feature of the draft of the closing speech that the text almost wholly excludes any personal connection to the terrible facts that underpinned the legal arguments he crafted.

The opening speech deals primarily with the prohibition against aggression in international law and the crime against peace under the London Charter. The closing speech is broader and discusses all three crimes under the Charter, as well as procedural matters, the law to be applied by the Tribunal, and certain potential defences raised by the defendants. It is possible to identify four broad areas of argument: (i) the prohibition of aggression and the crime against peace in existing law; (ii) considerations relating to state and individual responsibility; (iii) the rejection of sovereignty as a defence and bar to individual criminal responsibility; and (iv) the fairness of the Trial, having regard to its aims.

1 The prohibition of aggression and the crime against peace

Lauterpacht began his opening speech with the claim that the notion of a war of aggression as an international crime “is not in any way an innovation”.¹³ In Part I, he spends six pages discussing several instruments referring to “aggression”—these were adopted verbatim by Shawcross—to demonstrate that war was illegal, referring to the “solemn, rigid, and unequivocal obligation of the General Treaty for Renunciation of War”.¹⁴ He explains that the prosecution of a crime of aggression is merely a procedural means to enforce existing law, and not an *ex post facto* crime: it means that individuals cannot hide from their violations behind the veil of state. Yet it is clear that the *ex post facto* argument was of considerable concern to Lauterpacht; this is evident from letters to the

¹³ HL Draft Opening Speech, Part I, typed foolscap, at 17; 49 of the final speech.

¹⁴ *Ibid.*, typed foolscap, at 17; not contained in the final speech.

Foreign Office Legal Advisors,¹⁵ his draft of *Oppenheim*¹⁶ and the closing speech.

In the closing speech, Lauterpacht is more defensive. He explains that the charge of war crimes “is by itself sufficient to seal the fate of these defendants”,¹⁷ but “if we were to-day called upon to frame the Charter”, we would “not hesitate to include crimes against the peace and crimes against humanity”.¹⁸ Nevertheless,

...there is no doubt that in the minds of some persons and circles, including counsel for the defence, these two charges of article 6 have given rise to questioning of the legal basis and of the propriety of the indictment. It is with regard to these counts that the shrill argument of retroactivity and of post facto legislation has been raised repeatedly and insistently.¹⁹

According to Lauterpacht, “we do not forget that they are additional, though not secondary, to the principal charge of the Charter—that of violations of the laws and customs of war.”²⁰ He dedicates several pages to crimes against humanity²¹ and key examples of war crimes: mass shooting of hostages, aerial bombardment for the sole purpose of terrorizing the civil population; and the extermination and murder of civilians and non-combatants in occupied territory (he never refers to the concept of genocide, as coined by Rafael Lemkin and referred to in the Indictment (in relation to war crimes) but not the Statute,

¹⁵ Lauterpacht, *supra* note 1, at 273, HL to Patrick Dean, 20 August 1945 (“The main criticism which the Government may have to meet in this matter will be that (c) [that the initiation of a war of aggression can properly be regarded as the principal instance of an international criminal act]—as accepted in Article 6(a) of the Agreement—is an innovation.” Later in the letter, Hersch frankly states that “Paragraph (c) of Article 6 of the Agreement—Crimes against humanity—is clearly an innovation. It is a fundamental piece of international legislation affirming that international law is not only the law between States but also the law of mankind and that those who transgress against it cannot shield themselves behind the law of their State or the procedural limitations of international law.”).

¹⁶ Lauterpacht, *ibid.* An advanced copy of *Oppenheim*, Volume I, 6th edition, was sent to Patrick Dean at the Foreign and Commonwealth Office (“Its purpose is to show: (a) that there is in international law such a thing as criminal responsibility of States; (b) that the criminal responsibility of States means criminal responsibility of the individuals who are the organs of the State; and (c) that the initiation of a war of aggression can properly be regarded as the principal instance of an international criminal act.”).

¹⁷ HL Draft Closing Speech, typed foolscap, at 10–11; not in the final speech

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*, at 12; not in the final speech.

²¹ *Ibid.*, at 48–50.

and makes almost no reference in the two speeches to the killing of particular groups, including Jews, a reflection no doubt of his desire to avoid the reification of groups as such).²² Notwithstanding this “secondary” status, Lauterpacht is clear that “in a very real sense, the crime of war had become the parent of and the opportunity for the war crimes”.²³

2 State responsibility and individual criminal responsibility

Although Nuremberg is often remembered as the trial at which individuals were held responsible for violations of international law, much of Lauterpacht’s attack on statehood is left for the closing speech. His draft weaves between individual and state responsibility. For example, having referred to the *Trail Smelter* arbitration between the United States and Canada,²⁴ he concludes that:

There is thus nothing startlingly new in the adoption of the principle that the State as such is responsible for its criminal acts. In fact, save for the reliance on the unconvincing argument of sovereignty, there is in law no reason why a State should not be answerable for crimes committed on its behalf...²⁵ The Charter lays down expressly that there shall be individual responsibility for the defendants for the crimes... The State is not an abstract entity. Its rights and duties are the rights and duties of men. Its actions are the actions of men. It is a salutary principle of the law that politicians who embark upon a war of aggression should not be able to seek immunity behind the intangible personality of the State...²⁶

In the final pages of his draft, Lauterpacht remarks that, “[t]hey, the defendants, were the State. They, in their deeds, embodied the greatest perversion, known in the history of man of the true meaning and function of the State. Even in the

²² *Ibid.*, at 31–3.

²³ *Ibid.*, at 35; not in the final speech.

²⁴ Koskenneimi has noted that the analysis of the *Trail Smelter* arbitration is “strangely out of place, yet included as an indication of the willingness of (some) states to accept liability for breaches of international law”: M. Koskenneimi, ‘Hersch Lauterpacht and the Development of International Criminal Law’ (2004) 2 *Journal of International Criminal Justice*, 810–25, at 821.

²⁵ HL Draft Opening Speech, Part III, typed foolscap, at 3; 57 of the final speech.

²⁶ *Ibid.*, at 4; 58 of the final speech.

course of this trial the good of the German State remained for them the supreme test and the final justification of conduct.”²⁷

3 Rejecting state sovereignty as a defence

In Part III of the opening speech, Lauterpacht mounts a strong attack on sovereignty:

For the first time in history we see a State in the dock. We behind the Government of what was a sovereign nation and most of the moving agents of its destructive malevolence placed as accused at the bar of mankind. The mystical sanctity of the sovereign State, shorn of the paraphernalia of pomp and power, is here arraigned before the judgment of the law.²⁸

Shawcross dropped this text. In the second part of his closing speech, Lauterpacht once again takes up the argument that international criminal responsibility “is incompatible with the basic assumption of international law, namely with the sovereignty of States”.²⁹ He states that “[i]t is not easy to see why the sovereign will of States should be subject to responsibility in contract and tort, but not with regard to crimes. Many theories have been made to rest upon the broad shoulders of sovereignty, but these theories have not always been accurate.”³⁰

Indeed, “the will of the Nazi State as formed and governed by these defendants” is not by the mere fact that it was the will of the State necessarily entitled to be regarded as law and as an absolute justification of acts committed in pursuance thereof.”³¹

In the final part of his closing speech, Lauterpacht deals with the act of state doctrine and the defence of superior orders. Although the Charter rejected both defences, Lauterpacht felt that it was the duty of the prosecuting powers to justify their exclusion by reference to general international law. He directs his attack towards state sovereignty:

²⁷ HL Draft Closing Speech, typed foolscap, at 74–5; not in the final speech.

²⁸ HL Draft Opening Speech, Part III, typed foolscap, at 2–3; not in the final speech.

²⁹ HL Draft Closing Speech, typed foolscap, at 44; not in the final speech.

³⁰ *Ibid.*, at 45–6; not in the final speech.

³¹ *Ibid.*, at 50; not in the final speech.

In no other sphere is it more necessary to affirm the principle that the rights and duties of States are the rights and duties of men and that unless they are the rights and duties of individual persons they are the rights and duties of no one. In no other sphere is it more imperative to disdain the artificial distinction between the corporate entity of the State and those who act on its behalf. The Charter of the Tribunal has ignored that distinction. In doing so it has confirmed and clarified a legal doctrine of transcending beneficence and authority.³²

4 Fairness

Lauterpacht begins his closing speech with a defence of the Tribunal itself, explaining the sources of law applied by the tribunal—relying on Article 38 of the PCIJ³³—and the fairness of the trial itself, specifically the safeguards accorded to the defendants.³⁴ He ends the closing speech by reflecting on the important aims of the trial, which for Lauterpacht were to “declare and clarify such rules and principles of the law of nations as are relevant to the Indictment and to the interpretation of the provisions of the Charter”.³⁵ “[f]or this is a trial not only before this Tribunal, but also before the enlightened conscience of the entire civilized world.”³⁶

5 Conclusion

The two draft speeches he prepared for Sir Hartley Shawcross merit careful consideration. The astute reader will pick up themes addressed in Lauterpacht’s seminal work—*The Function of Law in the International Community*—the preface to which emphasises his interest in the place that individuals should have in the evolving international legal order. “The well-being of an individual is the ultimate object of all law”, he wrote in 1932, “and whenever there is a chance of alleviating suffering by means of formulating and adopting legal rules, the law ought not to abdicate its function in deference to objections of apparent cogency and persuasiveness”.

³² *Ibid.*, at 59; not in the final speech.

³³ *Ibid.*, at 7; not in the final speech.

³⁴ *Ibid.*, at 8; not in the final speech.

³⁵ *Ibid.*, at 71; not in the final speech.

³⁶ *Ibid.*, at 73; not in the final speech.

These two drafts, which are here made generally available for the first time, provided an unhappy opportunity to put the words into practise. Taken together, they are as significant as anything else he ever wrote, helping to define the current international legal order, with its commitment to limits on state sovereignty, an emergent international criminal justice system, and the real protection of individuals.