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EAST WEST STREET: PERSONAL STORIES ABOUT LIFE AND LAW

PHILIPPE SANDS

**MARCH 30, 2017 ANHEUSER-BUSCH HALL, BRYAN CAVE
COURTROOM, WASHINGTON UNIVERSITY SCHOOL OF LAW**

ABSTRACT

*The tension between the importance of individual or group protections is one that has been continuously debated in international criminal law. “Crimes against humanity” and “genocide” are legal terms born from the atrocities in Poland under Governor Hans Frank and Nazi rule. Frank destroyed Poland with a reign of terror and with the introduction of camps like Treblinka. Hersch Lauterpacht, a Cambridge Academic and author of *An International Bill of Rights of Man*, who lost nearly all his family in *The Great Aktion* in August of 1942, and contributed to the British Prosecution at the Nuremberg trials, coined “crimes against humanity” which refer to certain atrocities committed against civilians on a large scale. In contrast, “genocide” addresses barbarism against large numbers of people bonded together by racial, religious or national identity, and was coined by Rafael Lemkin, author of *Axis Rule*, and member of the United States War Department, who lost his entire family to Nazi rule.*

While both terms, address two different aspects of the human rights offenses of World War II, both can be traced to ideologies of Polish Professor Julius Makarewicz at the University of Lwow, where Lemkin and Lauterpacht studied. While “crimes against humanity” and “genocide” have been embraced in international criminal law, the concepts sit in precarious relationship to one another. To some, “genocide” has become something that sits atop the list of horrors and can have the effect of minimizing the severity of “crimes against humanity” and promote an “us” versus “them” mentality inherent in group based categorization. However, in a world of increasing nationalism and xenophobia both the arguments of Lauterpacht and Lemkin about individual and group protections in International Criminal Law remain salient.

PROLOGUE

A little after three o'clock on Friday October 1st, 1946, the last day of a trial that has lasted a full year in Nuremberg's Palace of Justice, Hans Frank stands in an elevator. A small wooden door slides open, he passes through, enters Court Room 600.

Sitting there is Hersch Lauterpacht. He is waiting for that door to open, for Frank to emerge. Seven hundred kilometres to the west, Rafael Lemkin lies on a bed in an American military hospital in Paris, being treated for hypertension. He awaits by a radio for news of the judgment.

Three men, in search of consolation, each a lover of music. Which piece came to each at this moment?

I. FRANK

AUGUST 1, 1942, LEMBERG

Let us go back four years, to July 31st, 1942, to Lemberg, the capital of Distrikt Galitzie, in the heart of Europe. No longer Soviet Lviv, or Polish Lwow, the City of Lions has been controlled by Germany for a year. At the main rail station Hans Frank arrives by train, to the sound of church bells and a military orchestra. He leaves the station in a large black automobile, passing through handsome streets decorated with the insignia of the Third Reich. In front of the opera house schoolchildren wave little flags, in red, white and black.

Since October 1939 he has been the Governor General of occupied Poland, appointed by Adolf Hitler, a gift in return for services rendered to the Nazis, since the 1920s. He spends the day at party functions. In the evening, he inaugurates a new theatre, a "sanctuary of art." He is a man of culture. Years later, after the war, his friend Richard Strauss will tell Klaus Mann that Frank was "a nice guy, a music lover, refined, with a great sense of humour." In 1943 Strauss composed a short piece in his honour. I have the lyrics, but the music has been "lost," so to speak. So, we must imagine Frank, slender and swank.

Frank says: "We, the Germans, do not go to foreign lands with opium and similar measures like the English...we bring art and culture." To Lemberg he has brought Beethoven and Fritz Weidlich, an unknown Austrian conductor. He wanted von Karajan, or Furtwangler, but neither was available. He has chosen the repertoire, Beethoven's Leonore Overture, then the 9th Symphony.

The following morning Frank attends a ceremony to mark the first anniversary of the incorporation of Distrikt Galicia and Lemberg into his Gouvernement General, after the removal of the Soviets. The *Gazeta Lwowska* praises his "elaborate" speech. He announces the reintroduction of "European rules of social order" into the city. Later that day he holds a series of private meetings, to offer reassurance on Hitler's approach.

Galicia and Lemberg are the “primeval source” of the Jewish problem, under German control that problem will be addressed. “We still have some of them around ... but we’ll take care of that.”

Like a good courtroom lawyer, he pauses for effect, a moment of drama.

“I haven’t seen any of that trash hanging around here today. What’s going on? They tell me that there were thousands and thousands of those flat-footed primitives in this city ... but there hasn’t been a single one to be seen since I arrived.” Those were the words entered into his diary.

The audience applauds. Frank hasn’t seen any Jews because they are in the ghetto, ten minutes away, 100,000 of them. In November 1941 his office prepared a map with the title *Umsiedlung der Juden*: Resettlement of the Jews. The ghetto is a direct consequence of his decrees, as is the death penalty imposed for setting foot outside the ghetto. A report records that his words are followed by “lively applause.”

Within days of Frank leaving Lemberg – on August 16th 1942 to be precise - *die Grosse Aktion* begins, the Great Action to empty the ghetto. A week later, Himmler comes to town. Such events have consequences, across great distances and over time.

II. THE GREAT AKTION AUGUST 18, 1942, LEMBERG

In August 1942 the ghetto in the city of Lemberg is emptied, under Governor Frank’s authority. This is footage from another ghetto, the ghetto in Krakow. Made on the orders of Hans Frank, the footage is in the possession of his son Niklas, who has allowed me to show it. A private film, street scenes, people milling around, barefoot children, white armbands. Eventually we come to a young girl, with a beautiful smile, the girl in a red dress. Her smile has stayed with me ever since I first saw it, and now she is released.

One of the families in the Lemberg ghetto is that of a Cambridge academic, Hersch Lauterpacht. His parents, brother and sister, and many other family members are confined there in Lemberg, and in Zolkiew, a small town 25 kilometres to the west.

During the First World War Lauterpacht enrolls at Lemberg’s law faculty, when the city is in the Austro-Hungarian empire. Three years later, in 1918, the War is over and so is that Empire. Over a bitter month, control of the city passes from the Austrians to the Western Ukrainians, and then to the Poles. The city’s name changes with each successive regime, and there is much bloodshed. Through a long winter, Lauterpacht is on the front lines, protecting his parents. I find a photograph, the snow-covered street, which ends with a barricade, as you can see.

In 1919 Lauterpacht moves to Vienna. At the Law Faculty he picks up interesting new ideas about the rights of individuals. A seed is sown. He meets Rachel, a student of classical piano. She records that on the first date she played “one of the early Beethoven sonatas.” “Very lovely, but not too easy to execute.”

Hersch and Rachel marry in 1923 and move to London. He enrolls at the LSE, five years later their only child is born, a son called Eli. In 1937 Lauterpacht is elected to a Chair at Cambridge University. The war begins in September 1939. Polish Lwow becomes Soviet Lviv. In June 1941 the Germans take control of the city from the Soviets, once more it is Lemberg. By then Hersch Lauterpacht is 45 years old. As Hans Frank visits Lemberg, Lauterpacht is deeply worried about his family, he hasn't heard from them for eighteen months. His sister Deborah has one child, a girl called Inka, born in Lemberg.

Four summers ago I met Inka in Paris. We drank black tea, she told me about August 1942, with a clear memory. The first to be taken was her grandfather Aron, Lauterpacht's father.

“Two days later, Hersch's sister, my mother, was taken by the Germans. It was on the street; my mother was rushed by Ukrainians and German soldiers.” Inka watches from a window of their home, on an upper floor, alone. Her father is working nearby. “Someone went and told him that my mother had been taken.” “I understood what had happened, I saw everything looking out of the window ... I was twelve, not a child any more. I stopped being a child in 1939. I knew the dangers and all the rest. I saw my father running after my mother, behind her, on the street. I understood, it was over.”

She speaks without obvious emotion. She has spent a lifetime dealing with that single moment, watching from a window. “I was watching discretely. I wasn't brave. If I had been, I would have run after her. I knew what was happening. I can still visualize the scene, my mother's dress, her high heels...”

“My father didn't think about me. You know what? I rather liked that. For him, it was simply that they had taken his wife, the woman he loved so much. It was just about bringing her back.”

Her father goes off, to look for his love, in a dark grey suit. Then he is taken, and Inka is alone.

She survives a few weeks, hiding in attics, sheltered by neighbours. One day she knocks on the door of a Roman Catholic convent, where she is taken in, hidden until the war's end. The only condition is that she must be baptised.

III. "CRIME AGAINST HUMANITY"
JULY 29, 1945, CAMBRIDGE

Lauterpacht knows nothing of this. He is far away, an academic in Cambridge. On the very day his father is taken he starts work with the British and American governments on the war effort, offering legal advice. He has come to know Robert Jackson, President Roosevelt's Attorney General, later a Justice at the U.S. Supreme Court. They work together, as Lauterpacht imagines the role of the law in the protection of individuals.

In the summer of 1945, after the war in Europe ends, Lauterpacht publishes a new book, titled *An International Bill of the Rights of Man*. It includes ideas on the protection of the individual against the actions of states, who should not be able to kill and torture and then hide behind a principle of sovereignty. It's a revolutionary idea, his draft international Bill of Rights.

With end of the war, Churchill, Roosevelt and Stalin announce there will be a war crimes trial, in Nuremberg, with Robert Jackson as Chief Prosecutor. The British hire Lauterpacht to join the prosecution team.

In July 1945 Jackson travels to London to draft the Charter of the Nuremberg Tribunal. The U.S., Britain, France, and the Soviet Union disagree about the crimes which the Tribunal will prosecute; Jackson turns to Lauterpacht for help. On July 29th Jackson goes to Cambridge, lunches with Lauterpacht and Rachel. They sit in the garden at their home. Here he is. The grass is freshly cut, offering a sweet, fresh smell, and later a child will wander in.

Over tea, perhaps with a favourite Victoria sponge cake from Fitzbillies, the local bakery, the two men discuss the list of crimes. Lauterpacht offers a suggestion: why not insert headings into the Statute, to help public understanding? Jackson is positive, so Lauterpacht offers another idea on atrocities committed against civilians on a large scale: why not refer to them as "Crimes against Humanity," and use the term as a heading? Here you can see the words, in his own hand. The term would cover torture and murder and other persecutions, introducing a new concept into international law. Jackson likes the idea, takes it back to London.

Within a few days "Crimes against Humanity" is in the Nuremberg Charter, the first time it has ever been included in an instrument of international law. Lauterpacht calls it "an innovation," an "enlightened concept" which affirms that those who break international law "cannot shield themselves."

IV. "GENOCIDE"
OCTOBER 1945, LONDON

As this is going on, four thousand miles away, in the city of Durham, North Carolina, another former resident of Lwow is also thinking about these matters, but differently. Born three hundred miles to the north, on a farm near Azaryska, now in Belarus, Rafael Lemkin also studied at the law faculty at the University of Lwow, arriving in 1921, shortly after Lauterpacht left. He earned a doctorate in criminal law.

The great love of his life is his mother Bella, who sang him simple Russian, poetic melodies, which he will always remember.

From this world, Lemkin moves to Warsaw, to work as a public prosecutor. At a League of Nations meeting in 1933 he proposes a new international crime, to combat "barbarism" and "vandalism" against groups of people. Lemkin's focus is not on individuals, like Lauterpacht, but on large numbers of people bonded by racial, religious, or national identity. Nothing comes of the idea, but this concept will become his cause, his obsession.

Six years later, as the Third Reich invades Poland, Lemkin is in Warsaw. He escapes to his parent's town of Wolkowysk, under Soviet control, then to Stockholm. The following year, in 1941, he is offered academic refuge at Duke University in North Carolina.

The journey from Stockholm to America is long, three quarters of the way around the world. He has little money and virtually no personal belongings. Yet he travels with much luggage, for he has spent those months in Stockholm collecting decrees promulgated by Frank and other Nazis in occupied Europe. Lemkin's luggage is filled with paper, literally thousands of pages of decrees which he carts across the world.

These he will analyse in America. He obtains a book contract, to see whether there is a master plan underlying German actions. The book is published in November 1944. It is called *Axis Rule*, and Chapter IX uses a new term in its title: "Genocide." He has invented the word for a new crime - the destruction of groups - which you can see in his hand.

In 1945 Lemkin is hired by the U.S. War Department, to assist in the prosecution of war crimes. He works with Robert Jackson's team, separately from Lauterpacht. Lemkin is greatly disappointed to learn that the Nuremberg Charter - with its list of crimes with which the German defendants will be charged - includes "Crimes against Humanity" but not "genocide." So, he flies to London to press for the inclusion of "genocide" in the Indictment. There is strong opposition, from Jackson's office, under pressure from Southern U.S. Senators who worry that claims of "genocide" might be invoked by African-Americans. The British, worry that such a crime will be claimed by the victims of colonial rule. Many of Lemkin's colleagues think he is too pushy. Yet his word makes it into the Indictment, the first time it is used in any legal instrument, with Lemkin's definition,

the “extermination of racial and religious groups,” mentioning “Jews, Poles, Gypsies and others,” covering all occupied territories, including Lemberg and Wolkowysk.

On October 18th 1945 the Indictment is filed at the Tribunal. “I went to London and succeeded in having inscribed the charge of Genocide against the Nazi war criminals in Nuremberg.”

V. THE OPENING
NOVEMBER 20, 1945, NUREMBERG

There is here a striking coincidence: the two men responsible for introducing “crimes against humanity” and “genocide” into international law, studied at the same university, walked the same streets, entered the same buildings, had the same teachers, yet developed different ideas on how the law might protect against atrocity. The origins of both new crimes may be traced to Lemberg, to events at the end of the Great War, to the law faculty of the University. You can trace the origins to one teacher the two men had in common – Julius Makarewicz, a Polish professor of criminal law – and to the building and room where Makarewicz taught, as I have done.

A quarter of a century after studying with Professor Makarewicz, the two men are deeply involved in the Nuremberg trial. Lauterpacht is with the British, urging the protection of individuals. Lemkin is with the Americans, pushing for the protection of groups. They are together and apart, and share the absence of information as to the fate of their families.

The trial opens on November 20th. Amongst the twenty-one men in the dock is Hans Frank. He was caught in May, near his home in Bavaria, along with forty-two volumes of his diaries and a marvellous collection of artworks. Amongst the many paintings is Leonardo da Vinci’s famous portrait of Cecilia Gallerani, the Lady with an Ermine, painted in 1489.

It hung in Frank’s rooms in the Wawel Castle in Krakow, and he took it with him when he left to return to Germany, in January 1945. Frank’s son Niklas tells me that as a young boy his father made him stand before the painting and part his hair, just like Cecilia Gallerani.

Now Frank is charged with “Crimes against Humanity” and “genocide,” a long way from the old days, hanging out with A.H. and Richard Strauss.

Frank sits near Hermann Goering, dark glasses concealing his expression. Lord Justice Geoffrey Lawrence, the English judge, presides over the trial, “unique in the history of the ... world.” Lemkin is confined to Washington because his colleagues find him uncontrollable, obsessively pushing his “genocide” agenda, not a team player, constantly talking to the press. Lauterpacht is in court, a member of the British team, but strongly

opposed to Lemkin's word. He considers "genocide" to be impractical and unsupported by precedent. He worries that focusing on groups will distract from protecting individuals.

On the opening day, the prosecutors describe the "crimes against humanity" and acts of "genocide." The atrocities in Lemberg are a focus, following Frank's visit. Over 133,000 persons tortured and shot, 8,000 children killed in just two months. Lauterpacht listens, but knows not whether the victims include his own family.

On this day, Lauterpacht and Frank are in the same room. I'd like to see a photograph, but Lauterpacht's son tells me that none exists. I visit the archives of Getty Images, the largest collection of images from the trial, and spend a day going through hundreds of old glass plate images. After several hours, I eventually find what I am looking for:

There is Lauterpacht at the end of the British table, on the left of the image. Elbows on the table, hands clenched under his chin. He's attentive, behind a Soviet prosecutor at the lectern. In the lower right hand corner, you can see the oversized figure of Hermann Goering, in a light-colored suit. Six along to the left you can see the semi-bowed head of Hans Frank.

Lauterpacht and Frank, divided by just a few tables and chairs. Lauterpacht knows nothing of the fate of his family. He will have studied Frank, but if Frank saw Lauterpacht he will not have known of a personal connection.

VI. THE DEFENCE APRIL 18, 1945, NUREMBERG

Six months into the trial, on April 18th, 1946, Frank sets out his defence. The Tribunal has just heard evidence from a lone survivor of the killings at Treblinka, in Frank's territory. Samuel Rajzman explains that he was present on the platform for the arrival and despatch of Sigmund Freud's three elderly sisters. I visited Treblinka with my son, three years ago, curious to see what remains. We had lunch at a small restaurant in the nearby town of Brok, placid and hushed, a world away from the killing fields described by Rajzman. It's a simple place, as a radio plays an unlikely tune. Familiar words float around the room, a song catches my ear. "There is a crack in everything, that's how the light gets in."

Frank is questioned about his role in Poland, after 1939.

"I bear the responsibility."

This is unexpected.

"Do you feel guilty?"

That's a question for the Tribunal.

Five months into the trial he has been able to gain "a full insight" into the atrocities.

"I am possessed by a deep sense of guilt."

It feels like an admission, of sorts.

On the stand Frank appears nervous. He looks around for signs of approval from other defendants, but it's not forthcoming. Did you loot art treasures?

"I saw to it that those art treasures remained in the country right to the very end."

What about the art in your possession when you were captured?

"I was safeguarding them, but not for myself ... You cannot steal a 'Mona Lisa.' "

He is referring to Cecilia Gallerani. The argument is hopeless. Goering is deadpan, but other defendants are seen to be grinning. Did you introduce Jewish ghettos?

Yes.

Did you introduce badges to mark the Jews?

Yes.

Did you yourself introduce forced labour in the Government General?

Yes.

Did you know of the conditions in Treblinka, Auschwitz, and other camps?

Auschwitz was not in the area of the Government General. "I was never in Maidanek, nor in Treblinka, nor in Auschwitz."

He doesn't answer what he has been asked. It's a dangerous question, one he sidesteps.

Did you ever participate in the annihilation of Jews?

"I say 'yes,' and the reason why I say 'yes' is because ... my conscience does not allow me to throw the responsibility solely on ... minor people."

He wants to be clear.

"I myself have never installed an extermination camp for Jews, or promoted the existence of such camps."

Yet he recognises his own "most horrible utterances."

"[M]y own diary bears witness against me ... it is no more than my duty to answer your question in this connection with 'yes.' "

And then he says this:

"A thousand years will pass and still this guilt of Germany will not have been erased."

A silence descends over the courtroom. Frank accepts a collective guilt, the guilt of a group, but not his own. Goering shakes his head, in disgust.

During the lunch hour Frank talks with Captain Gustave Gilbert, the U.S. Army psychologist tending to him. He hopes the judges were

impressed by his sincerity. Yet just a few weeks later, when he returns to the stand in August, he retracts the tentative, limited expression of collective guilt. The other defendants have got to him. Von Ribbentrop, Foreign Minister of the Reich, tells Captain Gilbert that no German should ever say that his country is disgraced for a thousand years. Admiral Doenitz, Hitler's successor, complains that Frank should only have spoken as an individual, "for himself," not for the Germans as a group.

VII. THE CLOSING JULY 27, 1946, NUREMBERG

In June 1946 Lauterpacht learns of the fate of his family. The news comes from Inka, his niece, who is in a displaced person's camp in Austria. She tracked him down after hearing of a newspaper report that her uncle was involved in the trial. She sends an acquaintance to Nuremberg, who stands outside the Palace of Justice for three weeks, whispering "Hersch Lauterpacht, Hersch Lauterpacht," as people come and go. Eventually someone recognises the name, and this leads to a letter and contact. Inka tells her uncle she is the only member of the family to have survived. Later that year Inka comes to live with Hersch and Rachel in Cambridge.

The prosecuting powers make their closing arguments at the end of July. It's a difficult period for Lauterpacht, a time of personal grief and professional challenge, as he prepares the closing argument for the British. He writes frequently to his son Eli. One letter describes the "moving strains" of Johann Sebastian Bach's *St. Matthew Passion*. From this Lauterpacht draws solace and strength.

The *Matthew Passion* must have had a particular resonance for Lauterpacht. The work reflects Bach's desire to emphasize a Pietist belief in the individual: every aria but one in the Passion is sung as *ich* – I; the three landmark choruses are sung in the first-person plural, downplaying the Priest-celebrant and the church, the group. The connection with Lauterpacht's focus on the vital importance of the individual is plain.

Lemkin must wait longer to learn that his family in Wolkowysk has suffered the same fate. Just one survivor, his brother Elias, with whom he is reunited in Munich. Elias Lemkin survived because he and his family happened to be on holiday in Moscow in June 1941, when Hitler invaded. Within days, Wolkowysk was occupied. Lemkin's nephew Saul, who lives in Montreal, impecunious, surrounded by books and with a fine memory, tells me the story. A detail haunts him, as he recalls his uncle's visit to the hospital in Munich, where Saul was recovering from a minor operation. "The Germans in the clinic were very nice to me, very polite. My uncle didn't look at them. He hated them, like they were poison."

As the trial draws to an end, the prosecution offers closing arguments. They address "Crimes against Humanity" in some detail, but "genocide" remains in the frame, somewhat surprisingly. The Soviets, the French and

the British all support a conviction for the crime of “genocide.” Robert Jackson, on the other hand, who closes for the Americans, says nothing about genocide.

British support for the “genocide” argument is unexpected. Lauterpacht is strongly opposed to the concept, and makes no mention of it in the draft he prepares for Sir Hartley Shawcross, the Attorney General who will deliver the British closing arguments. Lauterpacht’s son Eli shows me a copy of the handwritten original manuscript. It argues for the protection of every individual human being and “the rights of man against the ... barbarity of his own State,” but makes no mention of Hitler or of the Nazis. Lauterpacht is implacably opposed to the reduction of matters to a struggle between groups.

Eli tells me his father never talked about the fate of his family, a private man, not prone to public displays of emotion. This makes all the more striking a feature of Lauterpacht’s draft: over dozens of pages, the only defendant to be mentioned more than once is Hans Frank, the one most directly connected to the murder of his family. Only at the end of the seventy-six-page handwritten manuscript does Lauterpacht permit himself to become personal, to target the man who sat but a few feet from him in the dock. The handwritten version reflects a rare passion and anger.

He writes of the accused: “Neither have they seriously attempted to alleviate the anger of the civilized world by a simple admission of guilt. Even the abject confessions, with a ring of sincerity about them, have been no more than artful evasions.”

He is referring to Frank, to the tentative expression of collective responsibility, offered in April, retracted in August. In his handwriting, he continues: “Witness defendant Frank confessing to a sense of deepest guilt because of the terrible words which he has uttered – as if it were his words that mattered and not the terrible deeds that accompanied them. What might have become a redeeming claim to a vestige of humanity reveals itself as a crafty device of desperate men. He, like other defendants, have pleaded, to the very end, full ignorance of that vast organised and most intricate ramification of the foulest crimes that ever sullied the record of a nation.”

On the legal arguments, Shawcross uses most of Lauterpacht’s text, but makes two significant changes: he adds British support for genocide, and removes all the references to Hans Frank.

By now Lemkin too has learned of Frank’s role in the destruction of his entire family. In a New York archive I find an undated page of pencil writing in Lemkin’s hand, on a single sheet of lined, yellow paper. As you can see, he has written the word “genocide,” at least twenty-five times, then crossed them out. He toys around with other formulations. And there, right in the middle of the page, hidden amongst the thicket of words,

another is crossed out, with a line pointing away that resembles an arrow. The word is: “Frank.”

IX. JUDGMENT
OCTOBER 1, 1946, NUREMBERG

Judgment is given over two days, on September 30th and October 1st, 1946. Frank is the seventh to learn his fate. Has he done enough to save himself? Hoping for mercy, he too thinks about music, frequently evoking the work of Johan Sebastian Bach, the *Matthew Passion*. This we learn from the diary of Captain Gilbert, the American Army psychologist who has been tending to him. It must be *Erbarme dich, Erbarme dich mein Gott*. “Have mercy, have mercy, my God.”

How extraordinary. Two men, on opposite sides of the courtroom, finding solace in the same musical space.

As the judgment is read out, Frank sits motionless. The American Judge, Francis Biddle summarises Frank’s role, from the day he joined the Nazi Party in 1927 to the end, in early 1945, in Krakow. Frank destroyed Poland, crushing opposition with a reign of terror. The concentration camp system was introduced on his territory, “notorious” camps like Treblinka, where Lemkin’s parents perished, although Lemkin would never know this. He oversaw the liquidation of the Polish intelligentsia and thousands of Poles, deported slave labourers to Germany, persecuted Jews by forcing them into ghettos, starved them, then systematically and brutally exterminated them.

Biddle notes Frank’s expression of “terrible guilt” for the atrocities committed on his territory, noting that not all the criminal policies originated with him. If Frank’s hopes rise, they are soon crushed. Frank was “a willing and knowing participant,” in terrorism, exploitation, starvation, the deportation of Poles, and the program “involving the murder of at least three million Jews.”

Frank is found guilty of Crimes Against Humanity and War Crimes, but the judgment against him makes no mention of “genocide.” The Tribunal adjourns for lunch, without mention of the word. It has disappeared.

The Tribunal reconvenes at ten to three. The defendants are not in the dock. Each awaits his turn, outside the courtroom. Each will enter alone, to hear the sentence, then will be escorted out. For many in the courtroom, the enduring memory of the trial is this single hour, the small sliding door at the back of the dock through which the defendants enter to face the judges.

“Open, shut, open, shut, open, shut.” The door slides noiselessly. So writes R.W. Cooper, of *The Times* of London, formerly the lawn tennis correspondent.

Frank is number seven. Up the elevator, through the sliding door, into the courtroom. Losing all sense of direction, he stands with his back to the judges. The guards spin him around the writer Rebecca West, who notices from the press gallery (and happens to be having an affair with Judge Biddle).

“Odd proof” of Frank’s “complete perturbation,” she writes.

Frank listens to Lord Justice Lawrence, who speaks four words. “*Tode durch den Strang.*” Death by hanging. He will never know that the French judge, his old acquaintance Donnedieu de Vabres, whom he invited to speak at a conference in Berlin in the summer of 1935, voted for life imprisonment but was overruled by the others. The French judge was said to be “curiously tender” towards Frank.

Frank leaves through the sliding door. “Open, shut, open, shut.” When Captain Gilbert comes to his cell, Frank smiles politely. He is unable to look at the military psychologist. “Death by hanging,” Frank says softly. He nods his head. “I deserved it and I expected it.”

Two weeks later, on October 16th, Mr. R.W. Cooper of *The Times* is in Paris when he receives news of the hanging.

The journalist writes that he learned of the end in a little Paris restaurant, as musicians strummed a popular new song written by Jean Sablon. It has the title *Insensiblement*.

A photograph of Frank’s hanged body is sprawled across the back pages of a newspaper.

“Ça, c’est beau à voir,” a patron murmurs, idly turning the pages.

Frank was the sixth to be hanged, in the courtyard of Nuremberg’s Palace of Justice.

Lauterpacht is satisfied with the judgment. It will contribute to the protection of individuals.

Lemkin is distraught. The judgment does not refer to the word genocide, not once. He describes the day as “the blackest” of his life, worse even than when he heard about the deaths of his parents and family.

X. LEGACY

What came next?

Modern human rights and international criminal law came alive. The debate between the focus on the individual and the group never was resolved, so both ideas were embraced.

A month after the judgment, the United Nations General Assembly affirmed that the Nuremberg Charter, the judgment, and crimes against humanity were part of international law. The Assembly also went further than the Tribunal, affirming that genocide “is a crime under international law.” In December 1948 states adopted the Convention for the Prevention and Punishment of Genocide, driven by Lemkin. They also agreed on the

Universal Declaration on Human Rights, a non-binding instrument that drew inspiration from Lauterpacht's book. In 1950, the European Convention on Human Rights was signed, setting out a list of minimum rights for all individuals, and setting up a European Court, to hold governments to account. There is as yet no parallel convention on crimes against humanity, but the fine efforts of the Whitney R. Harris World Law Institute at this wonderful law school, led by Professor Sadat and her colleagues and the students will, I feel sure, soon remedy that situation.

Lauterpacht and Lemkin's legacies have been far-reaching, and "crimes against humanity" and "genocide" live side by side. Yet, despite their common origins and far-reaching influence, it seems that the two men never met. Their ideas are the stuff of my daily working life, although more than fifty years passed before their ideas are taken forward. The catalyst is the crimes in the former Yugoslavia and in Rwanda.

In July 1998, more than 150 states adopt the Statute for an International Criminal Court, able to rule on "genocide" and "crimes against humanity."

Two months later, the International Criminal Tribunal for Rwanda convicts Jean Paul Akayesu, who oversaw the persecution and slaughter of Tutsis by Hutus, for genocide. He is the first person ever to be convicted for the crime of genocide by an international court.

In November 1998, the House of Lords in London rules that Augusto Pinochet, former President of Chile, cannot claim immunity before the English courts: the acts in which he is alleged to have engaged – torture of his political adversaries – are a "crime against humanity." This is the first such national ruling.

In May 1999, Serbian President Slobodan Milošević becomes the first serving Head of State to be indicted for "crimes against humanity," for alleged acts in Kosovo. In October 2000 genocide charges are added in respect of atrocities in Bosnia, at Srebrenica.

In March 2007, an American judge strips a man called John Kalymon of his American nationality. Why? Because in August 1942 he was a Ukrainian Auxiliary policeman who rounded up Jews in Lemberg, a crime against humanity.

In September 2007, the International Court of Justice in The Hague rules that Serbia has violated the obligation to prevent genocide in Srebrenica, the first time a State is condemned for violating the Genocide Convention.

In July 2010 President Omar al-Bashir of Sudan becomes the first serving Head of State to be indicted for genocide by the International Criminal Court.

In April 2012, Charles Taylor is the first Head of State to be convicted of crimes against humanity. The cases go on. So do the crimes.

What, one might ask, is the enduring legacy of these two legal terms? Lauterpacht believed that we should be concentrate on the protection of

the individual, and would surely argue, even today, that Lemkin's invention of the concept of "genocide" has been practically useless and politically dangerous, replacing the tyranny of the state with the tyranny of the group.

In a way my own practical experience concords with that view, having observed that by focusing on the protection of one group against another there is a tendency to reinforce the sense of "them" and "us," to amplify the power of group identity and association, a source both of sustenance and danger. How does this happen? In seeking to prove that a "genocide" has occurred – establishing the existence and expression of an intent to destroy a group in whole or in part - I have seen for myself how that process tends to reinforce both a sense of victimhood of the targeted group, and hatred towards the perpetrators as a mass.

Yet I also understand what Lemkin was trying to do. He was surely right to recognize a reality, that in most (if not all) cases mass atrocity is targeted not against individuals but against those who happen to be a member of a group. Lemkin would say, and it is a powerful argument, that the law must reflect that reality, that it must also recognise and give legitimacy to that feeling we all have, of association with one or more groups.

This profoundly strong sentiment was brought home to me very recently, as I wrote an article for the Financial Times magazine, in a profile of Dr. Jan Kizilhan, the German doctor who has established a programme to assist the Yazidi women and girls who have been enslaved, tortured and raped by individuals associated by ISIS, bringing 1100 of them to Germany for medical and psychological treatment.¹ He identifies a connection between the possibility of justice and the future wellbeing of victims. Characterising such atrocities as a genocide is a first step, and he welcomed the use of the word by the European Parliament, the Obama administration and – eventually and in the face of opposition by the Her Majesty's Government – the UK Parliament. "Calling it a genocide," Dr Kizilhan told me, "recognises the group's identity, what is being done to it, and its right to exist." In this way, the implication is that "crimes against humanity" is not enough.

Nevertheless, I am concerned about the hierarchy that seems to have emerged, one that puts "genocide" atop the list of horrors, so that a mere "crime against humanity" or "war crime" is seen somehow as a lesser evil. Call something a genocide and it will be on page one, call it a crime against humanity and it will only be on page thirteen. Such is the power of the word invented by Rafael Lemkin, and of our association with the protection of the group.

¹ Philippe Sands, 'On Genocide and Trauma', FINANCIAL TIMES, 15 April 15, 2016, <https://next.ft.com/content/2ce55dee-01c7-11e6-ac98-3c15a1aa2e62>

These issues are at the fore again today. Once again a poison of xenophobia and nationalism is coursing its way around the veins of Europe and the rest of the world, not least the United States. I see it on my journeys to the central and eastern parts of the continent – to Hungary, to Poland, to the Ukraine, where those who saw my film *My Nazi Legacy* will have seen me in a faraway field watching people dressed in SS uniforms celebrating the creation of the Waffen SS Galicia Division, back in '43.

I see it in the UK, with the BREXIT vote, and in related political developments. One former London Mayor – Ken Livingstone - offensively evokes Adolf Hitler as a supporter of Zionism. Another former London Mayor – Boris Johnson, now Foreign Secretary – suggests that the EU and Adolf Hitler somehow share common aims, and has no compunction in referring to the President of the United States as “part Kenyan,” to explain a perceived anti-British tendency.

I see it in the U.S., and the election of Donald Trump. The overt use of racial and identity politics is now centre stage. The themes I have evoked are central to Mark Lilla’s much discussed and provocative piece in Saturday’s *New York Times*, “The End of Identity Liberalism.”

It is impossible not to have gone through the experience of writing *East West Street*, an immersion in the world of the years between 1914 and 1945, and not feel an acute sense of anxiety as to what is stirring. Those who have read the book will know that I oscillate between the views of Lauterpacht and Lemkin, between the individual and the group, between the realism of Lemkin and the idealism of Lauterpacht. I can see the force of both arguments, and recognise the tension and the struggle between the individual and the group, between crimes against humanity and genocide, one that will not soon be resolved. International law today embraces both.

EPILOGUE

After I first told this story, at a lecture in the law faculty at Lviv, a young woman approached me, a student.

“Why do you take such a personal interest in these matters, which are so much a part of your working life?”

Lemberg is where my grandfather was born, I explain. In 1904. I came to Lviv to see the streets he walked as a young boy, when Lauterpacht and Lemkin were here.

Along the way I learned his story – he moved to Vienna in 1914, married in 1937, had a child – my mother – in 1938, and was then expelled from the Reich in January 1939.

Many decades passed before another - and more direct - connection crystallized between my family and the Lauterpachts. Hersch’s son, Eli, was my teacher of international law. Only recently did Eli and I learn that

his father and my great-grandmother, Amalia Buchholz, were born in the same small town, Zolkiew. Remarkably, they lived on the same street, Lemnbergerstrasse, just a few hundred metres apart. It was called East West Street by the writer Joseph Roth, it was the first street on which Amalia walked. Later I learned that my great-grandmother travelled on the same transport that brought the three Freud sisters from Theresienstadt to Treblinka, observed by Samuel Rajzman, which is where she perished. A few weeks later Lemkin's parents followed her to Treblinka. The last street on which Amalia and the Lemkins walked was Himmelfahrtstrasse, the street to heaven, the street from the railway platform to the gas chamber.

Lauterpacht and Lemkin. Individuals and groups. Zolkiew and Treblinka. Personal stories matter. Individuals can make a difference.

I have come to know Frank's son Niklas. When we first met he removed a photograph from his jacket pocket and passed it to me. The lifeless body of his father, after the execution. "To remind myself that he is truly dead," Niklas says.

* * *

Later, Niklas and I go to Krakow to visit the Wawel Castle. We spend a few minutes alone with Cecilia Gallerani. It is the first time in seventy years, since the summer of 1944, that Niklas has been with the painting. I am allowed to take a single photograph to capture the moment.

That evening Niklas and I dine at a restaurant in Krakow's old town. He asks me about my book. At the end of our meal, three people pass our table. The older of them, a distinguished lady, says: "We couldn't help but overhear your conversation, your book sounds interesting." They join us, we talk, a mother with her daughter and son-in-law. The mother is an academic, a chemist. She is serene, distinguished, from Brazil. She is back in the city where she was born, forced out in 1939, for she was a Jew, ten years old. How much of my conversation with Niklas did she overhear? Not much.

The daughter was born well after the war, in Brazil. She takes a stronger line than her mother. She says, "I enjoy being in Krakow, but I will never forget what the Germans have done. I don't ever want to talk to a German." We glance towards each other. The mother looks at Nicholas and asks, "and you are a Jew from Israel!?" Niklas answers immediately. "Quite the opposite. I am a German, I am the son of Hans Frank, the Governor General of Poland."

I recall a fleeting moment of silence, then Niklas stands and rushes out of the restaurant.

Later that evening I find him. He says: “They were right to have such strong views, I feel a shame for the wrong that the Germans have done to them, to the mother, to their family.”

I comfort him.

Individuals and groups.

Never an easy thing.

PROVIDING ACCOMMODATIONS FOR PRISONERS IN SOUTH AFRICA'S CORRECTIONAL CENTRES: A CONSTITUTIONAL CONTRADICTION?

The plight of prisoners with physical disabilities in South Africa was brought to the attention of the world after the 2013 arrest of Oscar Leonard Carl Pistorius. The former Olympic athlete was charged with the February 14, 2013 murder of his girlfriend Reeva Steenkamp, a model and law graduate.¹ Pistorius never denied shooting Steenkamp, and the case turned on whether he intended to shoot her or whether he shot into the locked bathroom believing an intruder had broken into his home.² The trial of this fallen national icon was followed by tens of millions of people around the world³ and, to the shock of many,⁴ Pistorius was later convicted of the lesser crime of culpable homicide.⁵

During Pistorius' original sentencing, his disability⁶ was cited as a relevant sentencing consideration,⁷ and defense advocate Barry Roux argued Pistorius' health and safety would be put at risk in an overcrowded South African prison.⁸ Roux contended that without significant assistance,

1. Stu Woolman & Courtenay Sprague, *Nowhere to Run, Nowhere to Hide: The Absence of Public Policy on Intimate Partner Violence Abrogates the Rights to Health Care and Bodily Integrity Under the South African Constitution*, 22 *CARDOZO J.L. & GENDER* 29, 52 (2015).

2. Sarah Lyall & Alan Cowell, *A Trial Concludes, but for South Africans, the Debate May Be Just Starting*, *N.Y. TIMES* (Sept. 12, 2014), <http://www.nytimes.com/2014/09/13/world/africa/oscar-pistorius-verdict-guilty-of-culpable-homicide.html>.

3. Jason Burke, *Oscar Pistorius: case that obsessed a nation and captured its reflection*, *THE GUARDIAN* (June 12, 2016), <http://www.theguardian.com/world/2016/jun/13/oscar-pistorius-case-south-africa-athlete-prison-murder-girlfriend-reeva-steenkamp>.

4. *Id.*

5. *S. Afr. v. Pistorius* 2014 (42) SA 3280. The crime of culpable homicide involves "killing someone but without direct intent either through recklessness or negligence." *What is culpable homicide*, *The Telegraph* (Sept. 11, 2014), <http://www.telegraph.co.uk/news/worldnews/oscar-pistorius/11091036/What-is-culpable-homicide.html>.

6. Pistorius was "Born with no fibulas - the smaller of the two lower leg bones" and his legs were amputated below the knee when he was 11 months old." Tom Geoghegan, *The Making and Unmaking of Oscar Pistorius*, *BBC* (Nov. 3, 2016), <http://www.bbc.com/news/magazine-26628573>. He uses prosthetics to assist him in walking. *Id.*

7. As articulated in *State. v. Zinn*, sentencing considerations are guided by "the triad consisting of the crime, the offender and the interests of society." *State. v. Selebi* 2010 ZAGPJHC 58 (S. Afr.) (citing *State. v. Zinn* 1969 (2) SA 537 (A) at 540 G (S. Afr.)). When imposing a sentence, the judge must consider "all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender." *Dodo v. State* 2001 (1) SACR 594 at 35.

8. Almari Wessels, *If Oscar goes to jail*, *YOU MAGAZINE* (Sept. 11, 2014), <http://you.co.za/news/oscar-pistorius/if-oscar-goes-to-jail/>.