

Genocide at 70: A Reflection on its Origins

Column by Philippe Sands

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On the anniversary of the Genocide Convention, it is useful that we look back at the history of the crime of genocide, its relationship with crimes against humanity and that we reflect on its relevance today.¹ Over the last nine years, I have spent a significant amount of time grappling with these questions, whilst writing *East West Street*.² The book is about the lives of individuals seeking to understand how their particular circumstances contributed to the roads they took and how the roads thus travelled changed the system of international law. Underneath this lurks a bigger question, a central question of identity: who are we? Are we individuals or members of a group? And how do we wish the law to protect us, as individuals or as members of a group?

The book came about by chance. In the spring of 2010 an invitation arrived from the Ukraine, from the law faculty of the university in the city that was called Lemberg during the Austro-Hungarian empire until 1918, which was later changed to Lwów during the Polish years until 1939, and finally to Lviv after 1945. I was asked if I could visit the university and deliver a public lecture on my work on ‘crimes against humanity’ and ‘genocide’ in Nuremberg. I accepted the invitation immediately as I had long been fascinated by the Nuremberg trials, the myths, the words, images, sounds, the lengthy transcripts, the grim evidence, the memoirs and diaries, and films like *Judgment at Nuremberg*. This 1961 Oscar-winner film was made memorable by Spencer Tracy’s momentous performance, the unexpected flirtation with Marlene Dietrich and the line of his closing judgment: ‘We stand for truth, justice and the value of a single human life’.³ There is also the fact that the Nuremberg judgment blew a powerful wind in the sails of a germinal human rights movement, opening the possibility that the leaders of a country could be put on trial before an international court.

The emergence of international justice

Probably my work as a barrister, rather than my writings, caused the invitation for the lecture to be sent. In the summer of 1998, I had been peripherally involved in the negotiations in Rome that led to the creation of the International Criminal Court (ICC), a body with jurisdiction over ‘genocide’ and ‘crimes against humanity’, and other crimes. In the years that followed the gates of international justice slowly opened, and cases from the former Yugoslavia and Rwanda soon landed on my desk in London. Others relating to allegations in the Congo, Libya, Afghanistan, Chechnya, Iran, Syria, Lebanon, Sierra Leone, Guantánamo, and Iraq followed suit. The long and sad list reflected the failure of the good intentions aired in Courtroom 600 of Nuremberg’s Palace of Justice in 1945 and 1946. I became involved in too many cases that involved mass killings. Some raised claims of crimes against humanity, the killings of individuals on a large scale, and others gave rise to allegations of genocide and the destruction of groups.

The answer to the question ‘who is protected and why’ explains the essential difference between the concepts of ‘genocide’ and ‘crimes against humanity’. Assume 10,000 people are killed, murdered, and exterminated. The systematic killing of such numbers of individuals will

¹ This column is based on the USC lecture Professor Philippe Sands delivered at University College London and Matrix Chambers in February 2018.

² Philippe Sands, *East West Street: on the Origins of Genocide and Crimes Against Humanity* (Alfred A Knopf 2016).

³ Stanley Kramer, ‘Judgment at Nuremberg’ (1961).

always be a ‘crime against humanity’, but will it be classified as ‘genocide’? That depends on the intent of the killers, and the ability to prove it. To establish the crime of ‘genocide’ it is necessary to show that the act of killing is motivated by a special intent, namely the intent to destroy a group in whole or in part. If a criminal prosecutor cannot prove that a large number of people have been killed with an intent to destroy the group of which those people are a member, then ‘genocide’ is not established. The two crimes operate side by side and overlap: every ‘genocide’ will also be a ‘crime against humanity’, but not every ‘crime against humanity’ will be a ‘genocide’. Through the years, these two distinct crimes, with their different emphases, grew side by side, although over time genocide seems to have emerged, in the eyes of many, as the ‘crime of crimes’.

Hersch Lauterpacht: ‘Crimes against humanity’

In preparing my lecture, back in the summer of 2010, I was surprised to learn that the man who introduced crimes against humanity into international law came from Lviv. Indeed, he was a student at the very university that had invited me to deliver the lecture.

Hersch Lauterpacht was born in the small town of Zolkiew, about 15 miles north of Lviv. He moved to the city when he was 14, in 1911, and enrolled at the University’s law faculty four years later. In 1919 he moved to Vienna, did four more years of study and then moved to London in 1923. He became a renowned academic, first at the London School of Economics, then at Cambridge. In 1945 he published a book that laid the foundation for the modern system of human rights titled *An International Bill of the Rights of Man*. It offered the revolutionary idea to give individuals rights under international law, something that did not exist until then.⁴ His draft Bill gave effect to his credo that ‘[t]he individual is the ultimate unit of all law’.⁵

In April 1945, after the war in Europe ends, Churchill, Roosevelt and Stalin agreed that there would be a criminal trial for senior Nazi leaders. The British hired Lauterpacht to assist in the prosecution, to work with Robert Jackson, the chief prosecutor. In July 1945 Jackson travelled to London to draft the Charter of the Nuremberg Tribunal. The four powers – America, Britain, France and the Soviet Union – disagreed about the crimes over which the Tribunal would exercise jurisdiction. On 29 July Jackson left his room at the Claridges Hotel in Mayfair and drove up to Cambridge to have lunch with the Lauterpachts. Later they sat in the garden of Lauterpacht’s home and discussed the problem of the list of crimes. Lauterpacht suggested it might be a good idea to insert titles to promote public understanding and add legitimacy. Jackson reacted positively, so Lauterpacht offered another idea in respect of atrocities committed against civilians. Why not refer to the atrocities against civilians as ‘Crimes Against Humanity’ – Lauterpacht suggested. The term would cover atrocities against individuals on a large scale – torture, murder, disappearance – and introduce a new concept into international law. On 8 August, ‘Crimes against Humanity’ was incorporated into the Nuremberg Charter as Article 6(c).⁶

Rafael Lemkin: The crime of ‘genocide’

⁴ H Lauterpacht, *An International Bill of Rights of Man* (OUP 2013).

⁵ H Lauterpacht, ‘The Grotian Tradition in International Law’ in *British Year Book of International Law* 23 (1946) 1, 27.

⁶ United Nations, Charter of the International Military Tribunal Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (‘London Agreement’) (8 August 1945).

Preparing the Lviv lecture required me to focus also on ‘genocide’, and brought me to a second surprise: the man who invented that word, in 1944, also passed through Lviv, and studied at the same law school as Lauterpacht. His name was Rafael Lemkin. He arrived at Lwów University in 1921, a couple of years after Lauterpacht left, and in 1926 he obtained his doctorate in criminal law. After law school he became a public prosecutor in Warsaw. In 1933, he wrote a paper for a League of Nations meeting in Madrid proposing a new international crime, to combat what he called ‘barbarity’ and ‘vandalism’ against people.⁷ His focus was not on the protection of individuals, like Lauterpacht, but on the protection of groups. His ideas bounced around, but nothing came of them: the timing was hardly ideal, with Hitler having just taken power in Germany.

In 1939, when Germany invaded Poland, Lemkin was in Warsaw. He escaped and eventually made his way to America and Durham, North Carolina, where he had been offered a place of academic refuge. On this journey, he travelled with little money and almost no personal belongings, yet his luggage was filled with papers consisting of thousands of decrees promulgated by the Nazis in occupied countries. He had gathered these materials which he now carted around the world over many years. In America he analysed the decrees, and in 1942 he was offered a contract to write a book that would describe the patterns of behaviour he found, indicia of an underlying master plan. The book was published in November 1944, called *Axis Rule of Occupied Europe* and Chapter IX was entitled ‘Genocide’. Lemkin had invented a new word: the crime of the destruction of groups, the Nazi master plan, an amalgam of the Greek word *genos* (tribe or race) and the Latin word *cide* (killing).

In the summer of 1945, Lemkin was hired by the US Government to work on war crimes. He began to work with Robert Jackson and his team, although separately from Lauterpacht. He pushed his idea of genocide, a crime for which he wanted the senior Nazis to be indicted. In his view, the destruction of groups was a matter for the Nuremberg Tribunal, which was dealing with the greatest of crimes.

Lemkin was disappointed when the Nuremberg Charter was adopted in August 1945 with a mention of ‘Crimes against Humanity’ – the killing of individuals – but no mention of ‘genocide’ or the destruction of groups. So, he flew to London, where the Indictment was being crafted. He was persistent, constantly pressing for ‘genocide’ to be included. There was strong opposition to ‘genocide’ from Jackson’s office, under pressure from Southern senators who were concerned about discrimination against African-Americans, and from the British, who were concerned about colonial legacy.

Nevertheless, Lemkin’s persistence paid off and, against all odds, his word made it into the Indictment, which alleged that the Nazis had ‘conducted deliberate and systematic *genocide*’.⁸ This was the first time the word had been used in an international legal instrument, and it came with an agreed definition: the ‘extermination of racial and national groups.... in order to destroy particular races and classes of people and national, racial, or religious groups’.⁹ The Indictment mentioned ‘Jews, Poles, Gypsies and others’.¹⁰ It also included the ill-treatment and murder of

⁷ R Lemkin, ‘Acts Constituting a General (Transnational) Danger Considered as Offences Against the Law of Nations’ (additional explications to the Special Report presented to the 5th Conference for the Unification of Penal Law in Madrid, 14-20 October 1933).

⁸ ‘Indictment’ Art 6(b) ‘War Crimes’ (under Count Three).

⁹ *ibid.*

¹⁰ *ibid.*

civilians in occupied territories. On October 18, 1945, the Indictment was filed at the Tribunal. Lemkin wrote: ‘I went to London and succeeded in having inscribed the charge of Genocide against the Nazi war criminals in Nuremberg’.¹¹

The enduring legacy of Lauterpacht’s and Lemkin’s ideas

The Nuremberg trial opened on November 20, 1945. Lauterpacht was present in the courtroom, with the British team, pushing for the protection of individuals. Lemkin was in Washington, with the American team, pushing for the protection of groups. On this day, for the first time ever, the terms ‘genocide’ and ‘crimes against humanity’ were used in open court. The trial lasted for a full year, and judgment was handed down over two days, on September 30 and October 1, 1946. The seventieth anniversary was marked two years ago in Courtroom 600 of Nuremberg’s Palace of Justice, which still functions as a working courtroom as well as a museum that is well worth visiting. We marked it with a performance of *East West Street: A Song of Good and Evil*, drawing on the music that touched Lauterpacht, Lemkin and Hans Frank.¹²

The ideas of these two remarkable men, Lauterpacht and Lemkin, are of enduring relevance today. Lauterpacht believed that we should 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 concurs 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 of both sustenance and danger. In seeking to prove that a ‘genocide’ has occurred in law, you have to establish the existence and expression of an intent to destroy a group in whole or in part, and 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 recognise 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, writing an article for the Financial Times magazine. It was a profile of Dr Jan Kizilhan, the German doctor who has established a programme to assist Yazidi women and girls who have been enslaved, tortured and raped by individuals associated by ISIS, bringing 1,100 of them to Germany for medical and psychological treatment.¹³ Dr Kizilhan 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 and the Obama administration. ‘Calling it a genocide’, Dr Kizilhan told me, ‘recognises the group’s identity, what is being done to it, and its right to exist’.¹⁴ The implication is that ‘crimes against

¹¹ R Lemkin, ‘Totally Unofficial’ in S Totten and SL Jacobs (eds), *Pioneers of Genocide Studies* (Transaction Publishers: New Brunswick 2013) 375.

¹² <<https://www.youtube.com/watch?v=G17PiqIHjGI>>.

¹³ Philippe Sands, ‘On Genocide and Trauma’ *Financial Times* (15 April 2016) <<https://next.ft.com/content/2ce55dee-01c7-11e6-ac98-3c15a1aa2e62>>.

¹⁴ *ibid*.

humanity' is not enough.

Nevertheless, I am concerned about the hierarchy that has 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 of our newspapers, call it a crime against humanity and it will only be on page 13. Such is the power of the word invented by Rafael Lemkin and of our association with the protection of the group.

This is the context in which 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. International law today embraces both.

What is the enduring legacy of these two legal terms? After Nuremberg, there was a period of quiescence, and five decades passed before international criminal justice was catalysed by the events in the former Yugoslavia and in Rwanda, by the arrest of Senator Pinochet, by the creation of the ICC, by the events of 9/11 and the actions that followed, taking us through Afghanistan and Iraq and into the world of ISIS.

Today once more a poison of xenophobia and nationalism is coursing its way through the veins of Europe. I see it on 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.¹⁵ 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. Closer to home too, it is possible to smell a change in the air, a move to vicious, damaging identity politics. Brexit and President Trump are surely a reflection of that unhappy, dangerous, xenophobic, nationalistic direction.

I ended *East West Street*, in a long-ago place of mass killing, caught between poles – of head and heart, of intellect and instinct – recognising the need to value the inherent worth of every human being, understanding the pull of tribal loyalty and the essential truth of the notion that we are indeed haunted by 'the gaps left within us by the secrets of others',¹⁶ and the possibility that the discovery of such a haunting will not necessarily destroy us but may actually make us stronger.

¹⁵ Philippe Sands, 'What our Fathers Did: a Nazi Legacy' (2015).

¹⁶ The epigraph of Nicolas Abraham, 'Notes on the Phantom: a Complement to Freud's Metapsychology' (1987) 13 *Critical Inquiry*, 287.