I am very pleased to be with you today, and to address the International Association of Jewish Lawyers and Jurists, an organization that makes a significant contribution to the promotion of the rule of law and the protection of fundamental human rights.

My book – *East West Street: On the Origins of Genocide and Crimes against Humanity*¹ – was seven years in the writing. It is not about the life of one person but of four. It seeks to understand how the particular circumstances of each individual contributed to the roads he took, and how the different roads individually travelled changed the system of international law that I encounter in my daily work.

*East West Street* came about by chance, like so much in life. In the spring of 2010, I was immersed in the classrooms of University College London (UCL), in academic articles, and in cases in The Hague. An invitation arrived from Ukraine, an email from the law faculty of the University of Lviv, the city known as Lemberg during the Austro-Hungarian empire (until 1918), then Lwów during the Polish years (until 1939), then Lviv (after 1945). I was asked: Would you visit and deliver a public lecture on your work on “crimes against humanity” and “genocide”? About the cases in which you have been involved? About your academic work on the Nuremberg trial? About the trial’s consequences for our modern world?

Yes, I would, I replied. I had long been fascinated by the trial and the myths surrounding Nuremberg, by the words spoken and read out at the time, the images, and sounds. The trial was catalytic, a moment when our modern system of international justice crystallized into being. I was mesmerized by odd points of detail to be found in the lengthy transcripts, by the grim evidence, and I was drawn to the books and memoirs and diaries that described in forensic detail the testimony that was laid before the judges, and the love affairs that went on behind the scenes. I was drawn to movies like *Judgment at Nuremberg*, the 1961 Oscar winner made memorable by Spencer Tracy’s line from his closing judgment: “We stand for truth, justice and the value of a single human life.” There was also a practical reason for my interest in accepting the University of Lviv’s invitation, as the trial’s influence on my work had been profound: the Nuremberg judgment had blown a powerful wind into the sails of a germinal human rights movement. Yes, there was a strong whiff of “victor’s justice” that pervaded the proceedings, yet the case was catalytic, inasmuch as it opened the possibility that the leaders of a country could be put on trial before an international court. This had never happened before.

It was probably my work as a barrister, rather than my writing, that caused the invitation to be sent from Lviv. In the summer of 1998, I was 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 two other international crimes. The essential difference between the two concepts is on who is protected, and why. Assume thousands of people are killed, murdered, exterminated. The systematic killing of such large numbers of individuals will always be a “crime against humanity,” but will it be a “genocide”? That depends on the intent of the killers, and the ability to prove motive. To establish the crime of “genocide,” it is necessary to show that the act of killing is motivated by a special intent, namely 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 that intent, then the crime of “genocide” is not established in law. And so, you have the two concepts operating side by side, and overlapping: every “genocide” is also a “crime against humanity,” but not every “crime against humanity” is a “genocide.”

A few months after both crimes were inscribed into the Statute of the ICC, Senator Pinochet was arrested in

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¹ *Editor’s Note: This article is an abridged version of a lecture delivered by the author at the IAJLJ in Tel Aviv on May 5, 2019.*

London on charges of “genocide” and “crimes against humanity” laid by a Spanish prosecutor (October 1998). The House of Lords ruled that even as a former president of Chile, he was not entitled to claim immunity from the English courts. That was a novel, revolutionary judgment.

In the years that followed, the gates of international justice creaked open, following five decades of relative quiescence during the Cold War chill that came after the Nuremberg trial. Eichmann in Jerusalem was, of course, a trial before a domestic court, not an international trial.

Cases from the former Yugoslavia and Rwanda landed on my desk in London. Others followed, relating to allegations in the Congo, Libya, Guantánamo, and Iraq, as well as Israel and Palestine. These cases were based on the new rules that came into being after 1945, a revolutionary moment in the making of modern international law, one that recognized that the rights of the sovereign over its people were no longer unlimited. The long and sad list of cases that reached me reflected the failure of good intentions aired in Courtroom 600 of Nuremberg’s Palace of Justice. I became involved in too many cases that involved mass killings. Some concerned crimes against humanity, the killings of individuals on a large scale, others focused on genocide, the destruction of groups.

The two distinct crimes, with different emphases, respectively, on the individual and the group, grew side by side, although over time, genocide seems to have emerged in the eyes of many as “the crime of crimes.” The supposed hierarchy leaves an unfortunate suggestion that the killing of large numbers of people as individuals is somehow less terrible. Occasionally, I picked up hints about the origins of the two term, and their connection to arguments first made in Courtroom 600. However, I never really inquired about what exactly had happened in Nuremberg.

In preparing the lecture for Lviv, I was surprised to discover that the man who had coined the term “crimes against humanity” in international law originated from Lviv. Indeed, he was a student at its university, although those who invited me were blissfully unaware of this fact. His name was Hersch Lauterpacht. He was born in the small town of Zolkiew, about 15 miles north of Lviv, and moved to Lemberg in 1911, when he was fourteen. He enrolled at the University law faculty four years later. In 1919, he moved to Vienna, where he spent four years studying with Hans Kelsen. In 1923, Lauterpacht moved to Lemberg, and then became a renowned academic, first at the LSE, then at Cambridge. In 1945, he published a book that laid a foundation for the modern system of human rights. Titled An International Bill of the Rights of Man, it offered a revolutionary idea: to recognize that every human being on the planet had rights under international law, as an individual. This did not previously exist.

Lauterpacht prepared twenty draft articles that covered much that was new, but was by no means exhaustive. Notable omissions included torture and discrimination against women. Moreover, realpolitik informed his approach to the situation of non-whites in South Africa and what he called “the thorny problem of actual disenfranchisement of large sections of the Negro population in some States of the United States.” Yet the draft Bill gave effect to his credo, that “The individual human being … is the ultimate unit of all law.”

In April 1945, after the war in Europe had ended, Churchill, Roosevelt and Stalin agreed on a criminal trial for senior Nazi leaders. The British hired Lauterpacht to assist in the prosecution and to work with Robert Jackson, the U.S. 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. Jackson turned to Lauterpacht for help. On July 29, Jackson was driven to the Lauterpacht’s garden in Cambridge. …They … discussed the problem of the list of crimes. Lauterpacht suggested the idea of inserting titles, to help public understanding and add legitimacy. Jackson reacted positively to this idea and Lauterpacht offered another idea: he advised that atrocities committed against civilians, a matter on which the Soviets and Americans were deeply divided, be included in the Charter. …

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 the new concept into international law. No legal instrument had ever used the term. Jackson liked the idea, took it back to London, and a few days later, on August 8, “Crimes against Humanity” was incorporated into the Nuremberg Charter as Article 6(c) of the Statute. “[C]learly an innovation,” Lauterpacht told the Foreign Office in London, but one that was necessary to signify that those who break international law “cannot shield themselves behind the law of their State.”

Preparing the Lviv lecture required me to focus also on “genocide.” The man who invented this term – in 1944 – also dwelled for a while in Lviv and studied at the same law school. His name was Rafael Lemkin. He started at
Lwów university in 1921, two years after Lauterpacht had left, and in 1926 he obtained his doctorate in criminal law.

After law school, he became a public prosecutor in Warsaw. He wrote a paper for a League of Nations meeting in Madrid in 1933, proposing new international crimes to combat “barbarity” and “vandalism” against people. His focus was not on the protection of individuals, like Lauterpacht, but on the protection of groups, sometimes referred to as “minorities.” His ideas bounced around, nothing came of them, as Hitler had just taken power in Germany.

In 1939, when Germany invaded Poland, Lemkin was in Warsaw. He escaped to Sweden, via his parents’ town of Wolkowysk which had come under Soviet control. In 1941 he travelled to America, forced to take on the long route, across Russia, to Japan, by boat to Seattle, then train to Durham, North Carolina, where he was offered a place of academic refuge at Duke University.

He travelled with little money and almost no personal belongings, yet he carried with him a great deal of luggage – trunks filled with paper, thousands of pages of decrees promulgated by the Nazis across occupied Europe that he had gathered and now carted around the world. Once settled in America he analyzed the decrees, and was soon offered a contract to write a book that would describe the patterns of behavior, the indicia of an underlying master plan that had not been made explicit. The book, *Axis Rule of Occupied Europe,* was published in November 1944. 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 verb *cide* (killing).

In the summer of 1945, Lemkin was hired by the U.S. Government to begin to work with Robert Jackson and his team on war crimes, separately from Lauterpacht. It was Lemkin who pushed his concept of genocide, a crime for which he wanted the senior Nazis to be indicted. In his view, the destruction of groups was the greatest of crimes and a matter for the Nuremberg Tribunal.

In August 1945, when the Nuremberg Charter was adopted after Jackson had visited Lauterpacht in Cambridge, Lemkin was greatly disappointed that it included “Crimes against Humanity” – the killing of individuals – but made no mention of genocide and thus remained silent about the destruction of groups.

Lemkin did not give up. He flew to London, where the indictments for the defendants were being crafted. He actively pressed for “genocide” to be included in the Charter – a “persistent bugger,” Jackson’s son wrote to his mother. In Jackson’s office, there was, however, strong opposition to “genocide” being included in the Charter, due to pressure from Southern senators (concerned about discrimination against African-Americans). The British also resisted (as they were concerned about the colonial legacy).

Nevertheless, against the odds, Lemkin’s word made it into the draft indictment. Genocide was included in Count Three, as a “War Crime,” to include the murder of civilians in occupied territories (including Lemberg and Wolkowysk) where his parents had lived.... The indictment alleged that the Nazis “conducted deliberate and systematic genocide,” the first time the word was used in an international legal instrument. It included an agreed upon definition of “genocide,” the “extermination of racial and religious groups.” The indictment mentioned “Jews, Poles, Gypsies and others.”

On October 18, the indictment was filed at the Tribunal. “I went to London and succeeded in having inscribed the charge of Genocide against the Nazi war criminals in Nuremberg,” Lemkin would claim.

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 back in Washington, with the American team pushing for the protection of groups.

One of the 22 men in the dock was Hans Frank, the fourth character in *East West Street.* He too was a lawyer, and from the late 1920s served as Adolf Hitler’s personal lawyer. In 1933, he became Bavarian Minister of Justice and in October 1939 became Governor General of Nazi occupied Poland. On August 1, 1942, he visited Lemberg and Galicia, recently incorporated into his territory. He hosted a concert that concluded with Beethoven’s 9th symphony, and in the very room in which I would lecture seven decades later – the Aula of the university – he gave a speech to announce the elimination of the city’s entire Jewish population. Among those caught up in the horrors in the days that followed, were the families, friends and teachers of Lauterpacht and Lemkin, as well as my grandfather’s family. For each family there would be only a single survivor.

Frank did not seem unduly perturbed by the actions he had unleashed, but he was rather more bothered by other mundanities. He lodged at the home of his deputy, Otto von Wächter, Governor of Galicia – the principle character in the BBC radio and podcast series I have recently made, *The Ratline,* which will be published in April 2020 with that title, the sequel to *East West Street.*

Frank was caught by the U.S. Army near his home in Bavaria in May 1945. With him were his diaries, 42
volumes, and a remarkable collection of artwork. … In
the Nuremberg dock, Frank was charged on three counts,
including “Crimes against Humanity” and “Genocide.”

On the first day of the trial, the Soviet prosecutors
referred the judges to the events in Lviv that had befallen
the inhabitants following Frank’s visit. They described
the acts of murder and torture and other ill-treatment as
“genocide.” During the Holocaust, more than 130,000
people in Lviv were killed, including 8,000 children
murdered in just two months in the Janovska camp, located
in the heart of the city. As the words were spoken in
Courtroom 600, Lauterpacht and Lemkin did not know
that the man they were prosecuting, Hans Frank, was
directly implicated in the murder of their own families.

On the first day of Frank’s trial, for the first time ever,
the terms “genocide” and “crimes against humanity” were
used in open court. As I knew Lauterpacht and Frank to
have been in the same room on that day, I wondered if
there was a photograph showing the two together in the
court room. … Indeed, I found a photograph of the
Nuremberg court room on November 20, 1945.

In this photograph, Lauterpacht is sitting at the end of
the British table, the second on the left, elbows on the
table and hands clenched under the chin. He is attentive,
behind the counsel’s lectern at which a Soviet prosecutor
speaks. Divided by no more than a few tables and chairs,
Lauterpacht and Frank are together in the same room.

The trial lasted for a full year, and judgment was handed
down over two days, on September 30 and October 1,
1946. …Over the course of that remarkable year, … the
lives of our three characters became increasingly
intertwined. … The ideas and endeavors of Lauterpacht
and Lemkin would continue to influence politics, history,
culture, my life and yours.

The concepts of “crimes against humanity” and
“genocide” have entered our world, although many are
under the impression that they have existed since time
immemorial. In fact, they have not: both legal concepts
are the product of creative and inventive minds, two men
driven by their own experiences, forged on the anvil of
a single city. Why Lauterpacht opted for the protection
of the individual, and what caused Lemkin to embrace
the protection of the group, is a matter of speculation.
Their backgrounds were similar, two Polish Jews who
studied at the same university with the same teachers. If
you want to trace the origins of these crimes, you can
trace them to Lemberg, to events at the end of the Great
War and to the law faculty of the University of Lviv.

Something else also strikes me as remarkable: despite
their common origins, interests and journeys, and despite
the fact that I have located Lauterpacht and Lemkin to
have been in the same city on the same day, it seems that
the two never actually met, not even in Courtroom 600
where they missed each other sometimes by only a day.

The concepts they put into international law – “crimes
against humanity” and “genocide” – inform my working
life. I have frequently wondered how it could be that I ended
up doing the work I do. My quest to understand Lauterpacht
and Lemkin was surely driven by my personal history…

How does one begin to understand these points of
connection? The starting point is the ideas of these two
remarkable men, Lauterpacht and Lemkin, and the
enduring relevance of their ideas until today. By the same
token, the relationship between the individual and the
group has been contested across the ages.

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, in that it will tend to replace 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 the focus on the protection of one group
against another tends 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, in law you have to establish the
existence and expression of an intent to destroy a group
in whole or in part. I have seen for myself how that process
reinforces a sense of victimhood felt by 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, recognize
and give legitimacy to a feeling we all have, of association
with one or more groups.

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
1, call it a “crime against humanity” and it will only be
on page 13. That is the power of the word invented by
Rafael Lemkin, and perhaps too of our association with
the protection of the group.

What, one might ask, is the enduring legacy of these
two legal terms? The crime of genocide, and the idea that each of us as individuals has rights under international law, were new in 1945. The moment of creation was significant, revolutionary even, a recognition that sovereignty over human beings is not unlimited. Yet, the crimes continue.

Today, once more, the poison of xenophobia and nationalism is coursing its way through the veins of Europe, and many other parts of the world. The strong leader is back. I see it on journeys to the central and eastern parts of our European continent. I saw it when making the BBC documentary My Nazi Legacy, on my relationship with the sons of Hans Frank and Otto Wächter. I saw it in making The Ratline podcast, on the fugitive flight and strange death of Otto Wächter in the Vatican. I encounter it travelling across Europe, in Austria, in Viktor Orban’s Hungary, in Poland. In these and other places, it is hard to avoid what is stirring, and to wonder to where such stirrings will lead.

The generation that experienced the horrors of the 1930s, that lived through the Second World War, that knows why states came together after 1945 to create a United Nations (to embrace multilateral cooperation and the idea of an international rule of law, to adopt in Paris in 1948 a Universal Declaration of Human Right and a Convention on the Prevention of Genocide), will soon be gone. Perhaps the disappearance of actual experience (of first-hand memory) allows our politicians to take for granted what occurred in 1945, and to forget.

It is impossible not to have gone through the experience of writing East West Street, and the projects that have followed – 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.

Two years ago, the man who is now President of the United States, a devotee of lawlessness in this region, called “for a total and complete shutdown for Muslims entering the United States.” The idea of targeting people not because of their individual propensities but because they happen to be a member of a particular group has a long, dark history. The idea of a travel ban based on a person’s nationality, religion, or race, is deeply troubling. Experience teaches us to where such a beginning can lead, singling out people not for what they might have done but because they happen to be a member of a particular group. One thing leads to another.

In Britain, too, change is in the air, a move to identity politics, an embrace of antisemitism and Islamophobia. Two years ago the then Prime Minister – who had indicated she would take the United Kingdom out of the European Convention on Human Rights if she could, but who was unable to deliver on BREXIT, told her party Conference that “If you believe you are a citizen of the world, you are a citizen of nowhere.”

Her words reminded me of a passage in Stefan Zweig’s magnificent book The World of Yesterday – required reading for our times – published posthumously in 1942, after Zweig committed suicide. “For almost half a century,” he wrote, “I trained my heart to beat as the heart of a citizen of the world. On the day I lost my Austrian passport I discovered that when you lose your native land you are losing more than a patch of territory within set borders.”

One thing leads to another. One former London Mayor offensively evoked Adolf Hitler as a supporter of Zionism. Another former London Mayor who, shockingly, later served as Foreign Secretary, suggested that the EU and Adolf Hitler somehow share common aims. BREXIT and Trump are surely a reflection of a new direction.

And, of course, Israel is hardly untouched by matters of identity, by conceptions of the individual and the group. From a distance, what one hears and reads is perplexing. Last summer the Prime Minister of Hungary raged against “an enemy that is different from us,” an enemy that is “[n] ot open, but hiding; not straightforward but crafty; not honest but base; not national but international; does not believe in working but speculates with money; does not have its own homeland but feels it owns the whole world.”

To which individual or group might he be referring? George Soros certainly, but not only him. A few weeks later, the Prime Minister of Israel welcomed the same Prime Minister of Hungary, peddler of antisemitic tropes, to this country as “a true friend of Israel.” He did so on the day the Knesset adopted a Basic Law on Israel – The Nation State of the Jewish People, which declares that “The state of Israel is the nation-state of the Jewish people,” and retained a conspicuous silence on the matter of equality


and equal rights for all citizens. Questions have been raised – understandably – as to whether the intention and effect of the new law is to undermine rulings of the Supreme Court of Israel, to the effect that a citizen of Israel will not have more rights merely because she or he is Jewish, or that a member of another group, for that reason alone, will have less rights. \(^4\) Concerns are hardly put to rest when the Prime Minister of Israel, in response to a comment by the actor Rotem Sela, and citing the new Basic Law, stated that Israel “is not a country of all its citizens.” \(^5\)

The words sound darkly familiar to me, steeped in the cities of Lviv, Vienna and Berlin. In Italy too, the writer Primo Levi knew something about hierarchies amongst the citizenry, and to where that leads, and all the more so when he arrived in Auschwitz. I invite you to read the Preface to his book *If This Is a Man*, published in 1947 (but only available in Hebrew in 1989, after Primo Levi died). He wrote: “Many people – many nations – can find themselves holding, more or less wittingly, that every stranger is an enemy.”

When this happens, he continued: “when the unspoken dogma becomes the major premise in a syllogism, then, at the end of the chain, there is the [concentration camp].”

This is the context – past and present, unspoken dogmas, the stranger, them and us – 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 recognize the tension and the struggle between the individual and the group, between crimes against humanity and genocide, one that will not soon be resolved. Today, international law embraces both.

We are at a dangerous moment. Our politicians seem not to be able to recognize how precious was the settlement of 1945, and how vulnerable is the acquis that was created – one that has offered a foundation to international relations in our time. We cannot take for granted what was achieved back then.

This is the context – past and present – in which I ended *East West Street*, at a site of mass killing long ago, caught between my head and my heart, intellect and instinct, recognizing the need to value the inherent worth of every human being, yet understanding too the pull of tribal loyalty, the essential truth of the notion that we are indeed haunted by “the gaps left within us by the secrets of others,” and the possibility that the discovery of such a haunting will not necessarily destroy us but may actually make us stronger.

Philippe Sands QC, Professor, University College London & Matrix Chambers. http://www.laws.ucl.ac.uk/people/philippe-sands/