

The Beautiful Crime

Raphael Lemkin and the 1927 *Shvartsbard* Trial

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Abstract

Virtually unknown to scholars of international law today, the 1927 *Shvartsbard* trial served as a crucial early stage in Raphael Lemkin's development of the legal concept of genocide — a connection overlooked by scholars who read Lemkin backwards through Holocaust teleology, ignoring how antisemitism and Jewish rights-claims shaped his earlier thinking. This article re-introduces Lemkin's coverage of the trial of the Jewish anarchist charged with killing Ukrainian leader Symon Petliura in Paris as revenge for pogroms. This episode challenges state-centric narratives of international law's origins, revealing how diasporic minorities outside territorial-state protection were crucial agents in legal development. The case raises important questions: How does extra-legal violence interact with legal imagination? What role do emotions play in legal change? How did this episode shape Lemkin's understanding of genocide's 'double life' as moral taboo versus legal crime?

Justice is an idea. Because it is an idea which infuses a sort of glow, it is also an emotion ... [T]he justice that will serve our purposes must also be a process of moral valuation tinged with a kind of humane emotion How is this sense of justice to be distinguished from an inveterate personal prejudice? How is it to be distinguished from a whimsical oddity of feeling? The answer can be based only on the extent to which it is shared by other persons.

—Max Radin, *Law as Logic and Experience*¹

The truly beautiful crime is rare. It is not enough that the crime committed be extraordinary for it to be a beautiful crime, seizing the people's mind and fixing itself in their memory through the

¹ M. Radin, *Law as Logic and Experience* (Yale University Press, 1940), at 156, 160. See also J. Frank, *Law and the Modern Mind* (Brentano's Publishers, 1930); R. West, 'Law's Emotions', 19 *Richmond Public Interest Law Review* 4 (2015) 339–362.

melody of the lament It must be that the action has been carefully prepared and orchestrated, that its execution is both atrocious and daring, that the victim was led, with pitiless coldness, to the point of their destiny... . It must be that the head that conceives and the arm that executes are united in a single person, who acts under the influence of a concentrated passion, and that this passion is not one of those common and vulgar motives that lead to the misfortune of countless individuals every day It is necessary, if possible, that an entire city or an entire class of society is affected and troubled.

—Jean-Jacques Weiss, *Le drame historique et le drame passionnel*²

1. INTRODUCTION: A FORGOTTEN TRIAL

What role does emotion play in legal judgement? Affect is often thought of as the antithesis of legal rationality. In his famous opening statement at Nuremberg in 1945, Prosecutor Robert H. Jackson juxtaposed the human desire for revenge with the law's demand for dispassionate reason.³ A trial must transcend the irrational forces of vengeful human emotions, he argued. Even when confronted with atrocities on an unimaginable scale, the judge must find facts, not validate feelings. That view remains encoded in our conventional understanding of law. Yet Raphael Lemkin, who coined the term 'genocide' and helped devise the Genocide Convention, thought differently. Rather than acting as law's foil, Lemkin wrote, emotion provided its ultimate source. Law grows out of 'the living, pulsating people's conscience'. As such, we must build 'a court which is truly alive to all the pain and suffering, one which is truly free in its feelings and judgements'.⁴

These words might seem to evoke the Nuremberg trial, where Lemkin briefly served as a member on Jackson's team. In fact, they were written two decades earlier about another atrocity crimes trial that captured the world's imagination. In 1927, Sholem Shvartsbard, a Ukrainian-born

² J.-J. Weiss, *Le drame historique et le drame passionnel* (Calmann Lévy, 1894), at 69.

³ *Trial of the Major War Criminals before the International Military Tribunal*, vol. 2 (Secretariat of the Tribunal, 1947), at 99: 'That four great nations flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason.'

⁴ R. Lemkin, 'Dos gerikht far di "sheyne farbrekhens"' (Yid.) [The Court for 'Beautiful Crimes'.] *Haynt*, 28 October 1927, at 4. For reasons of space, we have published our translation of the article at the website for this research initiative: www.thelemkinproject.org.

Jewish émigré, stood trial in Paris for assassinating Symon Petliura, the exiled Ukrainian national leader. Shvartsbard freely admitted shooting Petliura in broad daylight on a Parisian street, but claimed his act was justified revenge for Petliura's role in the post-World War I pogroms in Ukraine that killed over 100,000 Jews.

The week-long jury trial featured two simultaneous proceedings — a criminal prosecution and a civil suit by Petliura's widow. The prosecution case was straightforward: murder was murder. Whatever Petliura's role in the pogroms, the defendant had killed a man in cold blood. The defence, however, transformed the courtroom into a tribunal on the pogroms themselves. A parade of witnesses drawn from the ranks of survivors, historians, and Jewish political leaders offered testimony that helped turn the proceedings into a reverse criminal trial, in which the accused shifted the blame back onto his victim. The trial became an international *cause célèbre*, dividing Jewish and Ukrainian communities, while testing France's self-image as a defender of humanity. It ended with Shvartsbard's unexpected acquittal by the jury.

Lemkin covered the trial as a journalist for *Haynt*, a Varsovian Yiddish daily newspaper. In a commentary written immediately after the verdict, he offered his first recorded thoughts on how law should respond to mass atrocities.⁵ His 1927 essay, 'The Court of "Beautiful Crimes"', presents both 'a legal analysis' of the case and a broader meditation on justice and legal change in the post-World War I world of nation-states and diasporic minorities.

In his post-World War II memoirs, Lemkin identified the *Shvartsbard* trial as a key inspiration for his development of the legal concept of genocide. Intriguingly, while he cited his own 1927 article, he misrepresented its central thesis, suggesting that he saw the trial as a failure, when he actually praised its moral and legal achievement.⁶ This discrepancy prompted our

⁵ For the trial's genesis and impact on European and Jewish politics, see D. Engel (ed.), *The Assassination of Symon Petliura and the Trial of Sholem Schwarzbard, 1926–1927: A Selection of Documents* (Brill, 2016); C. Dean, *The Moral Witness: Trials and Testimony after Genocide* (Cornell University Press, 2019), at 26–60; A. Garbarini, 'Power in Truth-Telling: Jewish Testimonial Strategies before the Shoah', in J. Coy, B. Marschke, J. Poley, and C. Verhoeven (eds), *Kinship, Community, and Self: Essays in Honor of David Warren Sabean* (Berghahn Books, 2015), at 170–184; J. Loeffler, 'Becoming Cleopatra: The Forgotten Zionism of Raphael Lemkin', 19 *Journal of Genocide Research* (2017) 340–360; L. Engelstein, *The Resistible Rise of Antisemitism: Exemplary Cases from Russia, Ukraine, and Poland* (University of Chicago Press, 2020), at 76–122; M. Slodzian, *L'Ukraine depuis le procès Schwartzbard Petlioura* (1927) (Difference, 2016); V. Sansico, "'Je ne pouvais pas vivre sans cette vengeance": le procès du "terroriste" Samuel Schwartzbard devant la cour d'assises de la Seine (1927)", 45 *Histoire Politique* (2021) 1–20.

⁶ Lemkin's own account of this episode is published in D. Frieze (ed.), *Totally Unofficial: The Autobiography of Raphael Lemkin* (Yale University Press, 2013), at 20–21. Steven Jacobs raised preliminary questions about the trial's impact on Lemkin in S. Jacobs, 'The Complicated Cases of Soghomon Tehlirian and Sholem Schwartzbard and Their Influences on Raphael Lemkin's Thinking About Genocide', 13 *Genocide Studies and Prevention* (2019) 33–41. Piotr Madajczyk makes various unfounded claims and insinuations about the trial and Lemkin's relationship to it in

examination of Lemkin's original text in its historical context. Revisiting the *Shvartsbard* trial and Lemkin's commentary illuminates how he transmuted particular injustices into a cosmopolitan vision of legal universalism.⁷ Though popular memory casts Lemkin as a lone legal entrepreneur, in reality he belonged to a transnational network of interwar Jewish intellectuals and activists. Confronting the limitations of international law, they sought to create new legal tools for protecting minority groups. Their efforts would yield much of the architecture of international humanitarian and human rights law after World War II.⁸

Placing the *Shvartsbard* trial at the beginning of this historical genealogy reveals an alternative origin story for modern international criminal law, one centred on stateless peoples and transnational communities rather than sovereign states. In this account, universal jurisdiction emerged not only from problems that transcended borders (war, piracy, maritime slavery, refugees, or terrorism) but also from the predicament of minorities and diasporic groups that suffered mass violence while remaining outside their states' protection.

These vulnerable communities drove legal change alongside — and sometimes against — sovereign states. One response to their unprotected status was vigilante violence, like the one undertaken by *Shvartsbard*, which entangled vengeance with politics.⁹ *Shvartsbard*'s premeditated assassination was both morally wrong and legally groundless — he had no proof of Petliura's personal guilt. Yet his act challenged the state's monopoly on punishment and exposed the inadequacy of existing legal frameworks. We do not aim in this article to resolve philosophical debates about extralegal revenge for mass atrocities. Instead, we retrace Lemkin's intellectual journey as he wrestled with how to define a new universal law, genocide, that would transcend a particular collective experience.

Central to Lemkin's intellectual development was his early recognition that emotion drives both legal judgement and legal innovation. This insight illuminates how acts of retributive violence can catalyse legal imagination and generate new legal forms. Before World War II, stateless groups

P. Madajczyk, *The Biographical Landscapes of Raphael Lemkin* (Routledge, 2023), at 95–97. For a critique of the myths found in Lemkin biographies, see Z. Mazur, 'Some Corrections to the Record on Lemkin's Early Years: The Evidence from Poland', 19 *Genocide Studies and Prevention* (2025) 20–32; J. Loeffler, 'The First Genocide: Antisemitism and Universalism in Raphael Lemkin's Thought', 112 *Jewish Quarterly Review* (2022) 139–163.

⁷ On this theme, see C. Kiechel, 'Legible Testimonies: Raphaël Lemkin, the Victim's Voice, and the Global History of Genocide', 13 *Genocide Studies and Prevention* (2019) 42–63.

⁸ J. Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (Yale University Press, 2018).

⁹ S. Lavi, "'The Jews are Coming': Vengeance and Revenge in post-Nazi Europe', 1 *Law, Culture and the Humanities* 3 (2005) 282–301.

seeking justice faced a fundamental obstacle: they had no courts of their own. Instead, they turned to third-party courts adjudicating criminal cases of political assassination, effectively creating universal jurisdiction *avant la lettre*. Their legal strategy relied heavily on empathy, using survivor testimony and emotional appeals to activate juries' moral imagination across boundaries of nationality, time, and geography. Such cases generated new modes of legal thinking that transcended traditional territorial limits, fostered empathy across national borders, and ultimately helped transform the law by compelling recognition of previously unnamed injustices.

Yet this transformation carried its own risks. To gain empathy across borders, groups often had to allow their historical particularity to be abstracted away in service of a broader humanitarian logic. More troubling still, the reliance on emotions in criminal trials — enlisted to acquit against the letter of the law — proved a double-edged sword. The same mechanisms that enabled protection of vulnerable stateless minorities could be marshalled for populist manipulation against them. Forward-looking codification of new international crimes offered one solution to this problem, but at a cost; it rendered the law less adaptable to injustices not yet named.

Today's difficult questions about international criminal law's function and future demand a fuller understanding of its origins. This article excavates one such beginning through three interconnected analyses. First, we trace a neglected strand of international criminal law's genesis to the 1927 trial, examining the competing Jewish legal strategies deployed in Shvartsbard's defence. Second, we analyse key trial moments where survivor testimony introduced emotion into the courtroom, raising fundamental questions about empathy's role in legal judgement. Finally, we offer a close reading of Lemkin's 1927 Yiddish text, revealing his early thinking on three critical issues: legal reasoning without fixed rules, legal creativity without state authority, and justice centred on victims' experiences.

We close by reflecting on Lemkin's complex legacy for the present. The Genocide Convention embodies a fundamental paradox: genocide functions simultaneously as an international crime like any other and as a universal moral taboo — a violation without equal. This duality, captured in its designation as the 'crime of crimes', is precisely what enabled its codification. A shared moral imagination of the ultimate injustice helped genocide win global acceptance, yet this extra-legal emotional dimension remains in tension with law's formal constraints. The enduring gap between moral and legal norms, between legitimacy and legality,

returns us to the question that haunted Lemkin a century ago: how far can emotion drive legal change without collapsing law's legitimacy under the weight of its own subjectivity?

2. A TALE OF TWO CRIMES: FROM POGROM IN UKRAINE TO ASSASSINATION IN PARIS

Sholem Shvartsbard was an unlikely Jewish national hero. A Communist revolutionary and anarchist activist, a Yiddish poet, and a soldier in two different armies, he crisscrossed Europe in the first decades of the twentieth century. Shvartsbard was born in 1886 in Izmail, in the Bessarabian region of the Russian Empire, present-day southwestern Ukraine on the Danube River. During the Russian Revolution of 1905, he joined Jewish armed self-defence efforts and took part in socialist activities before being arrested and imprisoned. Released under a general amnesty, he fled the country for Austria-Hungary, where he embraced the anarchist philosophy of Peter Kropotkin. In 1910 he settled in Paris, marrying a fellow Jewish immigrant from Odessa. There, he began a career as a watchmaker and a Yiddish poet.

When World War I broke out, Shvartsbard enlisted in the French Foreign Legion. He fought on the Western Front, where he was wounded, earning him the *croix de guerre* and French citizenship. Following his discharge in August 1917, he returned to Russia only to be immediately arrested for Communist activity. With the outbreak of the October Revolution, he joined the Red Guards, a revolutionary paramilitary brigade that would form the nucleus of the Bolshevik Red Army. During the next few years Shvartsbard saw service in a vicious civil war involving multiple actors fighting for land and power. As the emerging Bolshevik government sought to consolidate control over the Russian western borderlands, they faced challenges from pro-Tsarist forces, local warlords, Cossacks, and a rising provisional Ukrainian government led by Symon Petliura. Militarily and politically, the situation in Ukraine was extremely volatile and fluid. For example, the city of Kyiv changed hands some 16 times between 1918 and 1920.

Throughout this period, the Jews of Ukraine experienced extreme violence in what was then the heartland of Jewish Eastern Europe. Some 2,000 pogroms took place involving nearly every military group. For its part, the Petliura regime exhibited a complex, dynamic set of attitudes towards its Jewish population. The new Ukrainian leadership invited Jewish leaders into the project of building an independent multi-ethnic Ukraine, even offering extensive national-cultural autonomy of a kind that many Jewish political groups had sought for decades. At the same time,

the Petliura regime acquiesced to lawless rampage and mass violence against Jewish communities throughout the territory nominally under its control. By standard accounts, Petliura forces committed the largest percentage of all anti-Jewish pogroms, the largest single number of any organized political group.¹⁰

As part of a Red Guard international brigade, Shvartsbard fought directly in 1919 against a coalition of anti-Bolshevik forces in Ukraine that included White Russian and pro-Petliura militaries. After his unit's defeat in Kyiv, Shvartsbard toured the ravaged rural towns in which he saw the aftermath of a particularly brutal set of pogroms. He then returned to Paris where he opened a clock and watch repair shop. He also resumed his anarchist activism and restarted his Yiddish literary career.

In 1926, Shvartsbard learned that Petliura had fled Ukraine and settled in Paris. Convinced that the exiled Ukrainian national leader bore direct responsibility for the murder of his family and his people, Shvartsbard began covertly plotting an assassination. On 25 May, he approached Petliura in the street, and, after confirming his identity, shot him five times with a revolver before firing twice more at the ground to discharge his remaining bullets. Petliura was rushed to the hospital; Shvartsbard surrendered immediately to police without struggle. When news reached the station that Petliura had died, Shvartsbard rushed to shake the officer's hand, exulting, 'I have killed a great assassin.'¹¹

From the moment French authorities announced charges against Shvartsbard, Jews worldwide mobilized in his defence. An international defence committee quickly formed, drawing massive support for a simple reason: the pogroms had devastated the very heartland from which millions of Jews had recently emigrated, destroying the centres of modern European Jewish life. These postwar massacres had also catalysed a transformation in global Jewish politics. At the Paris Peace Conference, Jewish leaders had united around an unprecedented claim: Jews deserved recognition as a nation within the League of Nations. The Comité des Délégations Juives — a new transnational network centred in Eastern Europe with affiliates worldwide — spearheaded this

¹⁰ B. McGeever, *Antisemitism in the Russian Revolution* (Cambridge University Press, 2019), at 4. For a comprehensive overview, see J. Veidlinger, *In the Midst of Civilized Europe: The Pogroms of 1918–1921 and the Onset of the Holocaust* (Macmillan, 2021).

¹¹ 'Schwartzbard: Interrogatoire de l'accusé,' in *Schwartzbard Defense Committee, 1927*, 18 October 1927 (Mizrakh Yidisher Historisher Arkhiv RG 80, Folder 486, YIVO Institute for Jewish Research).

effort. Though Zionist and non-Zionist leaders disagreed about Palestine, they shared a conviction that Jews required legal recognition and national rights in the emerging international order.¹²

The Jews of Eastern Europe faced what leaders called an ongoing threat of ‘extermination’, prompting the Comité to demand urgent action at Paris. They called for immediate intervention to halt the violence and an international tribunal to prosecute those responsible.¹³ Greek, Armenian, and Serbian groups mounted parallel campaigns seeking justice for wartime atrocities against their communities.¹⁴ All these efforts failed.

Prevention proved equally futile. As the League of Nations began operations in the early 1920s, the Comité appealed for intervention against the final wave of pogroms ravaging the Polish-Ukrainian borderlands.¹⁵ These massacres triggered a refugee crisis, with displaced Jews flooding into European cities. Yet League officials refused to act, claiming such matters lay beyond their jurisdiction.¹⁶ The core problem was structural: unlike other minorities, Jews lacked a kin-state to advocate for them — no equivalent to Poland defending ethnic Poles in Lithuania or vice versa. Without state sponsorship, Jewish persecution could not be framed as inter-state conflict, the only category of armed conflict the League recognized. Stateless and diasporic, Jews found themselves excluded from the very framework designed to prevent mass violence.¹⁷

Denied formal legal recourse, East European Jewish leaders turned to their traditional response to catastrophe: documentation and memorialization. But they also prepared for future justice. The Russian Jewish historian Elias Tcherikower led a team of scholar-activists in gathering evidence, including witness testimonies, official documents and forensic records. In 1921, they established the Eastern Jewish Historical Archive in Berlin and launched an ambitious seven-

¹² On the complex dynamics of Jewish diaspora politics, see J. Frankel, ‘The Paradoxical Politics of Marginality: Thoughts on the Jewish Situation during the Years 1914–1921’ repr. in: J. Frankel (ed.), *Crisis, Revolution, and Russian Jews* (Cambridge University Press, 2008), at 131–154; S. Baron, *Ethnic Minority Rights: Some Older and Newer Trends* (Oxford Centre for Postgraduate Hebrew Studies, 1985), at 14.

¹³ ‘Mémoire sur l’extermination des Juifs d’Ukraine’, in *Les pogromes en Ukraine sous les gouvernements ukrainiens (1917-1920); aperçu historique et documents* (L. Beresnian, 1927), at 135–137.

¹⁴ See M. Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford University Press, 2014), at 64-77. Lewis contrasts the Comité’s focus on minority treaties and civil rights with other groups’ criminal law efforts, though the Comité may not have seen this distinction.

¹⁵ P. Graf, ‘Arbeitsbericht des Comité des Délégations Juives für das Jahr 1920/1921’, 4 *Jahrbuch des Simon-Dubnow-Instituts* (2005) 175–208.

¹⁶ Engel, *The Assassination of Symon Petliura*, *supra* note 5, at 78.

¹⁷ D. Engel, ‘Being Lawful in a Lawless World: The Trial of Sholem Schwartzbard and the Defense of East European Jews’, 5 *Jahrbuch des Simon-Dubnow-Instituts* (2006) 83–97.

volume chronicle of the pogroms.¹⁸ The first volume, *Antisemitism and Pogroms in Ukraine, 1917-1918*, appeared in 1923 in Russian and Yiddish editions, with a preface by the legendary historian Simon Dubnov. Vengeance is alien to the Jewish spirit, wrote Dubnov, '[o]ur only revenge is to eternalize the murders in history Inscribing these deeds in the black record of the Jewish history is the most severe moral punishment.'¹⁹

Three years later, Shvartsbard shattered this principle. His assassination of Petliura represented everything Dubnov had rejected — violent, personal vengeance against the alleged architect of the pogroms. Yet paradoxically, this act of individual retribution gave the Comité an unexpected opportunity: a French courtroom where they could finally present their meticulously gathered evidence and bring survivor testimony before the world.

From the outset, Jewish leaders debated two competing defence strategies. The Comité leadership envisioned a trial that would not merely acquit Shvartsbard but indict the 'Ukrainian pogromists'. They proposed transforming the proceedings into a 'reverse criminal trial' — the accused would become the accuser, mounting an affirmative defence that Petliura, not Shvartsbard, was the true criminal. The assassination would be reframed as collective self-defence on behalf of the Jewish people. This strategy aimed beyond acquittal toward historical judgement. By centering Jewish victim testimonies, the defence would argue for new legal mechanisms to protect minorities abandoned by their own states. As Comité leader Leo Motzkin wrote, '[a] Jewish defendant is sitting in the dock, but the accusers are really the three million Jews who suffered so terribly.' Murder is wrong, he acknowledged, but in this instance 'we are talking not about the act itself but about Ukrainian Jews and the danger that faces them'.²⁰ The goal was to recast Shvartsbard's individual vengeance as the Jewish people's collective self-defence.

This vision resonated across the Jewish world. In New York, the journalist Menachem Ribalow wrote of the 'dual task' facing Jews: 'to argue for the acquittal of the accused and to

¹⁸ I. Cherikover (ed.), *Antisemitizm un pogromen in Ukraine, 1917–1918* (Eastern Jewish Historical Archive, 1923). Only one other volume appeared, decades later and posthumously: I. Cherikover (ed.), *Di Ukrainer pogromen in 1919* (YIVO Institute for Jewish Research, 1965).

¹⁹ Dubnov contrasted the Jewish approach to revenge with the Roman poet Virgil's epigram, '*Exoriare aliquis nostris ex ossibus ultor*' ('arise from my dead bones, o my unknown avenger'). Cherikover, *Antisemitizm*, *supra* note 18, at 15.

²⁰ L. Motzkin, 'Unzer shtelung tsum Shvartsbard-protses' [Our Attitude Toward the Shvartsbard Trial] (Yid.), *Di idishe shtime*, 28 October 1927, at 3, quoted in translation in Engel, *The Assassination of Symon Petliura*, *supra* note 5, at 420.

prosecute the murderer who has been murdered and the others who have not. We must simultaneously defend Shvartsbard and reveal to the world everything that happened during that frightful period of bloodshed in Ukraine.’ Like the Comité’s leadership, Ribalow saw the trial as a rare opportunity for a stateless Jewish people to achieve justice and tell their story. The trial would compensate for international law’s failures: ‘[i]f we do not have the power to punish the evildoers who still roam free on the earth in all the greater and lesser capitals, at least let our powerful voice of protest for our spilled blood be heard.’²¹ An ordinary criminal trial would become the vehicle for the victims to realize their right to truth.

A smaller but influential faction, led by the American Jewish Committee, rejected this approach as legally unsound and politically dangerous. They advocated defending Shvartsbard on grounds of temporary insanity, or ‘mental irresponsibility in the juridical sense’, as the renowned American Jewish leader Louis Marshall, himself a trial lawyer with extensive United States Supreme Court experience, put it.²² The assassination should be presented simply as a ‘crime of passion’, nothing more. Marshall, an avowed opponent of Jewish nationalism, insisted on avoiding any collective claims for retributive justice. A defence of *non compos mentis* would enable acquittal without condoning the crime. This strategy offered multiple advantages: it would sidestep contentious questions about Jewish national rights, reduce tensions with exiled Ukrainian nationalists still reeling from the Soviet destruction of independent Ukraine, and deflect dangerous accusations that Shvartsbard was a Communist operative. Such charges, Marshall feared, would inevitably fuel antisemitism.²³

In the end, the Comité’s view prevailed. During the 17 months between Petliura’s assassination in May 1926 and the trial’s opening in October 1927, the defence committee orchestrated a sophisticated public campaign. They began by relaunching their documentary project, publishing a new volume in three languages that reframed the Paris murder as the

²¹ Ribalow, ‘Petlyura shhik-atsumot’ [Petliura, May His Bones Be Ground to Dust] (Heb.), 26 *Ha-Doar*, 4 June 1926, at 506, quoted in translation in Engel, *The Assassination of Symon Petliura*, *supra* note 5, at 171.

²² American Jewish Committee (ed.), ‘Twentieth Annual Report of the American Jewish Committee’, 29 *American Jewish Year Book* (1927-28), at 425; reproduced in Engel, *The Assassination of Symon Petliura*, *supra* note 5, at 81.

²³ Ironically, the Ukrainian leadership sought to strip Shvartsbard of his Jewish associations to avoid antisemitism charges that would harm their nationalist effort against Soviet rule. D. Engel, ‘From Dreyfus to Schwarzbard: Changes in the Jewish World over Three Decades’, in P. Maciejko and S. Ury (eds), *Making History Jewish: The Dialectics of Jewish History in Eastern Europe and the Middle East* (Brill, 2020), at 173–182.

culmination of years of unpunished atrocities.²⁴ History would explain what law could not justify: why a man might kill when all appeals to international institutions had failed.

The defence team envisioned the trial as a site of collective memory, where the deeds of the deceased and the suffering of his anonymous victims would be exhumed and put on display. To achieve this effect, they assembled three types of evidence. First, they summoned Jewish historians as expert witnesses to provide historical context. Second, documents from Tcherikover's archive were translated into French as forensic evidence. Lastly, and most dramatically, they planned to bring 80 witnesses and survivors to Paris, among them eyewitnesses who would testify about the horrors that they had endured. This overwhelming archive of Jewish suffering would serve a strategic purpose: linking Shvartsbard's act to a moral imperative for collective self-defence when all other recourse had failed.

The Comité enlisted Henri Torrès, a notable French Jewish defence attorney experienced in defending political assassins. Torrès embraced their strategy of justifiable homicide based on collective Jewish suffering. As grandson of Isaiah Levaillant, a Dreyfusard hero who founded the Ligue des Droits de l'Homme, he shrewdly framed the case as an opportunity for France to fulfil its republican ideal as humanity's defender.

Torrès faced a daunting challenge: convincing a French jury that events from eight years earlier and half a continent away determined the accused's guilt or innocence. The evidentiary imbalance was stark. While Petliura's responsibility for the pogroms remained debatable, Shvartsbard had confessed to murder.²⁵ With no appellate court, the death penalty loomed. Torrès could have argued for acquittal on grounds of temporary insanity, but this would not have achieved what his client and the defence committee sought: introducing the Jewish historical experience of the pogroms to the world.

To secure acquittal, then, Torrès needed the jury to undergo a profound shift in perspective — to see Jewish victims, not Petliura or his widow, as the true injured party, and to accept that law could legitimize assassination as belated justice. This legal transformation would emerge not through demonizing Petliura for his supposed crime but through cultivating profound sorrow. As

²⁴ *The Pogroms in the Ukraine under the Ukrainian Government (1917-1927): Historical survey with documents and photographs* (John Bale & Sons Danielsson, 1927). The book was published before the opening of the trial in English, Yiddish, and French editions.

²⁵ On how Petliura became identified as the main perpetrator and symbol of anti-Jewish violence, see Engel, *The Assassination of Symon Petliura*, *supra* note 5, at 68–71.

we shall see, compassion born from shared grief would provide the foundation for a revolutionary legal judgement.

3. TRANSFORMATIVE TESTIMONY: LAW AND EMOTION IN THE *SHVARTSBARD TRIAL*

The trial opened on 18 October 1927 in the Parisian *cour d'assises* to extraordinary public attention. Hundreds queued daily for hours to witness the dramatic proceedings, which assembled a remarkable cast: Petliura's widow, Shvartsbard's wife, eminent French lawyers, former Ukrainian officials, and Jewish pogrom survivors. Three judges presided, with a jury of 12 to determine the verdict.

International press coverage was intense. Lemkin's newspaper *Haynt*, despite maintaining a Paris bureau with its own daily edition, dispatched a special team of journalists to cover the trial. Though Lemkin likely remained in Warsaw, he edited their dispatches and shaped the newspaper's coverage from afar.²⁶

The prosecution pursued a straightforward strategy. They sought to establish Petliura's innocence and present his credentials as a liberal and a friend to the Jews. The defence countered with both eyewitnesses and expert historians to contextualize the pogroms and justify Shvartsbard's act.

Political intrigue, dramatic crime, and horrific atrocities guaranteed the trial would overflow with emotion. Lawyers heightened this through theatrical flourishes — at one point, Torrès dramatically drew an unloaded pistol from his robes and pulled the trigger to illustrate his argument. Defence witnesses, too, channelled emotion to justify Shvartsbard's actions.²⁷

Yet such emotional intensity was hardly unique to this trial. As one journalist observed, all jury trials speak 'at one and the same time to the spirit and to the heart'.²⁸ Nor would emotion alone guarantee legal victory. Early in the proceedings the defence called eminent French physicist

²⁶ We have reviewed the *Haynt* coverage from both the Warsaw and Paris editions and found no credited bylines from Lemkin in Paris. Based on the chronology of Lemkin's international travel in the month of October 1927, it remains possible that he visited Paris at some point during the trial.

²⁷ 'Déposition de M. Henrys [sic] Sliosberg' in *Schwarzbard Defence Committee, 1927*, 24 October 1927 (Mizrah Yidisher Historisher Arkhiv RG 80, Folder 491, YIVO Institute for Jewish Research).

²⁸ 'Das Weltgewissen', 9 *Bnai Brith: Monatsblätter der Grossloge für den Čechoslovakischen Staat* [Czechoslovakia] 9 November 1927, 423, at 423. On the theatricality of the *cour d'assises*, see J. Donovan, *Juries and the Transformation of Criminal Justice in France in the Nineteenth and Twentieth Centuries* (University of North Carolina Press, 2014), at 12–14.

Paul Langevin to justify the crime scientifically. Given the absence of ‘organized international justice’ for ‘crimes of this order’, Langevin argued, Shvartsbard acted rationally and with proven ‘disinterest’ in ‘replacing the non-existent justice’.²⁹

But neither dispassionate rationality nor theatrical emotion would prove decisive. Instead, at crucial moments, something deeper reshaped the legal process itself: raw trauma, publicly displayed, that made emotion itself the testimony. The turning point came with Haya Greenberg, a medical student who had served as a nurse during the Proskurov pogrom of 15 February 1919.³⁰ As she described the massacre in halting speech, her testimony dissolved repeatedly into tears:

I saw before me little girls of 12 or 14 years who were directly sent to the Sempz hospital. Beside them was a three-year-old boy who would not speak a word Only that evening, when I removed his clothes, did I see that his back was covered with wounds. Alone in an unfamiliar place without his mother who had been killed, he held his silence, not daring to reveal that he was injured. I wept as I washed him

The next day, a woman arrived with a three-week-old infant. She told us that they had smashed her window and thrown the baby out onto a bayonet. I will never forget how that baby cried. I held the child close; I couldn’t feed it. I could only give him water mixed with milk. I couldn’t calm him down.

On Tuesday, one of the young girls I mentioned died. The second I placed in the kitchen after her operation. The little boy went to her, embraced her and told her how he kissed their mother for the last time. I still hear that twelve-year-old girl’s cries coming from the kitchen. I cannot forget these memories that forever float before my eyes.

On Monday evening, a woman shot through the throat, who couldn’t swallow because of her wound died in my arms. Eight members of her family survived. The next day, her

²⁹ ‘Déposition de Prof. Paul Langevin’, in *Schwarzbard Defense Committee, 1927*, 20 October 1927 (Mizрах Yidisher Historisher Arkhiv RG 80, Folder 488, YIVO Institute for Jewish Research).

³⁰ Another important emotional testimony came from Jacques Safra, father of a victim. See ‘Déposition de Monsieur Jacques Safra’, in *Schwarzbard Defense Committee, 1927*, 25 October 1927 (Mizрах Yidisher Historisher Arkhiv RG 80, Folder 492, YIVO Institute for Jewish Research).

fourteen-year-old daughter asked to see her body, which I had placed in the kitchen to spare the others. She lost her mind. She clutched her mother's jacket, embracing it, and saying: 'Come, Mama, come. We are going to the synagogue. We are going to pray for you.'³¹

Crying and the inability to forget emerged as the two *leitmotifs* of Greenberg's narrative. In the Paris courtroom, she embodied the traumatized witness struggling with memories that refused to fade:

Always the same thing, always the same memory! Seeing these wounded, I cannot forget them! You cannot imagine how the Jewish population was terrorized. Always the same message on the walls: 'Jews, you detested and accursed people, kikes cursed by all the world, stay quiet.' Know your place. Silence yourselves and know that we are still here, powerful, and ready to smite you.³²

Greenberg's testimony centred on the fate of children and women, giving voice to the suffering of the silenced. She became a bridge between the victims whom she described as having lost their ability to speak or their minds from agony, and the French courtroom public. Her testimony provided an emotional bridge: the empathy that had made her weep while caring for the wounded now transformed the courtroom from a place of rational legal discussion into a space of collective mourning.

This emotional power threatened to overwhelm the law. César Campinchi, the civil prosecutor, intervened to challenge her testimony's relevance. He first acknowledged the 'most sincere lamentation that we have heard here, this account of the abominable scenes of massacres known under the name of pogroms', and then apologized 'as a man addressing a woman, as a lawyer addressing a victim', before asking:

Where in all of this is the hand of Hetman Petliura? ... If we let ourselves be moved by emotion — and I am just as much as you, at least I was in the moment and I am a bit less

³¹ 'Déposition de Mlle Grimberg [sic]' in *Schwarzbard Defence Committee, 1927*, 24 October 1927 (MizraKh Yidisher Historisher Arkhiv RG 85, Folder 491, YIVO Institute for Jewish Research). Translation by the authors.

³² *Ibid.*

so now — by all those who were mutilated or wounded and struggled to escape the massacre and lost their children and their parents, that would grant honor to our heart but not to our intelligence. There is only one possible discussion here: the justification of a criminal act. The defenseless man who was murdered – does he or does he not have the blood of a harmless, oppressed Jew on his hands?³³

The law must maintain a sharp distinction between emotional experience and legal reasoning, Campinchi insisted. He urged the jury to resist being swayed by feeling: ‘Members of the jury of the Seine, you are honest and free men; intelligent, experienced people, you must know what is asked of you.’ In that instant, Torrès countered, defending the primacy of victims’ voices: ‘The value of the witness testimony lies in the degree to which it represents the unfortunate, persecuted Jews!’³⁴

In this quick exchange, we can see the essence of a larger jurisprudential disagreement about the role of victim testimony in atrocity trials.³⁵ Should it be different from ordinary criminal trials where victims have a limited forensic role as eyewitnesses? Should we allow for an independent role of victims’ testimonies in atrocity trials to recognize their common humanity as part of doing justice? When trials occur outside the territory of the crime scene, before a foreign tribunal and audience not familiar with the events, what role should victim testimony — and emotions — play? Should these trials pursue goals beyond retribution, serving also an expressive or didactic function of giving voice to victims, establishing historical truth and constructing a collective memory?³⁶

Campinchi’s effort came to naught. Multiple accounts confirm that Greenberg’s powerful testimony transformed the courtroom. A site of fact-finding became a space of shared feeling.³⁷

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ D. Orentlicher, ‘Victim Participation and Social Impact: Contemporary Lessons of the Eichmann Trial’, 31 *Minnesota Journal of International Law* (2022) 35–55, at 35; L. Bilsky, ‘Rachel Auerbach and the Eichmann Trial: A New Conception of Victims’ Testimonies’, 36 *Journal of Holocaust Research* (2022) 327–345; P. Massida, J. Akwenyu, and L. Moffett, ‘Victims’ Perspectives on Participation in the Ongwen Case: Justice in Victims’ Interests’, 22 *Journal of International Criminal Justice* (2024) 777–783.

³⁶ On criminal trials as sites of historical truth-seeking or collective memory, see L. Bilsky, *Transformative Justice: Israeli Identity on Trial* (University of Michigan Press, 2009).

³⁷ Decades later, the South African Truth and Reconciliation Commission was nicknamed ‘the Kleenex’ committee because victims’ tears became indicative of authentic testimony and transformation from retribution to forgiveness. L. Bilsky, ‘Al Regashot, safa ve-tsedek: Beyn Mishpat Eichman le-veadat ha-emet ve-hapyius be-drom Afrika’ [On Emotions, Language, and Justice: From the Eichmann Trial to the Truth and Reconciliation Committee in South

The entire audience was seized with the ‘feeling of fear and pity’, one reporter wrote. Lawyers wept. One of the judges covered his face, weeping. The prosecutors fell silent. None could contain their emotions.³⁸ ‘Today we had a session not only of speeches, of words, but also of tears’, read another account, describing the impact of testimony from both Greenberg and Henrikh Sliozberg, the distinguished Russian Jewish lawyer who had defended Mendel Beilis in the 1913 antisemitic ritual murder trial in Kyiv:

Shvartsbard cried. With his head lowered he sat in the box and from his eyes flowed forth tears as Mlle. Greenberg described the Proskurov massacre.

Mlle. Greenberg wept, at times her voice barely audible because of the tears that caught in her throat.

Old Sliozberg wept as he spoke with passion about Jewish suffering. Like an ancient prophet, this elder, who for so many years carried the burden of Russian Jewry’s troubles on his shoulders – addressed the court. His voice rang out, sending shivers throughout the entire room. But then his voice broke, growing weaker, quieter – until he, too, wept.

And one other party wept – the jury. ... They [covered] their faces with their hands and afterwards dried their eyes.³⁹

Greenberg’s weeping transformed the legal process in Shvartsbard’s trial, enabling French spectators to grasp the horror of the pogroms in Ukraine that had left so many victims mute and unable to relate what had happened to them. Her weeping, and the empathy it evoked, overcame the transnational divide helping to create a shared community of humanity. Yet these tears signified more than grief. They offered a form of psychological catharsis.

Africa] (Heb.), 3 *Mishpat*, *hevra ve-tarbut* (2020) 35–81. For a critique of the South African process, see T. Brudholm, *Resentment’s Virtue: Jean Améry and the Refusal to Forgive* (Temple University Press, 2008).

³⁸ M. Kotik, *Mishpat Shvartsbard: Rezaḥ nakam al reka ha-pogromim be-Ukrainah* [The Shvartzbard Trial: Revenge Murder in Light of the Pogroms in Ukraine] (Heb.) (Hotsaat Mifale Niyar *Haderah*, 1972), at 53. Kotik speculates that it was ‘this testimony that swayed the judgement of the court’.

³⁹ N., ‘Tern’ [Tears] (Yid.), *Haynt*, 25 October 1927, at 2.

In Aristotle's *Poetics*, Greek tragedy involves more than sadness. It triggers intense emotional reactions to traumatic events, producing pain, fear, and compassion. Viewers identify with the hero's fate, experiencing their own fear and self-pity. In this way, they achieve a new moral insight.⁴⁰ In the *Shvartsbard* trial, the most important person to experience this catharsis was none other than the defendant. Many observers noted how Shvartsbard's obvious 'passion' 'purified him' in the Court's eyes.⁴¹

Yet his most powerful tears came not during his own testimony but while listening as a spectator to Greenberg's testimony. Shvartsbard's tears transformed him from actor to spectator, from defendant to witness. His crying became a substitute for words, a non-verbal physical identification with the suffering of the victims. Though he later described that moment in his memoirs as a failure of will — 'I tried not to cry, in order not to show my weakness, but I could not withstand the challenge.' — it was precisely those tears that fused the collective Jewish tragedy with his personal story.⁴² When he cried with the victims, he became them.⁴³

This phenomenon was explicitly noted in the Paris courtroom. As Shvartsbard wept, Torrès swiftly directed attention to his client, parsing the moment for the jury:

Shvartsbard sits behind me. Today he cried for the first time – not at your demands for his punishment, not at your threats, nor at your description of his culpability, but when he heard you dismiss the personal opinion of the witness.⁴⁴

With this intervention, Torrès recast Shvartsbard as an empathic listener who acted not from personal vengeance but from solidarity with the victims. By highlighting that his client wept only when prosecutors callously dismissed victim-witness testimony as irrelevant, Torrès implied that Shvartsbard's deep identification with the victims was the selfless motive for his crime.

⁴⁰ As Vered Lev Kenaan has observed, central to this process is a gendered dynamic of grief familiar from Greek tragedy, one that creates a new form of intersubjectivity between narrator and audience. V. Lev Kenaan, *Pandora's Senses: The Feminine Character of the Ancient Text* (Cambridge University Press, 2010), at 176.

⁴¹ See, for instance, 'Das Weltgewissen', *supra* note 28, at 423.

⁴² Sh. Shvartsbard, *In'm loyffun yorn* [In the Course of Years] (Yid.) (Shalom Shvartsbard Komitet in Shikage, 1934), at 356.

⁴³ Carolyn Dean suggests that the trial helped transform Shvartsbard from a violent assassin into a moral witness. Dean, *supra* note 5.

⁴⁴ 'Déposition de Mlle Grimberg', *supra* note 31.

Shvartsbard's tears also hinted at his deeper fear: that the court's rejection of eyewitness accounts would silence the victims forever, leaving them outside law's protection. They had been wronged, yet that very wrong now risked being rendered legally invisible. The trial thus threatened to fail the victims in its most fundamental task of granting normative weight to the victims' words and experiences.

Greenberg's testimony proved to be a turning point. Torrès cancelled the remaining eighty defence witnesses, anticipating that the emotional impact on the jury would suffice to exonerate Shvartsbard. His instinct proved correct. Yet this decision thwarted the Comité's vision of Jews asserting their collective presence in law through the testimony of witnesses and experts. Ironically, Torrès himself silenced other victims for the sake of securing the defendant's acquittal. Jewish historical specificity was lost in the process. In its place, Torrès reframed the trial as a test of French justice. As historian Carolyn Dean has shown, he invoked Republican tradition to argue that humanitarian justice would reunite French society.⁴⁵ By condemning inhumane atrocities and exonerating a heroic avenger, France could uphold its claim to universal justice. The jury needed to feel it acted out of French patriotism, not merely human compassion. 'It is impossible to distort the natural instinct of a people', Torrès told the jury:

The natural instinct of the French nation has always been deep, touching feeling that penetrates the soul. They have always sought to grant freedom, justice, courage and grandeur to every man, and of course to Jews ... [This trial] ... belongs to the ideals of revolutionary French ideals, whose inheritance none of us can deny.⁴⁶

In his closing argument, Torrès cast the trial as an exercise in French humanitarian justice. He contrasted Shvartsbard's embrace of the French values of liberty and justice and heroic action with the ghetto mentality of Jewish victims who had suffered and mourned passively in Ukraine. This sharp binary erased the reality of Jewish legal resistance: the activism of the Jewish leaders in Eastern Europe, and the Comité's own work in creating an archive and demanding justice that

⁴⁵ Torrès's biographical connection to the Dreyfus Affair framed the *Shvartsbard* trial as a repetition in reverse: whereas French justice was then compromised by antisemitism, France could now lead the legal struggle against it by extending its republican tradition to an international humanitarian role.

⁴⁶ 'A Geshprekh mit Henry Torrès' [A Conversation with Henri Torrès] (Yid.), *Der Moment*, 3 November 1927, at 3. On Shvartsbard's critique of this move by Torrès, see K. Johnson, 'Sholem Schwarzbard: Biography of a Jewish Assassin' (Ph.D. Thesis on file at Harvard University), at 356.

had shaped the trial. ‘I ask you to permit Shvartsbard to leave here free and acquitted’, Torrès told the jury, ‘for he carries on his face all the tragedy of his people’.

The final speech by Torrès triggered another round of crying amongst the jurors. As they dried their tears, the judge issued jury instructions. Then, the jury exited the hall, only to return 20 minutes later with a verdict of not guilty. At the announcement of that decision, cries of ‘*Vive la France!*’ rang out in the courtroom.⁴⁷

4. LEMKIN’S BEAUTIFUL CRIME: A POST-TRIAL LEGAL INTERPRETATION

Immediately after the trial, Jewish newspapers across the world reported that French and Jewish lawyers were discussing plans for a new international legal tribunal to prosecute other leaders responsible for the pogroms.⁴⁸ Such a court would exercise jurisdiction over perpetrators ‘who could not be tried in courts of the countries where they committed the pogroms, because they were political *émigrés*’ who had fled and found refuge in other lands. To address this problem, they envisioned a ‘world-tribunal’ under the League of Nations that could exercise jurisdiction.⁴⁹ ‘The first step has been made’, wrote the poet Hillel Tsaytlin, and now ‘we must claim our right to live in the world’ and bring ‘those who seek to deny us the right to live ... to justice at the League of Nations.’⁵⁰

The world tribunal idea quickly faded from view. International legal circles shifted their attention instead to the Kellogg-Briand Pact, a treaty to outlaw war and protect territorial state-sovereignty. Jewish activists, meanwhile, launched a campaign to rebuild the Comité into a truly transnational organization, which led to the emergence of the World Jewish Congress in 1936.

⁴⁷ The jury vote was 8-4. Ben-Ammi, ‘Chalom Schwartzbard devant le Jury’ [Shalom Schwartzbard before the Jury], *L’univers Israelite*, 28 October 1927, at 174.

⁴⁸ ‘Der proyekt tsu shtelen ale pogrom-helden far a velt-tribunal fin der Felker-Lige’ [The Project to Bring All the Pogromists Before a World Tribunal at the League of Nations] (Yid.), *Der Moment*, 30 October 1927, at 2. For a survey of French and French Jewish reactions, see R. Bijaoui, *Le crime de Samuel Schwarbard* (Imago, 2018), at 79–95. For broader Jewish and Ukrainian reactions, see Engel, *The Assassination of Symon Petliura*, *supra* note 5.

⁴⁹ This project anticipated universal jurisdiction over international crimes and the establishment of a permanent International Criminal Court. Prior to the creation of the International Criminal Court, domestic courts invoked this doctrine for crimes against humanity.

⁵⁰ H. Tsaytlin, ‘Oyfn veg fun yosher-zukh’ [Towards the pursuit of justice] (Yid.), *Der Moment*, 1 November 1927, at 3.

Lemkin was among the few lawyers who continued pursuing the question of an international criminal law for atrocity crimes.⁵¹ From 1927 onward, he worked to develop a framework for prosecuting transnational crimes against minority groups, seeking a path toward international justice. At the heart of Lemkin's work lay recognition of a legal lacuna. A crime with no name represented a gap within international law that must be closed. Though the crime was universal, unbounded by time or space, it always occurred on the bodies of a specific group. Lemkin developed his conception through two paradigmatic cases that exposed the insufficiency of existing law vis-à-vis stateless minority populations. As the Russian, Habsburg, and Ottoman empires collapsed, Jews and Armenians suffered terrible atrocities at the hands of the emerging post-imperial nation-states. In Lemkin's mind, these twin examples demonstrated how the absence of legal protection, or rightlessness, enabled mass atrocities against diasporic peoples.

Jews and Armenians shared more than a common plight. In 1921, five years before Shvartsbard killed Petliura, an Armenian named Soghomon Tehlirian assassinated Talat Pasha, the former Turkish official, in Berlin. Like Shvartsbard, he was tried and acquitted. By Lemkin's own account, these twin cases catalysed his thinking about the lacuna in international criminal law. In both instances where such proceedings were necessary, it demonstrated how the law failed diasporic minorities. The future of justice required a new law that could offer protection to such minorities against their own states.⁵² Yet in a world in which law was made by powerful sovereign states, how could stateless peoples create legal change?

Lemkin's answer was emotion. He opened his 1927 article with a bold assertion. Shvartsbard's Paris trial had proven that 'there are such things as "beautiful crimes"'. The phrase, he explained, hailed from a post-verdict statement of approval by the eminent French scholar of criminal law, Rene Garraud. Garraud took his notion of a 'beautiful crime' from the nineteenth-century theatre critic Jean-Jacques Weiss, who in his survey of French theatre noted a certain dramatic species of 'beautiful crime' in which the murderer is a pure, selfless soul, acting out of 'a concentrated passion' unpolluted by 'common and vulgar motives'.⁵³

⁵¹ Lewis, *supra* note 14, at 78–121.

⁵² Upon learning about the Petliura trial, 'I felt that a law against this type of racial or religious murder must be adopted by the world', he wrote in his memoirs. Then the *Shvartzbard* case triggered 'a rare moment of clarity that seething indignation instills': 'I further understood the concept of the crime I was trying to establish.' *Totally Unofficial*, *supra* note 6, at 20–21.

⁵³ Garraud employed the phrase from Weiss to refer to the neuro-psychological profile of the criminal perpetrator and the question of mental capacity. R. Garraud, *Traité théorique et pratique du droit pénal français*, Vol. 1 (L. Larose et

What explained Lemkin's provocative phrase 'beautiful crime'? Was he really aestheticizing violence and endorsing assassination? In reality, Lemkin focused not on the violent act itself, but on the legal transformation it catalysed. His true subject was the 'beautiful judgement', not the crime. 'Jurisprudence did not easily reach the conclusion that a crime can be beautiful', he wrote. 'Only after a long path of legal evolution did the concept emerge of a crime that can only be committed by people with sublime feelings, noble souls and huge hearts, who absorb into their being the pain of their brothers, often of all of humanity, of entire generations.' As in the trial itself, Lemkin subtly shifted the emphasis from 'pure' or 'selfless' individual motive to one that transcends particularistic group-affiliation and concerns itself with humanity writ large.

Rather than praising the vigilante murder, Lemkin went on to illuminate how the trial can expose — and begin to bridge — the gap between positive law and moral conscience:

And the legal consciousness of the nations, which develops together with their culture and which refuses to be restricted to the narrow confines of a legal code, has declared: One cannot judge such cases on the basis of musty formulas and antiquated laws; and the people judging these cases must create a court that is tied to the living, pulsating people's conscience, a court which is truly alive to all the pain and suffering, one which is truly free in its feelings and judgements.

The question that preoccupied Lemkin here was the lacuna in the law. A Ukrainian Jewish minority population had been left outside the protection of the laws in its own country; international law could not protect it from the sovereign state to which they nominally belonged. The atrocities they suffered had no name in law — since they were not ordinary acts of murder, rape or robbery but structural violence rooted in the designation of a minority group as subhuman, beyond legal protection. This gap created a profound judicial dilemma. When these atrocities surfaced years later in a Parisian courtroom, the jury faced difficult questions: By what law could they judge events that occurred in another country? Which legal framework applied? How could the jury distinguish between vengeance and retribution?

Forcel, 1898), at 127, fn. 15 and *Traité théorique*, Vol. 2 (Librairie du Recueil Sirey, 1909), at 210, fn. 10; Weiss, *supra* note 2, at 68–70.

Lemkin argued that in such cases, juries must abandon ordinary criminal law (determinative judgement) and instead exercise free or spontaneous judgement based on empathy with the pain and injury suffered (reflective judgement).⁵⁴ Emotions in such cases do not pose an obstacle to judgement but serve as its compass. For Lemkin, the judgement of what constituted a ‘beautiful crime’ began with assessing the perpetrator’s motive: whether it represented a selfless act of empathic identification. In the *Shvartsbard* case, neither personal injury nor private revenge drove the perpetrator’s deed. He was seen as acting solely out of empathy with his people, who were defenceless and rightless.⁵⁵ However, this interpretation can only be the beginning of a process of judgement that identifies gaps in the law and culminates in new reflective judgement. In his article, Lemkin extended this reasoning further. Following Torrès, he portrayed Shvartsbard as a selfless humanitarian whose empathy ultimately transcended national boundaries to embrace universal human suffering. The trial allowed for the jury’s transformation through victims’ testimonies, legal representation, and empathic listening — leading to acquittal.

This explains Shvartsbard’s acquittal, but how could one verdict generate legal change? When law confronts a new type of criminal whose motive is ‘beautiful’, even as the act remains a crime, a tension appears. Lemkin saw this tension as a creative one, resolved through the jury’s verdict — and its power of nullification.

Jury nullification became key to Lemkin’s solution for closing gaps in the law — a legal practice that allows juries to judge against the law to provide justice in individual cases. He traced the practice of ‘jury nullification’ — cases in which a jury acquits a defendant despite acknowledging that the law was broken — in European (mainly English) legal history.⁵⁶ The practice emerged along with the jury trial itself in post-sixteenth-century England. Faced with mandatory capital punishment for all felonies, juries began to distinguish between ‘murder’ and

⁵⁴ For an analysis of the two types of judgments see, H. Arendt, *Lectures on Kant’s Political Judgement* (University of Chicago Press, 1989).

⁵⁵ ‘I will discharge my duty on behalf of our poor Jewish people’, Shvartsbard wrote to his wife before the murder. ‘I will avenge all the pogroms, the blood and hatred for the Jews. Petliura is responsible for our people’s misfortune. He must pay with his blood.’ Engel, *The Assassination of Symon Petliura*, *supra* note 5, at 353–354.

⁵⁶ Jury nullification varies in form. In its strongest sense, a jury acquits because it believes the act should not be proscribed by law. An intermediate form reflects the view that the act, though criminal, does not deserve the prescribed punishment. A weaker form grants an exception based on the defendant’s personal characteristics or particular features of the case. T. Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800* (University of Chicago Press, 1988), at xviii. On jury nullification in French law, see Donovan, *supra* note 28, at 2–3, 177.

‘manslaughter’ by extending the definition of ‘self-defence’ through acquittals ‘against the rule’.⁵⁷ As legal historian Thomas Green explains, dissatisfied with harsh punishments in homicide cases at odds with communal notions of justice, juries focused on the mental state of the defendant, thereby introducing the new idea of different degrees of culpability.⁵⁸

It was in France, Lemkin explained, that the jury trial turned into ‘an instrument of modern rights-development and humanitarian legal-application’. In England, jury nullification remained ‘silent’, a solution applied ad hoc to individual cases, since there the jury acquits without giving its reasons. In France, where Montesquieu developed the idea of separation of powers in his *Spirit of the Laws*, Lemkin argued, a procedure developed to translate the verdict of the jury into a source of legal reform. ‘French jurors have according to the creative tradition the power to register their opinions about reforms of certain statutes of the criminal code ... in the form of the so-called *voeux* [vows]’.⁵⁹ In this way, individual cases of jury nullification did not remain exceptions to the rule, undermining its authority, but emerged as a source for new law.

Lemkin noted that one such change in French criminal law, the recognition of ‘extenuating circumstances’, originated in the practice of jury nullification. He presented this recognition as part of a larger process of the humanization of modern criminal law — moving its focus from actions, or *actus reus*, to mental states, *mens rea*, or from crime to criminal.⁶⁰

In 1927 Paris, the challenge for the jury was harder than in sixteenth-century England, since the jurors were tasked with judging a crime connected to foreign national communities and jurisdictions. Regardless of their formal citizenship, both perpetrator and victim legally belonged elsewhere.⁶¹ Indeed, the trial itself was needed to help *create* a transnational community of solidarity.

The prosecution sought to exempt the jury from responsibility for assessing the crime’s circumstances and moral valences by severing any link to the history of Ukraine. The defence tried to use the trial to spark the French jury’s solidarity with the foreign Jews of Ukraine. Hence the

⁵⁷ Green, *supra* note 56, at 30–31.

⁵⁸ *Ibid.*, at 31, and more generally chapter 2.

⁵⁹ French juries formally submitted these *voeux* to the Minister of Justice. J. Garner, ‘Criminal Procedure in France’, 25 *Yale Law Journal* (1916) 255–284, at 275; Donovan, *supra* note 28, at 158–166.

⁶⁰ The ‘core of the transformation’, writes Donovan, ‘was the movement away from a criminal justice system meant to try the crime to one that tried the criminal’. Donovan, *supra* note 28, at 177.

⁶¹ J. Marglin, *The Shamama Case: Contesting Citizenship across the Modern Mediterranean* (Princeton University Press, 2022), at 1; K. Knop, ‘Citizenship, Public and Private’, 71 *Law and Contemporary Problems* (2008) 309–342, at 309.

importance of emotions in applying the abstract French value of fraternity to the victims of the pogroms. Doing so permitted the imagination of a new community of judgement, one that encompassed all of humanity.⁶² In this way, Shvartsbard's trial created a universal jurisdiction of sorts, where a third-party national court undertook to protect the rights of nationals from another territory for the sake of humanity writ large.

This point led Lemkin to describe the argument among French legal experts about the nature of emotion and subjectivity in jury trials. The documented trend in the growing number of exonerations in jury trials had alarmed the 'reactionary part of French society', who claimed it was not conscience that motivated such patterns but class interest. According to this theory, petit bourgeois jurors had judged severely on property-related crimes while exhibiting 'great leniency in judging crimes against individuals', such as 'crimes of passion'.⁶³ Far from the commonsense reasoning of average citizens, one expert had dismissed jurors as 'gallant amateurs', implying false, partial knowledge of the law itself. 'In France, however', Lemkin wrote, 'people have never taken seriously such criticism, and the moral authority of jury trials has only grown without pause'.⁶⁴

Only in the final paragraph of his article did Lemkin mention Shvartsbard's name. Given the French juridical tradition of jury nullification in promoting justice and humanism, he argued, Shvartsbard's verdict should not be seen as exceptional but as an example of French justice: 'The twelve jurors of the Seine District well understood Shvartsbard's act. They grasped that the simple Jewish watch-maker Sholem Shvartsbard had wound back the clock of Jewish history to display for them and for the whole world two historical dates.'

Lemkin seized on the fact that Shvartsbard was a watchmaker, suggesting that his natural instinct for justice did not allow him to forget or forgive the crimes despite the long passage of time. His internal clock was frozen and only displayed two points in time — pogrom and revenge.⁶⁵ The metaphor of a frozen clock that only has two dates — the pogroms of 1918–1920, and the

⁶² V. Munez-Darde, 'Fraternity and Justice', in K. Bayertz (ed.), *Solidarity* (Springer, 2010) 81–97.

⁶³ For discussion of acquittal rates in the French cour d'assises see Sansico, *supra* note 5, at 37 and Donovan, *supra* note 28, at 58.

⁶⁴ David Engel, however, traces the conflict's origin elsewhere. After World War I, lawyers including Torrès and Campinchi broadened 'crimes of passion' to include political passion, sparking debate over violence, law, and France's role as a refuge for political assassins. Engel, *The Assassination of Symon Petliura*, *supra* note 5, at 12–15.

⁶⁵ In today's psychological terms, one might suggest that Shvartsbard suffered from post-traumatic stress. J. Améry, *At the Mind's Limits: Contemplations by a Survivor on Auschwitz and Its Realities* (Yale University Press, 1990), at 62–81.

1926 assassination of Petliura as an act of (justified) revenge — invoked criminal law’s most basic principles of retributive justice. Every crime deserves accounting. The passage of time does not erase culpability. Justice must be measured, and proportionate.

Even though Lemkin spoke of vengeance, he depicted the response as reasonably proportional — the murder of one culpable individual against 50,000 innocent lives. ‘The French jurors possess a deep understanding of beauty and history’, he concluded. In recognizing ‘the “beautiful” crime of Sholem Shvartsbard they have rendered an historical judgement’.

We began our reading of Lemkin’s 1927 text asking why he chose to aestheticize the process of judgement. His choice revealed a conviction that spontaneous moral reflection could bridge the gap between formal law and human ethics.⁶⁶ He took up that theme in a short book he published in 1933 on judging and criminal law that identified fundamental gaps in the law. These gaps emerged from what he called ‘incommensurable concepts’ — the tensions between guilt and punishment, between social harm and punishment, and between the crime and the criminal. A more realistic law would acknowledge these gaps and seek ways to overcome them. He observed that lawyers, legislators, and judges were increasingly embracing psychological ‘subjectivity’, shifting their focus from ‘the events of the external world ... to penetrate as deeply as possible into ... the internal world of the criminal’s psyche’. This shift meant that ‘the living person enters criminal law’. He concluded the book with his own variation on a Latin epigram: ‘*Pectus facit jurisconsultum*: ‘[i]t is the heart that makes the judge.’⁶⁷

For Lemkin, aesthetic judgement enabled jurors to perceive the ‘beauty’ of the subjective motive behind a criminal deed and to reinterpret the law accordingly. In the case of Shvartsbard, this meant creating an exception by recognizing a ‘defence’ for his violent act.⁶⁸ Lemkin envisioned this judgement process as fundamentally emotional, driven by empathy with victims and requiring an exercise of the imagination.⁶⁹ The process unfolds in two stages: first, the avenger

⁶⁶ A similar argument appears in Hannah Arendt’s reading of Kant’s *Critique of Judgement*: reflective judgements, unlike rules-based or determinative ones, draw on moral sentiment to empower imagination — ‘putting ourselves in the place of any other man’. Arendt, *supra* note 54, at 76. L. Bilsky, ‘When Actor And Spectator Meet in the Courtroom: Reflections on Hannah Arendt’s Concept of Judgement’, 8 *History and Memory* (1996) 137–173, at 147.

⁶⁷ The original phrase stemmed from the Roman writer Quintillian: ‘*pectus est quod disertos facit*’ or ‘it is the heart that brings eloquence’. A variation was associated with the nineteenth-century German Christian theologian, Neander: ‘*pectus est, quod facit theologum*’, ‘the heart makes the theologian’.

⁶⁸ R. Lemkin, *Sedzia w obliczu nowoczesnego prawa Karnego i Kryminologii* [The Judge Confronting Modern Criminal Law and Criminology] (Wydawnictwa Instytutu Kryminologicznego, 1933), at 141.

⁶⁹ In this respect, we can see the imprint of the East European legal realist school and Leon Petrażycki’s influential psychological theory of law. J. Loeffler, ‘The Right to Banality: Interwar Jewish Global Thought between Eastern

identifies with voiceless victims and acts to avenge the injustice they suffered; then, the trial transforms this act of violence through victim and witness testimonies. These testimonies lead the jury to enlarge their own mentality through empathy; they exercise independent judgement of the limitations of the law, ultimately through jury nullification.⁷⁰ In Lemkin's account, the act of judgement precedes the naming of a new crime. Emotions precede legal reasoning.

Still, there remained the tension between free judgement and formal law.⁷¹ The *Shvartsbard* trial had only resulted in *ex post facto* justification of a criminal act. Lemkin, like the Jewish defence committee, was searching for an *ex ante* law that would eliminate the need to resort to private violence in the first place. Emotion had created legal change; now law needed to formalize it, replacing private revenge with legal prohibitions.

Lemkin undertook this work through his efforts at international law codification. In 1933, he presented his proposal for the League of Nations to enact a pair of laws to ban barbarism and vandalism that targeted religious and national groups. The international community must take measures to prevent and punish 'acts of extermination directed against the ethnic, religious or social collectivities.' Such crimes he initially proposed to 'call by the name 'barbarity' [for they] endanger both the existence of the collectivity concerned and the entire social order.' This formulation enlarged the legal community, making space for groups outside the state-centric order, while also tapping into the cosmopolitan moral sensibilities of a single humanity.⁷²

Formalization was also necessary because subjective judgement remained an unstable force, vulnerable to abuse by individuals and states. He acknowledged in his 1933 book that 'the subjectivization of criminal law' could lead to greater justice but also reduce or impair the

Europe and the Middle East', *Nationalities Papers* (2024) 2–25; A. Likhovski, 'The Many Exiles of Max Laserson', 22 *Clio@Themis* (2022); E. Fittipaldi, 'On Leon Petrażycki's Critical Realism and Legal Realism', in B. Brozek, J. Stanek, and J. Stelmach (eds), *Russian Legal Realism* (Springer, 2018) 93–110.

⁷⁰ Arendt elaborates on Kant's notion of 'enlarged mentality' — thinking from others' viewpoints to validate subjective judgements. This shows why empathy is central to forming political communities of judgement. Arendt, *supra* note 54, at 76.

⁷¹ The European Free Law movement (Freirechtsbewegung) urged judges to interpret positive law, according to their sense of justice, emphasizing gaps in legislative commands. See W. Friedmann, *Legal Theory* (New York, 1967), at 342–344 and K. Schmidt, 'Law, Modernity, Crisis: German Free Lawyers, American Legal Realists, and the Transatlantic Turn to 'Life,' 1903–1933', 39 *German Studies Review* (2016) 121–140.

⁷² R. Lemkin, *Les actes constituant un danger general (interetatique) consideres comme delites des droit des gens* [Acts Constituting a General (Interstate) Danger Considered as Offences against International Law] (A. Pedone, 1933).

‘guarantees of individual rights.’⁷³ Likewise, making law out of national conscience could be perverted into a pretext for illegality.

This was precisely the scenario that Lemkin confronted in the late 1930s, as Nazi lawyers argued at international conferences that law should not be bound by artificial legalism. Codification, they claimed, hampered the organic development of justice along particularistic national lines. At the 1937 International Congress on Comparative Law at The Hague, Lemkin was disturbed to hear German lawyers advocate abandoning the basic legal principle *nullum crimen sine lege* [no crime without law]. If law emerged from national will, they argued, then the judge must ‘interpret the will of the people, which is the source of the law,’ in the spirit of the French Revolution.

Lemkin responded emphatically: the ‘will of the people’ was not a legal principle, but a moral and philosophical one. The distinction was critical for preserving law’s autonomy from politics. In the hands of the Nazi regime, legal creativity on behalf of an imagined *Volk* could justify a perversion of legality itself.⁷⁴

5. CONCLUSION: THE TRIAL’S UNCERTAIN LEGACIES IN GENOCIDE LAW

During World War II, Lemkin coined the term ‘genocide’ to provide a new name for the crime of eliminationist violence of the kind Jewish and Armenian minorities suffered. Yet throughout his subsequent drive to legalize this concept, he remained torn between the need to secure formal codification and the impulse to rely on law’s affective power to respond to new needs of excluded groups. Genocide, Lemkin stressed time and again, was both a specific new kind of international crime that states must proscribe *and* a timeless, universal moral taboo.

This tension between norm and positive law was never really resolved. It persisted in what we call the double life of genocide law in the post World War II period. On the one hand, there now existed the law on the books — the 1948 Convention, which codified genocide into law, piercing the strong wall of state sovereignty and obliging states and international tribunals to

⁷³ Lemkin, *Sedzia w obliczu nowoczesnego prawa Karnego i Kryminologii*, *supra* note 68.

⁷⁴ ‘Rapport sur IIe Congres international de Droit compare (La Haye, 1937),’ Correspondence with the International Academy of Comparative Law, The Hague, UN Library and Archives, R3958/5A/18871/394. See also I. Muller, *Hitler’s Justice: The Courts of the Third Reich* (Harvard University Press, 1991); M. Dubber, ‘Judicial Positivism and Hitler’s Injustice’, 93 *Columbia Law Review* (1993) 1807–1832; M. Stolleis, *The Law under the Swastika: Studies on Legal History in Germany* (University of Chicago Press, 1998).

prosecute individuals for the crime of genocide committed in times of war or peace. But this formal law created high bars for prosecution, by limiting the categories of protected groups, excluding ‘cultural genocide’, and demanding a special intent (*dolus specialis*). The price of codification was that the Genocide Convention emerged as a legal instrument that could not be applied readily to prevent and punish mass atrocities.

On the other hand, during the same period, genocide grew in political and social discourse to become known as ‘the crime of crimes’. States freely invoked the term to accuse other states of grievous harms to their kin-populations. Many groups also found in the term a potent symbol that could convey the devastation and wrongs suffered by them, regardless of the precise scope of the law.⁷⁵

The double life of genocide was epitomized in the struggle over the recognition of the principle of universal jurisdiction. Lemkin saw in the Genocide Convention a means for protecting minority groups in a post-war world of strong sovereign states and weak human rights. He championed the idea of universal jurisdiction (then called ‘universal repression’) — allowing any state to prosecute perpetrators regardless of where the crime occurred or the nationality of the accused or victim. The draft Genocide Convention that Lemkin prepared with Vespasian Pella and Henri Donnedieu de Vabres specifically included universal enforcement.⁷⁶ However, powerful states such as France, the United States, and the Soviet Union opposed it as a violation of sovereignty.⁷⁷ The final Convention did not recognize universal jurisdiction.⁷⁸

Yet alongside the legislative path, the prohibition of genocide had a second life. National courts, beginning with the *Eichmann* trial in 1961, found creative ways to circumvent the jurisdictional limitations of the Convention. Lacking jurisdiction under the Convention, the Israeli court declared that its authority originated from ‘the universal power vested in every state to

⁷⁵ A. Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (Rutgers University Press, 2017); A. Graziosi and F. Sysyn (eds), *Genocide: The Power and Problems of a Concept* (McGill-Queen’s University Press, 2022).

⁷⁶ ‘The High Contracting Parties pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.’ Art. 7 of Draft Convention on the Crime of Genocide, UN Doc, E/447, 26 June 1947 (Secretariat draft).

⁷⁷ A. Adanan, ‘Reflecting on the Genocide Convention in its Eighth Decade: How Universal Jurisdiction Developed over Genocide’, 19 *Journal of International Criminal Justice* (2001) 1045-1047.

⁷⁸ According to Art. VI of the Genocide Convention, ‘[p]ersons charged with genocide ... shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction.’

prosecute for crimes of this type committed in the past – a power which is based on customary international law.’⁷⁹

That process of creative reinterpretation of the Genocide Convention, even in boldly radical and counter-intuitive ways, continues and represents a direct legacy of Lemkin’s approach to the *Shvartsbard* trial.⁸⁰ Thinking with emotions, Lemkin showed, can create a space for legal creativity and change, humanizing the law by extending its reach to groups that otherwise remain outside its protection. Yet it can also undermine international law’s common normative framework. No crime can be addressed by law without a shared community of understanding and judgement. As Lemkin explained, ‘the people judging these cases must create a court that is tied to the living, pulsating people’s conscience, a court which is truly alive to all the pain and suffering, one which is truly free in its feelings and judgements.’

Yet this vision proved difficult to achieve. As Hannah Arendt famously wrote, ‘[o]ne judges always as a member of a community, guided by one’s community sense, one’s *sensus communis*. But in the last analysis, one is a member of a world community by the sheer fact of being human; this is one’s “cosmopolitan existence”.’ In the tension between those roles — the particular and the universal — lies a gap that neither Lemkin nor his law could bridge.

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⁷⁹ *District Court of Jerusalem – Attorney General v. Adolf Eichmann – Judgement* (1961), 12. Eichmann was not charged with genocide (as the Convention only applies prospectively) but rather was charged with ‘crimes against the Jewish people’, which were based on Israeli law and the Genocide Convention, which Israel had ratified.

⁸⁰ So, too, the International Court of Justice (ICJ) re-interpreted the Genocide Convention to apply not only to individuals but to state parties that can be liable for violations of the Genocide Convention. In *Bosnia Herzegovina v. Serbia* the Court held that the obligation of a state to prevent genocide necessarily implies the prohibition of the commission of genocide. *The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007, ICJ General List No. 91, at 142–201.