East West Street

On the Origins of "Genocide" and "Crimes Against Humanity"

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For Malke and Rosa,
for Rita and Leon,
for Annie,
for Ruth
The little town lies in the middle of a great plain . . . It begins with little huts and ends with them. After a while the huts are replaced by houses. Streets begin. One runs from north to south, the other from east to west.

—JOSEPH ROTH, *The Wandering Jews*, 1927

What haunts are not the dead, but the gaps left within us by the secrets of others.

—NICOLAS ABRAHAM, "Notes on the Phantom," 1975
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Note to the Reader

The city of Lviv occupies an important place in this story. Through the nineteenth century, it was generally known as Lemberg, located on the eastern outskirts of the Austro-Hungarian Empire. Soon after World War I, it became part of newly independent Poland, called Lwów, until the outbreak of World War II, when it was occupied by the Soviets, who knew it as Lvov. In July 1941, the Germans unexpectedly conquered the city and made it the capital of Distrikt Galizien in the General Government, known once more as Lemberg. After the Red Army vanquished the Nazis in the summer of 1944, it became part of Ukraine and was called Lviv, the name that is generally used today. Exceptionally, if you fly to the city from Munich, the airport screens identify the destination as Lemberg.

Lemberg, Lviv, Lvo, and Lwów are the same place. The name has changed, as has the composition and nationality of its inhabitants, but the location and the buildings have remained. This is even as the city changed hands, no fewer than eight times in the years between 1914 and 1945. What to call the city in the pages of this book posed a number of difficulties, so I have used the name by which it was referred to by those who controlled it at the time of which I am writing. (I generally adopt the same approach for other places: nearby Żółkiew is now Zhovkva, after an interregnum from 1931 to 1991, when it was called Nesterov in honor of a Russian World War I hero, the first pilot to fly a loop.)

I thought of calling it Lemberg throughout, because the word evokes a gentle sense of history, as well as being the city of my grandfather’s childhood. Yet such a choice could be taken as sending a signal, which might cause offense to others, all the more unfortunate at a time when the territory
of Ukraine is being fought over with Russia. The same went for the name Lwów, which it was called for two decades, and also for Lviv, which had been the name of the city for just a few tumultuous days in November 1918. Italy never controlled the city, but if it had, it would be called Leopolis, the City of Lions.
Principal Characters

Hersch Lauterpacht, professor of international law, was born in August 1897 in the small town of Żółkiew, a few miles from Lemberg, to which the family moved in 1911. The son of Aron and Deborah (née Turkenkopf), he was the second of three children, between his brother, David, and his sister, Sabina. In 1923, he married Rachel Steinberg in Vienna, and they had one son, Elihu, who was born in Cricklewood, London.

Hans Frank, a lawyer and government minister, was born in Karlsruhe in May 1900. He had two brothers, one older and one younger. In 1925, he married Brigitte (née Herbst), and they had two daughters and three sons, the last of whom was named Niklas. In August 1942, he spent two days in Lemberg, where he delivered several speeches.

Rafael Lemkin, a prosecutor and lawyer, was born in Ozersk near Białystok, in June 1900. The son of Josef and Bella, he had two brothers (the older, Elias, and the younger, Samuel). In 1921, he moved to Lwów. He never married and had no children.

My grandfather Leon Buchholz was born in Lemberg in May 1904. The son of Pinkas, educated as a distiller of spirits and later an innkeeper, and Malke (née Flaschner), he was the youngest of four children, after his older brother, Emil, and two sisters, Gusta and Laura. He married Regina “Rita” Landes in Vienna in 1937, and a year later their daughter, Ruth, who is my mother, was born there.
East West Street
PROLOGUE

An Invitation

TUESDAY, OCTOBER 1, 1946,
NUREMBERG’S PALACE OF JUSTICE

A little after three o’clock in the afternoon, the wooden door behind the defendant’s dock slid open and Hans Frank entered courtroom 600. He wore a gray suit, a shade that was offset by the white helmets worn by the two somber-faced military guards, his escorts. The hearings had taken a toll on the man who had been Adolf Hitler’s personal lawyer and then personal representative in German-occupied Poland, with his pink cheeks, sharp little nose, and sleeked-back hair. Frank was no longer the slender and swank minister celebrated by his friend Richard Strauss. Indeed, he was in a considerable state of perturbation, so much so that as he entered the room, he turned and faced the wrong direction, showing his back to the judges.

Sitting in the packed courtroom that day was the professor of international law at Cambridge University. Balding and bespectacled, Hersch Lauterpacht perched at the end of a long wooden table, round as an owl, flanked by distinguished colleagues on the British prosecution team. Seated no more than a few feet from Frank, in a trademark black suit, Lauterpacht was the one who came up with the idea of putting the term “crimes against humanity” into the Nuremberg statute, three words to describe the murder of four million Jews and Poles on the territory of Poland. Lauterpacht would come to be recognized as the finest international legal mind of the twentieth century and a father of the modern human rights movement, yet his interest in Frank was not just professional. For five years, Frank had been governor of a territory that included the city of Lemberg, where Lauterpacht had a large family, including his parents, a brother and sister, their children.
When the trial had opened a year earlier, their fate in the kingdom of Hans Frank was unknown.

Another man with an interest in the trial was not there that day. Rafael Lemkin listened to the judgment on a wireless, from a bed in an American military hospital in Paris. A public prosecutor and then a lawyer in Warsaw, he fled Poland in 1939, when the war broke out, and eventually reached America. There he worked with the trial's American prosecution team, alongside the British. On that long journey, he carried a number of valises, each crammed with documents, among them many decrees signed by Frank. In studying these materials, Lemkin found a pattern of behavior, to which he gave a label, to describe the crime with which Frank could be charged. He called it "genocide." Unlike Lauterpacht, with his focus on crimes against humanity, which aimed at the protection of individuals, he was more concerned with the protection of groups. He had worked tirelessly to get the crime of genocide into Frank's trial, but on this last day of the trial he was too unwell to attend. He too had a personal interest in Frank: he had spent years in Lwów, and his parents and brother were caught up in the crimes said to have been committed on Frank's territory.

"Defendant Hans Frank," the president of the tribunal announced. Frank was about to learn whether he would still be alive at Christmas, in a position to honor the promise he had recently made to his seven-year-old son, that all was fine and he would be home for the holiday.

THURSDAY, OCTOBER 16, 2014,
NUREMBERG'S PALACE OF JUSTICE

Sixty-eight years later I visited courtroom 600 in the company of Hans Frank's son Niklas, who was a small boy when that promise was made.

Niklas and I began our visit in the desolate, empty wing of the disused prison at the rear of the Palace of Justice, the only one of the four wings that still stood. We sat together in a small cell, like the one in which his father spent the better part of a year. The last time Niklas had been in this part of the building was in September 1946. "It's the only room in the world where I am a little bit nearer to my father," he told me, "sitting here and thinking of being him, for about a year being in here, with an open toilet and a small table and a small bed and nothing else." The cell was unforgiving, and so was Niklas on the subject of his father's actions. "My father was a lawyer; he knew what he did."
Prologue: An Invitation

Courtroom 600, still a working courtroom, was not greatly changed since the time of the trial. Back in 1946, the route from the cells required each of the twenty-one defendants to travel up a small elevator that led directly to the courtroom, a contraption that Niklas and I were keen to see. It remained, behind the dock at which the defendants sat, entered through the same wooden door, which slid open as noiselessly as ever. "Open, shut, open, shut," wrote R. W. Cooper of The Times of London, the former lawn tennis correspondent who reported each day on the trial. Niklas slid the door open and entered the small space, then closed the door behind him.

When he came back out, he made his way to the place where his father sat during the trial, charged with crimes against humanity and genocide. Niklas sat down and leaned forward on the wooden rail. He looked at me, then around the room, and then he sighed. I had often wondered about the last time his father passed through the elevator's sliding door and made his way to the defendant's dock. It was something to be imagined and not seen, because cameras were not allowed to film the last afternoon of the trial, on Tuesday, October 1, 1946. This was done to protect the dignity of the defendants.

Niklas interrupted my thoughts. He spoke gently and firmly. "This is a happy room, for me, and for the world."

Niklas and I were together in courtroom 600 because of an invitation I had unexpectedly received several years earlier. It came from the law faculty of the university in the city now known as Lviv, an invitation to deliver a public lecture on my work on crimes against humanity and genocide. They asked me to talk about the cases in which I'd been involved, about my academic work on the Nuremberg trial, and about the trial's consequences for our modern world.

I had long been fascinated by the trial and the myths of Nuremberg, the moment in which it was said our modern system of international justice came into being. I was mesmerized by odd points of detail to be found in the lengthy transcripts, by the grim evidence, drawn to the many books and memoirs and diaries that described in forensic detail the testimony that was laid before the judges. I was drawn to the images, the photographs and black-and-white newsreels and movies like Judgment at Nuremberg, the 1961 Oscar winner made memorable by its subject and Spencer Tracy's momentary flirtation with Marlene Dietrich. There was a practical reason for my
interest, because the trial’s influence on my work had been profound: the Nuremberg judgment blew a powerful wind into the sails of a germinal human rights movement. Yes, there was a strong whiff of “victor’s justice,” but there was no doubting that the case was catalytic, opening the possibility that the leaders of a country could be put on trial before an international court, something that had never happened before.

Most likely it was my work as a barrister, rather than my writings, that prompted the invitation from Lviv. In the summer of 1998, I had been peripherally involved in the negotiations that led to the creation of the International Criminal Court (ICC), at a meeting in Rome, and a few months later I worked on the Pinochet case in London. The former president of Chile had claimed immunity from the English courts for charges of genocide and crimes against humanity laid against him by a Spanish prosecutor, and he had lost. In the years that followed, other cases allowed the gates of international justice to creak open, after a period of quiescence in the Cold War decades that followed the Nuremberg trial.

Cases from the former Yugoslavia and Rwanda soon landed on my desk in London. Others followed, relating to allegations in the Congo, Libya, Afghanistan, Chechnya, Iran, Syria and Lebanon, Sierra Leone, Guantánamo, and Iraq. The long and sad list reflected the failure of good intentions aired in Nuremberg’s courtroom 600.

I became involved in several cases of mass killing. Some were argued as crimes against humanity, the killings of individuals on a large scale, and others gave rise to allegations of genocide, the destruction of groups. These two distinct crimes, with their different emphases on the individual and the group, grew side by side, yet over time genocide emerged in the eyes of many as the crime of crimes, a hierarchy that left a suggestion that the killing of large numbers of people as individuals was somehow less terrible. Occasionally, I would pick up hints about the origins and purposes of the two terms and the connection to arguments first made in courtroom 600. Yet I never inquired too deeply as to what had happened at Nuremberg. I knew how these new crimes had come into being, and how they subsequently developed, but little about the personal stories involved, or how they came to be argued in the case against Hans Frank. Nor did I know the personal circumstances in which Hersch Lauterpacht and Rafael Lemkin developed their distinct ideas.

The invitation from Lviv offered a chance to explore that history.
I seized it for another reason: my grandfather Leon Buchholz was born there. I knew my mother’s father for many years—he died in 1997 in Paris, a city he loved and called home—but I knew little about the years before 1945, because he did not wish to talk of them. His life spanned the entire twentieth century, and by the time I knew him, his family had diminished in size. That I understood, but not the extent or the circumstances. A journey to Lviv was a chance to learn more about those painful years.

A few scraps of information were available, but for the most part Leon locked the first half of his life into a crypt. They must have been significant for my mother in the years after the war, but they were also important for me, events that left lingering traces and many unanswered questions. Why had I chosen the path of the law? And why law of the kind that seemed to be connected to an unspoken family history? “What haunts are not the dead, but the gaps left within us by the secrets of others,” the psychoanalyst Nicolas Abraham wrote of the relationship between a grandchild and a grandparent. The invitation from Lviv was a chance to explore those haunting gaps. I accepted it, then spent a summer writing the lecture.

A map showed Lviv to be right in the center of Europe, not easily accessible from London. It stood at the midpoint of imaginary lines, connecting Riga to Athens, Prague to Kiev, Moscow to Venice. It was the epicenter of the fault lines that divided east from west, north from south.

Over the course of a summer, I immersed myself in the literature about Lviv. Books, maps, photographs, newsreels, poems, songs, in fact anything I could find about the city of “blurred borders,” as the writer Joseph Roth called it. I was particularly interested in the first years of the twentieth century, when Leon lived in this city of bright colors, the “red-white, blue-yellow and a touch of black-gold” of Polish, Ukrainian, and Austrian influences. I encountered a city of mythologies, a place of deep intellectual traditions where cultures and religions and languages clashed among the groups that lived together in the great mansion that was the Austro-Hungarian Empire. World War I collapsed the mansion, destroying an empire and unleashing forces that caused scores to be settled and much blood to be spilled. The Treaty of Versailles, the Nazi occupation, and Soviet control combined in quick succession to work their mischief. The “red-white” and “black-gold” faded, leaving modern Lviv with a Ukrainian population, a city now dominated by “blue-yellow.”
Between September 1914 and July 1944, control of the city changed eight times. After a long spell as the capital of the Austro-Hungarian Empire’s “Kingdom of Galicia and Lodomeria and the Grand Duchy of Kraków with the Duchies of Auschwitz and Zator”—yes, it is that Auschwitz—the city passed from the hands of Austria to Russia, then back to Austria, then briefly to the Western Ukraine, then to Poland, then to the Soviet Union, then to Germany, then back to the Soviet Union, and finally to Ukraine, where control resides today. The kingdom of Galicia on whose streets Leon walked as a small boy was one shared by Poles, Ukrainians, Jews, and many others, yet by the time Hans Frank entered courtroom 600 on the last day of the Nuremberg trial, which was less than three decades later, the entire Jewish community had been extinguished, and the Poles were being removed.

The streets of Lviv are a microcosm of Europe’s turbulent twentieth century, the focus of bloody conflicts that tore cultures apart. I have come to love the maps of those years, with streets whose names often changed, although the course they followed did not. One park bench, a fine art nouveau relic from the Austro-Hungarian period, was a place that I came to know well. From here I could watch the world go by, a fine vantage point on the city’s changing history.

In 1914, the bench was in the Stadtpark, the city park. It stood across from the grand Landtaggebäude, the parliament of Galicia in the easternmost province of the Austro-Hungarian Empire.
Prologue: An Invitation

A decade later, the bench hadn’t moved, but it was in a different country, in Poland, in Park Kościuszki. The parliament had disappeared, but not the building, now the home of the Jan Kazimierz University. In the summer of 1941, as Hans Frank’s General Government took control of the city, the bench was Germanized, now in the Jesuitengarten across from a former university building now stripped of its Polish identity.

Those interwar years were the subject of a significant literature, but no work described more evocatively what had been lost than Mój Lwów (My Lwów). “Where are you now, park benches of Lwów, blackened with age and rain, coarse and cracked like the bark of mediaeval olive trees?” the Polish poet Józef Wittlin inquired in 1946.

Six decades later, when I arrived at the bench on which my grandfather could have sat a century earlier, I was in the Ivan Franko Park, named in honor of a Ukrainian poet who wrote detective novels and whose name now graced the university building.

Wittlin’s idyllic reminiscence, in its Spanish and German translations, became my companion, a guide across the old city and the buildings and streets scarred by the fighting that erupted in November 1918. That vicious conflict, between Polish and Ukrainian communities with Jews caught or targeted in the middle, was grave enough to be reported in The New York Times. It caused the U.S. president, Woodrow Wilson, to set up a commission of inquiry. “I do not wish to disturb the wounds on the living body of these memories, and so I won’t talk about 1918,” Wittlin wrote, and then proceeded to do exactly that. He evoked “fratricidal fighting between Poles and Ukrainians” that cut the city into parts, leaving many caught between the warring factions. Yet common courtesies remained, as a Ukrainian school friend briefly halted the fighting near the bench on which I sat to allow young Wittlin to pass and make his way home.

“Harmony reigned among my friends, although many of them belonged to different ethnicities that were at loggerheads, and professed different faiths and views,” wrote Wittlin. Here was the mythical world of Galicia, where National Democrats loved Jews, socialists tangoed with conservatives, Old Ruthenians and Russophiles wept alongside Ukrainian nationalists. “Let’s play at idylls,” Wittlin wrote, evoking “the essence of being a Lwowian.” He depicted a city that was sublime and loutish, wise and imbecile, poetic and mediocrec. “The flavor of Lwów and its culture is tart,” he concluded wistfully, like the taste of an unusual fruit, the czerevicha, a wild cherry that ripened only in Lwów’s Kleparv suburb. Wittlin called the fruit a cerenda, bitter and sweet. “Nostalgia even likes to falsify flavours too, tell-
ing us to taste nothing but the sweetness of Lwów today. But I know people for whom Lwów was a cup of gall."

The bitterness festered after World War I, suspended but not settled at Versailles. Periodically, it flared up with a vengeance, as when the Soviets rolled into town on white horses in September 1939 and again two years later with the arrival of the Germans in their tanks. “In early August 1942 Governor General Dr. Frank arrived in Lwów,” a Jewish resident recorded in a rare surviving diary. “We knew that his visit did not bode well.” That month, Hans Frank, Hitler’s lawyer of choice and now Governor General, of occupied Poland, ascended the marble steps of the university building to deliver a lecture in the great hall in which he announced the extermination of the city’s Jews.

I arrived in Lviv in the autumn of 2010 to deliver my lecture. By then, I had unearthed a curious and apparently unremarked fact: the two men who put crimes against humanity and genocide into the Nuremberg trial, Hersch Lauterbach and Rafael Lemkin, had been residents of the city in the period of which Wittlin wrote. Both studied at the university, experiencing the bitterness of those years.

This would not be the last of many coincidences that passed across my desk, but it would always be the one that cut deepest. How remarkable that in preparing a journey to Lviv to talk about the origins of international law, I learned that the city itself was intimately connected to those origins. It seemed more than just a coincidence that two men who did more than any others to create the modern system of international justice should have origins in the same city. Equally striking was the sense that in the course of that first visit, not a single person I met at the university, or indeed anywhere in the city, was aware of its role in the founding of the modern system of international justice.

The lecture was followed by questions, generally directed to the lives of the two men. On what streets did they live? What courses did they take at the university, and who were their teachers? Did they meet or know each other? What happened in the years after they left the city? Why did no one talk about them at the law faculty today? Why did one of them believe in the protection of individuals and the other in the protection of groups? How had they become involved in the Nuremberg trial? What became of their families?

I didn’t have answers to these questions about Lauterbach and Lemkin.
Someone then asked a question I could answer.

"What's the difference between crimes against humanity and genocide?"

"Imagine the killing of 100,000 people who happened to come from the same group," I explained, "Jews or Poles in the city of Lviv. For Lauterpacht, the killing of individuals, if part of a systematic plan, would be a crime against humanity. For Lemkin, the focus was genocide, the killing of the many with the intention of destroying the group of which they were a part. For a prosecutor today, the difference between the two was largely the question of establishing intent: to prove genocide, you needed to show that the act of killing was motivated by an intent to destroy the group, whereas for crimes against humanity no such intent had to be shown." I explained that proving intent to destroy a group in whole or in part was notoriously difficult, since those involved in such killings tended not to leave a trail of helpful paperwork.

Does the difference matter? someone else asked. Does it matter whether the law seeks to protect you because you are an individual or because of the group of which you happen to be a member? That question floated around the room, and it has remained with me ever since.

Later in the evening, a student approached me. "Can we speak privately, away from the crowd?" she whispered. "It's personal." We moved toward a corner. No one in the city knew or cared about Lauterpacht and Lemkin, she said, because they were Jews. They were tainted by their identities.

Maybe, I responded, not knowing where she was headed.

She said, "I want to let you know that your lecture was important to me, personally important for me."

I understood what she was telling me, sending a signal about her own roots. Whether a Pole or a Jew, this was not a matter to be spoken of openly. Issues of individual identity and group membership were delicate in Lviv.

"I understand your interest in Lauterpacht and Lemkin," she continued, "but isn't your grandfather the one you should be chasing? Isn't he the one closest to your heart?"