

## BOOK REVIEW

PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”*  
(ALFRED A. KNOPF ED., 2016)

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*Vik Kanwar\**

In one of the final scenes of Phillippe Sands’s *East West Street*, the author stands upon the site of a mass grave where an entire branch of his family had been executed during the Holocaust, interred along with 3500 Galician Jews, including the families of the subjects of his book.<sup>1</sup> Having already sorted through some of their stories in detail, Sands finds in their entangled remains a metaphor linking their singular lives to their collective fate: “individuals each, together a group.”<sup>2</sup> This phrase, with all its intended duality, is also as close as the author comes to reconciling two competing legal narratives about the crime that consigned them to that grave: were they victims of “genocide” a crime aimed against a group, or a “crime against humanity,” a mass extermination of individuals? The book, which ends at this grave, begins with the discovery that the authors of these two legal concepts led parallel lives and careers on their way to these differing conceptions, and by the time they introduced these theories at Nuremburg,<sup>3</sup> they had both lost their immediate family members to that same mass grave.<sup>4</sup>

*East West Street*, already the recipient of major literary awards and significant critical acclaim,<sup>5</sup> is a milestone among recent writings

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1. PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”* 372 (Alfred A. Knopf ed., 2016).

2. *Id.*

3. See Charter of the International Military Tribunal, Annex to the Agreement for the Prosecution and the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter Nuremburg Charter].

4. See SANDS, *supra* note 1.

5. James Douglas, *Philippe Sands donates his £30,000 prize to refugee charities – Baillie Gifford matches donation*, THE BAILLIE GIFFORD PRIZE FOR NON-FICTION (Nov. 18, 2016, 9:39

on international law, expanding the stylistic possibilities available to the discipline, even if its role in advancing substantive knowledge of legal topics is modest in comparison. It offers glimpses into intellectual history and legal history, and links these effectively to the immediate social and political stakes of the ideas and doctrines. What the book lacks has been covered elsewhere, both in scholarly texts<sup>6</sup> and works intended for general audiences.<sup>7</sup> What it adds, however, can be found nowhere else.

Sands, a leading human rights lawyer and international legal scholar,<sup>8</sup> plots the book as a family memoir in the shape of a detective story, intercut with biographies of key individuals and the history of a region and a people. Despite its layers, the story can be summarized succinctly. Beginning in the period between the world wars, the lives and legacies of three Galician Jews and a Nazi officer intersected (even if they likely never met) in a provincial city that passed between regimes and nationalities over the last century.<sup>9</sup> The stories of three of the men—Hersch Lauterpacht (1897-1960), the legal scholar who formulated the notion of “crimes against humanity,”<sup>10</sup> Raphael Lemkin (1900-1959), the inventor of the term “genocide,”<sup>11</sup> and the author’s own grandfather Leon Bucholz<sup>12</sup>—proceed in parallel and primarily

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AM), <http://thebailliegiffordprize.co.uk/news/philippe-sands-donates-his-%C2%A330000-prize-refugee-charities-%E2%80%93-baillie-gifford-matches-donation>; Daniel Martini, *Winners of the 40th Anniversary JQ-Wingate Prize 2017*, JEWISH Q. (Feb. 24, 2017), <http://jewishquarterly.org/2017/02/winners-40th-anniversary-jq-wingate-prize-2017/>; *British Book Award Shortlist Announced*, FOYLES (Mar. 15, 2017), <http://www.foyles.co.uk/news/British-Book-Award-Shortlists-2017-Announced>.

6. See, e.g., DOUGLAS IRVIN-ERICKSON, RAPHAËL LEMKIN AND THE CONCEPT OF GENOCIDE (2016); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (2001); Martti Koskenniemi, *Hersch Lauterpacht (1897–1960)*, in JURISTS UNROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN 601 (J. Beatson & R. Zimmerman eds., 2004); WILLIAM A. SCHABAS, GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES (2009); Mira L. Siegelberg, *Unofficial Men, Efficient Civil Servants: Raphael Lemkin in the History of International Law*, 15 J. GENOCIDE RES. 297 (2013); Ana Filipa Vrdoljak, *Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law*, 20 EUROPEAN J. INT’L L. 1163 (2009).

7. See, e.g., SAMANTHA POWER, A PROBLEM FROM HELL: AMERICA IN THE AGE OF GENOCIDE (2002); GEOFFREY ROBERTSON, CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE (4th ed. 2013).

8. *Philippe Sands QC*, UCL FAC. L., <https://www.laws.ucl.ac.uk/people/philippe-sands/> (last visited Nov. 30, 2017); Lisa Appignanesi, *East West Street by Philippe Sands review – putting genocide into words*, THE GUARDIAN (May 22, 2016), <https://www.theguardian.com/books/2016/may/22/east-west-street-origin-genocide-crimes-against-humanity-philippe-sands-review>.

9. SANDS, *supra* note 1, at xi.

10. See Vrdoljak, *supra* note 6 at 1164, 1189.

11. *Id.* at 1164.

12. SANDS, *supra* note 1, at xiii.

in exile, in tragic contrast to the larger community and families they leave behind in the years before the Holocaust.<sup>13</sup> The final character, the Nazi administrator Hans Frank, bears responsibility for the destruction of their families and community,<sup>14</sup> which can be viewed either as an extermination of a massive number of individuals (a crime against humanity) or as a systematic crime against a people (genocide). The setting as much as the *dramatis personae* tells a complicated story about the recent history of international law. The city, in turns, Austrian, Polish, and Ukrainian, and alternately under the control of the Hapsburgs, nationalists, Nazis, and Soviets, has been known as Lviv, Lwow, or Lemberg; even if its residents had not crossed borders, the borders would have crossed them, repeatedly throughout the century.

The book elaborates on a lecture, published in a US law review, but originally delivered in Lviv itself at the very law faculty Lauterpacht and Lemkin both studied (but where, astonishingly, they had been largely forgotten).<sup>15</sup> The earlier lecture explores some of the narrative possibilities of the present book; it sketches the main characters, with a few crucial differences. There, the accounts of Lauterpacht and Lemkin are limited to existing biographical accounts,<sup>16</sup> without any of the additional archival research that enriches *East West Street*. Perhaps more significantly, the lecture provided an occasion for Sands to begin to uncover his own family history. Whereas the lecture intersects with Sands's journey as a lawyer, the book uncovers connections to his larger family, details which were at the time of the lecture unknown to Sands himself. He also exchanges Louis B. Sohn, another prominent international lawyer with origins in Lviv, for an antagonist Hans Frank. Though absent in the lecture, Frank is central to another Sands project, the documentary film *What our Fathers Did: A Nazi Legacy*, which relates the story of Lviv/Lemberg from the point of view of the sons of two Nazi officers involved in the atrocities, and in coming to a reckoning, leading Sands and his subjects inevitably to visit that same mass grave.<sup>17</sup> Unlike the lecture and the film, in *East West Street* Sands brings doctrines back into the drama. Some of the most compelling discussions are not about the lives, but the

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13. *Id. passim*.

14. *Id.* at xiii, 236-40.

15. Philippe Sands, *A Memory of Justice: The Unexpected Place of Lviv in International Law - A Personal History*, 43 CASE W. RES. J. INT'L L. 739, 739, 740 (2011).

16. E.g., JOHN COOPER, RAPHAEL LEMKIN AND THE STRUGGLE FOR THE GENOCIDE CONVENTION (2008); ELIHU LAUTERPACHT, THE LIFE OF HERSCH LAUTERPACHT (2010).

17. WHAT OUR FATHERS DID: A NAZI LEGACY (Wildgaze Films 2015).

worldviews leading to the formulations of two of the most significant concepts in international law and human rights discourse.

As expanded in the book, the characterizations of Lauterpacht and Lemkin remain consistent with the secondary sources, but a sharper contrast is drawn between them. Lauterpacht is steady, scholarly, and cautious to a fault in avoiding any appearance of overreaching into purely moral territory. Lemkin is impatient, obsessed and slightly tragic in his lack of self-awareness, qualities that befit a prophet nonetheless. So pronounced are these traits that we might miss the fact that Lauterpacht is a believer in natural law, and Lemkin in positivism. The former's caution and the latter's zeal act as checks against the excesses of their theoretical orientations. Without being reductive, Sands helps us understand the temperaments and commitments of the two men, and makes at least a basic case that each of the men derived their legal innovations from their respective views of individual dignity and community.<sup>18</sup> Over the decades, their reputations and relative influence have waxed and waned. Lemkin had been taken less seriously among the tribe of international lawyers but has, in recent years, emerged as a hero of the human rights and anti-impunity movements, canonized in Samantha Power's prize-winning *A Problem from Hell*, and the subject of a number of biographies.<sup>19</sup> Finally, in this book, their legacies are assessed side by side, and it is hard to believe that this has not been attempted earlier.

What hooks the reader early on is exactly what motivated the author to write the book in the first place—the striking coincidence that these significant doctrines should originate in a single provincial city in the center of Europe. How could two men living on opposite ends of a market street, far from the centers of power and influence, and schooled in the municipal laws of an obscure region, go on to develop ideas that have been so important to the 20th century and

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18. Taking up two incredibly complex lives, Sands does not attempt to include every major life event or nuance of character. Instead, he foregrounds any aspect of their stories that would account for the genesis of their theories or, sometimes less convincingly, link them to each other. An example of the latter is the effort to locate a common ancestor or mentor to both men in their university days. SANDS, *supra* note 1, at 148-50. The effort bears fruit (in a way—the criminal law professor who taught both men is a provincial anti-Semite with no demonstrable link to the two theories). *See id.* Missing, however, are accounts of Lauterpacht's youthful Zionism, which might have added some complicating texture to the claims that Lauterpacht was opposed to nationalism in all its forms. Also brushed aside as irrelevant are Lemkin's various experiments with spirituality, and though a few guesses are made about his sexuality, the only identity that seems to interest Sands is an émigré with Galician Jewish roots, Leon. *Id. passim.*

19. SAMANTHA POWER, "A PROBLEM FROM HELL" AMERICA AND THE AGE OF GENOCIDE (2013).

beyond? As one learns more about the distinctive character of the region, the coincidences are less compelling. Indeed, one begins to get a sense that only in a place like this, in the near-periphery of great power realpolitik, could innovations take place. For one thing, this region was a laboratory of the interwar minority treaties, which continue to hold an ambivalent legacy in the later articulation of human rights.<sup>20</sup> For another, a number of intellectuals (ranging from theologian Martin Buber to the political economist Ludwig Von Mises) as well as international lawyers (such as Sohn or C.H. Alexandrowicz) walked these streets in the same years,<sup>21</sup> and whatever ideas they formed in exile may well have taken shape in reaction to the fate of their homeland. Sands establishes Lemberg/Lviv as Vienna writ small, an outpost of the intellectual currents of the time. The unravelling empire was a halfway house between orthodoxy and pragmatism, tradition and experimentation,<sup>22</sup> and a significant number of émigrés during this period left a mark on the past century of thought and practice. Still, there are certain elements of coincidence that remain difficult to ignore, and intriguing enough to puzzle over. The proximity of the notions “crimes against humanity” and “genocide” and the debate over their applicability to the very same acts is indeed striking, when we look at the parallels in the lives of their authors. Both Lauterpacht and Lemkin studied at the law faculty before emigrating and exerting an influence on the Nuremburg prosecutorial teams,<sup>23</sup> offering their differing conceptions of the crimes being committed in their city and beyond. Lauterpacht was involved in drafting the Nuremburg Charter along with his mentor Sir Hartley Shawcross and the American Robert Jackson,<sup>24</sup> who interacted with Lemkin as well. Lemkin attempted

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20. See generally Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 HARV. INT'L L.J. 353 (1992).

21. See C. H. ALEXANDROWICZ, *THE LAW OF NATIONS IN GLOBAL HISTORY* 3, 19 (David Armitage & Jennifer Pitts eds., 2017) (indicating that C.H. Alexandrowicz was born in “October 1902 in Lemberg . . . .”); Tamra Wright, *Martin Buber*, in 5 *TWENTIETH-CENTURY PHILOSOPHY OF RELIGION: THE HISTORY OF WESTERN PHILOSOPHY OF RELIGION* 91, 91 (Graham Oppy & N. N. Trakakis eds., 2014) (indicating that Martin Buber was born in 1878 in Vienna); Daniel Barstow Magraw, *Louis B. Sohn: Architect of the Modern International Legal System*, 48 HARV. L.J. 1, 3 (2007) (indicating that Louis Sohn was “[b]orn in Lwow in what was then Austria-Hungary” and that Sohn received degrees in science and law in 1935 while studying in Poland); Richard M. Ebeling, *Ludwig von Mises and The Vienna of His Time (Part I)*, FOUND. FOR ECON. EDUC. 24, 26 (Mar. 1, 2005), <https://fee.org/media/4449/ebeling0305.pdf> (indicating that Ludwig von Mises was born in Lemberg in 1881 and that he often wrote for *New Free Press*, a “Viennese newspaper . . . in the 1920s and 1930s.”).

22. See, e.g., PETER WATSON, *THE MODERN MIND: AN INTELLECTUAL HISTORY OF THE 20TH CENTURY* 26-38 (2001).

23. Vrdoljak, *supra* note 6, at 1168, 1185-86.

24. *Id.* at 1185-90.

to shape the views of the same prosecutorial team with more limited success.<sup>25</sup>

The intellectual puzzle at the center of the book is the divergence between crimes against humanity and genocide. Both crimes were, as legal scholar William Schabas put it, “forged in the same crucible and were used at Nuremberg almost as if they were synonyms.”<sup>26</sup> Even today, to the non-specialist the terms will tend to converge. This is not the first time that the two have been in close proximity. In the crucial Article 6 of the Nuremberg Charter, a section titled “Crimes against Humanity” seems to subsume or preempt the scope of genocide:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>27</sup>

But if genocide is subsumed under this section, the kind of intent Lemkin conceptualized is missing.<sup>28</sup> The word genocide was itself not included in Article 6, where it arguably belongs, but as count 3 of “war crimes,” which limited its intended meaning and its applicability.<sup>29</sup> Yet Nuremberg was not the end of the story. In December of 1946, the United Nations General Assembly passed two resolutions: Resolution 95, affirming that “crimes against humanity” were part of international law,<sup>30</sup> and Resolution 96 clarifying that genocide is “a crime under international law.”<sup>31</sup> Subsequently, due to Lemkin’s efforts, the General Assembly adopted the Genocide Convention.<sup>32</sup> Today, the two crimes sit co-equally in the Rome Statute of the International Criminal Court.<sup>33</sup>

Sands dramatizes the stakes of choosing between the two doctrines by referring, wherever possible, to an unsubstantiated rivalry

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25. *Id.* at 1191-92.

26. William A. Schabas, *Origins of the Genocide Convention: From Nuremberg to Paris*, 40 CASE WESTERN RES. J. INT’L L. 35, 53 (2007) (“The distinction only emerged because of the nexus with armed conflict that Nuremberg had imposed upon crimes against humanity,” which by the 1990s was dropped).

27. Nuremberg Charter, *supra* note 3.

28. Vrdoljak, *supra* note 24, at 1184.

29. Nuremberg Charter, *supra* note 3.

30. G.A. Res. 95 (I) (Dec. 11, 1946).

31. *Id.*

32. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

33. Rome Statute of the International Criminal Court art. 6, 25, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002).

between Lemkin and Lauterpacht.<sup>34</sup> As a narrative device, this is satisfying enough. Doubtless, as Schabas has said, “over the decades that followed adoption of the Genocide Convention, the two concepts had an uneasy relationship.”<sup>35</sup> In Sands’s narrative, this uneasy relationship is projected upon Lemkin and Lauterpacht. What evidence is there that either man held any opinion of the other, negative or positive? Well, Lauterpacht had reviewed one of Lemkin’s books, with a cool and dismissive tone (we are told), and what’s more, he never referred to Lemkin by name, attributing the work to the organization that had commissioned the study.<sup>36</sup> The remaining evidence is adduced from stray comments, letters, and remembrances (particularly one by Eli, Lauterpacht’s son) that Lauterpacht may not have regarded Lemkin very highly and was suspicious from the start of the notion of “genocide.”<sup>37</sup> There is a quotation or two, but misgivings are either half-remembered, or attributed to Lauterpacht’s interlocutors, such as his mentor Sir Hartley Shawcross during the drafting and adoption of the Nuremburg Charter.<sup>38</sup> Shawcross wrote to Lauterpacht that the charter introduces allegations which “hardly pass the test of history, or indeed, of any serious legal examination.”<sup>39</sup> To fit the story, Sands needs the reader to believe Shawcross is referring to “genocide” and that Lauterpacht’s attitudes mirror his own skepticism. For Lemkin’s part, at Nuremburg, he served as adviser to the chief prosecutor, Justice Robert Jackson (one of the few men who worked with Lauterpacht as well).<sup>40</sup> We are told he was deeply disappointed that while reference was made to genocide in individual indictment, overall preference was given to the concept of crimes against humanity, which did not require proof of atrocity being committed against a particular group.<sup>41</sup> The drama of rivalry, two upstarts from Lviv (a kind of *Wittgenstein’s Poker* on the outskirts of the same empire), is compelling in the sense that since the reader already knows the lives of the two men, there is a narrative investment in seeing each of them succeed, and a resulting tension when their goals are

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34. See, e.g., SANDS, *supra* note 1, at 347.

35. Schabas, *supra* note 26.

36. See SANDS, *supra* note 1, at 109-10.

37. It is probably worth mentioning that Eli did not consider these details worthy of inclusion in his own biography of Lauterpacht. See generally LAUTERPACHT, *supra* note 16.

38. SANDS, *supra* note 1, at 116.

39. *Id.*

40. John Q. Barrett, *Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945–1946*, in *THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION* 35, 44-45 (Christoph Safferling & Eckart Conze eds., 2010).

41. See *id.* at 45-47.

set in opposition. But this would of course be more convincing if the two men had at any point met or cited one another. Any such rivalry, conceivable or semi-fictional, is rendered partially moot in a world where it is rare to see any instances of an actual conflict between the two provisions in international law.

In the end, it is neither coincidence nor rivalry, but revelation that drives the narrative to its multiple, satisfying conclusions. Having set out early on the terms of possible coincidence, beginnings and common fates, along with significant divergences, each page is suffused with the possibility of revelation, and for stretches, every page delivers. Lemkin and Lauterpacht discover, only through their participation in the Nuremberg trials, the ultimate fate of their families.<sup>42</sup> In this way, Sands is constantly one step ahead of his protagonists, but when it comes to the fate of his own family, Sands as detective and narrator is in lock step with the reader. Close kinship is established, photographs, and significant members of each of the families are separated from one another, and too soon, we see their lives end. The journey is complementary but self-contained, and takes full advantage of a story spanning decades and continents, pulling in a supporting cast ranging from novelist Stefan Zweig to bodybuilder Charles Atlas.<sup>43</sup> At the same time, from his intellectual forefathers, he draws a shorter line to his grandfather, who was not a lawyer (Sands never quite resolves what he actually did, smuggler or resistance fighter) but a silent witness to the destruction of his family. Following closely, one family member is born on the same street as the Lauterpachts and sees his end in the same concentration camp as the Lemkin family;<sup>44</sup> as coincidences stack up, we wonder whether this is due to intimacy of close community (numbering at 100,000 people) or the scale of mass extermination (3,500 on one day alone). What it all adds up to is the feeling that in narrating the story of his own family, Sands must make a choice between Lauterpacht's and Lemkin's characterization of this atrocity.

Finally, standing at the edge of a mass grave, with which intellectual forefather does Sands choose to stand? It would seem like Sands, in his commitments to human rights narrative and his distrust of the excesses of group identity, has a greater affinity for Lauterpacht<sup>45</sup> but by the time in the book the moment of choosing comes around, to

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42. See SANDS, *supra* note 1, at 345-47.

43. *Id.* at 26, 76, 124-25, 287.

44. *Id.* at 346-47.

45. *Id.* at 365.



actually choose would seem graceless and unpoetic. So we are left with the felicitous phrase “individuals each, together a group,”<sup>46</sup> which is as evasive as Sands intends it to be. Readers taking pleasure in the arc of the book will not fault him for it. In the end, it is not faint praise to say the book’s greatest contribution is a stylistic one. Here it joins a handful of genre-bending experimental works covering international legal topics, from within the discipline<sup>47</sup> as well as outside,<sup>48</sup> rooted in memoir, anecdote, and aphorism. What is common to such works is the sense that one must not simply provide answers, but also seek new ways of pursuing them. In this important sense, the book’s formal accomplishments far exceed its limitations.

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46. *Id.* at 372.

47. *See, e.g.*, PHILIP ALLOTT, *HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* (2002); DAVID KENNEDY, *THE RIGHTS OF SPRING: A MEMOIR OF INNOCENCE ABROAD* (2009). While much of what happens in law review articles is more diverse than what one might expect, book-length treatments of these issues remain steadfastly academic or quasi-academic in tone.

48. *See, e.g.*, SVEN LINDQVIST, *A HISTORY OF BOMBING* (Linda Haverty Rugg trans., 2003); LAWRENCE WESCHLER, *VERMEER IN BOSNIA* (2004).

