

# *Popularizing the History of International Criminal Law*

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Review of Philippe Sands, *East West Street: On the Origins of “Genocide”  
and “Crimes Against Humanity”* (Knopf, 2016)

The history of international criminal law has occupied academic scribblers for decades. The innovations of the 1990s—the Ad Hoc International Criminal Tribunals and Rome Statute of the International Criminal Court (ICC)—further stimulated the enterprise, as did the sixtieth anniversaries of the Nuremberg Trials, United Nations Genocide Convention, and Universal Declaration of Human Rights. The last three years alone have witnessed the publication of major contributions: *Totally Unofficial: The Autobiography of Raphael Lemkin*, edited by Donna Lee-Frieze; a special issue of the *Journal of Genocide Research* devoted to Lemkin (disclaimer: I am the journal’s senior editor); David M. Crowe’s *War Crimes, Genocide, and Justice: A Global History*; and Mark Lewis’s *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950*. Later this year, the University of Pennsylvania Press will publish Douglas Irvin-Erickson’s *Raphaël Lemkin and the Concept of Genocide*, the first full-length intellectual history of inventor of the genocide concept.

The history of international law more generally has also flourished over the last few decades. It is no accident that the

inaugural issue of the *Journal of the History of International Law/Revue d’histoire du droit international* appeared in 1999 and, two years later, Martti Koskenniemi’s landmark *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*. His treatment of Hersch Lauterpacht and Carl Schmitt—both the subject of substantial commentaries—has been especially influential.

As these lists suggest, Lemkin’s star has risen from relative obscurity. Whereas he did not rate a mention in Koskenniemi’s book, Lemkin’s subsequent canonization as an improbable humanitarian saint—no less than a “hero of humankind” as one publication about him is titled—has been sealed by plays, documentaries, and prizes dedicated to his legacy: the prevention and punishment of genocide. In the meantime, Lauterpacht—associated with the counter-concept of crimes against humanity—is taken more seriously by black-letter lawyers. The center for the study of international law at the University of Cambridge is named both after him and his son, Elihu, also a distinguished jurist.

At length, scholars began to associate the lives and work of the contemporaries

Lauterpacht (1897-1960) and Lemkin (1900-1959), who hailed, remarkably, from adjacent parts of east-central Europe. More remarkably still, they studied law almost simultaneously at the same university in Lviv, Ukraine, once known as Lwów or Lemberg depending on whether Poles or German-speakers governed—though it is still unclear whether the two jurists ever met in person. Their rival yet intersecting projects of proscribing legal protection for groups (Lemkin) and individuals (Lauterpacht) lend themselves to comparison and contrast. The Australian scholar Ana Vrdoljak juxtaposed them in the *European Journal of International Law* in 2010. Three years later, Stefan Troebst presented a short paper about the men’s Lviv days as part of a Leipzig-based investigation of international law and eastern Europe. There he cited a 2011 article by Philippe Sands on “The Unexpected Place of Lviv in International Law – A Personal History,” which referred to a lecture Sands gave there; it features Lauterpacht and Lemkin, as well as the slightly younger Louis B. Sohn (1914-2006), who also studied in Lviv and went on to a career in international law at Harvard. A backwater from the perspective of Cambridge, England or Cambridge, Massachusetts, Lviv suddenly found itself at the center of legal-historical attention. Could it be that postwar international criminal law, especially human rights law, was born there in the interwar years?

Sands thinks so. His new book *East West Street* bears the subtitle, *On the Origins of “Genocide” and “Crimes Against Humanity.”* Those origins lie in the east—in Lviv—while their development points west as Lauterpacht and Lemkin end up in the United Kingdom and United States respectively, Jews fleeing the Nazis and entreating their ideas to the Allies. But this is no conventional history of international

law. It reads far too well for that. *East West Street* is something else altogether: part portrait of four contemporaries—Lauterpacht and Lemkin, Sands’s grandfather Leon Bucholz, who also fled Lviv, and the Nazi Hans Frank, who (mis)ruled there during the war; part dramatization of the author’s reconstruction of their intersecting lives; part meditation on the origins of genocide and crimes against humanity.

Sands is also no conventional academic scribbler. Half his time is spent as a professor of law at University College, London, lecturing and publishing on subjects like the Nuremberg trials. In the other half, he ranges the globe as a queen’s counsel (QC) appearing before international courts, including the ICC. In between, he has managed to write and stage a play (*A Song of Good and Evil*) and produce a film (*My Nazi Legacy*) about his personal history of Lviv. *East West Street* is its culmination. The book has been widely reviewed across the Atlantic world, and its publication is a literary event in the London scene.

The self-dramatization is the source of the book’s strengths and weaknesses. The family connection yields compelling material: the grandparent’s life in Lviv, their flight to Vienna and subsequent separation as Leon mysteriously moves to Paris alone, eventually followed by his wife Rita and daughter Ruth with the help of a committed Christian woman from Norwich who hid them from the Nazis (thanks to Sands’s retrieval of her story, she was recognized as Righteous among the Nations by Yad Vashem in Israel). Family secrets and intrigues are revealed along the way. No stone was left unturned in the quest for documents and photographs, no person was too remote to interview for another piece of the puzzle. Each episode and encounter makes its way

into the text as the author rediscovers his eastern Jewish roots in the now familiar if wrenching story of narrow escape for some family members and doom for others. For understandable reasons, the psychological insights and poignancy of the writing are at their most acute and moving in these sections.

The insights are less impressive when it comes to the three lawyers: Lauterpacht, Lemkin, and Frank. Frank is a fitting subject, not only because he was co-responsible for the murder of the former's families as governor of the Nazi General Government in Poland, but also because he was a lawyer—Hitler's personal attorney no less—with his own views on individual rights (opposed) and group rights (favored). To some extent, the author is hamstrung by his book's genre: literary non-fiction, the agents call it. They implore gifted writers like Sands to emphasize the personal over the intellectual, and they ban superscript numbers in the text so that endnotes are instead correlated to material indicated by keywords and phrases, an irritating practice that makes it difficult to trace sources and quotations. Apparently, the general public is intimidated by footnotes. At the same time, one senses that the author enjoyed the unshackling of his literary self from the flatness of academic legal prose. He is introducing international criminal law to a new audience.

Consequently, more space is devoted to the drama of these men's journeys rather than to their ideas. Instead of thinking further about, say, the source of Lemkin's preoccupation with group survival, which would have entailed a visit to the library to read about Jewish intellectual and cultural history, Sands visits the remote farm where he was raised. Quite what was expected from this trip is unclear but it is a complete waste of time for him and

readers—unless the exercise was a pilgrimage rather than education about what made these men tick.

Likewise with Lauterpacht: his intense activism, indeed leadership of Jewish student organizations in Lviv indicates a concern for group life—for want of a better term—that is not satisfactorily reconciled with his subsequent hostility to Lemkin's notion of genocide. His apparent aversion to tribalism is ascribed, in a few paragraphs, to the possible influence of Hans Kelsen, his professor in Vienna, and Martin Buber, inaccurately described as a non-Zionist, and also to the fighting between Poles and Ukrainians in Lviv—and their common antisemitism—during his studies. Lauterpacht, a private man, did not leave an intellectual biography, and neither does Sands's extensive discussions with son Elihu reveal much. Sands's thin explanation for Lauterpacht's emphasis on the individual and human rights remains speculation uninformed by seeming curiosity about his subjects' intellectual formation, despite the libraries of book about Jewish academic refugees from central and eastern Europe.

Many ended up in England with Lauterpacht: Norbert Elias, Ernest Gellner, and Karl Mannheim come to mind. They all wrestled with the demons of nationalism and totalitarianism in their own way. Did he know them? What might they have had in common? Sands does not seem to realize that Egon Schwelb (1899-1979), who is mentioned in passing, was also a Jewish émigré lawyer, this time from Czechoslovakia, whose work behind the scenes at the United Nations as John Humphrey's deputy in the Human Rights Commission was likely as decisive for institutionalizing crimes against humanity as anything Lauterpacht wrote. Mira Siegelberg's article on Lemkin and his legal contemporaries like Schwelb in the

*Journal of Genocide Research* might have been consulted with profit. Perhaps the origins of human rights law lie in Prague? Or Vienna? But, seriously, can a case be made that any city is the birthplace of phenomena so complex as international criminal law? Coincidence is not the same as crucible.

The same can be said of Frank, treated here as a buffoon. Only late in the book does Sands remark that he was a cultivated man, although throughout Frank's familiarity, indeed facility with music and art is readily apparent. Still, if Frank was really so banal, why not discuss the banality of evil as a clue to his inner life (or lack of it)? Why not draw on the recent biographies of Reinhard Heydrich (by Robert Gerwarth) and Arthur Greiser (by Catherine Epstein) as exemplars of perpetrator history? They were roughly Frank's age and his Nazi colleagues in occupation and mass murder. The same inability to penetrate the "Nazi conscience" (Claudia Koonz) is also evident in Sands's encounters with Horst von Wächter, son of Otto (1901-1949), the Nazi governor of Krakow and Galicia, and collaborator with Frank. The author's confrontation with Horst, who steadfastly refuses to believe his father was an evil murderer, delivers the dramatic "gotcha" moment of the book and film, *My Nazi Legacy*. The unrepentant Nazi (or rather the filial piety of a pathetic old man) is a standard trope of emotional gratification for writers and readers in the Atlantic world. The genre of literary non-fiction favors the ripping yarn and feel-good moral condemnation over the laborious inter-textuality and challenging read of the intellectual historian.

The rich material presented in *East West Street* cries out for further analysis. As character types, Lauterpacht and Lemkin exemplify the Jewish parvenu and pariah

that Hannah Arendt—leaning on Max Weber—discerned in emancipation's ordeal of civility. Lauterpacht became a consummate insider: the Cambridge don, member of the Athenaeum Club, the family man with the smart house in town and its meticulously mown lawn. He did not just enjoy access to the highest legal echelons; he was a member of that elite world. The British legal term at the Nuremberg trials leaned on him constantly, meaning he could leave his mark on the indictment: crimes against humanity. Contrast this ease with Lemkin's insistent hectoring of anyone he thought might further his campaign for genocide's recognition, burning bridges along the way. Impecunious to the end, he died at a bus stop in New York where he rented a shabby room, all but forgotten for decades thereafter. Seen in this light, Lauterpacht's legal individualism aligns with his parvenu trajectory: shedding public manifestations of tribal affiliation. Lemkin, by contrast, while a member of Warsaw's legal scene in the interwar years, noisily advocated the public recognition of ethnic identity in his genocide concept.

Their treatment of women matches the types. Ever wary of what others may think, Lauterpacht was "incandescent" with rage when his wife and mother let their hair down (literally). He prevailed in his dogmatic insistence that they wore it in a modest bun, and was usually too busy to put his son to bed. His immense academic productivity was predicated on wifely domesticity and the secretary at work. Lemkin, who never married, was apparently the dapper, if lonely man about town, and managed his own immense correspondence.

This is a very masculine book: about men and some of their women written by the male impresario. Sands does note the intense maleness of the Nuremberg scene:

the only women were the stenographers, one of whom the men derided as “the passionate haystack.” But this throwaway line is not subject to critical reflection, and nor are the gendered personal costs of Jews negotiating integration into an unfamiliar gentile world after traumatic expulsion from their homelands. Both Lauterpacht and Lemkin also seemed to have suffered from vicarious PTSD-like-symptoms upon learning of their extended family’s terrible fate. The darkness of their worlds does not really shine through the lightness of the elegant prose.

The book’s dramatic intellectual tension is the rivalry between genocide and crimes against humanity, Lemkin’s concern with group protection versus Lauterpacht’s emphasis on the individual. The tension is overplayed. Lemkin’s law against genocide protected individuals, even if by virtue of their ascribed group membership. And Lauterpacht, whose book *An International Bill of the Rights of Man* was enabled by the American Jewish Committee, included “The Right to Preservation of Cultural Entity.” Of the Holocaust (a word he did not use), he wrote: “No people in history has suffered more cruelly from a denial of elementary human rights.” Upon closer inspection, both men sought to balance individual rights and group identity in different ways; we are dealing with a spectrum rather than a simplistic binary.

In the same book, Lauterpacht praised “Jewish organization, from the United States and elsewhere,” for promoting the minorities protection treaties. For him, they were “a significant step in the direction of the general international protection of the rights of man.” This anachronism has been subject to withering criticism by recent scholarship, most prominently by Samuel Moyn in *The Last Utopia: Human Rights in History*. Sands writes as if none of this new work exists, taking

Lauterpacht at his word that those treaties serve as the starting point for law’s gradual taming of Leviathan. A touching faith in the rule of law, and especially the efficacy of prosecuting state representatives, permeates *East West Street*, whose denouement is the trial of the major Nazi criminals in Nuremberg. Its legacy continues with the ICC, Sands avers, where he appears. History was made, and genocide and crimes against humanity, however imperfect, have found their way into the statute books. Sands is walking in their footsteps, on the path that leads from Lviv to The Hague.

This teleology omits elements of the story that cast doubt on the view that the perfection of international law would banish genocide and crimes against humanity. For at the moment of their formulation, along with the Nuremberg principles, significant swathes of sovereignty were removed from the purview of criminality. Nuremberg did not prosecute Nazis for the Luftwaffe’s bombing of civilians; it excused the German army’s blockade of Leningrad, in which hundreds of thousands died, in the name of military necessity; and cultural genocide and political groups were removed from the genocide convention drafts. Ethnic cleansing never made it in, hardly a surprising outcome given that the Allies signed off on the expulsion of millions of ethnic Germans from central and eastern Europe, and while more were packed off in the partitions of South Asia and Palestine. The UN human rights declaration was just a declaration with no teeth, as Lauterpacht lamented. If the UN Charter is less a herald for human rights than for the state’s immunity from interference, the rule of law Sands seeks in the teeth of the ICC will never vitiate the reason of state at sovereignty’s heart. In view of the fact that Bernard-Henri Lévy—the chief advocate of NATO’s

catastrophic intervention in Libya—wants President Obama to read *East West Street* as an inspiration for what he calls “cosmopolitan justice,” one can understand why states of the global South in particular hold fast to their sovereign rights.

More judicious are Sands’s brief remarks about his negotiation of the tension between genocide and crimes against humanity. Like Gareth Evans and David Luban, he thinks that the status of the former as the “crime of crimes” is a problem, because crimes against humanity thereby pale by comparison. He finds himself torn, attracted to both concepts and their originators (the Russians in fact coined crimes against humanity as a quasi-legal category before the First World War as Peter Holquist shows in various papers). Sands does not ask, though, how genocide assumed this lofty status. Might it have something to do with genocide’s symbiotic relationship to the Holocaust and Holocaust memory that *East West Street* participates in perpetuating? It is, after all, another book in the genre of The Law

redeeming the incalculable suffering of the Holocaust.

As literary non-fiction, *East West Street* is an outstanding performance. But what kind of knowledge does it present? Anyone who has read the basic literature on the origins of genocide and crimes against humanity, like, say, William Schabas’s *Genocide in International Law*, which is not cited here, or Sands’s own academic books, won’t learn anything new. *East West Street* is a work of art rather than of scholarship. And a pleasure to read.

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