

THE EXTERMINATION OF PEACEFUL SOVIET CITIZENS: ARON  
TRAININ AND INTERNATIONAL LAW

by

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A dissertation submitted to the Faculty of the Graduate School of the University of Colorado in  
partial fulfillment of the requirement for the degree of

Doctor of Philosophy

Department of History

2017

This dissertation entitled:  
The Extermination of Peaceful Soviet Citizens: Aron Trainin and International Law  
written by Michelle Jean Penn  
has been approved for the Department of History

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The Extermination of Peaceful Soviet Citizens: Aron Trainin and International Law

Dissertation directed by Professor David Shneer

This dissertation examines the life and work of Soviet Jewish lawyer Aron Trainin, placing him in conversation with his better-known contemporaries, the founder of the concept of genocide Raphael Lemkin, and human rights advocate Hersch Lauterpacht. Together these three legal minds—who differed widely in temperament and approaches to law but possessed similar backgrounds as Jewish lawyers from the eastern European borderlands, developed concepts foundations to the Nuremberg Tribunal and, subsequently, modern international criminal law. By situating Trainin’s work with Lemkin’s and Lauterpacht’s, this dissertation acknowledges the central role Trainin played in the development of international criminal law on the international stage. Trainin’s work also played a significant role in how the events of the Holocaust were conceptualized and portrayed in the Soviet Union. Trainin’s concept of “crimes against peace” was instrumental in portraying the crimes of the Nazis and their accomplices as crimes against “peaceful Soviet citizens.” Finally, this dissertation reveals that rather than rejecting international law, the Soviet Union provided critiques and an alternative approach to international law.

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## Introduction

Late summer, 1945. The end of the war was in sight for the Allied powers. Representatives for the United States, the Soviet Union, Great Britain and France met in London to discuss how to bring the Axis powers to justice when the war ended. These negotiations culminated in the London Agreement signed on August 8, 1945, and the subsequent creation of the Nuremberg Tribunal.

The Soviet government sent Aron Trainin, a well-known legal academic, to London to represent the Soviet government's position on how the international legal order should prosecute the unprecedented crimes that had just taken place. Hersch Lauterpacht, an émigré professor in nearby Cambridge, advised the United States representative, Supreme Court Justice Robert H. Jackson, on how the Agreement should approach international law. Raphael Lemkin, a Polish lawyer who had tried unsuccessfully to join Jackson's team, also joined the lawyers in London with the goal of persuading the representatives of the victorious powers to include his newly coined concept of "genocide" in the London Agreement.

Together these three legal minds—who differed widely in temperament and legal writing styles but possessed similar backgrounds as Jewish lawyers from the eastern European borderlands, or after World War II, "bloodlands" according to one strand of current historiography<sup>1</sup>—would develop concepts foundational to the Nuremberg Tribunal and, subsequently, modern international criminal law. While all three men were instrumental in shaping post-war international law, they all approached this peculiar field of law from very different theoretical perspectives and they have been "remembered" differently. While Raphael Lemkin has been remembered for his role in creating the concept of genocide, and Hersch Lauterpacht has been lionized among Western international lawyers (the legal scholar Phillippe

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<sup>1</sup> See Timothy Snyder, *Bloodlands: Europe Between Hitler and Stalin*, (New York: Basic Books, 2010).

Sands calls Lauterpacht his “legal hero”<sup>2</sup>), the third in this crucial triumvirate of legal minds in London, Aron Trainin, has largely been forgotten.

The forgetting of Trainin is not accidental. To overlook Trainin’s role in the development of international criminal law conveniently ignores the central role the Soviet Union played in developing the concepts of aggressive war, genocide, and human rights. In the process, it reinforces the narrative that international law was made by *Western* European lawyers (and their North American descendants). Trainin has been largely forgotten, I argue, because most scholarship on Soviet legal history dismisses Soviet criminal law as itself *ipso facto* political, mere propaganda produced by the Soviet government, and thus does not actively “study” Soviet law *as law*.<sup>3</sup> The dismissive attitude to Soviet law has its origins in Cold War scholarship, of course. And it might well trace back to the fact, observed by Sheila Fitzpatrick, that “some readers may think that nothing but sustained outrage is appropriate for writing about a great evildoer like Stalin.”<sup>4</sup> However, as Fitzpatrick reasons, “the historian’s job is different from that of prosecutor, or, for that matter, counsel for the defense.”<sup>5</sup> Instead, the historian’s job is to help illuminate and understand the past. As a Soviet lawyer, Trainin’s job was different: to

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<sup>2</sup> Phillippe Sands, “My Legal Hero: Hersch Lauterpacht,” *The Guardian*, Nov. 10, 2010 <https://www.theguardian.com/law/2010/nov/10/my-legal-hero-hersch-lauterpacht> (last accessed January 10, 2017).

<sup>3</sup> See e.g., Victor Vasilyevich Nikulin, “Criminal Law Policy and Penalty Institution in the Criminal Law of the Soviet Russia in the 1920s,” *Society, Politics, Economics, Law* (Sept. 1, 2013), David R. Shearer, *Policing Stalin’s Socialism: Repression and Social Order in the Soviet Union, 1924-1953*, (New Haven: Yale University Press, 2009). Some contemporaries of the Soviet Union applied a legal perspective to Soviet law, Harold Berman, William E. Butler, Richard J. Erickson, and F.J.M. Feldbrugge are the most prominent Western examples (see, e.g. F.J.M. Feldbrugge, *Encyclopedia of Soviet Law*, (Leiden: A.W. Sijthoff, 1973), Richard J. Erickson, *International Law and the Revolutionary State*, (Leiden: A.W. Sijthoff, 1972)), and as to be expected, numerous Soviet scholars, such as A.N. Trainin, Evgenii Aleksandrovich Korovin, and Grigorii I. Tunkin. V.M. Kuritsyn’s *Sovetskaia istoriko-pravovaia nauka: ocherki stanovleniia i razvitiia*, (Moskva : Nauka, 1978), is one fairly well-known example of a Soviet legal history, though Soviet legal history as such does not appear to be a popular area of study for many historians, Russian or not. A G Zviagintsev; Iurii Grigor’evich Orlov, *Prigovorennnye vremenem: rossiiskie i sovetskie prokurory: XX vek, 1937-1953* (Moskva : ROSSPĖN, 2001) and George Ginsburgs, “The Jurisdictional Scope of Soviet Law,” *Europe-Asia Studies*, (Vol.45, Issue 4, Jan. 1993), are exceptions to this.

<sup>4</sup> Sheila Fitzpatrick, *On Stalin’s Team: The Years of Living Dangerously in Soviet Politics*, (Princeton and Oxford: Princeton University Press, 2015), 10.

<sup>5</sup> Fitzpatrick, 10.

argue for, and justify the Soviet Union's positions regardless of their morality or immorality, in the same way that John Yoo used legal argument to justify the United States' legitimization of torture under George Bush.<sup>6</sup>

Peter Solomon's *Soviet Criminal Justice under Stalin* represents the most formidable work regarding Soviet legal history as *legal* history, rather than as simply political history.<sup>7</sup> Solomon argues that while the regime often used criminal justice as a political tool, one also sees public life operating largely according to the law.<sup>8</sup> Ordinary criminals were acquitted at levels similar to Western European countries and the rule of law appears to have been largely respected for non-political prisoners.<sup>9</sup> In the sphere of international legal history, Francine Hirsch represents one of the more innovative voices in acknowledging and reconstructing the Soviet influence in the creation of international criminal law at Nuremberg.<sup>10</sup> Rather than dismissing the influence of the Soviet Union in international law as simply an imposition of the will of the dictator Stalin, Hirsch examines why certain Soviet arguments were accepted as legally desirable by British, French, and American government lawyers. This approach is more helpful in understanding the development of international criminal law, rather than dismissing the Soviet

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<sup>6</sup> See, e.g. Deputy Assistant Attorney General John Yoo and Special Counsel Robert J. Delahunty, Memorandum for William J. Haynes, General Counsel, Department of Defense, "Application of Treaties and Laws to al Qaeda and Taliban Detainees," Jan. 9, 2002, available online at *National Security Archive, George Washington University (gwu.edu)*, last accessed September 7, 2016.

<sup>7</sup> Peter Solomon, *Soviet Criminal Justice under Stalin*, (Cambridge: Cambridge University Press, 1996).

<sup>8</sup> Solomon, 8. This rule of law was encouraged by the professionalization and bureaucratization of the law that began 1936 (and was interrupted by both the Great Purge and World War II). Stalin rejected and delegitimized the revolutionary antilaw perspective, thus encouraging the professionalization of the legal service. While Stalin attempted to make criminal punishment more severe, this policy was frequently resisted by judges in ordinary criminal cases who were awarded a great deal of judicial discretion (following the dictates of "revolutionary consciousness." Solomon, 452. In addition to judges, officials charged with implementing Stalin's objectives often failed to cooperate with attempts to increase the severity of criminal sentences for ordinary (non-political) criminals. Solomon, 452.

<sup>9</sup> See, e.g. Solomon, 51, 135, 371.

<sup>10</sup> Francine Hirsch's "The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order," *American Historical Review* 113:3 (2008): 701-730 provides a valuable contribution to the Nuremberg historiography by examining the contribution of the Soviet Union at Nuremberg. Hirsch looks at the Soviet Union and the United States' respective portrayals of the International Trial. Hirsch argues that United States propaganda successfully downplayed the meaningful role played by the Soviet Union at Nuremberg.

role as unimportant from a legal standpoint, either because of the unsavoriness of Stalin as an authoritarian leader, or of Communism as a supposedly “totalitarian” system.<sup>11</sup> Some recent scholarship, in fact, has emphasized that Soviet concepts of law need to be examined even while acknowledging Stalinist politics had the ultimate say over the legal system.<sup>12</sup>

This dissertation takes law seriously as an intellectual and social structure in and of itself. When examining international legal history, it is helpful to view international law from the perspective of *how* a lawyer makes her/his argument reveal what they believe to be the underlying purpose of international law. Law is, as Martti Koskenniemi and Duncan Kennedy have persuasively shown in their work, a way of making arguments about the law, rather than putting forth one particular set of legal doctrine.<sup>13</sup> Using the interpretive framework of Duncan Kennedy as a model, I will examine the arguments the participants advanced and how these arguments were received. However, instead of describing and applying a style of classical American legal thought, I will be describing a style of functionalist legal thought. This style of functionalist legal thought was in part a reaction to the classical international legal thought which dominated international legal thought from the early nineteenth century to the First World War.

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<sup>11</sup> See Michael Geyer & Sheila Fitzpatrick, eds., *Beyond Totalitarianism: Stalinism and Nazism Compared*, (Cambridge: Cambridge University Press, 2009); J. Arch Getty, *The Origins of the Great Purges: The Soviet Communist Party Reconsidered, 1933-1938*, (Cambridge: Cambridge University Press, 1987); and Sheila Fitzpatrick, *Everyday Stalinism, Ordinary Life in Extraordinary Times: Soviet Russia in the 1930s*, (Oxford: Oxford University Press, 1999) for rejections of totalitarianism theory in Soviet history.

<sup>12</sup> Many academics have examined Soviet concepts of law while acknowledging the ultimate dominance of Stalinist politics over the legal system. See, e.g. Alexander Prusin, “‘Fascist Criminals to the Gallows!’: The Holocaust and Soviet War Crimes Trials, December 1945-February 1946,” *Holocaust and Genocide Studies*, 17.1 (2003), 1-30.

<sup>13</sup> I am grateful for Justin Desautels-Stein for his own work and for introducing me to Duncan Kennedy’s *The Rise and Fall of Classical Legal Thought*. Justin Desautels-Stein, “International Legal Structuralism: A Primer,” *International Theory* 8 (2016): 201-235; “Structuralist Legal Histories,” *Law and Contemporary Problems* 78 (2015): 37-59; “Back in Style,” *Law and Critique* 25 (2014):141-162. Duncan Kennedy, *The Rise of Classical Legal Thought*, (Washington D.C.: Beard Books, 1975). Kennedy describes the development and style of legal argument that dominated American legal thought between 1885 to 1940. See also Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Cambridge: Oxford University Press, 2005, originally published in Finland in 1989), for another example of law as a style of argument, though from a broader perspective than I will employ.

At the same time, I cannot ignore the political and social context of law in a given nation-state. It should be no surprise that Western legal theory dismissed Soviet law as propaganda, just as Soviet legal theory dismissed Western law as a racist tool of the bourgeoisie to subjugate the working class. To date, scholarship has assumed the former to be true but has ignored the latter. I aim to re-insert a more nuanced legal perspective into international legal history, since it profoundly shaped post-colonial legal theory and therefore the current international legal system we inhabit. By examining Aron Trainin and the Soviet approach to international law, I will show that international law is by definition a system of inclusion and exclusion, and is embedded in an imperial history masked by a rhetoric of individual liberalism. In doing so, I reveal the injustices that lie at the core of international law, such as the racialized thinking that determines not only what international law is but who benefits from it and who does not.

Trainin was the main voice articulating Soviet views of mid-century international criminal law, especially for the concepts of aggressive war and genocide. Moreover, just because the law could often play a nefarious role in a society (and may be “unjust” by numerous standards), as often was the case in the Soviet Union, does not mean we should or even can think of it as something other than “the law.”<sup>14</sup> Indeed, my study reveals that Soviet international lawyers were deeply engaged in international legal theory and as engaged in an on-going conversation with their Western international counterparts. Trainin’s legal approach was embedded in a Soviet worldview about the role international law should play in the world.

International law, always embedded in politics, required Trainin, Lemkin, and Lauterpacht to tailor their arguments to their audiences. Raphael Lemkin, the legendary Polish

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<sup>14</sup> Observing the difficulties many Westerners having in viewing the Soviet legal system as such, Estonian legal scholar Lauri Mälksoo notes “That *Recht* could actually be *Unrecht* is sometimes hard to understand in the liberal West because there is the extremely powerful notion that law, in principle, is something positive, and the ideal of it in democracies is associated with justice.” Lauri Mälksoo, *Russian Approaches to International Law*, (Oxford: Oxford University Press, 2015), 24-25.

legal theorist who founded the very concept of genocide, perhaps even more than Trainin, was the most fluid in his approach to legal argument, making whatever argument that was more likely to lead to the prevention, punishment, and ultimate end of genocide. Like Trainin's arguments that were consistently favorable to the Soviet state, Lemkin's arguments were always favorable to preventing genocide (and ultimately favorable to his adopted home of the United States), although Lemkin and Trainin were both frequently and equally inconsistent inconsistent and at times, contradictory.

Legal theorists have often been studied in a comparative frame. Philippe Sands' recent work, *East West Street: On the Origins of "Genocide and Crimes against Humanity,"* places the lives of Lemkin and Lauterpacht together, as well as the lives of the Nazi Governor-General of Occupied Poland Hans Frank and Sands' own grandfather.<sup>15</sup> Sands' book is informative and engrossing, although he emphasizes the consistent and persistent oppositional stance the Soviet Union took in developing the concepts of genocide and crimes against humanity. I show that the Soviet Union in no way dismissed these concepts out of hand. Instead, through my examination of Trainin, I show that the Soviet Union came to both embrace and define them in their own way as well as promote their own concepts of international criminal law, which has larger ramifications for understanding international law in a decolonizing world.

My dissertation uses the life of Aron Trainin and his contemporaries to explore the development of international criminal law, including the ways the Soviet Union was an active participant in international law, providing an alternative voice to Western Christian Europe, and the ways in which the Soviet international legal thought conceptualized the crimes of Nazi Germany. The first chapter provides a basic history of Western international legal thought,

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<sup>15</sup> Philippe Sands, *East West Street: On the Origins of "Genocide and Crimes against Humanity"*, (New York: Alfred P. Knopf, 2016).

showing that it is deeply intertwined with the history of European empire building, including its racialized thinking. I give an overview of different ways of thinking about international law, from natural law, whose proponents claimed that certain values were universal and thus accessible to all humans, to positivism, whose proponents claimed that sovereign states could only be bound by international law with their consent, to functionalism, whose advocates claimed that international law must be effective, operate in the interests of states, and be enforced by a legal power above the level of the state.

The second chapter provides biographical sketches of the early lives and work of three legal minds. This chapter corrects some of the Western-obsession (and bias) in international legal history by putting Aron Trainin's life and work into conversation with the most well-known liberal international lawyer of the time, Hersch Lauterpacht. It similarly juxtaposes Trainin with Raphael Lemkin. In one striking commonality that is hardly a coincidence, all three men were born to Jewish families in the unstable areas of late nineteenth, early twentieth century, eastern Europe often referred to as the "borderlands" or *kresy*.

From their common origin stories, I then move forward in time to explore their professional biographies as legal thinkers. These men also reflect ideas in legal thought popular to the time and place in their respective pre-Great War *imperial* contexts. Hersch Lauterpacht, born in the Austrian-Hungarian empire, and Raphael Lemkin, born in the Russian empire, both saw their hometowns incorporated into the Soviet Union, but neither received legal training in the heartland of the Russian empire, where Jews only of a certain class status could move.<sup>16</sup> Trainin, born to a higher status Jewish family in the Russian empire, was educated in Moscow, not in regional centers of the Russian empire like Warsaw or Lviv where Lauterpacht and

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<sup>16</sup> As the Estonian scholar of international law Lauri Mälksoo has observed, the eastern imperial borderlands had a history of producing prominent "Russian" scholars of international law, such as Fyodor Fyodorovich Martens, Baron Mikhail Taube, and Vladimir Hrabar. Mälksoo, *Russian Approaches to International Law*, 42.

Lemkin trained. Lauterpacht never personally experienced the Soviet sphere of influence, and Lemkin's only experience in the Soviet Union was a brief and negative one. Lauterpacht and Lemkin reflect an exclusive embrace of Western European ideas in international thought.<sup>17</sup>

The third chapter gives context to Trainin's legal education and provides an overview of Soviet approaches to international law. I include the Soviet critique of traditional Western international law and the formulation of a distinctly Soviet approach, which displayed striking similarities with earlier Western approaches to international law. Trainin played a central role in using his tsarist-era training in Russian approaches to international law to develop particularly Soviet (qua communist) approaches, including the concept of "crimes against peace," on the international stage. Developed in the 1930s, I show that the emergence of "crimes against peace," was a reaction to the threatening growth of fascism in Europe. Trainin introduced the language of "extermination" of the "inherently peaceful" Soviet peoples through crimes of aggression aimed at destroying communism in the Soviet Union. I also demonstrate the similarities between Trainin's 1930s concept of "crimes against peace" (which would shape how the Soviet Union understood the Holocaust and genocide) and Lemkin's 1930s concept of "crime of barbarity" (which he later termed "genocide"), thereby revealing the global conversation about international law's response to mass violence that began not in the postwar era, but in the 1930s.

The fourth chapter explores Soviet legal notions of fascist mass killings during World War II, as theorized in Trainin's legal writings and as practiced in Soviet war-crimes trials. Here I draw explicit connections between Trainin's "crimes against peace" and the Soviet portrayal of

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<sup>17</sup> Ana Filipa Vrdoljak has written skillfully on the similarities and differences in the lives and work of Lemkin and Lauterpacht in "Human Rights and Genocide: The Work of Lauterpacht and Lemkin in Modern International Law," *European Journal of International Law* Vol. 20, No. 4, (2009), 1163-1194. This dissertation both expands upon and challenges numerous aspects of her work.

the Holocaust as crimes against “peaceful Soviet citizens.” Scholars have usually interpreted the Soviet use of the phrase “peaceful Soviet citizens” to describe victims of mass atrocities as an attempt to obscure the Nazi racial persecution of Soviet *Jewish* citizens. I, on the other hand, show how this portrayal makes logical sense when seen in light of 1930s Soviet legal history on mass violence, which emphasized the Sovietness of the victims of fascism, not their Jewishness.

The penultimate chapter analyzes the role of the Soviet Union at the 1948 Genocide Convention, as well as if and how the concept of genocide was presented to the Soviet public. The 1948 Genocide Convention is frequently criticized for having a narrow definition of the categories of people to be protected from genocide. In the most widely-discussed example, political groups are specifically (and explicitly) *not* protected by the Convention. This means that the mass killings that are labelled “genocide” by sociologists and historians today (such as those committed by the Cambodian Khmer Rouge in the 1970s and the Soviet Union in the 1930s and 40s) cannot legally be considered genocide, according to the 1948 Convention. Genocide scholars have attributed the weaknesses of the Convention, including the omission of political groups, to Soviet political machinations at the Convention. As the Holocaust historian Dan Stone has noted, “The omission of political groups can partly be explained by the Cold War context in which the convention was drawn up, but actually owes more to the fact that the four groups mentioned were obviously felt, in an assumption that makes the [Genocide Convention] seem very dated, to be immutable.”<sup>18</sup>

My dissertation casts new light on this viewpoint by revealing how international legal thought and its historic and persistent reliance on racial difference and race science, more than political gamesmanship in the early Cold War period, influenced how Soviet legal arguments

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<sup>18</sup> Dan Stone, *Histories of the Holocaust*, (Oxford: Oxford University Press, 2015), 215. The four groups Stone references are racial, national, ethnic and religious groups.

were formulated and received at the Genocide Convention. I show how *racialized* thought lay at the heart of the Genocide Convention. The arguments in favor of protecting racial groups from genocide stemmed from their perceived “stability” and “inherent difference” rather than political groups, which were too unstable and artificially constructed. Though officially condemning racism and violence based on race, the legal definition of genocide implicitly endorsed antiquated ideas about race science. The race science at the heart of the Genocide Convention has previously been ignored, though it has important relevance for contemporary debates over how to define genocide.

The last chapter returns to the postwar professional biographies of Trainin, Lauterpacht, and Lemkin, each of whom died between 1957 and 1960. I show that the three legal concepts that came to be associated with each figure in the postwar period—genocide (Lemkin), crimes against peace (Trainin), and human rights (Lauterpacht)—were all articulated by these figures well before the Holocaust.<sup>19</sup> I show that after World War II, each of the three concepts—and therefore each thinker—came to be embedded in Cold War politics and used the concepts for political purposes. For all three concepts, the events that we now refer to as the Holocaust stood as the paradigmatic example of the horrors that occurred when their respective international legal concept was violated, whether it was preventing genocide, stopping aggressive war, or protecting human rights.

Looking at Trainin’s life and work also gives insight into a major feature of postwar Soviet international relations—the concept of “peaceful coexistence”—that gained prominence in the 1950s under Nikita Khrushchev. Rather than being a postwar invention, the alleged

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<sup>19</sup> While Lemkin did not use the term genocide until after the Holocaust, the concept of genocide itself had already been articulated by Lemkin as the “crime of barbarity.” Likewise, what Lauterpacht and others later referred to as “human rights” he often referred to in his prewar work as the “rights of man” and was interrelated with his focus on the individual as a subject of international law.

inherent peacefulness of communism was a constant feature of Soviet self-conception from the 1930s forward. And international criminal law served as a primary vehicle through which a Soviet discourse of peace was formulated for both international and domestic consumption. First, Trainin's concept of "crimes against peace," characterized Soviet international law from the 1930s until World War II. In the latter half of the war, the Soviet media as well as Soviet war crimes trials placed special emphasis on "crimes against peaceful *Soviet citizens*." Soviet citizens were portrayed as inherently peaceful (with non-military or partisan deaths classified as "peaceful Soviet citizens," rather than "unarmed" or "defenseless" civilians), even as they were implored to fight to defend the motherland. In the post-war period when the Soviet Union was no longer a fledgling revolutionary state but was one of two global superpowers, diatribes against "crimes against peace" became invocations of "peaceful coexistence." Trainin's work reveals the different ways in which Soviet discourse both prompted changes in international law, rejected aspects of Western European international law, and reacted to changing views of law in both the Soviet Union and around the world.

In my epilogue, I show what the stakes are in bringing Trainin and the Soviet role in international legal history back into view for contemporary international law and debates about ongoing mass violence in our contemporary world. This helps to reveal the significance of international law for the Soviet Union as well as the significance of the Soviet Union to international law. Ideas about international law helped to frame official Soviet representation and memory of the Holocaust as the murder of "peaceful Soviet citizens." In turn, Soviet representations of the Holocaust influenced Soviet understandings of genocide. Law and legal thought shaped the Soviet experience of the Holocaust, as well as how contemporary events are understood today.

In its entirety, my dissertation reveals that even though Western scholars have largely disregarded Soviet law, in part because of the influence of the Cold War, Soviet approaches to law are significant. The Soviet Union provided critiques and an alternative approach to international law that went on to influence postcolonial scholars. Soviet legal ideas also influenced portrayals of the Holocaust. Examining the life and work of Trainin reveals both the centrality of legal thought for the Soviet Union on the international stage and the importance for historians of examining the way even the most oppressive states use “law” to justify and conceptualize their power.

## Chapter 1: A Brief History of International Legal Thought, or, a Brief History of Christian Europe's Imperial International Legal Thought

Let us start at the origins of modern international law. In 1526, Francisco de Vitoria (1483-1586), a Spanish Catholic theologian and jurist, became the chair of Theology at the University of Salamanca and an important legal mind and advisor to Charles V, the Holy Roman Emperor and King of Spain.<sup>1</sup> Shortly thereafter, the king asked Vitoria whether or not the Spanish conquest of the New World was legal. There was no such thing as international law at the time. Rather, the king was asking whether it was “legal” according to “natural law,” a concept in Western philosophy that proclaimed certain values to be universal and thus accessible to all humans. Vitoria’s answer came in the form of his 1539 *De Indis et De Jure Belli* (*The Indians and the Laws of War*).

Vitoria begins his work by establishing that the Indians, because they are human, are bound to observe natural law. Vitoria, along with his fellow neo-Thomists, believed that natural law was “the participation in the eternal law by rational creatures.” He asserted that “natural law is common to all,” though he was admitted that it was “not equally *recognized* by all.”<sup>2</sup> For Vitoria, natural law required the Indians to offer hospitality to the Spanish. Because they did not, as Vitoria finds, the Spanish crown had every reason to go to war.<sup>3</sup> Once the Spanish right to war was triggered, Vitoria finds that the Spanish have the right to kill as many “barbarians” as necessary to assert control. Here, Vitoria uses the term “barbarians” seemingly interchangeably

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<sup>1</sup> Martin Van Gelderen, “The Challenge of Colonialism: Grotius and Vitoria on Natural Law and International Relations,” *Grotiana*, Vol. 14-15, 3-37,15. Vitoria is today remembered as a precursor to modern Western international law and for his writings on just war theory. For further reading on Vitoria see Annabel Brett, “Francisco de Vitoria (1483-1546) and Francisco Suarez (1548-1617),” in *Oxford Handbook of International Law*, eds. Bardo Fassbender & Anne Peters, (Oxford: Oxford University Press, 2012), 1086-1991.

<sup>2</sup> Van Gelderen, 16-17. Emphasis my own.

<sup>3</sup> In establishing evidence of the right to hospitality owed to the Spanish, Vitoria cites, among other pieces of evidence, poetry by Virgil and verses from the Bible. Francisco de Vitoria, *De Indis De Jure Belli*, trans. John Pawley Bate, edited by James Brown Scott, (Widly & Sons: New York, 1964), Section 3. *De Indis De Jure Belli* was published based on lecture notes by Vitoria’s students taken around 1532. (All of Vitoria’s work is only familiar to us today through his students’ lecture notes).

with aborigines, Indians, and heretics, and it appears that their heretical nature combined with a non-European background is what made them barbarians. If the “barbarians” resist, they may all be killed and/or enslaved.

In spite of this, Vitoria was, and indeed still is, viewed by many as a defender of indigenous rights, because he argued that they were people for whom the law of nations applied. That this perceived defender of indigenous rights, and forefather of international law, should also argue for the legality of exterminating indigenous people, may be surprising to someone unfamiliar with the history of international law. That something today prohibited under international law—the exterminatory act of genocide—was not only allowed but considered just, is jarring in its divergence. And yet, international law is rooted in Christian Europe aiming to justify European colonialism across the globe from the Americas to Africa. As Antony Anghie and other scholars have shown, Vitoria’s examination, purportedly neutral under the guise of natural law (and published in the “universal” language of Latin), simply reframed Spanish Catholic values and culture as a universal legal standard.

Hugo Grotius, (1583-1645), often called the father of modern international law, was an influential Dutch scholar remembered today especially for his work *De Jure Belli ac Pacis*, (*The Rights of War and Peace*), although he wrote on a variety of subjects, including, like Vitoria, Christian theology. Grotius had studied law at Leiden and in France, was appointed Public Prosecutor for the Province of Holland in 1607 at the age of 24, and later became involved in politics.<sup>4</sup> While Grotius had a number of precursors in theories of natural law- especially Roman thinkers, Thomas Aquinas, and Vitoria, later generations of scholars saw in his articulation of natural law and rights an innovation, and so that is what I will focus on.

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<sup>4</sup> Pieter Geyl, “Grotius,” in *Transactions of the Grotius Society*, Papers Read before the Society in the Year 1926, (1926), 81-97, 82.

Grotius believed that “nature had made possible an ideal order in the moral world, and that the function of law was to maintain, rather than create it.”<sup>5</sup> Conflict thus arises because of the improper pursuit of rights, and natural law is intended to prevent this mistaken pursuit.<sup>6</sup> While the source of natural law was God, the content of the law was based on reason and observation of the natural world.<sup>7</sup> Grotius was greatly influenced by the work of Vitoria, and like Vitoria, Grotius believed in the concept of just war. Just war meant that one nation was in the wrong, and could be destroyed, while the other nation was in the right, and could oversee destruction and still be completely morally right. As Grotius wrote in *The Rights of War and Peace*,

“For of such Barbarians, and rather Beasts than Men, may be fitly said what Aristotle spoke out of Prejudice concerning the Persians, who were indeed nothing worse than the Greeks; that War against such is natural, and as Socrates said in his Panathenaic, the justest War is that which is undertaken against wide rapacious Beasts, and next to it is that against Men who are like Beasts.”<sup>8</sup>

In other words, “Men who are like Beasts,” unlike “civilized people” are fit to be exterminated, for “whatever is necessary to end the war is lawful in war” and “so where a punishment is justly due, there all manner of Force and Violence is Lawful and Just, if that punishment cannot be had without it: And so whatever is a part of that punishment, as the destruction of Corn, Cattle, the firing of Houses, Towns, Cities, and the like are also just.”<sup>9</sup> Like Vitoria, Grotius wrote in the

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<sup>5</sup> Knud Haakonssen, “Hugo Grotius and the History of Political Thought,” *Political Theory*, Vol. 13, No. 2 (May 1985), 239-265, 241.

<sup>6</sup> While later scholars such as the philosopher Emer de Vattel in his influential *Droits des Gens* (1758), would present the law of nations as merely the natural law of individuals as applied to states (following the lead of Thomas Aquinas, among others,) for many earlier scholars, including Grotius, natural law (*ius naturale*) and the law of nations (*ius gentium*) were distinct, with natural law composed of the law of all humanity, and the law of nations composed of the law between the states. For my purposes here, this distinction is not significant.

<sup>7</sup> Richard Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant*, (Oxford: Oxford University Press, 1999), 100, quoting Grotius’ *Des Indies*, (“laws of nature are based on the will of God).

<sup>8</sup> Grotius, *The Rights of War and Peace*, 2.20.40.3

<sup>9</sup> Grotius, *The Rights of War and Peace* 3.1.2.

“universal” language of Latin. Both writers presumed that all civilized people could read Latin, and thus would know the laws of war.

Although reflecting many ideas grounded in natural law, Grotius’ work also contained the seeds of a subsequent development in international law—state sovereignty. In legal and political theory, sovereignty is defined most simply as full power authority over some sort of polity. Grotius wrote frequently of sovereignty in *The Rights of War and Peace* and in this move towards sovereignty he anticipated the works of the English philosopher Thomas Hobbes (1588-1679).

Unlike Grotius, Hobbes believed that the state of nature was one of disorder and anarchy. It was the proper pursuit of rights that led to this state.<sup>10</sup> For Hobbes, nature and natural law thus meant something very different than for Vitoria, Grotius, and other natural law theorists. For Hobbes, the right we have in nature is the unlimited right of self-preservation. Natural law is not a relationship between law and morality, but instead simply outlines the state of nature—where all people are permitted to protect themselves.

As a result of this state of nature, Hobbes believes that war is a natural condition of humanity. Because of individuals’ desires to protect themselves, they renounce their rights in favor of the sovereign, who retains natural rights. In other words, the influential conception of sovereignty outlined by Hobbes based its legitimacy on a “social contract.” In order to improve the quality of life, people must join together under a sovereign power.<sup>11</sup> As the new holders of natural rights, sovereign states are all formally equal and able to make their own decisions for themselves, rather than be bound by prescriptive ideas of natural law.

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<sup>10</sup> Haakonssen, 241.

<sup>11</sup> Hobbes borrowed heavily in his writings on sovereignty from Jean Bodin’s *Les Six livres de la République* (1576).

However, for states to be bound by international law, they must first consent to be bound.<sup>12</sup> The main question in determining international law is no thus no longer whether or not it is just under (divine) natural law, but whether or not the sovereign has consented to be bound by the law. As the German jurist and Nazi apologist Carl Schmitt summarized this shift: “the omnipotent God became the omnipotent lawmaker.”<sup>13</sup> For this move away from natural law, Hobbes’ work was exceedingly controversial and influential.<sup>14</sup>

The 1648 Treaty of Westphalia formalized this shift in the law of nations—sovereigns were to be formally equal and recognized as such by other sovereigns. Because the sovereignty of states included the right to self-preservation—which may be asserted through war—the black and white world of natural law’s just war doctrine no longer made sense. It was not necessarily true that one state was completely in the moral and legal wrong and the other state was in the right. Warring states were both asserting their sovereign rights. As long as a state had not consented to give up their right to war (e.g. via treaty or convention), they were free to make war and to be as aggressive as they wished, so long as it was towards the preservation of their sovereignty, as they defined it.<sup>15</sup> Moreover, even if a state did promise not to go to war (e.g. had signed a peace treaty like at the Peace of Westphalia, which ended the 30 Years’ War), a violation of said treaty was perceived to be *illegal* under international law, but it was not

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<sup>12</sup> Keeping promises was considered a natural law, known as *pact sunt servanda* in international law, although this principle was hedged by *vebus sic standibus* (as long as circumstances did not change).

<sup>13</sup> Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, (Chicago: University of Chicago Press, 1985), 36; (originally published as *Politische Theologie*, 1922).

<sup>14</sup> Thus, even though Hobbesian theories of state sovereignty reject ideas about natural law as governing, ideas about Hobbes’ sovereign are based in natural law theories. Legal scholar Martin Loughlin as persuasively argued that Hobbes made natural law a focus of so much of his work in order to “expose its errors.” Martin Loughlin, “The Political Jurisprudence of Thomas Hobbes,” in *Hobbes and the Law*, ed. by David Dyzenhaus and Thomas Poole, 5-21, 12. See also Anthony F. Lang Jr & Gabriella Slomp, “Thomas Hobbes: Theorist of the Law,” *Critical Review of International Social and Political Philosophy*, 19:1, 1-11 for an overview of different interpretations of Hobbes on natural law and positivism.

<sup>15</sup> See, for an example of this belief, Immanuel Kant, *The Metaphysics of Morals*, transl. and ed. Mary Gregor, (Cambridge: Cambridge University Press, 1996), paragraphs 56 and 116, originally published as *Die Metaphysik der Sitten in zwei Teilen* in 1797. See also Seyla Benhabib, “Carl Schmitt’s Critique of Kant: Sovereignty and International Law,” *Political Theory*, Vol. 40(6), 688-713, 696.

*criminal*, as there was no mechanism for enforcing the laws and punishing those states that broke them. Neither the leaders of the state nor the state itself could expect to be held responsible for the decision to go to war in a criminal trial.

### ***Positivism in International Law***

While natural law—with its roots in the justification of European colonial endeavors—dominated Western European legal thought in the 17<sup>th</sup> and 18<sup>th</sup> centuries, by the second half of the 19<sup>th</sup> century until the Great War, a new way of thinking about international law dominated. Influenced by the Enlightenment and revolution, international law and legal thinkers were obsessed with questions of sovereignty, probably in response to the renewed interest in overseas expansion as whole swaths of new territory opened up for European expansion. This interest in sovereignty, called positivism, asks not if something was fair or just, like the natural law philosophers. Rather, positivism posed the question: “Has the sovereign consented to be bound by this rule?” If the sovereign has consented through treaty or tacit consent, the answer is clear enough. If the sovereign has implied his or her consent through custom and *opinio juris*—defined as state adherence to custom because of the belief of a legal obligation—this is also sufficient to find consent. However, if the sovereign has not consented, there can be no restrictions.<sup>16</sup> Because positivism only bound the sovereign with his or her consent, positivism provided no actual constraints on the use of state power.

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<sup>16</sup> For example, if a sovereign decides to kill 1/3 of his citizens because they belong to a particular religion, this is only illegal under a positivist view of international law if the sovereign has signed a treaty that granted his citizens the right not to be killed on the basis of their religion. There are many criticisms of the view that the 19<sup>th</sup> and early 20<sup>th</sup> century were highly positivist. However, these criticisms are not relevant here because the most prominent modern international legal scholars all accepted the narrative that positivism had been dominant. See e.g., Hersch Lauterpacht, *International Law and Human Rights*, (New York: F. A. Praeger, 1950).

Unlike natural law advocates, positivists did not believe that a law of nature existed on its own. Laws were created by human beings, not by God and nature. As Lassa Oppenheim, a German Jewish lawyer, wrote in 1908, “the method to be applied by the science of international law can be no other than the positive method,” given that there is no law of nature.<sup>17</sup> International law would be determined by sovereign states, rather than by God.

But first, international law needed to define which states were sovereign. Just as Vitoria and Grotius presented particular European (specifically Spanish and Dutch) norms as universal ones, international legal thinkers across Europe replicated this presentation of European Christianity as the norm, and other areas of the world as deviating from the norm.<sup>18</sup> Only now, in the nineteenth century, human-defined law between states, which people began calling sovereignty, rather than natural law, was the source of international law. States that were sovereign were those whose power was reminiscent of a European nation-state or empire. Other forms of social organization, such as tribal societies in Africa, or other peoples who had already been colonized in the early modern wave of European colonialism and had their indigenous social organizations destroyed, like indigenous Americans, were not sovereign.

### ***Part I: Race and International Legal Thought in the Standard of Civilization***

By the late 19<sup>th</sup> century, racial discourse permeated international law along with other bodies of knowledge. According to James Lorimer, a Scottish professor at the University of Edinburgh and natural law advocate who wrote *The Institutes of the Law of Nations* in the 1880s, humanity was divided into three groups based on the degree of something he referred to as

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<sup>17</sup> Oppenheim, “The Science of International Law,” *American Journal of International Law*, Vol. 2, 313-356, 1908), 333.

<sup>18</sup> In addition to Anghie, see Jennifer Pitts, “Empire and Legal Universalisms in the Eighteenth Century,” *American Historical Review*, Vol. 117, Issue 1, (Feb. 2012), 92-121 and Anthony Pagden, “Human Rights, Natural Rights, and Europe’s Imperial Legacy,” *Political Theory*, Vol. 31, No. 2 (April 2003), 171-199.

civilization: “that of civilized humanity, that of barbarous humanity, and that of savage humanity,” echoing the colonialist thinking of the time.<sup>19</sup> Lorimer further argued that the full recognition of international law “extends to all the existing States of Europe, with their colonial dependencies, in so far as these are peopled by persons of European birth or descent.”<sup>20</sup> However, for non-European peoples who may have possessed a civilization, (but not the correct type of civilization) such as China, Japan, and Thailand, partial political recognition was merited to these “semi-civilized” nations.<sup>21</sup>

For those other entirely “uncivilized” peoples, it was important to “distinguish between the progressive and non-progressive races.”<sup>22</sup> In other words, while some peoples like the Turks, (whom Lorimer says “possibly do not even belong to the progressive races of mankind”) are likely incapable by their very nature of ever attaining civilization, other peoples, like the Japanese, may become civilized if they “continue their present rate of progress for another twenty years.”<sup>23</sup>

Here we can see a reemergence of the Reason v. Barbarian debate from the early modern period about who qualifies as being bound (and more importantly protected) by international law but now framed in the new language of racial science. While some races were viewed as “progressive” (possibly the Japanese), and thus may be deserving of becoming bound and protected by international law, other races are “non-progressive” (possibly the Turkish peoples, and almost certainly all of the colonized African peoples). In that case, international law will for the most part never apply to them. The consequences of this included justifying the destruction

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<sup>19</sup> James Lorimer, *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*, (Edinburgh: Blackwell, 1883), vol. 1, 101.

<sup>20</sup> Lorimer, 101-102.

<sup>21</sup> Lorimer, 102.

<sup>22</sup> Lorimer, 102.

<sup>23</sup> Lorimer, 102-103.

of “uncivilized peoples,” such as the German campaign of racial extermination of Herero and Nama peoples in southwest Africa in the 1900s.<sup>24</sup>

The difference between natural law thinkers and positivists was the source of international law: whether it was created by sovereigns (people) or by God and nature. But at its core, positivists had a similar “standard of civilization” as natural law thinkers. For many late nineteenth-century international lawyers and scholars, race more than religion underpinned international law. European peoples provided the standard of international law and any deviation from this standard rendered other peoples both undeserving as participants in the making of international law, and more importantly in receiving the protections of international law.

### ***Western International Legal Thought and Lassa Oppenheim: The Standard of Civilization***

One clear piece of evidence that positivism’s emphasis on European-ness as a metric for the standard of civilization began replacing Christianity as that metric in shaping international law was the late nineteenth-century emergence of international legal thinkers who were Jewish. One of the most well-known positivists was Lassa Oppenheim, who taught criminal law in Germany until 1892, at which point he moved to the University of Basel to continue studying criminal law.<sup>25</sup> In 1895, Oppenheim moved to the United Kingdom, and there, he turned his focus to international law, the field that would make his name. Initially teaching at the London School of Economics, Oppenheim became the Whewell Professor of International Law at Cambridge in 1908, following the success of his 1905-1906 two-volume work, *International*

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<sup>24</sup> See Isabel V. Hull, “Military Culture and the Production of ‘Final Solutions’ in the Colonies: The Example of Wilhelminian Germany,” in *The Specter of Genocide: Mass Murder in Historical Perspective*, ed. by Robert Gellately & Ben Kiernan (Cambridge: Cambridge University Press, 2003), for the extermination of Herero peoples by German colonialists.

<sup>25</sup> Mathias Schmoekel, “Lassa Oppenheim (1858-1919),” in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, Jack Beatson and Reinhard Zimmermann, eds., (Oxford: Oxford University Press, 2004), 583-599.

*Law: A Treatise*. The publication of *International Law* is exemplary of the positivist approach to international law, and has been called “probably the most influential English textbook of international law.”<sup>26</sup>

In this work Oppenheim outlines what makes something “the law”: “We may say that *law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power*. The essential conditions of the existence of law are, therefore, threefold. There must, first, be a community. There must, secondly, be a body of rules for human conduct within that community. And there must, thirdly, be a common consent of that community that these rules shall be enforced by external power.”<sup>27</sup>

Thus, for international law to be “law,” there needs to be in international community that accepts it. “But is there a universal international community of all individual States in existence?”<sup>28</sup> Oppenheim replies yes, there is an international community, but only of “civilized states.” These civilized states create a community because of the many interests:

which knit all the individual civilized States together and which create constant intercourse between these States as well as between their subjects. As the civilized States are, with only a few exceptions, Christian States, there are already religious ideas which wind a band around them. There are, further, science and art, which are by their nature to a great extent international, and which create a constant exchange of ideas and opinions between the subjects of the several States. Of the greatest importance are, however, agriculture, industry, and trade.”<sup>29</sup>

We can observe that Oppenheim inserts “States” into his answer (not required by the question) into the international legal community. He puts forth no reason for the social organization of the “state” to be the base unit of the international community, rather than any other social

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<sup>26</sup> Mathias Schmoeckel, “The Internationalist as a Scientist and Herald: Lassa Oppenheim,” *European Journal of International Law*, Sept 01, 2000, Vol. 11, No. 3, 699-712.

<sup>27</sup> Lassa Oppenheim, *International Law: A Treatise*, (London: Longmans, Green and Co., 1905), 8.

<sup>28</sup> *Ibid*, 10.

<sup>29</sup> *Ibid*.

organization of a group of people. Regardless, Oppenheim, reflecting the thought of his time, assumes that states form the basis of international law. And most of these “civilized States” were Christian. The lingering question, that Oppenheim only partially answers, is who counted as part of the community of “civilized states” and how far that label could be extended in Europe.<sup>30</sup>

### ***Russia and the Standard of Civilization***

While Russia was considered one of the civilized states, many Russians were troubled by their “uncivilized” neighbors. The Russian foreign minister Aleksandr Gorchakov claimed that the presence of “those half-wild, unsettled peoples who lack a stable social organization,” on the Russian empire’s borders with Asia in the 1860s, obliged “the civilized state [to] exercise a certain authority over those neighbors that create disturbances because of their wild and impetuous habits.”<sup>31</sup> This obligation of the “civilized state” led to an exterminatory campaign against Muslim populations of the Caucasus Mountains, in which Muslim villagers who did not assimilate to the empire’s policy of Russification—giving up their language and culture—were killed or driven into exile.<sup>32</sup> Thus, in order to bring civilization to the farthest reaches of the Russian empire, the tsarist government told their eastern inhabitants they must be civilized or be killed.

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<sup>30</sup> See, e.g., the work of Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005). While the international legal scholar Gerrit Gong argues that the entry of Japan into the civilized countries shows that the standard was not based on race, a close look at some prominent legal scholars of the time reveals that the standard was actually based on race. For example, James Lorimer’s *The Institutes of the Law of Nations: A Treatise on the Jural Relations of Separate Political Communities*, written in 1883-1884 explicitly illustrates the use of race as barrier to international law.

<sup>31</sup> Andreas Kappeler, *Russland als Vielvölkerreich: Entstehung, Geschichte, Zerfall (Russia as a Multiethnic Empire: Formation, History, Collapse)*, (Munich: C.H. Beck, 1992), quoting Gorchakov, 163. I became aware of this quote thanks to Odd Arne Westad, *The Global Cold War*, (Cambridge: Cambridge University Press, 2007), 42, and am quoting his English translation of Gorchakov.

<sup>32</sup> See Westad, 42, and for atrocities committed against the Muslim Circassian peoples of the Caucasus specifically see Walter Richmond, *The Circassian Genocide*, (New Brunswick: Rutgers University Press, 2013).

At the same time, Fyodor Fyodorovich Martens (1845–1909), more commonly known as Friedrich von Martens, was a Professor of International Law at St Petersburg Imperial University, as well as a legal counsellor at the Russian Ministry of Foreign Affairs. Like so many European international lawyers of his day, Martens came from the Russian imperial borderlands, perhaps drawn to international law as an expression of the state power that was often lacking in their hometowns. Born to Estonian parents in Pärnu, then part of the Russian Empire, Martens was orphaned at the age of nine, and sent to live in St. Petersburg, where the native German speaker quickly achieved academic success. In 1882, Martens published what is considered to be the first comprehensive Russian textbook of international law, *Sovremennoe mezhdunarodnoe pravo tsivilizovannykh narodov*, or *Contemporary International Law of Civilised Nations*.<sup>33</sup> *Contemporary International Law of Civilised Nations* was written and published in Russian, but was quickly translated and published in German, French, Spanish, Serbian, Japanese, Chinese and Persian.<sup>34</sup> Because Imperial Russia was a member of the civilized nations, and engaged in imperial competition with Britain (in Central Asia), Japan (in eastern Asia), and Germany (in the Balkans), Martens' work was of great interest to scholars worldwide. Martens' work was also recommended reading for applicants preparing for the Russian Foreign Ministry's diplomatic examination.<sup>35</sup> As a professor, Martens taught many young men who would become important figures in the tsarist government, and Martens was known for his own diplomatic work.

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<sup>33</sup> Mälksoo, *Russian Approaches to International Law*, 42.

<sup>34</sup> Peter Holquist, "The Russian Empire as a 'Civilized State': International Law as Principle and Practice in Imperial Russia, 1874-1878," *National Council for Eurasian and East European Research*, Working Paper, (July 14, 2004), 1-37.

<sup>35</sup> D. C. B. Lieven, *Russia and the Origins of the First World War* (New York: St. Martin's Press, 1983), 87-89. I became aware of this source thanks to Holquist, 9.

Martens believed that international law only applied to countries who met the standard of civilization. However, Martens' "standard of civilization" differed from many other Western legal theorists. The imperial powers of Russia, France, Britain, Prussia and Austria (the European Great Powers from the Congress of Vienna) unquestionably met the standard of civilization according to conventional international legal theorists. Though Martens classified Russia as "civilized," he defined civilization differently than most. Martens believed that civilization was determined by how much a state respected its individuals and granted and observed their rights.<sup>36</sup> Importantly, Martens' defense of the "standard of civilization" was not on explicitly racial or religious grounds. Rather, Martens claimed that

if in a State the individual as such is recognized as a source of civil and political rights, then also international life presents a higher level of the development of order and law. To the contrary, with a State where the individual does not have any rights, where he is suppressed, international relations may not develop nor be established on firm foundations.<sup>37</sup>

Martens insistence on the "standard of civilization" seemed as much an attempt to encourage the further granting of individual rights, which were then lacking in the Russian empire—which had only recently freed peasants from serfdom—as it was to exclude non-European countries.

While Martens, Gorchakov, and other liberals, portrayed Russia as firmly one of the civilized nations, they did not speak for all intellectuals in the Russian Empire. In the divide between "Westernizers," who wanted Russia to be more similar to Western Europe, and "Slavophiles," who opposed the influence the influence of the West in Russia, the German-speaking Estonian-native Martens unsurprisingly leaned towards the West. He wrote implicitly against Slavophiles like Nikolay Yakovlevich Danilevsky (1822–85), who, in his work *Rossia i*

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<sup>36</sup> Lauri Mälksoo, "F.F. Martens and His Time: When Russia was an Integral Part of the European Tradition of International Law," *European Journal of International Law*, 25:3 (2014), 811,829, 817.

<sup>37</sup> F. von Martens, *Völkerrecht: Das international Recht der civilisirten Nationen*, transl. by C. Bergbohm, (Berlin: Weidmann, 1883), 25.

*evropa (Russia and Europe)* also touched on matters of international law and argued that Russia and the West were distinct and antagonistic civilizations; thus, Russia needed to stop appeasing and assimilating to Western Europe.<sup>38</sup> In spite of the relative popularity of Danilevsky and his fellow Slavophiles, the government of tsarist Russia firmly identified itself with the Western European international legal community and it would continue to do so until the Bolshevik revolution.

## ***Part II: Positivist Legal Thought and Oppenheim: Codification***

The second significant feature of positivist legal thought, (after the standard of civilization), for our purposes, is the focus on codification. This focus on codification is what makes Oppenheim explicitly a positivist. In “The Science of International Law: Its Task and Method,” Oppenheim claims that the task of codification is both the most important task for international law, and, simultaneously, the only way to improve it.<sup>39</sup> Anticipating the opposition, Oppenheim asks “But does international law really require to be codified? Would it not be better to leave it for all the future in its uncodified condition as customary law?”<sup>40</sup> Oppenheim answers her own hypothetical question:

It suffices to say that at least partial codification will at some future time become an absolute necessity. The practice and the views of the different states differ so much with regard to many important matters that it is only codification which can create agreement and unanimity, and thereby universally recognized rules of law.<sup>41</sup>

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<sup>38</sup> Nikolai Danilevski, *Rossîia i Evropa*, (St. Petersburg : Obshchestvennaia pol’za, 1871).

<sup>39</sup> Oppenheim, “The Science of International Law,” *American Journal of International Law*, Vol. 2, 313-356, 1908), 319 stating “For if we find fault with an existing rule of international law, it is now-a-days only be total or partial codification that matters can be improved.”

<sup>40</sup> *Ibid*, 320.

<sup>41</sup> *Ibid*.

Oppenheim (and the positivists) believed that only codification could create agreement and unanimity there was no law of nature exists to form a basis for international law. With Oppenheim's dismissal of the law of nature, he concludes that "the method to be applied by the science of international law can be no other than the positive method."<sup>42</sup> Oppenheim describes the positive method as

that applied by the science of law in general, and it demands that whatever the aims and ends of a work and may be, he must start from the existing recognized rules of international law as they are to be found in the customary practice of the states or in law-making conventions.<sup>43</sup>

How does a lawyer discover these rules of international law? Oppenheim claims that conventional rules are written down, and thus easy to find and grasp their meaning.<sup>44</sup>

Of course, it is important to note that not *all* law needed to be codified. The aforementioned "standard of civilization," upon which international law was grounded, was itself based on more "elusive" (read: racial and religious) characteristics. However, applying the general principles of the standard was acceptable to Western powers, because those being measured (and failing) were not civilized, and therefore not entirely sovereign. The need for codification stemmed from sovereignty itself. For the uncivilized—and, therefore people lacking the capacity for sovereignty and therefore needing some other group of people to be sovereign—codified laws did not apply. For these peoples incapable of sovereignty, "general principles" more in keeping with ideas about natural law could apply. The "general principles" of Western international law, limited the claims of the conquered for fair legal treatment, and instead reinforced the rights of the conquerors to bring civilization to the barbarians by any means

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<sup>42</sup> *Ibid*, 333.

<sup>43</sup> *Ibid*, 334.

<sup>44</sup> *Ibid*.

necessary.<sup>45</sup> For example, these “general principles,” included Vitoria’s and Grotius’ sanction of destruction for those peoples that did not meet the standards of civilization.

For Oppenheim and other positivists, the codification of international law was thus both the most necessary task of international lawyers and a highly achievable one. Oppenheim was writing in the early twentieth century, at the apex of positivist thought (and the apex of British imperial power), and died in Britain in 1919.<sup>46</sup>

### *The Geneva and Hague Conventions*

The thrust towards codification in international law can be seen in the early Geneva and Hague Conventions.<sup>47</sup> The first Geneva Convention, in 1864, was the result of the efforts of Henry Dunant, a Swiss businessman who had been shocked by the carnage he witnessed following the 1859 Battle of Solferino (during the Second Italian War of Independence). Dunant proposed the creation of a permanent humanitarian relief agency that was neutral, and thus would be able to provide aid in warzones.<sup>48</sup> The Geneva Convention gave birth to the International Red Cross, using the symbol of the cross to connect civilization and reason with Christianity. (It was not until 1929 the International Red Cross recognized the Red Crescent, symbolically acknowledging Islam as a civilized religion.)

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<sup>45</sup> See, e.g. British treaty with King Dosunmu of Lagos of 1861, reprinted in Makau wa Mutua, “Why Redraw the Map of Africa: A Moral and Legal Inquiry,” *Michigan Journal of International Law*, Vol. 16, (1994-1995) 1113-1176, 1132, in which King Dosunmu renounced his sovereignty over his people and territory under threat of military force. The “treaty” was a one-sided capitulation rather than a voluntary treaty among equals.

<sup>46</sup> The war put Oppenheim in a difficult political situation. A German, living in Britain, he was forced to condemn German actions. Schmoeckel, “Lassa Oppenheim (1858-1919),” 597.

<sup>47</sup> The 1863 Lieber Code preceded these Conventions as a collection of laws of war, though not on an international scale. The Lieber Code was an instruction signed by U.S. President Lincoln during the Civil War, authored by Francis Lieber, a Columbia history and political science professor (as well as writer on international law) and outlined soldiers’ conduct during wartime. The Lieber Code can be viewed in full at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp), (last accessed October 23, 2016). For more on the Lieber Code see Theodor Meron, “Francis Lieber’s Code and Principles of Humanity,” *Columbia Journal of Transnational Law*, Vol. 36, 269-281 (1998) and John Fabian Witt, *Lincoln’s Code: The Laws of War in American History*, (New York: Free Press, 2012).

<sup>48</sup> See Henry Dunant, *A Memory of Solferino*, (Washington, D.C.: The American National Red Cross, 1939).

The 1864 Geneva Convention also laid out rules designed to protect *hors de combat* (soldiers that were no longer in combat due to capture, injury, or illness) as well as medical and religious personnel in combat zones.<sup>49</sup> Later Geneva conventions built upon the first, and expanded protections to include more specific protections to prisoners of war, civilians, and armed forces both on land and at sea.<sup>50</sup> While the Geneva Conventions were designed to protect individuals who were not part of the armed conflict—either civilians, *hors de combat*, or medical and religious personnel—the Hague Conventions were concerned the rights and duties of those still involved in the armed conflict.

The 1899 Hague Convention had been proposed by the Russian Tsar, Nicholas II. A number of states at the Convention including, the United States, Russia, the United Kingdom, France, and China, supported a proposal to create a system of binding international arbitration—a step viewed as necessary to prevent war—which would have been mandatory for states to participate in. The new state of Germany, however, led the successful opposition to the proposal. Instead, the Convention created the Permanent Court of Arbitration, a voluntary arbitration tribunal to resolve disputes between states that ratified the Hague Convention, treaties on the laws of war (on both land and sea) and Declarations banning the use of certain weapons.

The 1899 Hague Convention also resulted in the “Martens Clause,” named after Friedrich von Martens, the Russian author of *Contemporary International Law of Civilised Nations* and Foreign Ministry advisor, who served as one of the Russian delegates to the Convention.<sup>51</sup> The Martens Clause held that both combatants and civilians were “under the protection and empire of

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<sup>49</sup> For example, the Convention stated that the wounded must be given medical relief without distinction based on their nationality. For the entire treaty, see Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864.

<sup>50</sup> For further reading on the Red Cross and the Geneva Conventions see Caroline Moorehead, *Dunant's Dream: War, Switzerland and the History of the Red Cross*, (New York: Carroll & Graf, 1999).

<sup>51</sup> Holquist, 9.

the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”<sup>52</sup> In other words, even though these protections were not explicitly spelled out, civilians and combatants maintained certain protections “until a more complete code of the laws of war is issued.”

The second Hague Convention, in 1907, called by Theodore Roosevelt, confirmed and expanded many of the treaties and declarations of the first, including the “Convention relative to the Opening of Hostilities,” which required that war “must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war,” and that neutral powers should be notified as soon as possible about the existence of war.<sup>53</sup>

Together, the Hague Conventions represented the first modern attempts to codify the laws of war, they thereby explicitly invented the category of a “war crime.” Moreover, the Hague Conventions not only codified the laws of war among civilized nations; it also attempted to create a system of binding international arbitration. Though this attempt failed, the Hague Conventions exposed the limitations of positivism, and particularly the lack of any sort of international body to enforce international law.

### ***The Great War and The Beginning of the End of Positivism***

The Great War witnessed the violation of many of the laws of war outlined in the Hague and Geneva Conventions. For example, the use of poison gas by all the major participants of the war violated both the 1899 Hague Declaration and the 1907 Hague Convention which forbade

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<sup>52</sup> Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899.

<sup>53</sup> See James Brown Scott, ed., *The Hague Conventions and Declaration of 1899 and 1907: Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers and Texts of Reservations*, (New York: Oxford University Press, 1918).

the use of poison.<sup>54</sup> The war was presented by international lawyers as something singularly awful and barbaric in human history. International law appeared unable to either prevent war or to force states to observe the laws of war, since there was no mechanism for enforcement. At the same time, due to technological advances that outpaced international law, some of the most atrocious features of the war—the deaths of millions from artillery shells and machine guns—were not illegal under international law defining the civilized conduct of war. And yet, some widely reported atrocities did not actually happen—for example, the severed hands’ myth—contributing to the discrediting of international law.<sup>55</sup>

In the face of these new horrors of war, natural law perspectives made a bit of a comeback, and were often religious in nature. For example, the Austrian professor Alfred Verdross, who, like Lauterpacht, studied with the illustrious jurist Hans Kelsen in Vienna, believed in a Christian natural law that was, unsurprisingly, “grounded in God.”<sup>56</sup> For Verdross, positivist law merely supplemented a natural law that was interchangeable with Christian values. Naturalists like Verdross believed that international law existed separate from codification. Even if no treaty existed prohibiting a certain act, it may still be in violation of international law (like the shelling of millions of soldiers). This is because international law was accessible through reason, and thus available to all humans. (It was the “white man’s burden” to bring that reason to the rest of the world.)

The Great War also saw the first major critiques of positivism based on the fact that positivist law also offered no external constraints on sovereignty. It was entirely voluntary.

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<sup>54</sup> For more on violations of international law during the Great War (particularly Germany’s) see Isabell Hull, *A Scrap of Paper: Breaking and Making International Law*, (Ithaca: Cornell University Press, 2014).

<sup>55</sup> See Hull, *A Scrap of Paper*, 4 and 7; Hull quotes John Maynard Keynes referring to “so called international law,” reflecting the despair many policy makers and elites felt towards international laws enforcement shortcomings.

<sup>56</sup> See Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen: Believing in Universal Law*, (Cambridge: Cambridge University Press, 2010), 155.

Thus, a more pragmatic approach to international law began to displace positivism around 1914. It did not criticize the foundation of positivist international law like the naturalists, but instead focused on its inefficacy. The lack of efficacy of international law stemmed from international law's positivist reliance on the concept of sovereignty, and its inability to constrain this sovereignty.

Sovereignty created a paradox in international law. As James Brierly, a critic of international law as currently conceived, wrote in 1924, International law professes “to consist of principles universally recognized, but insist[s] on the universal application of rules which the conscience of the world obstinately refuses to accept as universally applicable.”<sup>57</sup> Instead of focusing on positivism's interest in sovereign rights, and its concomitant inability to actually constrain states' power, the new emerging critique focused on state *interests*. Brierly noted that “Law is still thinking in terms of rights; States are thinking of interests and demanding that they be protected.”<sup>58</sup> In other words, international law's focus on sovereignty was actually helping to ensure that it would not be followed. Brierly showed that international law needed to focus on states' interests thereby helping to ensure that states would respect international law. If states' interests contradicted with the dictates of sovereignty, Brierly argued, strict defenses of sovereignty needed to be abandoned.<sup>59</sup> In addition to being more invested in states' interests as a way to make it more effective, Brierly suggested, international law should include a larger body,

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<sup>57</sup> James Leslie Brierly, “The Shortcoming of International Law,” 5 *The British Yearbook of International Law* (1924), 4-16, 12.

<sup>58</sup> Brierly, 16.

<sup>59</sup> For an example of early functionalist thought applied to a legal case see the 1923 Polish Nationality Case. The question raised in the case over who could decide what groups were minorities in Poland. Poland argued that the Minority Treaty allowed for the League of Nations to have jurisdiction over minorities in Poland and the questions of their rights. However, Poland argued that German immigrants to Poland were not the minorities protected by the treaty, as they were not nationals of Poland. The PCIJ rejected this view taking a functionalist approach by asking “what is the purpose of the treaty system?” The Court found that the treaty system was intended to protect all *inhabitants* of Poland, rather than simply Polish nationals. Any national minority, now within the borders of Poland, were protected minorities. Had the PCIJ wanted to, they could have decided the case on positivist terms—Poland was now a sovereign country, and thus had the power to interpret this issue unless they had clearly and explicitly given up this right. However, functionalism was making inroads in Western international legal thought.

a comity of states, with the ability to enforce the dictates of international law and thereby potentially constrain state sovereignty when in violation of said law. This new approach to international law, in which law takes account of social needs, has been termed the “functionalist” approach.<sup>60</sup>

Oppenheim, the classic figure of international law’s positivist school, was not immune to the criticisms of Brierly and other critics, all more or less functionalists. In his last works, which appeared in 1918 and 1919, Oppenheim recognized the need for some sort of stronger normative constraint on international law.<sup>61</sup> At the same time, Oppenheim was at heart a positivist and clearly rejected any infringement on the most basic conceptions of state sovereignty, as he “considered the sovereign states as the sole subjects of international law, a super-state covering the whole world would mean the end of international law.”<sup>62</sup>

One of the first concrete actions repudiating positivist international law’s emphasis on sovereignty can be seen in the victorious Allies’ support for trials of Germans following the Great War. The Leipzig War Crimes Trials of 1921 were a series of German Supreme Court trials trying German servicemen under the Treaty of Versailles, the treaty which officially ended the Great War. The Treaty of Versailles included among its many controversial paragraphs an arrest warrant for Kaiser Wilhelm and called for his prosecution “for a supreme offence against international morality and the sanctity of treaties.” Wilhelm fled to the Netherlands, which had remained neutral in the Great War, and lived the rest of his life in exile there.<sup>63</sup> In lieu of prosecuting the former Kaiser or other high-ranking figures in the German government, the

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<sup>60</sup> See Justin Desautels-Stein, “Pragmatic Liberalism: The Outlook of the Dead,” *Boston College Law Review* 55:4 (2014), 1041-1098, 1054.

<sup>61</sup> See Lassa Oppenheim, “Review of Pasquale Fiore, *International Law Codified and its Legal Sanction* (1918),” *Yale Law Journal*, 28:100-102 (1918).

<sup>62</sup> Schmoeckel, “Lassa Oppenheim (1858-1919),” 598.

<sup>63</sup> Treaty of Versailles, 1919, Art. 227.

Allied government proposed that the Germans themselves prosecute a number of German officials they identified as war criminals, for instance, Emil Müller, a captain in the Imperial German Army, who would be charged with the mistreatment of prisoners in the prisoner of war camp that he oversaw.<sup>64</sup> Prosecutors referred to the Hague and Geneva Convention in alleging German officials to have violated “the laws of war and humanity,” in addition to the custom of “civilized” countries. For example, prosecutors cited the German sinking of a hospital ship as a violation of both Article 7 of the 1906 Geneva Conventions and the Hague Conventions. Though Germany was in clear violation of these international agreements, the defendants were ultimately found guilty—but guilty only according to national German laws, not international ones.<sup>65</sup>

In spite of the initial Allied enthusiasm for prosecuting war crimes, the effort was tainted by accusations of victor’s justice, probably not surprising, since the Allied governments did not prosecute their own servicemen. Germany, in turn, resisted prosecuting their own belligerents: many of the cases were dropped, and of those that were not dropped, the defendants were either acquitted, received lenient sentences, or had their charges overturned. The new government of the Weimar Republic reasonably complained that the trials constituted a violation of German sovereignty.<sup>66</sup>

Despite the relative failure of the trials, lawyers invested in the emergence of a system to enforce international law, such as Claud Mullins, a British barrister and the author of *The Leipzig War Trials*, praised the Leipzig War Crimes Trials as revealing “the majesty of right and the rule

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<sup>64</sup> See Matthew Lippman, “The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany,” *Indiana International & Comparative Law Review*, Vol. 3, No. 1 (1992), 1-100, 4, citing “Judgment in the Case of Emil Muller,” (RGSt May 30, 1921), reprinted in *American Journal of International Law*, Vol. 16, 684, 696. (1922).

<sup>65</sup> Claud Mullins, *The Leipzig Trials: An Account of the War Crimes Trials and a Study of German Mentality*, (London: H. F. & G. Witherby, 1921), 104, 218, 222.

<sup>66</sup> Lippman, 4.

of law,” and an “important landmark” in the development of international law.<sup>67</sup> For many functionalists like Mullins, the trials revealed both the possibility of international law—to punish alleged aggressors and thus deter war—as well as its limits. International law had a long way to go to truly become an effective and coherent system of law, illustrated not the least by the fact that the defendants were found guilty under national German laws, rather than international ones.<sup>68</sup> Mullins himself argued that the trials were a “protest against a national system of brute force.”<sup>69</sup> The object of the trials was to show that “might is not right” by establishing “the principle that individual atrocities committed during a war may be punished when the war is over.”<sup>70</sup> Mullins evokes the language of the functionalists when he advocates for limiting sovereigns by enforcing international law, supports the right of the Leipzig courts to establish new legal principles. Nonetheless, although he supported functionalism in international law, Mullins continued to embrace the “standard of civilization.” In his view, “barbarous” Germany no longer met the standard of civilization, and it was up to the rest of Europe (particularly Britain) to enforce this standard, so that Germany would take “the road back to civilization and true progress.”<sup>71</sup> It seemed that no state was immune from the charge of barbarism.

Following the end of the barbarous Great War, the victorious powers formed the League of Nations. The League of Nation’s primary goal was to “promote international cooperation and to achieve international peace and security.”<sup>72</sup> The League sought to achieve this aim by promoting open relations between nations, helping to establish clear understandings of international law, and to strengthen respect for treaties. One of the means the League created to

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<sup>67</sup> Mullins, 17, 210.

<sup>68</sup> Mullins, 218.

<sup>69</sup> Mullins, 230.

<sup>70</sup> Mullins, 224.

<sup>71</sup> Mullins, 234.

<sup>72</sup> League of Nations Covenant, Preamble.

help support and further develop international law was their creation of the Permanent Court of International Justice (whose statute referred to “the general principles of law recognized by civilized nations.”<sup>73</sup> The Court heard cases of international law that arose regarding international conventions and treaties, as well as cases submitted directly by state members of the League.

Nine years after the League of Nations was formed, the 1928 Kellogg-Briand Pact, (officially named the “General Treaty for Renunciation of War as an Instrument of National Policy) was signed by Germany, the United States, France, Great Britain, Japan, and the Soviet Union, among other states. The signatory states asserted that the pact was to “unit[e] the civilized nations of the world in a common renunciation of war as an instrument of their national policy.”<sup>74</sup> The Pact pledged to conduct foreign relations “only by pacific means.” By this measure, states were consenting to give up their sovereign rights to wage war, a last attempt for positivism’s defense of sovereignty.

Although the Kellogg-Briand Pact made war *illegal*, it did not make it *criminal*. In other words, the pact made no provisions for punishing perpetrators of illegal wars. Both leaders and international lawyers were aware of this gap. The only change that resulted from the Pact was that states simply stopped making declarations that they were going to war.<sup>75</sup>

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<sup>73</sup> Article 38, Statute of the Permanent Court of International Justice, (Dec. 16, 1920), reprinted in *The Permanent Court of International Justice: Statute and Rules*, (Leiden: Sijthoff, 1922).

<sup>74</sup> “Kellogg-Briand Pact,” *League of Nations Treaty Series*, Vol. 94, signed in Paris, Aug. 27, 1928, p61.

<sup>75</sup> See, e.g. United States House Committee on Foreign Affairs, “Review of Japan’s War Activities in Violation of the Kellogg-Briand Pact,” 72 H.J.Res. 317; 72 H.J.Res. 282 (1932).

## **Chapter 2: Three Eastern European Jews from the Russian Borderlands Who Defined International Law**

### ***Aron Trainin: Rebellious Student and Brilliant Legal Mind***

Sitting at the confluence of the Dvina River and the Vitba, the latter of which gives the city its name, Vitebsk had been a center of Hasidic Jewish culture since the 1730s.<sup>1</sup> In 1772, with the first partition of Poland, Vitebsk became part of the Russian Empire. Tsar Nicholas I (1825-1855) simultaneously sought to integrate Jews through military conscription and codified established Jewish residential separateness with the Pale of Permanent Jewish Settlement, roughly along the lines of the old western border of the Polish-Lithuanian Commonwealth.<sup>2</sup> Just to the west of the Russian empire's Pale of Settlement sat Lemberg, formerly part of Poland but after 1772, the capital of the Austrian Habsburg Kingdom of Galicia and Lodomeria and therefore an entirely different legal order under which Polish Jews lived.

On June 26, 1883 Moshe Aron Naumovich Trainin was born to a Jewish merchant family in Vitebsk.<sup>3</sup> Over the course of the nineteenth century, Vitebsk experienced great economic and cultural development in part because of its location. Close to the forests, which could be used to build railroads and ships and produce paper, Vitebskers were able to ship their exports West by the Dvina river and then north through the Baltic Sea.<sup>4</sup> In the 1860s, the Russian empire began building a network of railroads, and Vitebsk became a major rail junction, linking Vitebsk to St. Petersburg in the north, Kiev and Odessa in the south, Moscow to the east,

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<sup>1</sup> Vitebsk was also the hometown of Menachem Mendel, a Hassidic leader featured in many of Martin Buber's *Tales of the Hasidim*.

<sup>2</sup> Benjamin Nathans, *Beyond the Pale: The Jewish Encounter with Late Imperial Russia*, (Berkeley: University of California Press, 2002), 27-29.

<sup>3</sup> Until 1918, the Russian Julian calendar was twelve days behind the Gregorian calendar in the nineteenth century and thirteen days behind in the twentieth century. Unless noted otherwise, dates prior to 1918 are given according to the old calendar. Under the Gregorian calendar, Trainin's birth was on July 8, 1883.

<sup>4</sup> Benjamin Harshav, *Marc Chagall and His Times*, (Stanford: Stanford University Press, 2004), 25- 26

and Riga to the west.<sup>5</sup> The railroads further propelled Vitebsk's economic and population growth, and Vitebskers also experienced the cultural fruits of their fortuitous location. The Vitebsk railway station was a natural stopping point for troupes of traveling artists and actors from Moscow and St. Petersburg, contributing to the cultural vibrancy of a city that by most measures one would have considered provincial.<sup>6</sup> In 1898, the city welcomed electric powered streetcars, the first of a city of its size in the Russian empire (following only Moscow, St. Petersburg, and Kiev), further cementing Vitebsk's status as a relatively sophisticated provincial capital.<sup>7</sup> Vitebsk was not simply home to the Hasidic Judaism depicted in the paintings of Marc Chagall, Vitebsk's most famous native son, but a lively, multicultural city, and home to socialist movements representing Poles and Russians, but especially vibrant were Jewish socialist movements, including the Bund. This was the environment in which Trainin was raised.<sup>8</sup>

On the other hand, the romantic portrayal of Vitebsk in Chagall's paintings was tempered by a grimmer, grittier reality of a rapidly industrializing provincial city. Samuil Khasin, a Jewish Vitebsker and contemporary of Trainin's, describes his hometown with dispassionate realism:

There was extreme overpopulation, both overall across the region and in individual houses. Very large families—ten or more children were typical. Large excess of labor and the corresponding unemployment. Unsanitary conditions, absence of plumbing, electricity, etc. Hardship of everyday life led to high infant mortality. Religious prohibitions on birth control led to high birth rate. Small brick houses were seen only in the center of the city. Surrounding them were log houses, pitched closely together. During the fall and the spring, the roads turned into deep mud.<sup>9</sup>

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<sup>5</sup> Harshav, 26.

<sup>6</sup> Aleksandra Shatskikh, *Vitebsk*, (New Haven: Yale University Press, 2007), 2-3.

<sup>7</sup> Shatskikh, 3.

<sup>8</sup> Vitebsk is a large part of Chagall's memoir *My Life*, which he wrote in the years 1921-1922. In the memoir Chagall refers to Vitebsk as "My sad, my joyful town!" in addition to dedicating the book to it. Marc Chagall, *My Life*, (New York: Orion Press, 1960), 11. Chagall first wrote his memoir in Russian, his wife Bella translated the memoir into French, the language in which it was first published as Marc Chagall, *Ma Vie*, (Paris: Editions Stock, 1931). Though Chagall described his hometown with fondness, he does not ignore the realities of life in Tsarist Russia, detailing a pogrom he witnessed as a child. Chagall, 38.

<sup>9</sup> The Memoirs of Samuil Khasin (1905-1979), ed. Elisheva Kott and Alexander Kott, published as *A Wedding in Darkness: One Life in the Twilight of Russian Jewish History*, (New York: Writers Club Press, 2003), 5.

Marc Chagall and other Vitebsk contemporaries of Trainin, like Khasin, have also described the antisemitic violence that they experienced as children, leaving no doubt that Vitebsk did not escape the pogroms that occasionally engulfed towns in the Pale of Settlement at the time.<sup>10</sup> And yet Vitebsk was a majority Jewish city, in which even many non-Jews spoke Yiddish, the most common language of the city.<sup>11</sup>

One of the most influential tsarist institutions shaping Jewish policy was Nicholas I's "Jewish Committee."<sup>12</sup> In 1840, Count Pavel Kiselev, who ran the committee from 1840 until 1863, advised Tsar Nicholas that Jews must be "transformed" prior to integration into Russian society.<sup>13</sup> One of Kiselev's proposed "transformations" of Jewish society would incorporate Jews into the longstanding system governing Russian imperial order, the *soslovie*. At the time, Russian society was based on a hierarchy of "estates" (*sosloviia*). At the top were nobility, then the clergy, urban dwellers and at the bottom, rural dwellers (peasants), who made up the vast majority of Russia's subjects. Within these broad categories there were more specific demarcations. For example, urban dwellers included distinguished citizens (by hereditary and by personal achievement), merchants, urban commoners, and craftsmen.<sup>14</sup> Jews were incorporated into the *soslovie* system, most of whom fell into the category "urban dwellers." But special privileges, including the freedom to live outside the Pale, were granted to select higher status categories among urban dwellers, who had "useful" professions, such as merchants. The

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<sup>10</sup> Khasin, 37, and Chagall, 38.

<sup>11</sup> Khasin, 6.

<sup>12</sup> See Hans Rogger, *Russia in the Age of Modernisation and Revolution, 1881-1917*. London and New York: Longman, 1983. See also his *Jewish Policies and Right-Wing Politics in Imperial Russia*, (Berkeley and Los Angeles: University of California Press, 1986.)

<sup>13</sup> Nathans, 32-33.

<sup>14</sup> For more on *soslovie* see Greg Freeze, "The Soslovie (Estate) Paradigm and Russian Social History," *American Historical Review*, Vol. 91 (1986), 11-36; Alison K. Smith, *For the Common Good and Their Own Well-Being: Social Estates in Imperial Russia*, (Oxford: Oxford University Press, 2014); Elise Kimerling Wirtschafter, *Structures of Society: Imperial Russia's "People of Various Ranks"* (DeKalb: Northern Illinois University Press, 1994); and Michael Confino, "The *Soslovie* (Estate) Paradigm: Reflections on Some Open Questions," *Cahiers du monde russe* Vol. 49, no. 4 (2008): 681-699.

majority of Jews lived in penury, and they lacked special privileges and were frequently at a heightened risk of being drafted.<sup>15</sup>

In spite of the relative advantages for higher-status Jews, they were still limited by other antisemitic rules in the Russian empire, especially after the assassination of Tsar Alexander II. The reign of his son, Alexander III, ushered in a new era of conservatism, including increased promotion of the Russian Orthodox Church and Russian nationalism in the form of the May Laws. This new conservatism boded ill for some of the recent liberalization of Russian society under his father, who was known as the “tsar liberator” for freeing the serfs from their slave-like status and as a champion of tolerance for Jews in Russia. For example, while Jews accessed with great fervor schools and universities under his father’s reign, the 1880s witnessed the birth of the *numerus clausus*, a system of anti-Jewish quotas on entry into schools, universities, and certain professions. The Ministry of Education established anti-Jewish quotas that loosely reflected the percentage of the Jewish population. The quotas were controversial, and thus were implemented by decree, rather than law. In this way, the quotas could be explained away as being temporary, when in fact they survived as long as the tsarist government did.<sup>16</sup>

Jewish students were only allowed to be 10% of gymnasia (advanced high school) and university students within the Pale of Settlement, although in many cities, like Vitebsk, the Jewish population exceeded 50%, making admission much more competitive for Jewish students. Harsher still, the quota was only 5% for institutions outside the Pale. But the strictest quota was reserved for Moscow and St. Petersburg, home of the most respected Russian

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<sup>15</sup> Nathans, 34, 52-59. In 1859, Jewish merchants of the first guild were granted equal rights with Russian merchants, including the right to live outside the Pale and the right to own land, and Jewish merchants of the second and third guilds were allowed temporary residence. As a result, the number of Jews of a higher guild increased outside the Pale, especially in Moscow and St. Petersburg.

<sup>16</sup> *Ibid*, 267.

institutions of higher learning, for which only 3% of the students could be Jewish.<sup>17</sup> It should also be noted that the lower quotas numbers in Moscow and St. Petersburg might better reflect the sheer absence of Jews in the heartland of the empire, which might mean that clever Jewish families might seek better opportunities to ensure their children's education by sending them, illegally, into the heartland of Russia.

While many universities exceeded the allowed quotas in fact, the quotas tended to be more strict at the gymnasium level. As a result, many Jewish parents sent their children to less competitive places, so that their children had a better chance to be admitted. As the scholar of Russian Jewish history Benjamin Nathans summarized, "Ambitious parents—now, more often than not, ardent proponents rather than foes of secular education—increasingly took the step of sending their sons to secondary schools outside the Pale, where by and large the Jewish presence was sparse, and the chances for admission therefore greater, despite the more restrictive quota."<sup>18</sup>

Trainin's parents were one such example of these ambitious parents, and Trainin and his family moved to Kaluga, a town 100 miles southwest of Moscow and, importantly, located *outside* the Pale of Settlement. Trainin recalled that "as a Jew [back in Vitebsk] it was very difficult to enter secondary school," so "I went to study in Kaluga and enrolled in the second class of the Kaluga gymnasium," implying that his family moved to Kaluga for Trainin's education.<sup>19</sup>

But how was it possible for Trainin's family to move "beyond the Pale"? Because of Kiselev's reforms of the 1840s, Trainin's father was designated as merchant class and therefore as "useful," thus allowing the family to move beyond the residential limits of the Pale. The family's move outside the Pale was not uncommon for those rare Jews possessing the status of

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, 275.

<sup>19</sup> ARAN, f. 1711, op. 1, d. 8, l. 1.

merchant class. While the majority of Jewish families responding to the social dislocation that came with the rapid industrialization of the late nineteenth century moved west, in other words, emigrating from the empire, the Jewish merchant class and the university graduates—those with special privileges in the Russian empire—were underrepresented in those leaving the empire.<sup>20</sup> Trainin’s migration to Kaluga, was thus representative of his privileged class background.

Given his location in Kaluga, outside the Pale, Trainin likely experienced culture shock when compared with Vitebsk’s vibrant Jewish life. Compounding his geographic dislocation, Trainin’s father died shortly after the move, leaving the family in financial trouble and eventually forcing young Trainin to give private tutoring lessons to support himself.<sup>21</sup> Busy though he was, Trainin flourished in academics, graduating from Kaluga’s *gymnasium* in 1903 with a gold medal, and then from Moscow State University (*Moskovskii gosudarstvennyi universitet*, MGU) in 1908, receiving his degree from the faculty of law.<sup>22</sup> While a law student at MGU, Trainin’s required courses very much reflected a classic Western European legal education, which included the history of legal thought, going back to Roman law, as well as criminal law and international law. Because he was learning in a Russian university, he naturally also studied the history of Russian law.<sup>23</sup>

Trainin’s time at university corresponded with the height of the student movement at MGU. Trainin took part in the active student revolutionary movement, the *studenchestvo*.<sup>24</sup> Many student protests were motivated by the war with Japan that commenced in 1904. On

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<sup>20</sup> Simon Kuznets, “Immigration of Russian Jews to the United States: Background and Structure,” *Perspectives in American History*, Vol. 9 (1975), 102-105. I become aware of this source thanks to Nathans, 87.

<sup>21</sup> ARAN, f. 1711, op. 1, d. 8, l. 1.

<sup>22</sup> *Ibid.*

<sup>23</sup> A. N. Naumov, *Iz utselevshikh vospominanii, 1868-1917*, (“*Of the Surviving Memories*”) (New York, 1954), vol. 1, 82. Aleksandr Naumov was a Russian politician and Moscow University law graduate. Naumov, along with Vladimir Lenin, was an 1887 graduate of Simbirskii gymnasium. Lenin received the class gold medal, and Naumov the silver. After the October Revolution, Naumov moved first to the Crimea, and then to exile in France.

<sup>24</sup> ARAN, f. 1711, op. 1, d. 8, l. 1-2

October 15, 1904, tsarist troops and railway porters, enraged by what they saw as the students' lack of Russian patriotism, attacked and beat MGU students who were observing their classmates leaving for the Russo-Japanese front from Moscow's Yaroslavl' station, the main rail hub for points east. This violence against peaceful students contributed to an outbreak of student unrest and demonstrations in Moscow.<sup>25</sup> On December 5, the police attacked MGU student demonstrators, and in response MGU students called a strike against police brutality. On December 11, many MGU junior faculty members released a statement critical of the tsarist government, thereby lending support to the student protests. The faculty members declared that "normal academic life is possible only if the whole political structure is reconstructed on the basis of personal inviolability, freedom of conscience, freedom of the press, and freedom of speech, all guaranteed by the participation of popular representatives in the legislative process."<sup>26</sup>

While Trainin and the rest of his student cohort were at home with their families over winter break, soldiers fired upon peaceful demonstrators attempting to present a petition to the tsar (which called for, among other things, improved working conditions and better wages, universal suffrage, and an end to the Russo-Japanese war). The massacre became known as Bloody Sunday (*Krovavoe voskresen'e*), and estimates of those killed range from several hundred to several thousand.<sup>27</sup> In reaction to Bloody Sunday, MGU students joined workers around the empire, voting to strike until September, 1905.<sup>28</sup>

Though MGU briefly reopened in the fall, by October students were increasingly the subjects of attacks and pogroms by the Black Hundreds, a Russian nationalist movement that supported the autocracy. According to Samuel Kassow, "It was now dangerous to walk the

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<sup>25</sup> Kassow, 191.

<sup>26</sup> *Ibid*, 193.

<sup>27</sup> Harrison E. Salisbury, *Black Night, White Snow: Russia's Revolutions, 1905-1917* (Garden City, N.Y.: Doubleday, 1978), 125.

<sup>28</sup> Kassow, 195.

streets in student uniform, and professors appealed for donations of “civilian” clothing to enable students to avoid vicious beatings by roaming gangs of the Black Hundred thugs.”<sup>29</sup> On October 15, a group of butchers and milkmen, out of work due to striking, swarmed the MGU campus and viciously beat anyone they suspected of being a student.<sup>30</sup>

In response to these events, MGU faculty decided to close the university, although members of the *studenchestvo* claimed that they closed the school not to protect students, but to avoid further student protests. Whatever the reason, MGU remained closed for a whole year until September 1906. In spite of the university’s temporary closure, the *studenchestvo* remained as active as ever, and Trainin was a key participant.

According to Trainin’s biographical materials I found in the Archive of the Russian Academy of Sciences (ARAN), the Social Democratic faction of the student body supported Trainin’s successful election to the Chairmen of the Council of Chiefs of the Moscow State University student body in 1906. Trainin claimed to have been arrested for participating in student demonstrations on two separate occasions.<sup>31</sup> Elsewhere in Russia, the 1905 revolutionary movements—made up not just of students but of workers, peasants, intellectuals, soldiers, and nationalist groups—resulted in a variety of reforms, including the creation of the State Duma (a legislative assembly), the granting of certain civil rights including freedom of speech, and the creation of workers’ soviets (organizations intended to act for workers’ interests).<sup>32</sup>

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<sup>29</sup> *Ibid*, 271.

<sup>30</sup> *Ibid*.

<sup>31</sup> ARAN, f. 1711, op. 1, no. 8, l. 1-2. While Trainin may have exaggerated his Bolshevik ties, there is archival evidence that Trainin was supported by the Social Democrats in the student movement, which included the Bolsheviks. It seems more likely that the Social Democrats supported Trainin in general, rather than Trainin being explicitly affiliated with the Bolshevik faction of the Social Democrats, in spite of his biographical emphasis on Bolshevik support.

<sup>32</sup> For more on revolutionary upheaval in early twentieth-century Russia see Abraham Ascher, *The Revolution of 1905: A Short History*, (Palo Alto: Stanford University Press, 2004).

In spite of the activities of the *studenchestvo* during the 1905 revolution, Trainin's remaining university years—1906-1908—saw the decline of the *studenchestvo* as the tsar agreed to a number of key reforms. More students entered university in increasing numbers, and there was no longer a coherent *studenchestvo* capable of acting together.<sup>33</sup> Along with the rise and decline of the *studenchestvo*, despite the 3% quota on Jewish university students at Moscow's universities, Trainin's MGU days witnessed a tripling in the number of Jewish students. By Trainin's fourth year, Jewish students comprised 10% of the incoming class.<sup>34</sup>

After Trainin graduated in 1908, he remained at MGU to prepare for a professorship in the Department of Criminal Law.<sup>35</sup> That he should aspire to become a professor was no surprise—even before he graduated Trainin had already published several legal articles while a student, the first of which focused on the status of Jews in the Russian Empire.<sup>36</sup> The second article, published in the prestigious legal journal *Pravo* (Law) revealed an early interest in criminal business law, as he examined what role trusts and cartels played in criminal law.<sup>37</sup> Many of Trainin's early published works suggest that he was both a socialist sympathizer and someone with a special interest in the legal status of Jews in the Russian empire.<sup>38</sup>

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<sup>33</sup> Kassow, 305.

<sup>34</sup> Nathans, 296.

<sup>35</sup> ARAN, f. 1711, op. 1, no. 8, l. 1.

<sup>36</sup> Originally published as “Vopros o klassovoi differentsiatsii evreev v Rossii, sovremennaia zhizn',” *Pravda*, May 1906: 33-54, as found in ARAN, f. 1711, op. 1, d. 9, l. 1.

<sup>37</sup> Tresty i karteli i ugololovnyi zakon, *Pravo*, 1906, n. 37-30, ARAN, f. 1711, op. 1, no. 9, l. 1.

<sup>38</sup> Originally published as “Evrei i voinskaia povinnost'” in *Russkie vedomosti* (*Russian Gazette*) and “Klassovaia differentsiatsia evreev v Rossii,” *Pravo*, and “Klassovaia bor'ba i nakazanie v istorii russkogo prava,” ARAN, f. 1711, op. 1, no. 9, l. 1. The archival list of Trainin's published works, apparently composed after Trainin's death in 1957, omits those articles with a Jewish focus such as “The Jews and Military Service” (Evrei i voinskaia povinnost') and “Class Differentiation among Jews in Russia” (Klassovaia differentsiatsia evreev v Rossii). Compare ARAN, f. 1711, op. 1, no. 9, l. 1-3 with the *Elektronnaia evreiskaia entsiklopediia* (Digital Jewish Encyclopedia), (Jerusalem: The Society for Research on Jewish Communities, 2016), <http://www.eleven.co.il/>, supported by the Claims Conference, The Memorial Foundation, and the Avi Chai Foundation and based on The Shorter Jewish Encyclopedia, (Jerusalem: Hebrew University, 2005).

During Trainin's early years as a professor, he also likely paid attention to a legal case that received a lot of media attention featuring a Jewish lawyer from his hometown of Vitebsk.<sup>39</sup> Said attorney, Arnold Gillerson, was furious that local officials were not put on trial for their role in inciting a 1906 pogrom in Bialystok. Instead, the authorities blamed violence between Christian and Jewish workers for instigating the pogrom. Gillerson gave a speech in which he advocated for all "proletariats of the world, unite," whether Christian or Jewish, against the "bourgeois and the bureaucracy," who wanted the workers to "devour one another."<sup>40</sup> Gillerson was brought up on charges of violating an 1891 law that prohibiting inciting one social group against another. The case went to trial, and Gillerson was found guilty and sentenced to one year in prison. While Trainin did not write about the Gillerson case, it is likely that he noted the way in which the incitement law—originally designed to maintain order by prosecuting the instigators of pogroms—was turned on its head and used to prosecute Gillerson. In the Russian empire, even laws intended to protect Jews could be used against them.

Further demonstrating his anti-tsarist politics, in 1912 Trainin resigned from his position at MGU, along with a number of prominent professors, as a part of the "Kasso Case" (*Delo Kasso*).<sup>41</sup> L.A. Kasso, a political archconservative appointed to serve as Minister of Education, had been on the legal faculty at MGU, so it is almost certain that Trainin had met him before his appointment.<sup>42</sup> One faculty colleague described Kasso as "a man who, though himself a professor, was by his spirit and breeding absolutely alien to the spirit and traditions of the

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<sup>39</sup> Gillerson was born in Vitebsk in 1864, see *Jewish Encyclopedia of Russia (Rossiiskaia evreiskaia entsiklopediia)*, (Moscow: EPOS, 1995).

<sup>40</sup> Stepanov, 24.

<sup>41</sup> ARAN, f. 1711, op. 1, no. 22, l. 1.

<sup>42</sup> See, e.g. Mikhail Novikov, "Moskovskii Universitet' v pervyi period' bol'shevitskogo rezhima," *Moskovskii Universitet', 1755-1930: Yubileinyi sbornik'* (Paris: Sovremennii zapiski, 1930), 156-192, 159.

Russian universities.”<sup>43</sup> Instead of valuing knowledge and the independence of universities, Kasso was dedicated to “killing their independence and originality” as the Minister of Education.<sup>44</sup>

As Minister, Kasso put out a number of circulars restricting university autonomy. As a result, over one hundred teachers, fully 1/3 of the university faculty, as well as MGU employees were dismissed or resigned in what was labelled the “destruction of Moscow University.” One of the primary controversies leading to the restriction on university autonomy was their collective failure to adhere to the Ministry’s anti-Jewish quota system.<sup>45</sup> Kasso also resurrected an 1884 Statute (that had in the recent past been unenforced) that required universities to receive government approval prior to hiring professors, making Jewish employment in the academy, already difficult, essentially impossible. The Kasso case was especially devastating to MGU’s criminal law faculty, as Trainin resigned along with Mikhail Gernet, N.V. Davydov, and Nikolai N. Polianskii, leaving only two professors remaining.<sup>46</sup> Trainin was one such individual who resigned in reaction to Kasso’s enforcement of the last imperial antisemitic and reactionary reforms, although he also potentially sought to avoid the public humiliation of being fired for being Jewish.

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<sup>43</sup> Kassow, 347, fn12. Kassow quotes Professor P.I. Novgorodtsev and cites P.N. Ignatiev, P.I. Novgorodtsev, and D.M. Odinet, *Russian Schools and Universities in the World War*, (New Haven, CT: Yale University Press, 1929), 149.

<sup>44</sup> *Ibid.*

<sup>45</sup> One factor animating the government’s desire to enforce the quotas was concern over Jewish student involvement in the student movement (*studenchestvo*).

<sup>46</sup> M.N. Tikhomirov, M.T. Beliauskii, D.I. Gordeev, S.S. Dmitriev, G.A. Novitskii, B.I. Spasskii, & A.V. Fadeev, eds., *Istoriia Moskovskogo Universiteta*, vol. 1, (Moskva: Moskva Universiteta, 1955) 465. For an overview of Mikhail Gernet, a socialist criminologist, see Zygmunt Ronald Bialkowski III, “The Transformation of Academic Criminal Jurisprudence into Criminology in Late Imperial Russia,” (Ph.D. diss., University of California-Berkeley, 2006), 174-180 and Tikhomirov, *et al*, eds., *Istoriia Moskovskogo Universiteta*, vol. 1, 465, and for more on Polianskii, see Bialkowski, 180-182 and Tikhomirov, *et al*, eds., *Istoriia Moskovskogo Universiteta*, vol. 1, 465. Trainin had a long relationship with Gernet—Gernet edited an educational pamphlet Trainin co-authored in 1908 on criminal law and continued to co-author works with Trainin up until 1927. See Mikhail Gernet, ed., *Seminarii po ugovnomu pravu*, (Moskva : Tip. Imp. Moskovskogo Univ., 1908).

If his Jewish background was not enough to warrant his dismissal from the law faculty, Trainin's left-wing credentials were of potentially greater concern to the conservative tsarist government.<sup>47</sup> In his autobiographies from the Soviet period, Trainin never explicitly states that he was a Bolshevik, and while the archives support his claim that he was supported by the Social Democrats—who had spilt into the Bolsheviks and Mensheviks in 1903—during his student days and that he was firmly anti-tsarist, no archival evidence exists to suggest that Trainin was a member of the Bolshevik party. While many of the professors who resigned in the Kasso case were in fact members of the Bolshevik faction of the Social Democratic Party, they also included other socialists and even liberals. It seems likely, given Trainin's affliction with the Social Democrats and later silence on the issue, that he was a Menshevik.

Following the Kasso Case, Trainin (along with many of his other former MGU criminal law colleagues) taught at the People's University A.L Shaniavski, a Moscow-based university named for a Russian army general who donated his fortune made in goldmines, and bequeathed his home, to create a Moscow university that would be free and open to everyone regardless of religion, gender, or economic background.<sup>48</sup> An alternative to the tsarist state university system, Trainin's embrace of the People's University is both another example of his left-wing politics (though Shaniavski University made an effort to hire a number of "Kasso Case" professors), as well as the limited job opportunities available for him in the tsarist state universities as a leftist Jewish law professor.<sup>49</sup> Trainin also continued to be a prolific writer, publishing an average of

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<sup>47</sup> See, e.g. ARAN, f. 1711, op. 1, no. 8, l. 2; ARAN f. 1711, op. 1, no. 22, l. 1.

<sup>48</sup> Irina Sotnikova, "Narodnyi universitet Shaniavskogo: Traditsiia blagotovitel'nosti na nive prosveshcheniia" ("The Shaniavski People's University: The Tradition of Charity in the Field of Education") in *Istina i Zhizn'* ("Truth and Life"), Vol. 6., 2006, available at <http://www.istina.religare.ru/article292.html>, (last accessed Sept 18, 2016). Such "People's Universities" would become more common in the Soviet Union. See David Currie Lee, *The People's Universities of the USSR*, (New York: Greenwood Press, 1988). See also Kassow, 367-368.

<sup>49</sup> See Irina Sotnikova, "Souz nauki i predprinimatel'stva: Universtitet Shaniavskogo i ego popechiteli," ("The Alliance of Science and Business: Shaniavski University and its trustees) in *Istina i Zhizn'* ("Truth and Life"), Vol. 1-2, 2007, available at <http://www.istina.religare.ru/material379.html> (last accessed Sept, 18, 2016), for an

four legal articles per year in the years immediately following the Kasso Case.<sup>50</sup> Throughout World War I, Trainin stayed in Moscow teaching at Shaniavski and published widely, sometimes collaborating with his former MGU colleague Mikhail Gernet, a criminal sociologist.

Trainin's association with Gernet may have encouraged his own interest in criminal sociology, including the recently identified problem of "hooliganism (*khuliganstvo*).” In 1914 he was cited widely as an expert on the phenomenon and he critiqued the growing trend toward labelling it a crime. He argued that the problem of hooliganism was essentially created by the police and sensational newspapers, and that the resulting attempt to criminalize hooliganism was “full of serious flaws,” including indeterminate sentencing and vagueness.<sup>51</sup> According to Trainin, this vagueness in the definition of hooliganism could easily lead to repression.<sup>52</sup> Trainin's critique of hooliganism was prescient as it became a catch-all term for the tsarist (and then Soviet) government to criminalize behavior that was deemed improper.<sup>53</sup>

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interesting overview of the creation and life of the Shaniavski People's University. The university closed in 1920 (though it had ceased being independent of the new revolutionary government in 1918) and became an academy named for Yakov Sverlov, the then-recently deceased Bolshevik leader. Today the university grounds house the Russian State Humanitarian University. See also Kassow, 367-368.

<sup>50</sup> ARAN, Fond 1711, op. 1, no. 9, l. 1-12.

<sup>51</sup> ARAN, f. 1711, op. 1, no. 1, l. 1-3. Trainin wrote a report on the subject of hooliganism, which he defined as a “purely psychological state like shame, fear, anger, and selfishness.” Trainin's report was for The Russian Group of the International Union of Penal Law, the elites of Russian criminologists. The Russian Group became an outlet for both liberal and socialist Russian professionals to express their dissatisfaction with the political decisions of the tsarist government.

<sup>52</sup> ARAN, f. 1711, op. 1, no. 1, l. 1. See also Joan Neuberger, *Hooliganism: Crime, Culture, and Power in St. Petersburg, 1900-1914*, (Berkeley: University of California Press, 1993) for an overview of the early identification of and reactions to hooliganism. “Hooliganism” became a pressing social problem in late imperial Russia, and continues to be identified as a problem to this day. See e.g. Brian LaPierre, *Hooligans in Khrushchev's Russia: Defining, Policing, and Producing Defiance during the Thaw*, (Madison: University of Wisconsin Press, 2012) for an example of “hooliganism” during Soviet times and “Moskovskogo politiskogo pokusal khuligan” (“Moscow policeman bitten by hooligan”), *Novaia Gazeta*, August 3, 2013, available at <https://www.novayagazeta.ru/news/2013/08/03/69729-moskovskogo-politseyskogo-pokusal-huligan> (last accessed November 19, 2016) for a recent example of the continued use of the term “hooligan” in Russia.

<sup>53</sup> See, e.g. David Shearer, *Policing Stalin's Socialism: Repression and Social Order in the Soviet Union, 1924-1953*, (New Haven & London: Yale University Press, 2009). Shearer notes that Soviet leaders used hooliganism was to criminalize homeless and unsupervised children in the 1930s as well as other socially marginal elements of society. Under a 1934 order, hooligans could be sentenced to concentration camps, and anti-hooligan campaigns sometimes swept up citizens who simply did not have their identifying documents (passports) on them. See Shearer, 53-57, 183-187, 202-203.

Trainin rode out the waves of tumult during the Great War, the collapse of the Tsar's regime, the Provisional Government, the Bolshevik seizure of power, and then the Civil War, all throughout, he continued working as a professor at Shaniavski until 1920, when he re-joined the law faculty at MGU in the new capital of Soviet Russia. Whether Trainin was somehow involved with revolutionary politics or the war effort, however, one can only speculate. If he was involved with the war effort in some way, it appears to have not been a politically fortuitous choice, as it was not mentioned in his Soviet-era official biography, where proper revolutionary comportment would have been a major asset. Nor did Trainin's decision to edit a short-lived journal focused on Jewish cultural life merit a mention in that official biography.<sup>54</sup>

In Trainin's birthplace of Vitebsk, the Revolution and resulting wars caused hunger, starvation and suffering. Vitebsker Samuil Khasin recalled: "Food products disappeared from the shops. Flour became a luxury. Meat and dairy products were unheard of. . . .Hunger approached. Rabbis permitted violations of the kosher laws. . . .Malnutrition killed many of our neighbors."<sup>55</sup> While the Revolution caused and exacerbated problems for many, Trainin saw his career soar to new heights. In 1920, he returned to MGU, now run by the new communist state. There, he became one of the first Soviet professors of criminal law, teaching courses on Soviet criminal law, criminal ethnology—which studied the social origins of crimes—and general and special aspects of criminal law.<sup>56</sup>

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<sup>54</sup> See ARAN, f. 1711, op. 1, no. 8, l. 1-2. See also *Novyi Put': ezhenedel'nik posviashchennyi voprosam evreiskoi zhizni* (*New Path: A Weekly Dedicated to Questions of Jewish Cultural Life*), in existence from 1916 until October 1917 and available on microfilm. Trainin is listed as an editor, though the journal's head editor and publisher was S.S. Kagan. The journal published articles by a variety of authors including one on Trainin's Vitebsk contemporary Marc Chagall, written by one of Trainin's MGU classmates.

<sup>55</sup> Khasin, 52.

<sup>56</sup> ARAN, f. 1711, op. 1, no.20, l. 3.

It is no coincidence that Trainin returned to MGU in 1920. That year, the Bolshevik government finally established control over the university.<sup>57</sup> In addition to Trainin, a number of previous MGU faculty who had been dismissed during the Kasso Case returned, including Trainin's occasional collaborator, the sociological criminologist Mikhail Gernet. While many MGU professors went back to their previous stance, fighting to establish university autonomy and freedom of thought just as they had under the tsar, their efforts were ultimately unsuccessful: the Bolshevik state harassed and arrested and harassed many of them, especially more conservative faculty.<sup>58</sup> In 1922, the so-called "Philosophers' Ship" carried around 160 intellectuals out of the country, including the influential Slavophile philosopher—today much admired by Vladimir Putin—Ivan Ilyin, who had been one of Trainin's fellow MGU law students, deporting them to eastern Europe.<sup>59</sup>

Trainin was actively responding to the suffering of those around him during the tumult of the times. He was involved in founding the Moscow chapter of the Red Cross in 1918, signaling an early interest with international law, specifically laws around war.<sup>60</sup> Trainin's interest in the Red Cross was out of step with the most prominent voices in early Soviet Russian law, especially given the Christian symbolism of the cross and the strident atheism of most Soviet legal minds. As explored in more detail in Chapter 3, early Soviet international law summarily rejected customary law. Because the Soviet Union was surrounded by capitalist states, so early Soviet international law suggested, the country should not be held to the same standards, and no

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<sup>57</sup> Vsevolod Stratonov, "Poteria Moskovskim' Universitetom' svobody," *Moskovskii universitet', 1755-1930: yubileinyi sbornik'*, (Paris: Sovremennyya Zapiski) 193-242, 193. See also the experiences of Mikhail Novikov, "Moskovskiy Universitet' v pervyi period' bol'shevitskogo rezhima," 156-192.

<sup>58</sup> See, e.g. the experiences of Mikhail Novikov, a zoologist who served as rector of Moscow University during the transition period from 1919-1920, and Vsevolod Stratonov, an Odessan-born astrophysicist who were both deported from Russia in 1922 on the "philosophers' ships" recounted in *Moskovskiy Universitet', 1755-1930: Uibileinyi sbornik'*, 156-242.

<sup>59</sup> See Lesley Chamberlain, *Lenin's Private War: The Voyage of the Philosophy Steamer and the Exile of the Intelligentsia*, (New York: St Martin's Press, 2007) for further reading on the philosophers' ships.

<sup>60</sup> GARF, f. 8419, op. 1, d. 67, l. 1-2. Trainin was one of five lawyers involved, out of the 52 founding members.

meaningful agreements could take place between capitalist states and the new socialist state. “Bourgeois” customary law was not appropriate for a new revolutionary state. Instead, the new state would only be bound by codified international agreements in the form of treaties law. Western governments understood this to be a rejection of international law in toto. This may have reflected a deeper truth about the claimed universalism of international law.<sup>61</sup>

In spite of Soviet rejection of customary international law, Trainin himself continued to teach and publish articles regularly. His two books from the 1920s focused on analyzing the texts of new Soviet criminal codes, demonstrating his investment in elucidating Soviet law and perhaps illustrating the lack of publishing opportunities for more theoretical works.<sup>62</sup> Trainin also analyzed the criminal codes of Germany, and the newly constituted states of Poland and Czechoslovakia.<sup>63</sup>

While on faculty at MGU, Trainin also worked from 1925 to 1938 at the All-Union Scientific Research Institute of Law (“All-Union” meant that the Institute represented all of the Soviet Union, rather than, for example, only the Soviet Russian Republic), and was appointed a professor of criminal law at the All-Union Academy of Law, where he worked on a variety of subjects in criminal law, including economic crimes.<sup>64</sup> Trainin’s writings also began reaching a wider Soviet reading audience in the mid-1930s, as he wrote several articles for the widely-read

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<sup>61</sup> Evgenii Pashukanis is usually considered representative of this negative approach towards international law.

<sup>62</sup> Trainin’s two main books published in the 1920s were 1924’s *Khoziaistvennye prestupleniia: tekst i kommentarii k st.126-141 ugovnogo kodeksa*, (*Economic Crimes: Text and Commentaries on criminal code st. 126-141*) (Moskva: Pravo i zhizn’, 1924), (although Trainin was not the book’s sole author, as other scholars also contributed commentaries) and *Ugovnoe pravo : obshchaia chast’* (*Criminal Law: General Part*) (Leningrad: Gosudarstvennoe izdatelstvo, 1925). Trainin also published a short study of proposed changes to the German criminal code. *Krizis nauk ugovnogo prava: bor’ba shkol vokrug Germanskogo proekta Ugolo. Kodeksa 1925g* (*The Crisis of Criminal Law: The Struggle of Schools around the 1925 German Draft Criminal Code*). (Moskva: Pravo i zhizn’, 1926).

<sup>63</sup> See e.g. ARAN, f. 1711, op. 1, no. 9, l. 5-9

<sup>64</sup> ARAN Fond 1711, opis 1, no. 8, l. 1-2. In 1924 Trainin’s comments on the economic crimes of the Soviet Russian criminal code were published, along with the code’s text. Aron Trainin, *Khoziaistvennye prestupleniia: tekst i kommentarii k st. st.126-141 ugovnogo kodeksa*, (Moskva: Pravo i zhizn’, 1924). An announcement of Trainin’s work was subsequently published in “*Novye knigi*,” *Izvestiia*, April 17, 1925, p7 showing that Trainin was of sufficient stature to merit mention in the Soviet state’s widely-read newspaper.

Soviet newspaper *Izvestiia*. This included an article on the law of asylum, a particularly suitable topic given the increasing number of refugees to the Soviet Union from Germany upon Hitler and Nazism's rise to power in 1933.<sup>65</sup> Trainin's private papers are not open to the public so more information about his personal life are unknown to researchers. We do know, however, that sometime during his professional success Trainin married a woman with whom he would conceive a daughter.<sup>66</sup>

### ***Hersch Lauterpacht: Zionist and Legal Advocate for Individual Rights***

Born in 1897, more than 500 miles further west and 15 years later than Trainin, Hersch Lauterpacht was raised in the Austro-Hungarian empire, specifically eastern Galicia, in Zhovka (Zolkiew) outside of Lwów by observant Jewish parents.<sup>67</sup> Like Trainin, his father, Aaron, ran a successful timber business and was well-known in the region as a leader of the Jewish cultural movement *Dor ha-haskala* (The Enlightened Generation).<sup>68</sup> The family moved to Lwów when Hersch was 10 years old, echoing the Trainin family's move to Kaluga for better educational opportunities. There, Hersch participated in the many activities of Jewish youth organizations, since there was much more political space for Jewish youth and cultural organizations in the Austro-Hungarian empire than in the post-1905 Reform Russian empire, let alone the pre-1905 Russian empire when Yiddish publications and other public forms of Yiddish culture were illegal.<sup>69</sup> Childhood friends later recalled that he was "at all times a brilliant student," who

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<sup>65</sup> "Pravo ubjenshcha," ("Asylum law,") in *Izvestiia*, July 18, 1936 p. 3. Trainin ends by concluding that the Soviet state had proved to be the "fatherland for the proletariats of all countries and the best sanctuary for all of progressive mankind (okazyvaetsia otechestvom proletariiev vsekh stran i vernym ubezhishchem vsego peredovogo chelovechestva)."

<sup>66</sup> ARAN, f. 1711, op. 1, no. 8, l. 7-8.

<sup>67</sup> Letter from Inka Katz to Eli Lauterpacht, *Life*, undated, Aug. 2001, p. 12.

<sup>68</sup> "Letter from Dr. Joseph Roth to Rachel Lauterpacht," *Life*, July 10, 1960, pp. 19-21.

<sup>69</sup> *Ibid*, "Letter from Dr. Fleisher to Rachel Lauterpacht," and "Letter from Dr. Lew Gilead, Tel Aviv, to Rachel Lauterpacht," in *The Life of Hersch Lauterpacht*, ed. by Elihu Lauterpacht, (Cambridge: Cambridge University

“played an active role in Jewish national circles.”<sup>70</sup> As a teenager, Lauterpacht joined the Zionist students’ organization, *Shachar* (The Dawn) and became a leader in their discussion groups, particularly lessons on Jewish history.

During the Great War, Lauterpacht was conscripted into the Austrian army, but he was somehow able to stay in Galicia working his father’s sawmill which had been requisitioned by the army. His town was frequently occupied and pillaged by foreign (usually Russian) military forces.<sup>71</sup> During the war, Lauterpacht enrolled in the University of Lwów, studying law, since it was more practical than his true loves of history and philosophy.<sup>72</sup>

It was in Lwów (then known as Lemberg) that Lauterpacht joined the Tseirei Zion movement (a Zionist and socialist labor movement meaning ‘Youth of Zion’) and later formed the Herzliyah Society of Zionist Youth. He then became leader of the undergraduate Zionist association in Lwów.<sup>73</sup> As a Herzliyah member, Lauterpacht met many important Jewish figures, including the philosopher Martin Buber, who delivered several lectures to the group.<sup>74</sup> Then, in November 1917, Lauterpacht was arrested by the Austrian government for arranging a demonstration celebrating the Balfour Declaration. The Declaration was a public statement by the British foreign minister, Lord Balfour, promising a Jewish national home in British Mandatory Palestine. When Lord Balfour made the declaration, Austria was still at war with Britain, and Lauterpacht was tried by a military court for supporting the British in the war against Austria. Luckily for Lauterpacht, the judge that he faced was also a Zionist (a Dr. Israel

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Press, 2010), 19-23. See Jeffrey Veidlinger, *Jewish Public Culture in the Late Russian Empire*, (Bloomington: Indiana University Press, 2009), 178 for the prohibition of Yiddish theater in the Russian Empire.

<sup>70</sup> “Letter from Dr. Joseph Roth to Rachel Lauterpacht,” July 10, 1960, in *Life of*, 19.

<sup>71</sup> *Ibid*, 19-21.

<sup>72</sup> Lauterpacht, *Life of*, 14-15.

<sup>73</sup> “Letter from Dr. Fleisher,” undated, in *Life of*, 22, see also *Life of*, 10.

<sup>74</sup> “Letter from Dr. Joseph Roth to Rachel Lauterpacht,” July 10, 1960, *Life of*, 21.

Waldmann) and understood the rationale for the celebration of the Balfour Declaration.

Lauterpacht was acquitted.<sup>75</sup>

The war and its resulting economic crisis led to a rise in antisemitic attacks in Galicia. Lauterpacht joined a voluntary Jewish militia, for which he patrolled Lwów 's Jewish quarters trying to protect its inhabitants from those attacks.<sup>76</sup> Following the war, Lwów became a part of independent Poland, which had been restored with territory from the three empires that had dismantled it in the eighteenth century. In 1920, despite signing an international document guaranteeing the protection of national minority rights, Poland allowed anti-Jewish quotas in practice, and Lauterpacht was apparently unable to graduate from Lwów University, stating, "I was unable to take my final examination because the university closed its doors to the Jews of Eastern Galicia."<sup>77</sup> After Polish universities were no longer an option for him, Lauterpacht sought refuge in Vienna, where he eventually obtained his doctorate in law.<sup>78</sup>

Lauterpacht was not alone in moving to Vienna. In the tumultuous environment of the post Great War eastern borderlands of Europe such migrations were common and Lauterpacht joined the many *Ostjuden* who had arrived from Galicia and the Russian Empire in search of greater opportunities beginning in the late 19<sup>th</sup> century. While Lauterpacht's Jewish cultural environment was likely very similar to Trainin's, geography dictated that he would move west instead of east. Moscow was a city rising in global prominence, the new capital of the first

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<sup>75</sup> *Life of*, 10. Like Lauterpacht, Waldmann was from Galicia. Waldmann was later involved in the 1924-1925 Steiger case (in which the Jewish Stanislaw Steiger was accused of conspiring to assassinate the Polish President Wojciechowski. The more likely conspirator, a Ukrainian nationalist named Teofil Olszański who was attempting to weaken Polish rule, escaped to Berlin. Waldmann, who had many contacts with Ukrainian statesmen, tried to convince Ukrainian leaders to admit to their role and quiet the antisemitism the allegations against Steiger had provoked. Waldmann failed in his diplomatic efforts but he testified about his negotiation's at Steiger's tribunal, an act that contributed to Steiger's acquittal.) In 1935 Waldmann emigrated to Palestine. Moshe Landau, "Waldmann, Israel." *Encyclopaedia Judaica*, edited by Michael Berenbaum and Fred Skolnik, 2nd ed., vol. 20, (New York: Macmillan Reference, 2007), 606.

<sup>76</sup> "Letter from Dr. Joseph Roth to Rachel Lauterpacht," July 10, 1960, *Life of*, 21.

<sup>77</sup> "Letter from Hersch Lauterpacht to Zionist Executive," June 10, 1920, *Life of*, 15-16.

<sup>78</sup> Lauterpacht, *Life of*, 26; see also "Letter from Professor Max Frankel (Hebrew University, Jerusalem), 1960 to Rachel Lauterpacht, in *Life of*, 25.

communist state. Vienna was a fallen imperial capital, suffering from rampant inflation. Most of the *Ostjuden* arriving in Vienna were driven from their homes by “harvest failures, cholera epidemics, overcrowding, and the pauperization in the cities,” in addition to increasing anti-Jewish economic boycotts, pogroms, and growing Polish nationalism.<sup>79</sup>

But Lauterpacht was different from the majority of *Ostjuden*—he was comparatively well-off and came for higher education, rather than out of desperation.<sup>80</sup> Nonetheless, he still retained the “the unmistakable accent of his origin.”<sup>81</sup> According to his professor Hans Kelsen, this accent was “under the circumstances which actually existed in Vienna at the time, a serious handicap and may explain the fact that he, in spite of his profound knowledge in all the subject matters taught at the Law School, received the degree of Doctor of Law by no more than a passing mark from the majority of examining professors.”<sup>82</sup> By the “unmistakable accent of his origin,” Kelsen implicitly refers to the stereotype held by some Viennese Jews as well as most non-Jewish Austrians that the *Ostjuden* were “loud, coarse and dirty, immoral, and culturally backward.”<sup>83</sup>

The University of Vienna, once relatively free of antisemitism, had become increasingly antisemitic beginning in the 1890s, a place “where liberal Christian professors like Hermann Nothnagel (known for their opposition to Jew-baiting) were subjected to vitriolic oral abuse by German nationalist students. Pan-German teachers in the Austrian universities and high schools

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<sup>79</sup> Robert Wistrich, *The Jews of Vienna in the Age of Franz Joseph* (Oxford: Oxford University Press, 1989), 50.

<sup>80</sup> Rachel Lauterpacht later recalled that “he had more money than the others [his fellow students]”. Rachel Lauterpacht, undated, *Life of*, 31.

<sup>81</sup> Hans Kelsen, “Tributes to Sir Hersch Lauterpacht,” *European Journal of International Law*, Vol. 8:2 (1997), 309-310 (originally published in *International and Comparative Law Quarterly*, Vol. 10, (1961)).

<sup>82</sup> *Ibid.* Lauterpacht wrote his dissertation on the Mandates Provision in the League of Nations Covenant.

<sup>83</sup> Wistrich, 51. Kelsen himself was of Jewish ancestry, and departed Vienna for Geneva in 1933, emigrating to America in 1940 to take a position at Harvard Law School before he moved to the political science department at the University of California-Berkeley. Though Kelsen wrote frequently about issues of international law, he is most well-known for his 1934 work *The Pure Theory of Law*, in which he presents a positivist theory of law.

publicly denounced Jews as ‘Asiatic invaders.’”<sup>84</sup> Jewish candidates were often blocked from becoming full professors, echoing the situation at tsarist era MGU on the eve of the Great War.<sup>85</sup> Outside of the university, the situation was not much better as Viennese Catholic priests condemned the “Semitic exploiters” and even made claims of blood libels, while politicians like Ernst Schneider took advantage of their parliamentary immunity to call for the expropriation and expulsion of Jews.<sup>86</sup>

If German nationalism defined the atmosphere at the University of Vienna, Jewish nationalism, including Zionism, also found a home there. Vienna was the alma mater of a number of prominent Jewish figures including the founding figure of Zionism, Theodor Herzl. Like back in Lwów, in Vienna, Lauterpacht was deeply involved with Jewish life at the university, and represented the interests of the Jewish university students as president of the Jewish *Hochschulausschuss* (a student organization that represented the thousands of Jewish students in Vienna).<sup>87</sup> It was as president of the *Hochschulausschuss* that Lauterpacht apparently met Paula Hitler, sister of Adolf, a housekeeper in one the kitchens managed by the *Hochschulausschuss*.<sup>88</sup>

Even as antisemitism came to define much of Viennese university life, Vienna in the interwar period was also home to a group of thinkers known as the “Vienna School of Legal

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<sup>84</sup> Wistrich, 259.

<sup>85</sup> *Ibid*, 173.

<sup>86</sup> *Ibid*, 259.

<sup>87</sup> “Letter from Professor Max Frankel (Hebrew University, Jerusalem), 1960 to Rachel Lauterpacht, in *Life of*, 25. Frankl wrote that as President Lauterpacht “deal[t] with the material and spiritual welfare of the 8-10,000 Jewish students in Vienna,” and he “had to appear before the University authorities and the authorities of the high schools to present to them the position of the Jewish students in Vienna. In spite of the fact that he was an Eastern Jew (Ostjude)—for whom the authorities as a rule had little respect—he managed to gain the attention and respect of all circles, non-Jewish and anti-Jewish, whom he came into contact in connection with his work.”

<sup>88</sup> “Letter from Dr. Fleisher,” undated, in *Life of*, 22.

Theory.”<sup>89</sup> The leader of this circle was one of Lauterpacht’s most influential professors, Hans Kelsen, author of the Austrian constitution and a strong supporter of individual rights. While Kelsen set the agenda for the circle, the group was characterized not by uniform opinions but by vigorous debates and critiques.<sup>90</sup>

While Lauterpacht was working on his doctorate, Kelsen was finishing up work on *Das Problem der Souveränität und die Theorie des Völkerrechts* (*The Problem of Sovereignty and the Theory of International Law*, or literally translated *The Problem of Sovereignty and the Theory of the Rights of Peoples*) where he interrogated the concept of sovereignty. Sovereignty, Kelsen said, did not reflect the state as the highest figure in the legal hierarchy, because the equality between states espoused by positivists presupposed a higher legal order to ensure its enforcement.<sup>91</sup> Furthermore, positivism was ultimately dependent on natural law ideas in its justification of state power, and natural law had its own problems, among which was its reliance on the morality of states.

As Kelsen would later expound in his *Reine Rechtslehre* (*Pure Theory of Law*), the “ought” statements common to natural law theorists were not sources of law, for law was a clearly delineated coercive system of power, not a system of vague morality.<sup>92</sup> Moreover international legal thought was too diverse in its ideas to speak of a “shared consciousness of law,” that both natural law advocates and positivists espoused.<sup>93</sup>

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<sup>89</sup> von Bernstorff, 276. Participants in this group were as varied as Hans Morgenthau, Alfred Verdross, and Adolf Merkl.

<sup>90</sup> *Ibid.*

<sup>91</sup> Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts*, (Mohr: Tübingen, 1920), 554. While Kelsen is often described as a positivist because of his support for codification, he does not conform to my definition of a “positivist” given his critiques of sovereignty, and thus I have not described him as such.

<sup>92</sup> See *Reine Rechtslehre* (*Pure Theory of Law*), first published in 1934 (Leipzig : F. Deuticke), and published in an expanded second edition (Wien: F. Deuticke, 1960).

<sup>93</sup> See von Bernstorff, 156, discussing Kelsen’s critiques of the “metaphysical dualism” that underlay both natural and positive law theories.

Lauterpacht was greatly influenced by Kelsen—as evidenced by the fact that he kept a picture of Kelsen in his London study for the rest of his life—accepting both Kelsen’s rejection of positivism and natural law as well as his embrace of individual rights. However, Lauterpacht also distanced himself from Kelsen’s worries about mixing morality and international law, stating that he “would rather err in the pursuit of a good life for all than glory in the secure infallibility of moral indifference.”<sup>94</sup> In other words, even though the establishment of universal law was fraught with problems, Lauterpacht believed that the idea of international law was inherently progressive, and could be made into a unified, universal system of law that would protect individuals.

After barely earning his law degree, Lauterpacht left Vienna for Britain in 1923, in part driven out by Vienna’s antisemitism and his resulting inability to obtain academic employment in Vienna.<sup>95</sup> Studying at the London School of Economics, Lauterpacht attached himself firmly to the post-Great War liberal internationalism which critiqued positivism’s emphasis on sovereignty and was advocated by the likes of Claude Mullins. Lauterpacht studied with Arnold McNair, whose picture (along with Kelsen’s) Lauterpacht kept in his study for the rest of his life.<sup>96</sup> Like Kelsen, McNair was a strong advocate for individual rights. McNair was also firmly steeping in the British common law tradition and the key role played by the judiciary.

Lauterpacht transferred these ideas to the realm of international law. Indeed, Lauterpacht become convinced of the importance of the judiciary in strengthening international law.

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<sup>94</sup> Hersch Lauterpacht, “Kelsen’s Pure Science of Law,” in *The Collected Papers of Hersch Lauterpacht*, ed. and arranged by Eli Lauterpacht, vol. 3, (Cambridge: Cambridge University Press, 1977) 418-419, originally published in *Modern Theories of Law*, (1933), 105-138.

<sup>95</sup> Kelsen too would leave Vienna in a few years, eventually settling in the United States. Kelsen left Vienna in 1930 for the University of Cologne in Germany. He left Germany after the Nazis rose to power in 1933, living in Geneva from 1934 until 1940, when he came to the United States, first teaching at Harvard Law School and then at the University of California-Berkeley. Kelsen had been born into a Jewish family, though he converted to Catholicism in 1905 and then to Protestantism in 1912.

<sup>96</sup> Hersch Lauterpacht, *Collected Papers*, vol. 3, 404.

International law, like domestic British law, required a judicial system that would hold states accountable and allow international law to develop through the court system.<sup>97</sup>

While both Kelsen and McNair likely influenced Lauterpacht in his attachment to liberalism, it seems that even prior to Lauterpacht's move west he had been drawn to British ideas and lifestyles, and as a teenager "was determined to spend some time at a western European university."<sup>98</sup> As McNair recalled, Lauterpacht's English language skills were "barely intelligible," when they first met, but when they met again only weeks later he was "staggered by his fluency in English."<sup>99</sup> While McNair's memory might have enhanced the degree of Lauterpacht's improvements, it was clear that Lauterpacht was eager to immerse himself in British culture. McNair later suggested that Lauterpacht's attraction to human rights was motivated in part to guarantee the sort of freedoms given by British common law.<sup>100</sup> Though McNair's own national bias may be showing in his statement, it is true that Lauterpacht doesn't appear to have written anything very critical of British law. Rather, in his work he firmly embraced British concepts of individual rights. Meanwhile, as Lauterpacht became enamored with British common law, he continued to investigate the history of legal thought, for example, in his 1927 article on "Spinoza and International Law," though his research topics varied widely in his early years.<sup>101</sup>

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<sup>97</sup> The civil law system, with its focus on codification, has more in common with positivists, when transferred to the international legal realm.

<sup>98</sup> Lord McNair, "Tributes to Sir Hersch Lauterpacht," *European Journal of International Law*, Vol. 8:2 (1997), 312 (originally published in *International and Comparative Law Quarterly*, Vol. 10, (1961)).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, 311.

<sup>101</sup> Hersch Lauterpacht, "Spinoza and International Law," *British Year Book of International Law*, Vol. 8, (1927), pp. 89-107. The seventeenth-century Dutch-Jewish philosopher, Lauterpacht writes, has much to say about international law and especially about state sovereignty. The Dutch-Jewish philosopher inadvertently contributed to the growth of positivism in international law in the nineteenth century through his acceptance of strict ideas of state sovereignty, where states were allowed to act without constraint. Lauterpacht wrote and published prodigiously on a variety of issues throughout the 1920s and 1930s. See, e.g. "Revolutionary Propaganda by Governments," *Transactions of the Grotius Society*, Vol. 13, (1927) pp. 143-164; "Spinoza and International Law," *British Year Book of International Law*, Vol. 8, (1927), pp. 89-107; "Revolutionary Activities by Private Persons against Foreign

In the 1930s Lauterpacht began lecturing at the University of London, and became a British citizen. There he published his most famous work in 1933, *The Function of Law in the International Community*. In this book, Lauterpacht articulates his vision of functionalism in international law, a form of legal thinking focused on the efficacy of international law.<sup>102</sup> In other words, to make states follow international law, law needed to disregard the formalist prescriptions of positivism, and instead track state's "interests," rather than "sovereign rights." This echoed Brierly and Mullins from the same time period. Such a prescription for international law marked a radical rejection of much of positivist legal thinking, especially its foundational focus on defining and protecting sovereignty as a human construct, which needed therefore to be codified by human actors.

Lauterpacht makes the focus of his attack clear from the very beginning of the book:

The function of law is to regulate the conduct of men by reference to rules whose formal—as distinguished from their historical—source of validity lies, in the last resort in a precept imposed from outside. Within the community of nations this essential feature of the rule of law is constantly put in jeopardy by the conception of the sovereignty of States which deduces the binding force of international law from the will of each individual member of the international community. This is the reason why any inquiry of a general character in the field of international law finds itself at the very start confronted with the doctrine of sovereignty.<sup>103</sup>

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States," *British Year Book of International Law*, Vol. 8, (1928), pp. 89-107; "Decisions of Municipal Courts as a Source of International Law," *British Year Book of International Law*, Vol. 10, (1929), pp. 65-95; "The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals," *British Year Book of International Law*, Vol. 11, (1930), pp. 134-157; "The So-Called Anglo-American and Continental Schools of Thought in International Law," *British Year Book of International Law*, Vol. 12, (1931), pp. 31-62; "Boycott in International Relations," *British Year Book of International Law*, Vol. 14, (1933), pp. 125-140; *The Development of International Law by the Permanent Court of International Justice*, (London: Longmans, Green, 1934); "Resort to War and the Interpretation of the Covenant during the Manchurian Dispute," *American Journal of International Law*, Vol. 28, Issue 1 (January 1934), pp. 43-60; "The Pact of Paris and the Budapest Articles of Interpretation," *Transactions of the Grotius Society*, Vol. 20, (1934), pp. 178-206; "Some Observations on Preparatory Work in the Interpretation of Treaties," *Harvard Law Review*, Vol. 48, Issue 4 (February 1935), pp. 549-591; "The Covenant as the Higher Law," *British Year Book of International Law*, Vol. 17, (1936), pp. 54-65; "Is International Law a Part of the Law of England?" *Transactions of the Grotius Society*, Vol. 25, (1939) pp. 51-88; and "Recognition of Insurgents as a De Facto Government," *Modern Law Review*, Vol. 3, Issue 1 (June 1939), pp. 1-20.

<sup>102</sup> Hersch Lauterpacht, *The Function of Law in the International Community*, (Oxford: Clarendon Press, 1933.)

<sup>103</sup> *Ibid*, 3.

In other words, the purpose of law is to act as a constraint on the conduct of men (even those who act as state sovereigns). The doctrine of sovereignty continually undermines the goal of international law by allowing individual states to consent to be bound by international law and then to decide whether to comply with international law—in a point of departure, Lauterpacht does not require that states be civilized. Sovereignty, and its requirement of consent, which has “found theoretical expression in the positivist doctrine,” going back to the days of Lassa Oppenheim, both limits the effectiveness of international law and mistakenly acts as its foundation.<sup>104</sup> Legal positivism, according to the functionalists, is at its heart tautological, resting on a sovereignty unable to be bound by outside forces, thereby undermining the very purpose of international law which is to constrain states, leading to a peaceful world. Throughout *The Function of Law*, Lauterpacht emphasizes the problems that reliance upon sovereignty has caused international law. For example, a lack of compulsory jurisdiction—compulsory jurisdiction requires that states accept a court’s authority to decide the matter in question—meant that many disputes between states were left unresolved, which could lead to violent conflict. But he doesn’t just critique past international legal approaches. He also suggests remedies.

One such remedy is to fill the “gaps” in international law. What are the “gaps” in international law? The text of a national law may not take account of all possible situations in which the law might reasonably apply. For example, the 4<sup>th</sup> Amendment to the United States Constitution prohibits unreasonable search and seizures to protect people’s ability “to be secure in their persons, houses, papers, and effects,” but does not mention electronic communications or stored digital content (as the Amendment was written in 1789, its authors could not envision such communications.) This is a “gap” in United States domestic law, that courts have remedied

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<sup>104</sup> *Ibid.*

by finding that the 4<sup>th</sup> Amendment applies to electronic communications, holding wiretapping to be a form of search and seizure. While “gaps” are not uncommon to national law, Lauterpacht alleges that the problem of gaps is “aggravated” in international law for numerous reasons including “the scarcity and indefiniteness of substantive rules of international law as the result of the comparative immaturity of the system, of the scarcity of precedent, both judicial and in the practice of States, and of the imperfections of the law-creating and law-amending process.”<sup>105</sup> In other words, international law is still too new to even have precedents to which contemporaries can refer back.

The issue of gaps is specifically “aggravated” by positivist approaches to international law. These approaches result largely from the positivist “insistence on the possibility of international tribunals having to refuse to adjudicate because of the absence of the applicable provisions of the law.”<sup>106</sup> In other words, positivists refuse to let international tribunals play a role in the ongoing development of international law. Through this insistence, positivism signifies “its futility as a legal theory.”<sup>107</sup> Because the positivist’s frequent refusal to submit to a judicial function stymies the development of international law by eliminating legal gaps, positivism reveals its complete unsuitability as a legal mode of thinking.

Now, how would Lauterpacht propose to fill those gaps? While “gaps” exist in domestic law, the judiciary mitigates their potential harm, because it can refer back to past precedent when adjudicating in the present. Domestically, “the sphere of law embraces ultimately every scope of human activity, either by regulating it directly or by affording it legal protection from forcible interference.”<sup>108</sup> Courts are “competent to deal with every possible claim, either by recognizing

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<sup>105</sup> *Ibid*, 70.

<sup>106</sup> *Ibid*, 65.

<sup>107</sup> *Ibid*.

<sup>108</sup> *Ibid*, 395.

the legal right to enforce it, or by forbidding acts of force calculated to give effect to it.”<sup>109</sup> By creating an analogy between domestic and international law, Lauterpacht argues that there is “no valid argument. . .in support of the existing rule of international law denying the obligatory jurisdiction of courts in settling dispute between States.”<sup>110</sup> Thus, in order to make international law “effective,” and to force states, like individual citizens of a state, to follow it, international law must embrace international courts—not as an option, but as an obligation. Lauterpacht’s primary interest then remains on how to make states comply with international law.

At the same time, in the wake of the Great War, Lauterpacht acknowledged that “uncompromising positivist tendencies have, to say the least, recently relaxed their hold upon international lawyers.”<sup>111</sup> By way of illustration, Lauterpacht notes that

Article 38, paragraph 3, of the Statute of the Permanent Court of International Justice, which authorizes the judges to apply, in the absence of conventional or customary rules of international law, ‘general principles of law recognised by civilized nations’, was therefore of a revolutionary character only by reason of its almost universal acceptance both by the signatories to the Statute and in other international instruments.<sup>112</sup>

It is also clear that Lauterpacht’s functionalism was not immune from a presumption of racial hierarchy and an implicit, if not explicit “standard of civilization.”<sup>113</sup> Although he was a Jew from the borderlands of eastern European empires, Lauterpacht was a European trained in law.

This made him part of a European international legal system that differentiated between laws that

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<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, 66.

<sup>112</sup> *Ibid.*

<sup>113</sup> Moreover, the proclaimed “universal” nature of international law and human rights, that of which is so associated with Lauterpacht, can be critiqued for its imperialistic assumptions about what it means to be human (for Lauterpacht, as with classical liberal thought, it is to be an individual). See, e.g. Pagden. Functionalism thought was not fully aware of the racist aspects of nineteenth century Western international law, which indicates, at best, a *less* outwardly vicious form of racism. Furthermore, the creation of the United Nations—that achievement of functionalism—was, as Mark Mazower has shown, heavily influenced by imperialist thought. Mazower *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations*, (Princeton: Princeton University Press, 2009). Moreover, the “standard of civilization” was again replicated in the charter of the International Court of Justice, which declared “the general principles of law recognized by civilized nations,” to be a source of international law and implicitly in the trusteeship system created by the United Nations. Statute of the International Court of Justice, Article 38, available at [http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER\\_II](http://www.icj-cij.org/documents/?p1=4&p2=2#CHAPTER_II)

applied to the civilized world and those that did not. In spite of the antisemitism he experienced and witnessed at the heart of “civilized” Europe, Lauterpacht was still a member of European civilization, or at least he wanted to be included.

While Lauterpacht writes sparingly about peace as the ultimate goal of international law in his book, following on the heels of the Kellogg-Briand Pact in 1928, achieving peace was clearly an underlying motivation of his work. The preface to this chapter reflects Lauterpacht’s goal of a unified legal system.<sup>114</sup> Only in a system in which international law is truly sovereign will it be related to a “higher legal principle,” namely the goal of using law to create a more peaceful world.<sup>115</sup>

### ***Raphael Lemkin, the 1933 Madrid Conference, and the Crime of Barbarity***

Lemkin was born in June 1900, three years after Lauterpacht and seventeen years after Trainin, to a Jewish family living on a farm called Ozerisko, outside Wolkowysk, a small village in the Russian Empire which later became a part of the Soviet Union, and today is part of Belarus, near the Polish border. Lemkin would later describe his hometown as a place where “Poles, Russians (or rather, White Russians), and Jews had lived together for many centuries. They disliked each other and even fought, but in spite of this turmoil they shared a deep love for

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<sup>114</sup> Additionally, some scholars have classified Lauterpacht’s desire to unify international law as a particularly “rabbinical” approach, influenced by Jewish legal thinking. See, e.g. Reut Yael Paz, “Making it Whole: Hersch Lauterpacht’s Rabbinical Approach to International Law” *Goettingen Journal of International Law* 4 (2012) 2, 417-445. Paz argues that a Talmudic dispute between Rabbis in which it becomes apparent that “God, the law-giver, is himself bound by law. As such, it is clear that answers to ethical questions must come from within a legal framework.” Paz, 441. While Lauterpacht was likely influenced by Jewish legal thought, this was not made apparent to readers of Lauterpacht’s work. Instead, Lauterpacht wrote in a style common to other non-Jewish legal thinkers in Britain such as J.L. Brierly. See e.g. Richard Collins, “The Progressive Conception of International Law: Brierly and Lauterpacht in the Interbellum Period,” forthcoming in R McCorquodale and J-P Guaci (eds), *British Influences on International Law 1915-2015* (London: Brill, 2016).

<sup>115</sup> Lauterpacht, *The Function of Law*, 438.

their towns, hills, and rivers.”<sup>116</sup> Even as an adult, Lemkin exalted the beauty of his homeland, and was proud of the poems he wrote as a child praising it.<sup>117</sup> His father, Joseph, was a farmer, an unusual profession for a Jewish subject of tsarist Russia, and his mother, Bella, was a painter, linguist, and philosophy student.<sup>118</sup> Exposure to the intellectual pursuits of Bella undoubtedly influenced Lemkin, and he would later credit reading the Polish Nobel Laureate Henryk Sienkiewicz’s novel *Quo Vadis* as a child, with its “description of the destruction of the Christians by Nero,” for his interest in the destruction of groups of people.<sup>119</sup>

Around this time period, Lemkin and his family moved to the nearby town of Wolkowysk. A few years after the move, in 1913 when Lemkin was thirteen, a Russian Jew living in Kiev named Menahem Mendel Beilis was tried for the murder of a thirteen-year old Ukrainian boy. In spite of Beilis’ strong alibi for the day of the murder, he was arrested and imprisoned for two years prior to the trial, accused of killing the Ukrainian child in a religiously motivated ritual murder, among the most famous of modern blood libel cases.<sup>120</sup> While Beilis was eventually acquitted, Lemkin recalled that the trial nonetheless inflamed antisemitism, stating that “All Jewish pupils [in school] were called by the collective name Beilis. The same thing happened in the city [Wolkowysk], where tensions were increasing. The Jewish population faced the possibility of a pogrom. It seemed as if the whole Jewish population of Russia were on trial.”<sup>121</sup> The following year, German troops marched into Wolkowysk during the Great War. Three years later, the new Bolshevik government of Russia withdrew from the war with the treaty of Brest-Litovsk. Lemkin described the town as a “a no-man’s land,” in 1918, because

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<sup>116</sup> Raphael Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze, (New Haven: Yale University Press, 2013), 3.

<sup>117</sup> *Ibid.*, 9.

<sup>118</sup> *Ibid.*, x.

<sup>119</sup> *Ibid.*, 1.

<sup>120</sup> For a similar case in Prussia at the time, see Helmut Walser Smith, *The Butcher’s Tale: Murder and anti-Semitism in a German Town*, (New York: W.W. Norton, 2002).

<sup>121</sup> Lemkin, *Totally Unofficial*, 18-19.

even after the war ended, the borders of the state of Poland, newly reconstituted with the the collapse of the Russian, German, and Austrian-Hungarian empires, were in dispute.<sup>122</sup>

Wolkowysk was part of the territory claimed by both the Bolsheviks and the Poles in the Polish-Soviet War that began in February of 1919.<sup>123</sup> Fighting continued for over a year and a half, until a ceasefire in October of 1920 put an end to the fighting, and the 1921 Treaty of Riga officially resolved the dispute. Wolkowysk, at least for the time being, would be a part of Poland.

Lemkin later went to school in Wilno, and he graduated from a trade school in Bialystok. (Both Wilno and Bialystok were also disputed areas in the Polish-Soviet War, and both ended up becoming a part of interwar Poland.)<sup>124</sup> In 1921, he began studying law at what was then the Jan Kazimierz University of Lwów, now located in Poland and the same university Lauterpacht had left two years earlier.<sup>125</sup> Both Lauterpacht and Lemkin had a number of professors in common. These included their criminal law professor, Julius Makarewicz (who would be arrested by the KGB in 1945 and exiled to Siberia before returning to teach in Lwów), and their international commercial law professor Allerhand, a Jewish convert to Catholicism whom the Germans killed in the Janowska concentration camp during World War II. While Lemkin wrote little about his early academic years, his academic achievements were apparently impressive enough to gain admission to study law at the university, not an insignificant achievement considering the antisemitic environment had already forced Lauterpacht to leave Lwów without gaining his doctorate.

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<sup>122</sup> *Ibid*, 55-56.

<sup>123</sup> See Jerzy Borzecki, "The Outbreak of the Polish-Soviet War: A Polish Perspective," *The Journal of Slavic Military Studies* 29:4 (2016): 658-680, for an overview of the Polish-Soviet War.

<sup>124</sup> For more on the Polish-Soviet War and Wilno (also known as the Polish-Bolshevik War), see Timothy Snyder, *The Reconstruction of Nations: Poland, Ukraine, Lithuania, Belarus, 1569-1999* (New Haven: Yale University Press, 2003), 60-72.

<sup>125</sup> Today known as Lviv University, Jan Kazimierz University was named so in 1919 for the Polish king who had originally founded the university and reflected the re-establishment of the Polish state with the end of the First World War.

Lemkin's decision to study in Lwów was a common one for Jewish students from his area of the Russian empire. Had Lemkin's father been a merchant like Trainin's, rather than a farmer, it would have been possible for Lemkin to study in a high school outside the Pale in imperial Russia, and thus integrate more into Russian society. As it was, because Lemkin's family was tied to their land, Lemkin spent his entire childhood in the Pale. Although all three spoke Yiddish as children, Lemkin considered himself a Polish-speaking Jew, rather than a Russian-speaking Jew like Trainin or a German- and English-speaking Jew like Lauterpacht.

Not long before Lemkin arrived in Lwów, during the postwar Polish-Ukrainian conflict, many Jewish residents of Lwów, as well as many Ukrainian residents, were killed in the Lwów pogrom of 1918.<sup>126</sup> (Lauterpacht was living in Lwów at this time, although he did not apparently write about it.) Following the retreat of Ukrainian troops from the city in November, Polish troops, accompanied by both civilians and criminals, began to loot and burn the Jewish quarter of the city, raping and killing many of its inhabitants. Lemkin's life in Poland, and his earlier life in the Russian empire, was full of such atrocities. Retrospectively, Lemkin alluded to the impact of pogroms and antisemitic persecutions on him both emotionally and intellectually, stating that "As the years went by, I kept thinking of these problems. I thought so hard that sometimes I felt physically the tension of the blood in my veins."<sup>127</sup>

Lemkin claimed he became interested in law and violent crimes as soon as he could read.<sup>128</sup> After entering law school in 1921, Lemkin studied the concept of sovereignty that undergirds international law. Inquiring why Ottoman leaders were not punished for the recent

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<sup>126</sup> See, e.g. coverage of autumn 1918 pogroms in Poland, "A Record of Pogroms in Poland: Massacres Began in Lemberg, According to Documents Received Here, and Spread Over Country—Women Violated, Men Slain, Synagogues Ruined, Property Taken," *The New York Times*, June 1, 1919, p1 cont. to p6.

<sup>127</sup> Lemkin, *Totally Unofficial*, 19.

<sup>128</sup> Lemkin papers, NYPL, reel 2, published in *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze, (New Haven: Yale University Press, 2013), 1 ("As soon as I could read, I started to devour books on the persecution of religious, racial, or other minority groups.")

massacres of Armenians—some organizers of the Armenian extermination had recently been arrested in Malta and then released as there was no international law they had violated—Lemkin famously remembered wondering, “Why is a man punished when he kills another man, yet the killing of a million is a lesser crime than the killing of an individual?”<sup>129</sup>

While sovereignty provided protection for leaders, Lemkin maintained that sovereignty “cannot be conceived as the right to kill millions of people.”<sup>130</sup> Here we see Lemkin’s early rejection of positivism in international law. Lemkin’s interest in concepts of mass violence may have been invigorated by the pogroms that occurred as part and parcel of Jewish life in twentieth-century eastern Europe. Lemkin’s own identity as a Polish Jew contributed to his ability to recognize the horrors of violence motivated by group identity and he noted that “a line, red from blood, led from the Roman arena [in persecutions of Christians] through the gallows of France to the pogrom of Bialystok.”<sup>131</sup>

At the same time, Lemkin wrote relatively little about his day-to-day life in Lwów , portraying himself as constantly focused on abstract ideas of international law. Lemkin represents himself as an avid reader and aficionado of the Jewish poet Hayyim Bialik (who like, Lemkin, was from the Polish edges of the Russian empire). Bialik was well-known for his poems about the destruction of pogroms, as well as his calls for a cultural Zionist awakening. Lemkin’s first published work would be a translation of the 1909 Bialik novella *Behind the*

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<sup>129</sup> Lemkin, *Totally Unofficial*, 19. While there were Ottoman trials of war criminals from 1919-1920, Ottoman leaders were not prosecuted, and the trials actually occurred under the direction of the sovereign (the Sultan) under British influence. The Turkish trials were largely a farce, finding most war criminals guilty only if they had already safely left the country and were out of the court’s reach. See Gabrielle Simm, “The Paris Peoples’ Tribunal and the Istanbul Trials: Archives of the Armenian Genocide,” *Leiden Journal of International Law*, Vol. 29:1 (2016), 245-268.

<sup>130</sup> Lemkin, *Totally Unofficial*, 20. Lemkin recalled discussing the matter with an unnamed law professor at university, likely Lauterpacht and Lemkin’s shared law professor, Julius Makarewicz. See Phillippe Sands interview with Zoya Baron, in *East West Street*, 155.

<sup>131</sup> Lemkin, *Totally Unofficial*, 17.

*Fence* from Hebrew into Polish in 1926.<sup>132</sup> The novella details a Jewish boy attracted to a Christian neighbor girl, a story of group identities and conflicts that ended in heartbreak.

Upon graduation Lemkin moved to the capital of Poland, Warsaw, where he worked from 1929 until 1934 as a city prosecutor. He later worked as a prosecutor in Brzezany, and returned to Warsaw to take a job in private practice. He also served as secretary of the Committee on Codification of the Laws of the Republic of Poland, (which codified the penal codes of the new country) and taught at a college in Warsaw.<sup>133</sup> Lemkin's work on codifying Poland's penal codes led him to write (in Polish) and then translate into English *The Polish Penal Code of 1932*. Lemkin worked with Malcolm McDermott, a Duke University law professor, on this project, a connection that would later prove beneficial to Lemkin.

In spite of Lemkin's busy professional work, he continued to develop his ideas about international law's ability to respond to mass violence as he learned about the massacre of Assyrians in Iraq in 1933. Lemkin described this crime as:

attacks brought against an individual as a member of a community. The will of the perpetrator affects not only the individual victim, but is primarily detrimental to the community to which he belongs. These offenses violate not only the rights of the individual, but first and foremost, they undermine the very foundations of the social order.

This crime can be committed by

actions of extermination on ethnic or any other social grounds (political, religious, etc.); such as, for example, massacres, pogroms, actions designed to ruin the economic existence of members of a community, etc. Similarly, all kinds of brutal manifestations against the dignity of an individual, when these acts of humiliation have their source in the exterminating struggle led against the community of which the victim is a member, also belong here.

Altogether

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<sup>132</sup> The novella was published by Raphael Lemkin under the name *Noach i Marynka* by Lwów's Wydawnictwo "Snunit" press.

<sup>133</sup> Lemkin taught family law at Tachkemoni Rabbinical Seminary in Warsaw. The most famous student of Tachkemoni is the writer Issac Bashevis Singer.

the acts of this character constitute a “délit de droit de gens” of which we shall name ‘barbarism.’ Taken separately all these acts are punishable in their respective [domestic] codes; they should constitute délits de droit des gens’ because of their common trait that threatens the existence of the targeted community and social order.”<sup>134</sup>

By referring to “barbarity” as a “délit de droit de gens,” (“crime against the law of nations”) Lemkin is declaring barbarity to be not simply an *offense* illegal under international law, but a *crime* (délits) that demanded a mechanism for punishment.<sup>135</sup> Lemkin proclaimed:

the concept of international criminal law comes from the civilized community’s struggle in solidarity against the criminal. From the formal point of view, this solidarity is manifested in the principle of universal repression, the principle based on the ability to judge the offender at the place of apprehension (forum deprehensionis loci), regardless of the place where the crime was committed and the perpetrator’s nationality.<sup>136</sup>

What Lemkin refers to as “universal repression,” is today referred to as universal jurisdiction and was a novel concept at the time in international criminal law. Universal jurisdiction has its origins in the concept of *hostis generis humani*, or an “enemy of the human race.” To be

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<sup>134</sup> AJSH Archives, Lemkin papers, Box 1, Folder 11. Original in French: “Pourtant, il existe des délits qui unissent en eux les deux éléments suscités. Ce sont notamment les attentats portés contre un individu en tant que membre d’une collectivité. La volonté de l’auteur tend non seulement à nuire à l’individu, mais, en premier lieu, à porter préjudice à la collectivité à laquelle appartient ce dernier. Ces infractions visent non seulement le droit de l’homme, mais de plus et surtout, elles sapent les fondements même de l’ordre social.

Citons ici, on premier lieu, les actions exterminatrices dirigées contre les collectivités ethniques, confessionnelles ou sociales quels qu’en soient les motifs (politiques, religieux, etc.); tels p. ex. massacres, pogromes, actions entreprises en vue de ruiner l’existence économique des membres d’une collectivité etc. De même, appartiennent ici toutes sortes de manifestations de brutalité par lesquelles l’individu est atteint dans sa dignité, en cas où ces actes d’humiliation ont leur source dans la lutte exterminatrice dirigée contre la collectivité dont la victime est membre.

Pris ensemble, tous les actes de ce caractère constituent un délit de droit de gens que nous désignerons du nom de barbarie. Pris séparément tous ces actes sont punissables dans les codes respectifs; ils devraient constituer des délits de droit des gens en raison de leur trait commun qui est de menacer l’existence de la collectivité visée et l’ordre social.”

Droits des gens (or jus gentium/the law of nations) is distinguished from droits de l’homme (or human rights). Human rights are rights given to individuals (from their nation state) on the basis of being human, rather than being citizens, while the jus gentium is international law that is allegedly based on the customs of all people or nations.

<sup>135</sup> Along with the “crime of barbarity,” Lemkin proposed the crime of “vandalism,” or the destruction of cultural treasures of human groups. CJH Archives, Lemkin papers, Box 1, Folder 11. This offense would also reappear under the concept of “cultural genocide.”

<sup>136</sup> AJSH Archives, Lemkin papers, Box 1, Folder 11. (“La notion des délits de droit des gens provient de la lutte solidaire de la communauté civile sée contre la criminalité. Du point de vue formel, cette solidarité se manifeste dans le principe de la répression universelle, principe basé sur la possibilité de juger le délinquant sur le lieu de son appréhension (forum loci deprehensionis), quels que soient le lieu ou le crime a été commis et la nationalité de l’auteur.”)

considered *hostis generis humani*, one must have committed a crime that would “outrage all of humanity.”<sup>137</sup> While the term *hostis generis humani* originated with the ancient Romans and was used to refer to tyrannical emperors, it became associated with pirates in the 16<sup>th</sup> century. Piracy became the classic example of *hostis generis humani* because they committed their crimes on international waters, which could not be held sovereign by anyone. Because they are not sovereign by anyone, they are held by all of humanity, and thus piracy is a crime committed against all of humanity.<sup>138</sup> It was also one of the crimes commonly considered to be outside the sphere of humanity, and by virtue of its outsider status, could be prosecuted anywhere and by any nation.<sup>139</sup>

The idea of joining Lemkin’s “crime of barbarity,” to the concept of *hostis generis humani* of course implied quite different possible outcomes than prosecuting a group of pirates. For one, Lemkin’s crime of barbarity could, indeed often did, point to *states* as perpetrators of the crime. Sovereignty’s jealous guardianship of domestic affairs thus conflicted with how Lemkin viewed the “crime of barbarity.” He presented these ideas to the League of Nations Legal Council’s conference on international criminal law in September 1933—as Jewish persecution was increasing in Germany—along with the crime of vandalism, which prohibited the destruction of cultural monuments and treasures. In his criticism of sovereignty, Lemkin failed to win over the positivists in Madrid.

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<sup>137</sup> See, e.g. David Luban, “Hannah Arendt as a Theorist of International Criminal Law,” *International Criminal Law Review*, Vol. 11 (2011), 621-641, 622-623.

<sup>138</sup> For more on piracy and international law see Michael Kempe, “Even in the Remotest Corners of the World: Globalized Piracy and International Law, 1500-1900,” *Journal of Global History*, (Nov. 2010), 353-372.

<sup>139</sup> See Dan Edelstein, “War and Terror: The Law of Nations from Grotius to the French Revolution,” *French Historical Studies*, Vol. 31, Issue 2, (2008), 229-262, 232; footnote 17, citing Pliny the Elder describing Nero as an *hostem generis humani* and the fourth-century AD Roman historian Eutropius describing the Senate’s condemnation of Commodus a *hostis humani generis*. See also Dan Edelstein, “*Hosti Humani Generis*: Devils, Natural Law and Terror in the French Revolution,” *Telos: A Quarterly Journal of Critical Thought* 141 (2007): 57-81 and Dan Edelstein, *The Terror of Natural Right* (Chicago: University of Chicago Press, 2015).

Of course, Lemkin’s critiques of positivism did not occur in a vacuum, nor did his alleged neologism “the crime of barbarity.” In spite of Lemkin’s presentation of this concept as his own creation, it is clear that he borrowed the idea from the Romanian legal expert, Vespasian Pella. Born in 1897, Pella was a Bucharest native who studied at the University of Paris and taught criminal law, first at the University of Jassy and later the University of Bucharest. Pella, one of the most prominent international law experts of his time, had written about the concept of barbarism prior to Lemkin, and presented these concepts in April, 1933—shortly after Hitler had consolidated power in Germany—at the Third International Conference on Penal Law in Palermo, Italy.<sup>140</sup> Pella defined the crime of *barbarie* to include acts directed at a “racial, religious or social collectivity,” such as massacres and pogroms. This formulation of *barbarie* was an evolution from Pella’s earlier writings on the necessary limitations of state sovereignty. In 1925, Pella had written about the “massacres of races” that were “if not sometimes ordered, at least tolerated, by the responsible state governments,” giving, as an example, the “massacre of the Armenians.” While these massacres were currently allowed under the principle of state sovereignty, this was “inconsistent with the most basic principles of humanity and the practices universally accepted by the civilized world,” echoing 19<sup>th</sup> century natural law advocates who suggested that there was something instinctually and morally wrong with mass violence, at least if one was civilized.<sup>141</sup> While Lemkin initially gave Pella credit for coming up with the idea of outlawing “barbarism” he later erased Pella’s contribution, claiming in his autobiography that the

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<sup>140</sup> See les Actes provisoires du III Congres Internationale de Droit penal, Palermo, 1933. In Lemkin’s text to the Congress he acknowledged his debt to Pella, in part likely because Pella was a conference organizer and one of the editors of the collected publication of the conference presentations. See Luis Jimenez de Asua, Vespasian Pella & Mauel Lopez-Rey Arroyo, eds. *Ve Conferencia internacional pour l’unification du droit penal, Actes de la Conference*, (Paris: Pedone, 1935), 55. He seems to have forgotten (perhaps intentionally) his debt to Pella in his autobiography, and instead presents himself as the sole creator of the concept of genocide.

<sup>141</sup> Vespasian V. Pella, *La criminalité collective des états et le droit pénal de l’avenir*, (Bucharest: Imprimerie de l’Etat: 1925, 145-146). I became aware of this cite thanks to Schabas, *Core Crimes of International Criminal Law: Evolving Conceptions from the time of Vespasian V. Pella*, 226.

September before the Madrid Conference—five months after Pella had already written and presented on the crime of barbarism in Palermo—“I formulated two crimes: the crime of barbarity and the crime of vandalism.<sup>142</sup> (Lemkin’s erasure of Pella likely had to do with Lemkin, a strong anti-communist, believing Pella to be a communist sympathizer.)<sup>143</sup>

Lemkin’s presentation of the crime of barbarity reveal him to be primarily a natural law advocate. His naturalism stems from his focus on an idea of justice, separate from either an embrace of sovereignty or a focus on the need to make international law effective. Lemkin believed that international law was composed of something other than the will of sovereigns—an international community that was constrained by a normative value system that was purportedly common to all of humanity. As with the earlier natural law theorists like Vitoria, Lemkin’s naturalism was implicitly imperialist, depending upon “civilized” humanity to lead the rest of the world. While Lemkin’s ideas of natural law were undoubtedly more inclusive than Vitoria’s, they still assumed European norms to serve as the basis of international law that would govern for the rest of the world.<sup>144</sup>

### ***Trainin on Lemkin***

Although after the Russian Revolution, the new socialist state rejected international law as a capitalist tool of imperialism, in the 1930s the Soviet Union began to re-engage with international law, as many of the ideals of the early communist period waned when Stalin came to power and wanted to be seen as part of the community of “civilized” nations. For example, the Soviet Union joined the League of Nations in 1934, and the Soviet engagement with

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<sup>142</sup> Lemkin, *Totally Unofficial*, 22.

<sup>143</sup> See Lemkin papers, NYPL, reel 4.

<sup>144</sup> One example of a fellow natural law theorist is the Austrian professor Alfred Verdross, a student of Hans Kelsen who came to reject much of Kelsen’s work. See von Bernstorff, *The Public International Law Theory of Hans Kelsen*, 154-155 for an overview of Verdross’ divergence with Kelsen.

international law likely encouraged Trainin's forays into the burgeoning field. As legal scholar Kirsten Sellars notes, the Soviet Union

...feared a war on both flanks. [...] With this in mind, Stalin revived Lenin's older tactic of 'peaceful coexistence' with capitalist states in order to create a breathing space for themselves and build new alliances against these escalating threats. This process included cooperation with and eventual membership of the League of Nations.<sup>145</sup>

In 1935, Trainin wrote *Ugolovnaia interventsii: dvizhenie po unifikatsii ugolovnogo zakonodatel'stva kapitalisticheskikh stran*, (*Criminal Intervention: Movement towards the Unification of Criminal Law in Capitalist Countries*). This was part of his analysis of international crime, included an extended analysis of the League of Nations' failed attempts to maintain peace.<sup>146</sup>

One major weakness Trainin identified in contemporary international law was its failure to "play a role in the struggle with warlike aggression."<sup>147</sup> In this work, Trainin engaged with Lemkin's 1933 proposals to criminalize "barbarism" along with "vandalism." Trainin quotes Lemkin directly, defining vandalism as "attacks on art and culture," which causes "irreparable damage not only to the State where the crime was committed, but the entire civilized world, which, when connected by innumerable ties, whole reaps the fruits of their creativity."<sup>148</sup> Once again, Russia was inserting itself into the family of "civilized nations," albeit this time as communist Russia, rather than tsarist Russia. Trainin critiques Lemkin's understanding of vandalism from a Soviet revolutionary perspective: "[M]ass revolutionary actions in an environment of fierce class struggles, of course, cannot take place under the banner of the

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<sup>145</sup> Kirsten Sellars, *Crimes against Peace' and International Law*, (Cambridge: Cambridge Press, 2015), 34.

<sup>146</sup> Having encouraged Trainin's turn to international law as Trainin's supervisor at Moscow State University, Andrei Vyshinsky wrote the introduction to Trainin's first major work in international law as well as many later works.

<sup>147</sup> Trainin, *Ugolovnaia interventsii*, 19 ("vnachale zametiuiu rol' igrala bor'ba s voennoi agressiei.")

<sup>148</sup> *Ibid*, 42-43, quoting Lemkin.

protection of monuments of the country.”<sup>149</sup> In other words, Trainin rejects vandalism because it does not allow revolutionaries to destroy monuments. While critical of vandalism given its basis in notions of private property and national patrimony, Trainin portrays the concept accurately.

His presentation of the concept of “barbarism,” on the other hand, is misleading. Rather than defining barbarism outright, Trainin inserts Lemkin’s general proposal to prohibit terrorism to the Madrid Conference in place of Lemkin’s definition of barbarism. Lemkin’s definition of terrorism included barring attacks on the “international post, telegraph, telephone and radio-relations.”<sup>150</sup> Trainin rejects this, noting that it is well known in the first stage of a revolution the masses are first and foremost “directed to take possession of telegrams, telephones, and other forms of communication.”<sup>151</sup> In other words, Trainin rejects “barbarism” because it does not allow revolutionaries to seize control of the telecommunications. Trainin does not give for the reader Lemkin’s actual definition of barbarism (acts directed at a “racial, religious or social collectivity,” such as massacres and pogroms), and instead criticizes Lemkin’s property-focused definition of terrorism. Perhaps Trainin genuinely misunderstood Lemkin’s proposal, or, perhaps he found himself unable to argue against Lemkin’s actual definition of barbarism (which protected people), and concocted a straw man argument instead, criticizing Lemkin’s definition of terrorism (which focused on protecting property) while claiming to criticize his concept of barbarism.

Finally, Trainin accuses Lemkin of “shrouding” (*okutat*) his attempt to create a “dangerously general” and “soft ‘universal’ formula of ‘vandalism’ and ‘barbarism.’”<sup>152</sup> The quotes around “universal” are Trainin’s own, making it clear that he believes Lemkin’s attempts

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<sup>149</sup> *Ibid*, 43.

<sup>150</sup> *Ibid*.

<sup>151</sup> *Ibid*.

<sup>152</sup> *Ibid*, 44.

to outlaw vandalism and barbarism are capitalist values masquerading as universal. According to Trainin, Lemkin fails “to conceal the true meaning of the ensuing unification movement” in international law, the purpose of which is—as Vyshinsky claimed in his introduction to Trainin’s book—to promote “liberal-legal prejudice” as a “sharp weapon” to “attack the most vital interests of the working masses.”<sup>153</sup>

The most significant point here is that Trainin, busily developing the Soviet response to international law’s capitalist bias, engaged directly with Lemkin in the mid-1930s and was invested in the global conversation about how to respond to international law’s failures after the Great War. All three figures received traditional European legal educations, although Trainin found it fit to make his legal arguments using positivism, while Lemkin tended towards natural law and Lauterpacht articulated the new trend towards functionalism. The changes of the 1930s would force all three men to articulate new ideas in international law.

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<sup>153</sup> *Ibid*, 44, 3.

### Chapter 3: Soviet Law, Trainin, and the Moscow “Show Trials”

With the 1917 October Revolution, Vladimir Lenin and the Bolsheviks took over the Russian government.<sup>1</sup> At its core, Bolsheviks did not believe in the idea of law, seeing it as a tool of the bourgeoisie to maintain power over the proletariat. The first Soviet Russian Constitution in 1918 reflected the belief that law in a socialist society would eventually “wither away,” through its organization of local and central governments into soviets ostensibly composed of workers, peasants, and soldiers. This Bolshevik approach to criminal law suddenly made them an outlier among European nation-states, but this divergence of the understanding of the etiology of crime goes back further than the Bolshevik seizure of power. Late imperial Russia had already diverged from western European legal traditions in terms of the origins of crime. While Western scholars like Cesare Lombroso looked to biological anthropological explanations, tracing criminal behavior genetically, Russian scholars condemned Lombroso and emphasized the social origins of crime, using theories influenced by Emile Durkheim and Gabriel Tarde to explain crime in society.<sup>2</sup>

The Bolshevik approach to law led to the belief that the new Russian state had no need for a pan-Russian, standardized criminal code. The Bolsheviks abolished the tsarist courts and legal codes. In their place, the Bolshevik government created a system of people’s courts and revolutionary tribunals and began drafting new legal codes.<sup>3</sup> Law suddenly became local. Tsarist laws and courts were dismantled, and local governments were responsible for criminal

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<sup>1</sup> For further reading on the February and October Revolutions see Sheila Fitzpatrick, *The Russian Revolution* (Oxford: Oxford University Press, 1982) and Orlando Figes, *A People’s Tragedy: The Russian Revolution: 1891-1924* (New York: Viking Press, 1996).

<sup>2</sup> Sharon Kowalsky, *Deviant Women: Female Crime and Criminology in Revolutionary Russia: 1880-1930*, (Dekalb: Northern Illinois University Press, 2009), 24-40. See also Hans Kurella, *Cesare Lombroso: A Modern Man of Science*, transl. by M. Eden Paul, (New York: Rebman Company, 1911).

<sup>3</sup> See Nikolai Krylenko, *Sudoustroistvo RSFSR (The Judicial System of the RSFSR)*, (Moscow, 1923) and *Dekrety sovetskoi vlasti, (The Decrees of Soviet Power)*, (Moscow, 1957), vol. 1, 124-126.

justice, with judges urged to follow their “revolutionary consciousness,” rather than formal law.<sup>4</sup> While some judges and lawyers had formal legal training, most in this new legal system did not, and it was not unusual for teenagers of the proper political background (i.e. workers) to become judges.<sup>5</sup> For political prisoners in the ongoing Russian civil war(s) the Bolsheviks made use of “revolutionary terror,” which not only separated the political opposition from the regular criminal opposition (a tactic also used by tsarist Russia) but denied the need for any legal hearing.<sup>6</sup> At the top of these revolutionary systems was the newly created a Commissariat of Justice (*Narodnyi kommissariat iustitsii* or *Narkomiust*).

At the bottom of the Bolshevik criminal legal structure were the local people’s courts, whose decisions could be appealed to the provincial level. Running parallel to this court system were revolutionary tribunals, whose judges heard cases about more serious crimes against the revolutionary state—such as political crimes.<sup>7</sup> Without a standardized legal code, courts’ findings and sentences varied greatly, and local judges—from the viewpoint of Moscow—did not always exercise their power wisely. Many judges, rather than following their “revolutionary consciousness,” instead followed the precepts of tsarist law.<sup>8</sup>

To the new revolutionary state, this was not a tenable situation, so the communist party finally approved a criminal code in 1922. The new criminal code, while borrowing much from tsarist law, was still distinctly Bolshevik. While “crimes against a person,” (such as assault and murder), stemmed from the tsarist code, the code also outlined a new category of crimes, ‘economic crimes,’ like speculation, defined as “buying or selling to make a profit,” and what

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<sup>4</sup> Evgenii Pashukanis, ed. Piers Beirne & Robert Sharlet, *Pashukanis: Selected Writings on Marxism and Law*, (New York & London: Academic Press, 1980), 12.

<sup>5</sup> See Solomon, 387.

<sup>6</sup> Terror was also of course practiced by the Red’s opposition. See Moshe Lewin, “The Civil War: Dynamics and Legacy,” in Diane Koenker et al., eds., *Party, State and Society in the Russian Civil War* (Bloomington, Indiana: 1989), 406.

<sup>7</sup> See Nikolai Krylenko, *Sudoustroistvo RSFSR*.

<sup>8</sup> Solomon, 23-24.

had been mere civil violations like homebrewing were now considered criminal violations.<sup>9</sup> The third category of crimes was “crimes by officials” (such as taking bribes), also found under tsarist law but now much expanded, and included crimes like “misusing one’s power.”<sup>10</sup>

Punishment for criminal offenses also changed from the tsarist codes to the communist codes, with remarkably light sentences for traditional criminal offenses using the explanation that crime was caused by problems within society, not the individual (like sentencing “up to ten years” for premeditated murder where tsarist law had allowed for capital punishment).<sup>11</sup> One thing in common between the tsarist and communist criminal codes was the harsh punishment of political crimes (now punished much more harshly than non-political crimes), but with newly expansive language to describe these “counterrevolutionary” crimes. Nearly any offense could be interpreted as political, and thus open to the death penalty.<sup>12</sup>

Given the uneducated criminal legal staff, including judges, and consistent with the “withering away of the law” perspective, most Bolshevik legal proposals aimed to simplify law and legal procedure. One of the primary advocates of this approach was Evgeny Pashukanis, an early star of Soviet law and legal theory. Playing a formative role in early Bolshevik criminal law, Pashukanis advocated for many of the key legal beliefs of the early revolutionary state including the perspective that formal legal codes were unnecessary in a socialist state and law would eventually “wither away.” He was forced to leave Russia due to his socialist activities—he had joined the Russian Social Democratic Workers’ Parties when he was seventeen—and was studying in Germany when the Great War broke out, but he returned to Russia during the war to

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<sup>9</sup> *Ibid*, 29.

<sup>10</sup> *Ibid*, 30.

<sup>11</sup> See Jonathan Daly, “Criminal Punishment and Europeanization in Late Imperial Russia,” *Jahrbücher für Geschichte Osteuropas*, 47 (2000): 341-362, 347 for the use of death penalty in late imperial Russia for crimes of murder, banditry, as well as political crimes.

<sup>12</sup> See Ugolovnyi kodeks RSFSR (1922), especially Article 58.

support the communist movement. After the October Revolution, Pashukanis joined the Bolsheviks and his strong leftist credentials, including his role in the student movement and the Kasso Case, helped him win quick professional success. He became a judge in Moscow in 1918, and by 1924 had established himself as the Soviet Union's premier legal scholar. In 1926, Pashukanis joined Trainin on the law faculty at Moscow State University and published *Obshchaia teoriia prava i marksizma (The General Theory of Law and Marxism)*.<sup>13</sup>

In *The General Theory*, Pashukanis outlined what would become known as the “commodity theory of law.” Drawing from Marx's theory of commodity exchange, Pashukanis argues that law, like a commodity, is portrayed as possessing a seemingly objective character, masking its true ideological nature. Law was superstructure to economic base. Just as commodity relationships would disappear under Marxism, so too would the legal relationships based on property relationships and the struggle for existence. Pashukanis' work was instantly celebrated in the Soviet Union, but he was also celebrated for his commodity theory of law in some unlikely places. The American legal philosopher and Dean of Harvard Law School, Roscoe Pound, referred to Pashukanis as the “most imaginative” young Soviet lawyers, and Pound studied Russian to read Pashukanis' untranslated works.<sup>14</sup>

Even though Pashukanis' theories were celebrated and put into practice, his ideological opponents like Trainin were also being published and remained at the heights of academia and in positions of power. Both Trainin, and his mentor Andrei Vyshinsky, who opposed Pashukanis' theories, were moving up in the legal ranks.<sup>15</sup> Trainin's research focused on analyzing criminal statutes from both Soviet Russia and elsewhere in Europe and was, in its own way, a repudiation

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<sup>13</sup> E.B. Pashukanis, *Obshchaia Teoriia Prava i Marksizm: Oput kritiki osnovnykh iuridicheskikh poniatii* (Sotsialisticheskoi akademii Moskva, 1924). Marc Jansen, *A Show Trial Under Lenin: The Trial of the Socialist Revolutionaries, Moscow 1922*, (Amsterdam: International Institute of Social History, 1984), 47.

<sup>14</sup> Beirne & Sharlet, xi, foreword by John N. Hazard.

<sup>15</sup> ARAN Fond 1711, opis 1, no. 8, l. 1-2.

of Pashukanis' belief that law would "wither away." By prioritizing criminal codes, Trainin was placing conventional forms of law above Pashukanis' "revolutionary consciousness."

The heavy burden on the legal system in the late 1920s resulting from the collectivization campaign further encouraged Soviet leaders to support Pashukanis' views on the "withering away" of law. Most peasants owned private property in the form of small parcels of land. This concerned Soviet leaders, who believed both that small-scale production encouraged capitalism and was inefficient, leading to grain shortages in the cities. The collectivization of land was often done by extralegal measures, and it was carried out by legal officials.<sup>16</sup> For people who believed that law would "wither away," the fact that legal officials were acting extralegally was not necessarily problematic. In fact, the opposite was the case. The decline of law meant society was becoming more communist. Because law was a bourgeois tool, disregarding the law meant that socialism was succeeding, and law was beginning to wither away.

Along with the withering away of the law, the early Bolshevik state also called for the "extermination" and "liquidation" of the bourgeois class structure.<sup>17</sup> Whether or not all of the individuals who made up that class were deserving of extermination and/or liquidation was left unclear. One of those Bolsheviks who questioned Lenin's fondness for extralegal violence was Isaac Steinberg, a Moscow University law contemporary of Trainin's, who briefly served as Commissar of Justice in the new Bolshevik state. He recalled, in a moment of frustration, that he

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<sup>16</sup> Solomon, 113-120.

<sup>17</sup> See, e.g. Yuri Slezkine, *The Jewish Century*, (Princeton: Princeton University Press, 2004) 174 ("The bourgeoisie' might be an elusive category, but no one apologized for the principle of their 'liquidation' on the basis of 'objective criteria. Property, imperial rank, and education unredeemed by Marxism were punishable by death, and tens of thousands of people were punished accordingly and unabashedly as hostages or simply as 'alien elements' within reach. . . The Bolshevik strength lay not in knowing for sure who to kill, but in being proud and eager to kill individuals as members of 'classes.' Sacred violence as a sociological undertaking as an essential part of the doctrine and the most important criterion of true membership." See also, James Ryan, *Lenin's Terror: The Ideological Origins of the early Soviet State*, (New York: Routledge, 2012), 159 (Ryan provides an illustrate quote from Lenin "it would be necessary to deport several hundred such gentlemen pitilessly. We will cleanse Russia for a long time.", citing Letter from Lenin to Stalin, July 16, 1922 in A.N. Artizov, Z.K. Vodopianova, V.G. Makarov, V.S. Khristoforov, E.V. Domchareva (eds), "*Ochistim rossiia nadolgo. . .*" *Repressii protiv inakomyisliashchikh. Dokumentyi. Konets 1921-nachalo 1923g.*, Rossiia XX Vek, Moscow: Materik, 2008. Document No. 110, p162.

asked Lenin, “Why do we bother with a Commissariat of Justice? Let’s call it frankly the *Commissariat for Social Extermination* and be done with it!” In response “Lenin’s face brightened and he replied ‘Well put!. . . that’s exactly what it should be . . .but we can’t say that.’”<sup>18</sup> In the new revolutionary state, law was designed to serve Soviet power, including the sanction of extralegal violence.

This revolutionary approach applied to international law as well. Because “bourgeois” states created international law, the revolutionary Russian state was not bound by their dictates. Moreover, not only were they not bound by so-called “international law,” but they could not make substantive agreements or treaties with bourgeois states.<sup>19</sup> The revolutionary state could only make agreements with other socialist states, creating an ideologically driven wedge in the very notion of universally applicable international law.<sup>20</sup> Pashukanis was especially critical of the “standard of civilization” in international law with its avowed adherence to Christian beliefs including “love for mankind.” Pashukanis rejected this illusion, prompting the reader to consider: “To assess the piquancy of this assertion recall that, at the time of the colonial wars, the representatives of these lofty principles, e.g. the French in Madagascar and the Germans in Southwest Africa, liquidated the local population without regard for age or sex.”<sup>21</sup> As the

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<sup>18</sup> Issac Steinberg, *In the Workshop of the Revolution* (New York: Rinehart & Company, 1953), 145. Unfortunately Steinberg’s book was only published in English, so I am unsure of the original term for “extermination” that Lenin allegedly used, but it was likely either *istreblenie* or *unichtozhenie*.

<sup>19</sup> In spite of the Soviet rejection of international law, Soviet theorists did endorse the concept of state sovereignty. This was likely motivated by political considerations (such as the desire for the Soviet state be considered sovereign and to justify and protect its existence), rather than theoretical considerations. Marx had no interest in international law, and although state sovereignty had the support of Hegel, Hegel’s influence on Marx was disputed by many early Soviet theorists, as the negative 1923 Soviet reception of the Hungarian philosopher György Lukács’ *Geschichte und Klassenbewußtsein: Studien über marxistische Dialektik* (*History and Class Consciousness: Studies in Marxist Dialectics*), (Berlin: Malik-Verlag, 1923) revealed.

<sup>20</sup> Pashukanis, *Selected Writings on Marxism and the Law*, 173.

<sup>21</sup> *Ibid*, 172. Pashukanis draws parallels between class structure in society and class structure in international law, stating that “While in feudal Europe the class structure was reflected in the religious notion of a community of all Christians, the capitalist world created its concept of “civilization” for the same purposes. The division of states into civilized and “semi-civilized,” integrated and “semi-integrated” to the international community, explicitly reveals the second peculiarity of modern international law as the class law of the bourgeoisie.” *Ibid*. Pashukanis was likely

Estonian legal scholar Lauri Mälksoo has suggested, “There was more to Soviet idiosyncratic approaches to international law than the application of Marxism-Leninism. There was a Russian ‘civilizational’ element to Soviet approaches to international law and Russia’s determination to distance itself from the West after have been a disciple of a ‘more enlightened (Martens) Europe for 200 years.”<sup>22</sup>

One of Pashukanis’ legal and political allies was Nikolai Krylenko. Krylenko had been an early Bolshevik who studied in St. Petersburg and was one of the leaders of the October Revolution. In 1922, the victorious Bolshevik government conducted a trial of their political rivals, the Socialist Revolutionaries (the “SRs”). Blurring the boundaries in traditional liberal legal traditions where by the prosecutor and the judge are not the same person, Krylenko served as both chairman of the Supreme Revolutionary Tribunal (then the revolutionary state’s highest judicial institution) and main prosecutor of the SR show trial. As Krylenko asserted the following year: “A club is a primitive weapon, a rifle is a more efficient one, the most efficient is the court.”<sup>23</sup> Some have accused the Soviet Union of conducting “show trials,” by which they mean trials in which the outcome is largely predetermined and the trial is designed to influence people outside the courtroom.<sup>24</sup> In the Soviet case, show trials were ipso facto demonstrations (“shows”) of the law’s inherent reflection of the socio-political conditions in which it was embedded, usually designed to scapegoat particular individuals for problems in society,

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influenced by Vladimir Lenin’s 1917 work *Imperializm, kak Vysshiaia Stadiia Kapitalizma (Imperialism: The Highest Form of Capitalism)*, and Nikolai Bukanin’s *Mirovoe Khoiaistvo i Imperializm (Imperialism and World Economy)*, written prior to Lenin’s work and from which Lenin borrowed heavily. See e.g. Stephen Cohen, *Bukharin and the Bolshevik Revolution*, (New York: A.A. Knopf, 1973), 25.

<sup>22</sup> Mälksoo, *Russian Approaches to International Law*, 72.

<sup>23</sup> Harold Berman, *Justice in Russia: An Interpretation of Soviet Law*, (Cambridge: Harvard University Press, 1950), 28.

<sup>24</sup> See e.g. Jansen.

encourage a level of suspicion and fear by defining and establishing mortal threats,<sup>25</sup> as well as signaling new changes in policy and the direction of society.<sup>26</sup>

While the term “show trials,” is not how the Soviet orchestrators would have viewed the trials, these trials of a political nature were viewed quite differently from ordinary criminal cases, which witnessed the strict observation of criminal procedure.<sup>27</sup> Although scholars tend to focus on the highly visible show trials, in fact, ordinary criminal prosecutions maintained a fairly constant level of acquittals throughout the 1920s to the early 1930s (around 10%, a figure comparable to contemporary United States federal prosecutions). This suggests that while there were undoubtedly many miscarriages of justice in ordinary criminal justice proceedings, they did not differ widely from the United States.<sup>28</sup>

In some of the earlier show trials, Krylenko had displayed his understanding of “revolutionary legality,” by which he meant that political considerations, rather than criminal issues or legal procedure, should be the primary criterion in determining guilt and punishment. Though Krylenko had served the Bolsheviks loyally, he was replaced as Prosecutor General of the Russian Soviet Republic in 1932 by Andrei Vyshinsky, a young lawyer and Baku acquaintance of Stalin’s.

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<sup>25</sup> See William Chase, “Stalin as Producer: The Moscow Show Trials and the Construction of Mortal Threats,” in *Stalin: A New History*, Sarah Davies and James Harris, eds. (Cambridge: Cambridge University Press, 2005), 226-248.

<sup>26</sup> Show trials can be distinguished from didactic trials whose role is to educate, while also pursuing justice. See, e.g. Lawrence Douglas, *Memory of Judgement: Making Law and History in the Trials of the Holocaust*, (New Haven, CT: Yale University Press, 2001). Douglas argues that trials may be both just (and thus not show trials) and didactic, and the Eichmann trial may be one such example. On the other hand, Hannah Arendt believed that the Eichmann trial qualified as a show trial because “the purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes. . . can only detract from the law’s main purpose: to weigh the charges brought against the accused, to render judgement, and to mete out due punishment.” Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York: Viking Press, 1963), 232. See also Peterson, 265-268, for a discussion of the differences and potential overlap between show trials and trials with a didactic purpose.

<sup>27</sup> See e.g., Solomon, 355.

<sup>28</sup> *Ibid*, 235.

In the early 1930s Vyshinsky began to promote his own ideas of “revolutionary legality.” By that time, Stalin had become the sole leader of the Soviet Union, and for Vyshinsky, who was in charge of Stalin-era Soviet law, that meant its promotion, rather than its “withering away.” The “withering away of the law” perspective had enabled Bolshevik supporters, rather than highly trained legal experts, to represent Soviet legal justice. However, the use of lay courts and lay participants in law was both difficult to manage and their execution of the law often “fell to such a low level as to breed disrespect for Soviet justice.”<sup>29</sup> Moreover, the withering away of the law had become inconsistent, even impractical, with the larger, *political* needs of the Soviet state for a functioning legal apparatus.

While other Soviet scholars had led the way in criticizing Pashukanis’ theories from academic Marxist perspectives, Vyshinsky led the way in venom.<sup>30</sup> Though it is unknown whether Vyshinsky explicitly had Stalin’s support in condemning the “withering away of the law” perspective or if he simply inferred which way the political winds were blowing, Vyshinsky came out on top, moving from the role Prosecutor General of Soviet Russia, to Prosecutor General of the entire Soviet Union.<sup>31</sup> Vyshinsky saw the power of a strong centralized legal system, especially one Stalin could wield as a tool to strengthen the Soviet state against a world that resisted Soviet power—both on the international front and within the Soviet Union—and came to convince Stalin of its use. This domestic turn in favor of a strong legal system was replicated on the international stage. No longer condemning international law as bourgeois, Vyshinsky maintained that international law could be used to protect and promote the Soviet

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<sup>29</sup> Solomon, 447.

<sup>30</sup> See, e.g. A. Piontkovski, *Marksizm i ugovnoe pravo: sbornik statei* (Moscow, 1929), 2<sup>nd</sup> ed., 32-33, 39, for a pointed critique of Pashukanis’ work. I became aware of this sources thanks to Beirne & Sharlet, 23, fn 37. See Beirne & Sharlet, 32 for discussion of Vyshinsky’s critique.

<sup>31</sup> Solomon, 161.

state and its socialist goals.<sup>32</sup> Trainin, co-founder of the Russian Red Cross and educated in Western international law, supported Vyshinsky in this position.<sup>33</sup> It was in the 1930s that Trainin would return to the area of international criminal law, under Andrei Vyshinsky's supervision. During this time, Vyshinsky was Trainin's direct superior at MGU, where they both taught and Vyshinsky served as rector.<sup>34</sup> Vyshinsky appears to have been a classic micromanager, given his involvement with the day-to-day affairs at the Institute of State and Law and in his subordinates' work.<sup>35</sup> Vyshinsky influenced Trainin's research agenda, particularly in the late 1930s after he joined the People's Commissariat of Foreign Affairs, which would direct and supervise Trainin's research on international law in the 1940s.<sup>36</sup>

Trainin's relationship with Vyshinsky raises many questions and suggests the thorny issue of moral complicity in Stalinist oppression.<sup>37</sup> While many high-ranking professionals in 1930s Russia saw their situations shift rapidly downward in the context of the Great Purges, Trainin emerged not only unscathed but on his way to the top. However, Vyshinsky's support of Trainin helps to explain how and why Trainin survived and prospered during the Terror. In 1936, Vyshinsky "categorically forbid" the arrest of any of his subordinates in the Procurator-General Office.<sup>38</sup> Although the order did not directly protect Trainin, who worked for Vyshinsky at MGU, it reveals Vyshinsky's desire to protect his underlings. Trainin also benefited from his reputation for professional competence—many superiors took advantage of the purges to remove inept employees—which decreased superiors' motivation to allow their persecution and likely

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<sup>32</sup> See *Ibid*, 157 footnote 8.

<sup>33</sup> GARF, f. 8419, op. 1, d. 67, l. 1-2.

<sup>34</sup> ARAN, f. 1711, op. 1, no. 13, l. 1-2. Vyshinsky became rector in 1925, leaving in 1928.

<sup>35</sup> See, e.g. ARAN f. 277, op. 3, d. 43 for an example of Vyshinsky's close involvement with events at the Institute and f. 1711, op. 1, no. 21, l. 1-2, for an example of Vyshinsky's oversight with Trainin.

<sup>36</sup> ARAN, f. 499, op. 1, d. 24.

<sup>37</sup> That Vyshinsky and Trainin worked closely together is not in doubt- Vyshinsky was Trainin's supervisor at the MGU and steered Trainin toward both researching the concept of complicity and topics in international criminal law. Trainin always acknowledged V's influence on his legal work. ARAN f. 1711, op. 1, no. 21, l. 1-3.

<sup>38</sup> Solomon, 246.

made Trainin less of target.<sup>39</sup> While the Great Purges created opportunities for social advancement, his brilliant legal mind certainly contributed to Trainin's rise. He was in great demand as a lecturer and professor, and both his peers and the doyen of Soviet law- Vyshinsky lauded his legal research.<sup>40</sup> Although Vyshinsky was already at the height of Soviet law, he became the defining figure of Soviet law with his arch-rival Pashukanis' execution. He also gained personally from the Purges, as he took over the dacha he had admired of a former friend and had him executed.<sup>41</sup>

Vyshinsky was the chairman of the legal subcommittee charged with drafting the 1936 Soviet Constitution (the first constitution since the 1924 version). Though the Constitution of 1936 provided for a wide variety of civil, political, and economic rights—in spite of the former communist suspicions of “rights” as “bourgeois”—the focus of the 1936 Constitution was about the appearance of a legal order, rather than an actual rule of law. At the same time, the focus on the appearance of law, along with constitutional provisions for an all-union civil and criminal code, were clear rejections of the classic Marxist “withering away of the law” perspective.<sup>42</sup>

In addition to the turn towards the appearance of law, the Stalinist Constitution also rehabilitated the edict (*ukaz*), which had its origins in imperial Russian law and referred to an ordinance that had the force of law. The *ukaz* had been abandoned with the October Revolution

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<sup>39</sup> See ARAN f. 1711, op. 1, no. 20, l. 2-3 (overwhelmingly positive reviews of Trainin's performance by the Head of the Institute of Law, Ilya Trainin and MGU professor F.I. Kozhevnikov).

<sup>40</sup> See, e.g. ARAN f. 1711, op. 1, no. 14, l. 3-14, (requests to hear Trainin lecture) and op. 1, no. 10, l. 10-11, (notes of congratulation on Trainin's professional success). While it is not clear exactly why Trainin was able to escape from the Purges unscathed—many of the victims were random although long-time Bolsheviks were particularly targeted—Trainin already had a good working relationship with Stalin's protégé Vyshinsky, and may have also been helped by the fact that he did not belong to the Communist party and while supportive of the October Revolution, he was not a Bolshevik. Moreover, while Jewish, Trainin was not a member of one the most suspect ethnicities at the time in the Soviet Union—at the time ethnicities that had an outside state government, such as Poland, Korea, Finland, etc.

<sup>41</sup> See Vaksberg, *Stalin's Prosecutor*, 86-92 for a description of Vyshinsky's persecution of Leonid Serebriakov and the appropriation of his *dacha*. See also, Vera Chelishcheva, "Vyshinsky the Raider" (Reider Vyshinsky ili Podmoskovnia dacha pokazanii), *Novaia Gazeta*, July 7, 2008.

<sup>42</sup> See 1936 Stalinist Constitution, Article 14, which calls for all-union civil and criminal codes.

for being “hostile” to the proletariat, in favor of decrees (*dekrety*) and declarations (*deklaratsii*). Decrees and declarations were legislative acts whose language was borrowed from revolutionary France (the *décret* and *déclaration*) and thus were viewed as more appropriate for the new revolutionary state than the tsarist *ukaz*.<sup>43</sup>

The Presidium’s rehabilitated *ukaz* was thus different than a regular law (*zakon*) issued by the Supreme Soviet.<sup>44</sup> Rather than needing a majority vote of the Supreme Soviet delegates—of which there were 387 following the first elections—the *ukaz* only required a majority vote of the Presidium, composed of the chairman, his fifteen deputies (one from each Soviet republic), a secretary, and twenty members.<sup>45</sup> The return of the *ukaz*, at the expense of *dekrety*, much as with the rehabilitation of law, reflected a new reality of “socialism in one state,” and the presumed persistence of that state.<sup>46</sup> At the same time, an *ukaz*, like a decree, could be presented as a temporary measure, a way to portray unpopular decisions as merely temporary in order to placate any opposition. This was a Stalinist strategy adopted from the tsarist government—the controversial anti-Jewish quotas at universities had been implemented by decree, and explained away as being temporary, when in fact they survived as long as the tsarist government did.<sup>47</sup>

Once Stalin decided to focus on the appearance of a legitimate legal order, he could hardly have Pashukanis and Krylenko, the advocates of a classic Marxist approach to law, contradicting his “new myth of the constitutional basis of the Soviet political order.”<sup>48</sup>

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<sup>43</sup> The 1924 Constitution provided for decrees to be issued and they had been used widely by the early Soviet state leaders in the years prior. See, e.g. the Decree on Peace and the Decree on Land, both written by Lenin and approved by the Second Congress of the Soviets on October 26, 1917.

<sup>44</sup> 1936 Stalinist Constitution, Article 39.

<sup>45</sup> *Ibid*, Article 48.

<sup>46</sup> *Ibid*, Art. 49(b); See J. Arch Getty, “State and Society Under Stalin: Constitutions and Elections in the 1930s,” *Slavic Review*, Vol. 50, No. 1 (Spring 1991), 18-35, 20-21 for a discussion on the drafting committee’s goals for centralization.

<sup>47</sup> See Nathans, 267.

<sup>48</sup> Solomon, 194.

Vyshinsky accused both Pashukanis and Krylenko of being “counter-revolutionary Trotskyist-Bukharinite parasites” and “fascist agents,” and were shot by the secret police without trial.<sup>49</sup>

1937’s *The Defense of Peace and criminal law (Zashchita mira i ugolovnyi zakon)* was written with fascism in mind, since the book explicitly condemns fascist threats to “exterminate” the Soviet Union.<sup>50</sup> Trainin wrote the book in 1936, during the months of unrest leading up to the outbreak of the Spanish Civil War. By the time *The Defense of Peace* appeared, the Nationalists, led by Franco, had made inconsistent but steady gains in their attempts to control all of Spain. The Soviet Union, already encircled by hostile capitalist states, was now also being directly threatened by Nazi Germany’s anti-Bolshevik propaganda, and their vehemently anti-communist allies were gaining power and influence throughout Europe. This global context, in which communism was directly under threat, is critical for understanding Trainin’s work in developing Soviet approaches to international law.

In the book, Trainin outlines two separate and clashing systems- capitalism and socialism.<sup>51</sup> These two systems resulted in two separate processes: the “preparation for war” and the “struggle for peace.”<sup>52</sup> On the capitalist side, fascism reigned with its “hatred of workers” and its love of war—fascism “was war, war today and for days to come.”<sup>53</sup> According to Marxist-Leninist thought, fascism was an inevitable outcome of capitalism. The countries in

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<sup>49</sup> Michael Head, “The Rise and Fall of Evgeny Pashukanis and Stalinism,” *Canadian Journal of Law and Jurisprudence*, Vol. 17, (2004) 269-294, 275.

<sup>50</sup> Though the mid-to-late 1930s mark Trainin’s shift to international criminal law, he continued to write about domestic law as well. In 1938 Trainin published *Ugolovnoe pravo: osobennaia chast’, dolzhnostnye i khoziaistvennye prestupleniia* (A Specific Field of Criminal Law: Official and Economic Crimes), (Moskva: Uridicheskoe izdatel’stvo NKIU SSSR, 1938).

<sup>51</sup> Trainin, *Zashchita mira* (1937), 7.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* Soviet thinkers were of course not alone in identifying fascism with war. See also Walter Benjamin, *Selected Writings*, Vol. 4, transl. by Edmund Jephcott, eds. Howard Eiland & Michael W. Jennings, (Cambridge: Harvard University Press, 2003), 269. Benjamin, writing in 1939, (in “The Work of Art in the Age of Its Technological Reproducibility,”) states that “*All efforts to aestheticize politics [Benjamin’s definition of fascism] culminate in one point. That one point is war. War, and only war, makes it possible to set a goal for mass movements on the grandest scale while preserving traditional property relations.*”

which fascism had “triumphed” were capitalist countries with “deteriorating economic situations,” who hated workers and where the “petty bourgeoisie grew increasingly frustrated with each passing day.”<sup>54</sup>

That fascism could be used somewhat interchangeably with capitalism was not unique to Soviet thinkers of the 1930s. For example, members of the Frankfurt school also advanced this critique of capitalism, in which fascism was the logical outcome of a capitalist society.<sup>55</sup> On the opposing side of fascism was socialism, embodied in the peaceful Soviet Union. Every hour of every day that the peaceful Soviet Union continued to exist was a new victory for communism.<sup>56</sup> What follows from this precept is Trainin’s assumption that a crime against the Soviet Union is ipso facto a crime against peace. As absurd as this assumption is, it has parallels with colonial-era legal thinkers who defined civilization as that which they are, ipso facto justifying their colonial wars.<sup>57</sup>

The inherent aggression of fascist states was seen in contemporary events. Trainin repeatedly brings up contemporary German, Italian and Japanese aggression and interference in the affairs of other states, all of whom were members of the League. Most egregious to Trainin are the Italian invasion of Abyssinia (Ethiopia) in 1935 and the Japanese invasion of Manchuria in 1931. The League’s threat of sanctions clearly failed in these instances to prevent war. Although Ethiopia, a member of the League of Nations, had continually appealed to the League regarding fellow League member Italy’s aggression towards Ethiopia, the League was powerless to stop fascist Italy. When Italy invaded Ethiopia in October 1935, the League imposed limited

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<sup>54</sup> Trainin, *Zashchita mira* (1937), 7.

<sup>55</sup> See, e.g. Theodore Adorno and Max Horkheimer, *Dialektik der Aufklärung (Dialectic of Enlightenment)*, (Amsterdam: Querido Verla 1947), first published in English in 1972 (New York: Herder and Herder; see also Judith Marcus & Zoltán Tar, *Foundations of the Frankfurt School of Social Research*, (New Brunswick, USA: Transaction, 1984), 76, relying on Horkheimer’s work to state that “fascism was the natural and logical outcome of a capitalist society in its stage of permanent crisis”.

<sup>56</sup> Trainin, *Zashchita mira* (1937), 7.

<sup>57</sup> See e.g. Francisco de Vitoria, ’s 1539 *De Indis et De Jure Belli (The Indians and the Laws of War)*.

sanctions against Italy, but these had little effect on Italy's ability to occupy Ethiopia, and with the exception of the Soviet Union, the United States, and four other states, most nations accepted the Italian occupation with little objection.<sup>58</sup> The League responded similarly to Japan's 1931 invasion of Manchuria, meaning very little response at all.<sup>59</sup> Trainin, in his desire to outline a *new* concept of international law—that of crimes against peace—wants to delegitimize prior attempts to protect peace, embodied by the League of Nations.

Though the Soviet Union had joined the League of Nations in 1934, the League was hopelessly subject to cynical capitalist politics, and inept in its attempts to protect peace.<sup>60</sup> Trainin alleged Italy, Japan, and Germany's actions had shown they were preparing for a new system of aggression. Outside of *Zashchita Mira*, Trainin brought his message of fascist aggression to a wider audience, writing an April 15, 1937 *Izvestiia* article titled "Exploding World" which alleged that the world was divided into competing aggressive forces.<sup>61</sup> Trainin's warnings about the impotence of the League of Nations to prevent aggression were to be proved all too correct. However, Trainin noted in his book, the League was not the only failing attempt in international law to preserve peace.

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<sup>58</sup> The Soviet Union, the United States, China, Mexico, the Republic of Spain, and New Zealand were the six nations who did not recognize Italian control.

<sup>59</sup> Trainin's view contrasted with Lauterpacht's, who argued that the Charter of the League was consistent with inaction. Lauterpacht's interpretation serves to buttress the League's Covenant from allegations (by both Trainin and others) that politicians ignored it. Lauterpacht's argument thus works to give the impression that international law is guiding the League of Nations and world events, rather than brute force. Lauterpacht, 'Resort to War' and the Interpretation of the Covenant during the Manchurian Dispute," *American Journal of International Law*, Vol. 28, (1934) 43-60. If the Manchurian Dispute did not violate the League's Covenant, international law presumably still has a role to play in the world through organizations like the League. Lauterpacht would subsequently argue that the League of Nations Covenant (via Article 20) constituted a "higher law" than other treaties in international law. Hersch Lauterpacht "The Covenant as the 'Higher Law,'" *The British Yearbook of International Law*, Vol. 17 (1936), 54-65.

<sup>60</sup> Trainin also represented the League of Nations Covenant's rejections of war as changing the status of war from being acceptable under international law to being criminal, muddling the distinction between what is merely illegal in international law, and what is criminal (and thus punishable.) Trainin, *Zashchita Mira*, 10-13.

<sup>61</sup> Trainin, "Vzryvaiushchie mir" (Exploding world) April 15, 1937 *Izvestiia*, p.2.

The 1928 Kellogg-Briand Pact had officially outlawed war. The Pact, named after its authors—the United States Secretary of State Frank Kellogg and the French Foreign Minister Aristide Briand—was signed by numerous states in the interwar period (including Germany and Italy), and championed especially by the Soviet Union. As Trainin noted, the “indisputable advantage of the Kellogg-Briand Pact to the League of Nations Covenant, was its decisive rejection of war.”<sup>62</sup> Rather than simply try to limit war by the threat of sanctions, Kellogg-Briand declared war inherently illegal. Of course, “the history of international relations shows how in the hands of warmongers, many treaties provided with assurances of friendship and explanations in mutual love and devotion are treated like mere ‘scraps of paper,’” referencing the German invasion of neutral Belgium in 1914.<sup>63</sup> In spite of the virtues of Kellogg-Briand’s clear rejection of war, it was still unable to prevent war and acts of aggression.

How, Trainin asked, could this grave weakness in international law be remedied? Trainin finds that “there can be and must be an international convention created to combat crimes threatening peace. Unfortunately, on this issue, as well as the entire issue of criminal defense, very little attention has been paid to international criminology conferences and the existing criminal laws in capitalist countries.”<sup>64</sup> From this follows Trainin’s concept of “crimes against peace,” that would presumably be the foundation for which these “capitalist countries” could

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<sup>62</sup> Trainin, *Zashchita Mira*, 45. (“Besspornoe preimushchestvo pakta Briana-Kelloga pered paktom Ligi natsii—v reshitel’nom otkaze ot voiny.”)

<sup>63</sup> *Ibid*, 47. (“Istoriia mezhdunarodnykh otnoshenii pokazyvaet, kak legok v rukakh podzhigatyelei voiny “kliuchkami bumagi” stanuiatsia mnogie dogovory, snabzhennye zavereniami v druzhbe i ob” iasneniiami vo vzaimnoi liubvi i predannosti.”)

<sup>64</sup> *Ibid*, 49. (“Dolzhni i mogut byt’ sozdany mezhdunarodnye konventsii po bor’be s prestupleniami, ugrozhaiushchimi miru; dolzhno i mozhet byt’ mobilizovano natsional’noe ugovnoe zakonodatel’stvo na pomoshch’ delu mira. K sozhaleniiu, imenno etomu voprosu, kak i vsei probleme ugovnoi zashchity, i kriminalisticheskie internatsional’nie konferitsii i deistvuiushchee ugovnoe zakonodatel’stvo kapitalisticheskikh stran udelili kraine malo vnimaniia.”)

learn from, and would provide the basis for this international convention to combat aggression.<sup>65</sup> “Crimes against peace” would encompass a wide-range of acts, ranging from insulting another country to outright war.

But the fundamental question was how to enforce *any* form of international law, especially in a world composed of sovereign states? Here, Trainin wants to combine the emphasis on sovereignty of the positivists with the functionalists’ desire for an enforcement body to make international law more effective. In investigating conceptions of sovereignty in international law, Trainin first surveys the state of the field:

In the general theory of international law, questions about the relationship between international and national laws are decided differently. Some authors, protecting the idea of the sovereignty of each state, defend the precedence of national law. Others, however, for the sake of securing the principles of internationalism, uphold the primacy of international law. Third, as is often the case in fights of opposing ideas, many look for a middle way.<sup>66</sup>

These approaches, Trainin argues, are all fundamentally in error.<sup>67</sup> For these authors “do not take sufficient account that there are two kinds of provisions of international law: position by custom, and on the other hand, the provisions established in the social contract of the parties. The dispute about the primacy of rational or international law, if it can take place, it is only in relation to the rules of the first kind.”<sup>68</sup> In other words, states may reject international customs, but they are bound by codified international law. “No doubt remains,” continued Trainin, “of the

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<sup>65</sup> As Lauri Mälksoo has noted, “it is fascinating to see that when [international legal historian] Taube pointed out that Byzantium held that it could by definition only wage just wars, the same was essentially argued in the context of Marxism-Leninism regarding socialist countries.” Mälksoo, *Russian Approaches to International Law*, 72.

<sup>66</sup> Trainin, *Zashchita Mira*, 61.

<sup>67</sup> *Ibid.* (“The fundamental error of the above views lies in the differentiated approach to the norms of international law,” originally “Osnovnaia oshibka privedennykh vsigliadov zakliuchaetsia v nediferentsirovannom podkhode k normam mezhdunarodogo prava.”)

<sup>68</sup> *Ibid.* (“Avtory nedostatochno uchityvaiut, chto sushchestvuiut polozheniia mezhdunarodnogo prava dvukh rodov: polozheniia, sozdannye obychaem, i s drugoi storony—polozheniia, ustanavlivaemye nepooredstvennym dogovorom gosudarstv-storon. Spor o primate natsional’nogo ili internatsionalogo prava, esli mozhnet imet’ mesto, to lish’ v otnoshenii norm pervogo roda.”)

necessity of subordinating national law to international law in those instances.”<sup>69</sup> Moreover, the “sovereignty of the state remains unshakable,” and thus states are the only subjects of international law.<sup>70</sup> While proclaiming the dominance of sovereignty, Trainin also misses the contradiction between this dominance and the bounds of international law. Trainin argues that article 16 of the League of Nations’ Convention, which requires sanctions for those who violate the League’s prohibition on war, should be enforced for members, because they agreed to the Covenant.<sup>71</sup>

Here Trainin is advocating positivist ideas about state sovereignty (and sovereigns’ voluntary ability to limit it), and, enabled by his pre-revolutionary legal training, is able to make the positivist argument with ease. However, unlike many positivists, he wants to “fill the gaps” of international law like functionalists argued. This combination of positivist methods, which makes sense in light of the presumption that a capitalist state has no right to limit the sovereignty of a socialist state, with avowed functionalist goals, about having international law be more effective by means of enforcement, is common to the approaches of other Soviet legal specialists towards international law. In spite of Trainin’s embrace of sovereignty, and Lauterpacht and Lemkin’s contempt for it, the three took remarkably similar approaches in advocating for a body to enforce international law.

While law between socialist countries would presumably “wither away”, socialist countries needed to assert their sovereignty when dealing with capitalist countries. Holding the Soviet Union responsible, in the current political climate of capitalist contempt, would “allow a

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<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*, 62. (“Suverenitet gosudarstva ostaetsia nepokolebimym.”) The Soviet legal use of the term “sovereignty” was unmistakably different than its Western uses. See, e.g. Mälksoo, 6, (“What the Bolsheviks eventually seem to have meant, was: peoples formerly part of the Russian Empire could have their sovereignty and self-determination *but only under the guidance of Moscow.*”)

<sup>71</sup> *Ibid.*

situation in which the Soviet Union could be accused before swarms of spectator capitalist countries.”<sup>72</sup> While in this situation, “the real criminal is actually the political situation,” and the false beliefs that “vigorously” unified capitalist countries, it would result in a criminal socialist state which, “violating the foundations of capitalist morality, becomes the object of punitive intervention.”<sup>73</sup>

That Trainin critiqued international law as being one-sided is not surprising. In his critique of the “capitalist morality” that defined international law, one sees, interestingly enough given his politics, similarities with Trainin’s contemporary Carl Schmitt. The controversial German jurist, known as the “crown jurist of the Third Reich,” was a member of the Nazi party, and, around the time of Trainin’s writing of the *Defense of Peace*, was presiding at a German legal convention where he advocated cleansing German law of the “Jewish spirit.”<sup>74</sup> Schmitt would later condemn the increasing hypocritical moralization of international law, in which the enemies of the most influential states are not simply legal opponents, but enemies of all of humanity.<sup>75</sup> In spite of their differences, both scholars were writing from the position of critics

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<sup>72</sup> *Ibid*, 109. (“Pri ètikh usloviakh dopuskat’ polozhenie, pri kotorom Sovetskii soiuz mog by okazat’sia obviniaemym pered sonnishchem kapitalisticheskikh stran.”)

<sup>73</sup> *Ibid*, 109-110. (“Pri ètikh usloviakh dopuskat’ polozhenie, pri kotorom Sovetskii soiuz mog by okazat’sia obviniaemym pered sonnishchem kapitalisticheskikh stran, znachilo by deistvitel’no prestupno ignorirovat’ ryealnuu politicheskuiu situatsiiu i deistvovat’ v napravlenii toi konstruksii, kotoraiia ranee usilenno vydvigalas’ unifikatorami: gosudarstvo-pryestupnik, narushivshee osnovy kapitalisticheskoi morali, stanovitsia ob’ektom karetl’noi interventsii.”)

<sup>74</sup> Claudia Koonz, *The Nazi Conscience*, (Cambridge: Harvard University Press, 2003), 207.

<sup>75</sup> Schmitt’s later work, 1950’s *The Nomos of the Earth*, would argue that in the twentieth century the previous international legal order based on European imperialism and the spatial division of the world into civilized and “uncivilized” territories, and animated by the concept of state sovereignty, has been replaced by a new *nomos*, or spatial world order. Carl Schmitt, *The Nomos of the Earth: In the International Law of the Jus Publicum Europaeum*, trans. G. L. Ulmen, (New York, Telos Press, 2003). Because modern technology has made the world smaller, “states and state systems have had to become larger.” Schmitt, 19. G.L. Ulmen, transl. in Introduction, quoting Carl Schmitt, *Volkerrechtliche Probleme im Rheingebiet* reprinted in *Positionen und Begriffe*, 107. Thus, this new *nomos* is not characterized by nation-states per se, but by the larger political groupings of these states. The implications of this world order can be seen in the modern development of the concepts of war crimes, crimes against humanity, and human rights violations, the commission of which all imply *moral* condemnation. Describing Article 227 of the Versailles Treaty at the end of the First World War which alleged Kaiser Wilhelm II to be a war criminal, Schmitt explains that “the talk was still not about a general criminalization of aggressive war, but only about a moral crime against humanity, committed only by the heads of state of the Central Powers and nobody else.”

to international law as currently conceived, Trainin, writing as a Soviet citizen and Schmitt as a German citizen and an active member of the Nazi party.

Despite Trainin's and Schmitt's similarities in their critiques of international law, Trainin also articulated (and echoed) many of the concerns of colonized peoples regarding international law. The Soviet Union at the time was, for many colonized states, a beacon of equality in a way that the United States, in its alliance with the imperialist states of Britain and France, simply was not.<sup>76</sup> Lenin's 1917 work, *Imperialism: The Highest Stage of Capitalism*, decried the capitalist exploitation of colonized peoples. Communist parties in the colonized world were also movements for national liberation (in India, Vietnam, Cambodia, and elsewhere). Moreover, communist parties in Europe tended to call for racial equality in large numbers. The fact that many nations in eastern Europe regarded the Soviet Union as equally imperialistic in its actions does not negate the fact that for many colonized peoples around the globe, the Soviet Union's approach to international law represented a persuasive alternative to the current international legal order, which seemed to justify their own oppression.<sup>77</sup>

At the time of Trainin's writings in the 1930s, the communist and anti-imperialist movement in French colonial Vietnam was gaining popularity, and in the coming decade would

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Schmitt, 266. The newly victorious powers were thus able to judge the criminality of other states. The implication of this development is that powerful states, such as the United States of America, are able to judge the actions of less powerful states based on their own moral views. In this way, an enemy is no longer simply a legal opponent but an enemy of humanity. Though these moral standards coincide almost exactly with American foreign policy, they are still proclaimed universal. See Isabell Hull, *A Scrap of Paper: Breaking and Making International Law*, (Ithaca: Cornell University Press, 2014), for the argument that Germany differed from other Western states in its understandings of Western international law during the early 20<sup>th</sup> century.

<sup>76</sup> See John Hazard, *Communists and Their Law: A Search for the Common Core of the legal Systems of the Marxian Socialist States*, (Chicago & London: University of Chicago Press, 1969), x-xi, for evidence of Soviet law as inspiration for colonized and formerly colonized peoples.

<sup>77</sup> Moreover, the global left on issues of race was almost always Communist during this time period, especially in the United States. See, e.g. Fraser M. Ottanelli, *The Communist Party of the United States: From the Depression to World War II*, (New Brunswick: Rutgers University Press, 1991).

gain power (along with communist movements in China, Albania and Yugoslavia).<sup>78</sup>

Communist leaders in colonized countries, such as Ho Chi Minh in Vietnam, traveled and studied in the Soviet Union. Ho's writings mocked the pretensions of international law and its embrace of colonialism, from documenting the charade of justice at colonial courts in French West Africa to hunting natives for cannon fodder in colonial wars, to the German extermination of the Herero and Nama peoples. Ho made clear that international law was imperial in nature and against the colonized, and Trainin and the other Soviet scholars, articulated an alternative vision to corrupt Western imperial international law.<sup>79</sup>

At the same time, Soviet views on international law were no less serving than western European powers. The inherently "peaceful" nature of the Soviet Union, by virtue of its socialism, would clearly not be subjected to accusations of committing "crimes against peace" in Trainin's work. Regardless, accusations of one-sidedness in international law can hardly be sufficient to excuse it from the realm of international law. As Trainin, Carl Schmitt, and Ho Chi Minh observed, international law hardly applied to western European imperial states in the same way as it did to the less powerful.

Given that the development of international law was in fact intractably linked to imperialism and colonialism, the Soviet (and Stalinist-era) origins of "crimes against peace" should not disqualify the concept from being part of international legal thought of the time. From the perspective of many colonized peoples, Trainin's work as a representative of Soviet law was no more pernicious than international law's injustices. If anything, Trainin's work was

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<sup>78</sup> See, e.g. S. Neil MacFarlane, "Successes and Failures in Soviet Policy toward Marxist Revolutions in the Third World," in *The USSR and Marxist Revolutions in the Third World*, ed. Mark Katz, (Cambridge: Cambridge University Press, 1990) 6-50, Galia Golan, *The Soviet Union and National Liberation Movements in the Third World*, (Boston: Unwin Hyman, 1988), and Westard, *The Global Cold War*, especially page 55.

<sup>79</sup> Quynh N. Pham and Maria Jose Mendez, "Decolonial Designs: Jose Marti, Ho Chi Minh, and Global Entanglements," in *Alternatives: Global, Local, Political*, Volume 40, Issue 2, (May 2015), 156-173, 161. Pham and Mendez are citing Hồ Chí Minh's Toàn Tập.

a potential vehicle for the liberation of colonized peoples, a legal precursor to the philosophical platform of Frantz Fanon. Rather than othering colonized peoples as “uncivilized,” and thus justifying colonialism, Trainin and Soviet international law condemned the colonizers via a Marxist critique.<sup>80</sup> Trainin’s work on crimes against peace represented in part a creative legal attempt to protect the Soviet Union, through a new system of international crimes designed to protect peace.

### ***Trainin’s Vision of the New System for International Law***

In the same 1937 book *Zashchita Mira*, Trainin describes three types of crimes against peace. The first type, “aggressive actions” (*agressivnie deistviia*) includes, aggressive war and the threat of aggression and blockades.<sup>81</sup> The second are “hostile actions” (*vrazhdebne deistviia*), such as aggressive propaganda, terrorism, support for armed bandits, boycotts, and violations of international treaties designed to protect peace. Finally, the third type are “unfriendly actions” (*nepriaznennie deistviia*) such as the spread of false information or false documents of other states and insulting actions regarding relations with other states.<sup>82</sup>

In his articulation of these concepts, Trainin routinely examines the work of scholars from outside the Soviet Union. Perhaps the most cited scholar in *The Defense of Peace* is Vespasian Pella, the same Romanian expert in international law who, inspired Lemkin and served as the Romanian representative to the League of Nations.<sup>83</sup>

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<sup>80</sup> See John Hazard, *Communists and Their Law: A Search for the Common Core of the legal Systems of the Marxian Socialist States*, (Chicago & London: University of Chicago Press, 1969), x-xi, for evidence of Soviet law as inspiration for colonized and formerly colonized peoples.

<sup>81</sup> Trainin, *Zashchita Mira*, (1937), 112.

<sup>82</sup> *Ibid*, 113.

<sup>83</sup> As Romania’s representative to the League of Nations Pella frequently found himself at odds with his anti-Semitic government. According to Sean Lester, an Irish diplomat and the last Secretary-General of the League of Nations, Pella was instructed to announce that Romania was going to leave the League in late January, 1938. Pella was so embarrassed by the order that he pretended to lose his voice in order not to make the announcement, delaying

Lemkin was also cited in Trainin's work. Lauterpacht, though he had written on aggressive propaganda (including "revolutionary propaganda") was not.<sup>84</sup> One may speculate that Lauterpacht, firmly representative of British legal positions and was of less interest to Trainin than the Polish Jewish Lemkin, and the Romanian Pella.<sup>85</sup>

Referring to the 1933 "Conference for the Reduction and Limitation of Armaments," held in London and born out of Soviet insecurity in the face of Hitler's election in Germany, which aimed at defining (and thus preventing) aggression, Trainin provides the standard Soviet definition of aggression:

- 1) a declaration of war to another state;
- 2) an invasion of its armed forces, even without a declaration of war, on the territory of another State;
- 3) attack its land, sea and air forces, even without a declaration of war, the territory, vessels or aircraft of another State;
- 4) a naval blockade of the coasts or ports of another State;
- 5) providing assistance to armed bandits who, having been trained within its territory, intruded to the territory of another State; or refusal, notwithstanding the requirement of the State subjected to invasion, to take, on its own territory, all the measures in his power to deprive those bands of all assistance or protection<sup>86</sup>

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Romania's departure from the League. Sean Lester, "Diary Entry dated Feb. 1, 1938, p255-256," United Nations Archives, Reference Code: pp 274/1/225-226; available at <http://biblio-archiv.unog.ch/detail.aspx?ID=37028>, [last accessed Oct, 5, 2016]. In 1944, Pella would be appointed Romanian ambassador to Switzerland, and it was in this position that he helped to save the lives of some Jews from Bihor, a region of northwest Romania bordering Hungary.

<sup>84</sup> Lauterpacht wrote about the subject in "Revolutionary Propaganda by Governments," *Transactions of the Grotius Society*, Vol. 13, (1927) pp. 143-164 as discussed in footnote 96 below.

<sup>85</sup> Pella's alleged communist sympathies also obviously made him more palatable to Soviet lawyers.

<sup>86</sup> Trainin, *Zashchita Mira*, (1937), 119. In the original:

- 1) ob'iavlenie voiny drugomu gosudarstvu;
- 2) vtorzhenie svoikh vooruzhennykh sil, khotia by i bez ob"iavleniia voiny, na territoriiu drugogo gosudarstva;
- 3) napadenie svoimi sukhoputnymi, morskimi ili vozdushnymi silami, khotia by i bez ob"iavleniia voiny, na territoriiu, suda ili vozdushnye suda drugogo gosudarstva;
- 4) morskuiu blokadu beregov ili portov drugogo gosudarstva;
- 5) pomoshch', okasannuiu vooruzhennym bandam, kotorye, buduchi obrazovannymi na ego territorii, vtorglus' by na territoriiu drugogo gosudarstva, ili otkaz, nesmotria na trebovanie podvergshegosia vtorzheniiu gosudarstva, priniat, na svoei sobstvennoi territorii, vse zavisiashe ot nego mery dlia lisheniia nazvannykh band vsiakoi pomoshchi ili pokrovitel'stva.

For an overview of the London Conference, including Soviet involvement in, see Sellars, 34-40. As Sellars noted, the armed bands clause, intended to prevent aggression by proxies, was originally included in the 1933 Conference (and subsequent Soviet) definition because of Turkish desire to repress Kurdish rebels. See Sellars, 39.

Trainin notes that while other scholars have tended to discuss the concept of aggression more generally, this definition has the benefit of specificity—a necessity given Trainin’s largely positivist approach to international law.<sup>87</sup> Positivism necessitated that a sovereign should not be assumed to give up rights—therefore, it must be explicit that a sovereign has consented to foregoing particular sovereign rights. This specificity is also necessary given that “in the interests of global security” the concept of aggression needs to be determined more precisely, “in order to “prevent any pretext that would justify its use.”<sup>88</sup>

While the prevention of “aggressive actions” was essential, the bulk of Trainin’s analysis focused on the broader and more nebulous category of “hostile actions.” Beginning his discussion of “hostile actions,” Trainin sounds an ominous note, claiming that in recent years new machines have been invented “for the extermination (*istrebliniia*) of humanity.”<sup>89</sup> This rhetoric, while seemingly prescient of the horrors of World War II, hardly required a crystal ball, given German propaganda against communists. In a 1936 pamphlet titled “The SS as an anti-Bolshevik Fighting Organizing,” Heinrich Himmler wrote that for the “agile opponents” of Germany (such as the “subhuman” communists and Jews) there was no possibility of peace, “but only winners and losers in a fight to the death.”<sup>90</sup> Shortly after his discussion of extermination, Trainin quotes Litvinov again, warning about “wars between peoples (nations, or “narod”), wars between races, between religions, for mutual extermination.”<sup>91</sup>

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<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* (“ . . . polagaia neobkhodimym v interesakh vseobshshchei bezopasnosti opredelit’ vozmozhno bolee tochno poniatie agressii, daby predupredit’ vsiakii povod k ee opravdaniuu.”)

<sup>89</sup> *Ibid.*, 123.

<sup>90</sup> Heinrich Himmler, *Die Schutzstaffel als antibolschewistische Kampforganisation*, (Munich: J.G. Weiss’sche Buchdruckerei, 1936).

<sup>91</sup> Trainin, *Zashchita Mira*, (1937), 125.

This language of extermination stems from the “hostile action” that Trainin classifies as “propaganda of aggression.”<sup>92</sup> This propaganda is used to “manufacture militaristic ideas and attitudes” in fascist countries. The propaganda is centralized in Ministries of Propaganda, which, “like the vodka monopoly, introduced by the tsarist government in Russia, intoxicates people.”<sup>93</sup> This propaganda called for the “destruction of Russia” and the “destruction of the Soviet Union.”<sup>94</sup> Quoting Litvinov again, Trainin declares that fascists believe that “only war can refine, refresh and rejuvenate humanity.” Young people are educated in this spirit, and this doctrine has a monopoly on the “press, literature, science and the arts.” While the fascists claim this to be a new ideology, “the truth is, it reeks of very remote antiquity,” the “mold of the Middle Ages,” and “raises the image and practices of the Holy Inquisition.” Moreover, in the name of a “civilizing mission,” fascist propaganda has declared a “campaign against Marxism, against communism, against radicalism.”<sup>95</sup>

The difference between this aggressive propaganda and “revolutionary propaganda,” for Trainin, appears to be that the propaganda of the fascists, which promotes “the extermination of thousands upon thousands of civilians,” is ipso facto aggressive.<sup>96</sup> (Of course, this is striking

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<sup>92</sup> *Ibid*, 123. (“propaganda agressii.”)

<sup>93</sup> *Ibid*, 125. (“Daby proizvodstvo militaristskikh idei i nastroenii bylo na nadlezhashchei vysote, ono v stranakh fashizma tsentralizuetsia v spetsial’nykh “ministerstvakh propaganda”, stanovias’ takim obrazom gosudarstvennoi monopoliei napodobie drugoi, takzhe durmanivshei narody, vodochnoi monopolii, kotoruiu kogda-to vvelo tsarskoe pravitel’stvo v Rossii.”)

<sup>94</sup> *Ibid*, 126-127, (“unichtozit’ Rossiu” and unichtozit’ Sovetskii soiuz.”)

<sup>95</sup> *Ibid*, 125. (Quoting Litvinov, “Nastoiashchie idealy chelovechestva, vidite li, èto vechnaia bor’ba mezhdunarodami, bor’ba mezhdunarodami rasami, mezhdunarodami religiiami, ikh vzaimnoe istreblenie. Tol’ko boina mozhet vnov’ oblagorodit’, obnovit’ i omolodit’ chelovechestvo. V ètom dukhe dolzhno vospitybat’sia iunoshestvo. Ètomu uchenii dolzhny sluzhit monopol’no pechat’, literatura, nauka i iskusstvo. Èta novaia ideologiiia, pravda, paxnet ves’ma otdalenoii starinnoi, otdaet plesen’iu srednikh vekov, voskreshaet obrazy i metody sviatoi inkvizitsii, no radi ee torzhestva, vo imia ètoi novoi ‘zivilizatorskoi missii’ obivliaetsia ‘poxod protiv marksizma, protiv kommunizma, protiv radikalizma.”)

<sup>96</sup> *Ibid*, 129. Trainin presumably considered Lauterpacht one of the “capitalists” who wrongfully deplore revolutionary propaganda. Lauterpacht wrote about the subject in “Revolutionary Propaganda by Governments,” *Transactions of the Grotius Society*, Vol. 13, (1927) pp. 143-164. In some ways, Lauterpacht and Trainin make a number of similar conclusion about the power of propaganda. Lauterpacht, like Trainin, believes that “when resorted to in modern times it is either an incident of an actual state of war, or a measure preceding a state of war, or an act of reprisals,” and, “when resorted to apart from an actual state of belligerency (in which case no illegality

given the context Trainin was writing in. The Stalinist Terror was at its height, and Trainin's own editor Vyshinsky was calling for the violent extermination of enemies of the Soviet state.)

Trainin was likely influenced in his condemnation of “aggressive propaganda” by the “counter-revolutionary propaganda” prohibited by the Soviet state's criminal codes. Article 58 of the 1928 Soviet Russian criminal code prohibited “propaganda or agitation, containing a call for the overthrow of Soviet power by violent and treacherous action, or through active or passive physical resistance to the workers.”<sup>97</sup> This part of the code was designed to cement Soviet power by prohibiting criticism of it, just as the prohibition of aggressive propaganda was designed to protect Soviet power by criminalizing interference in Soviet affairs and encouraging “peaceful coexistence.”

Both Lemkin and Trainin write about extermination based on the identity of the group. For Trainin, peoples victimized by capitalist aggression are the core persecuted group; for Lemkin, they are ethnic, religious or other social groups. Both consider these are crimes based on membership in a group (rather than crimes against individuals), and both emphasize the fact that the group's existence is threatened by attacks. The main difference is that Trainin focuses on the *potential* of propaganda to encourage extermination, while Lemkin has already conceptualized the act of extermination itself in the “crime of barbarity.” Trainin's “crime against peace of aggressive propaganda” can be considered an early, general form of *incitement*

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attaches to it) it inevitably tends to obliterate the borderline between the state of peace and the state of war, and as such is incompatible with the maintenances of orderly intercourse between nations.” Lauterpacht, “Revolutionary Propaganda by Governments,” 155. Lauterpacht concludes that revolutionary propaganda is “a clear violation of the law of nations, no right (and no corresponding duty) more absolute, more rigid or more formal than freedom from external interference.” *Ibid*, 156-157. Of course, the propaganda Lauterpacht declares illegal is “revolutionary propaganda,” such as that allegedly practiced by the Soviet Union through the Third International. *Ibid*, 162.

<sup>97</sup> “Propaganda i agitatsiia, vyrazhaiushchiasia v prizyve k sverzheniiu vlasti Sovetov putem nasil'stvennykh ili izmennicheskikh deistvii ili putem aktivnogo ili passivnogo protivodeistviia Raboche” Article 58 of 1928 Russian Soviet Federative Socialist Republic criminal code.

to genocide.<sup>98</sup> Perhaps Trainin was more influenced by Lemkin's advocacy for preventing "barbarism" than Trainin had wanted to admit in *Ugolovnaia interventsia*. This focus on *prevention* by the Soviets is also consistent with domestic Soviet criminal laws that emphasize the state's right to protect itself from internal threats (real or imagined) of counter-revolutionary propaganda. At the same time, Trainin's articulation of incitement in an international legal context is deliberately distinct from domestic law. In particular, it was defined to exclude the Soviet Union's domestic actions as incitement and was limited to international wars. Therefore, threats to exterminate internal populations (like capitalist enemies), separate from international wars, are not international crimes, not dissimilar to the fact that exterminatory wars of colonization were justified, because the colonized were not "civilized."

Trainin's second category of hostile actions is terrorism; an international offense that Trainin acknowledges had received a lot of attention in recent years. The topic is of special interest to the Soviet state, given the communist movement's history of revolutionary terrorism and the revolutionary state's struggle against anti-communist movements. This struggle with capitalism "is the first type of struggle with 'terrorism,'" claims Trainin.<sup>99</sup> While the capitalist countries' attempts to punish socialist revolutionaries as "terrorists" were misguided, "the second type of terrorism is a new problem," and a legitimate one.<sup>100</sup> In other words, terrorism is only a crime if capitalists perpetrate it.

This is modern political terrorism and poses a distinct threat to peace, and to the Soviet state. Again, quoting Litvinov, Trainin argues (like a positivist) that modern political terrorism

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<sup>98</sup> The modern legal definition of incitement to genocide is discussed more thoroughly in Chapter 5. Another way of interpreting Trainin's focus on potentiality is as a focus on prevention, rather than punishment.

<sup>99</sup> Trainin, *Zashchita Mira*, (1937), 140.

<sup>100</sup> Trainin, *Zashchita Mira*, (1937), 141.

is based on violations of another state's sovereignty. It is thus an international, not domestic, issue.

“The peculiarity of this kind of modern terrorism,” – says Comrade Litvinov – “is, that it is almost always prepared and carried out on foreign soil, it is financed from foreign sources and, consciously or unconsciously, becomes an instrument of foreign policy. We are dealing with a phenomenon that is clearly threatening peace.”<sup>101</sup>

The sort of terrorist acts perpetrated by socialists in tsarist Russia are largely excluded from this definition of terrorism because under Trainin's definition, the tsarist state was itself a terrorist state. Because the revolutionaries were acting against capitalism, their acts which would otherwise be considered acts of terrorism are better understood as “revolutionary” acts. While the same acts would be illegitimate against the Soviet state, the acts were legitimate against an oppressive state. International law's conflation of the two offenses is an example of how the world is “fighting against the communist movement.”<sup>102</sup> Rather, terrorism occurs by trying to undermine legitimate [read: socialist] governments by training, financing, or otherwise supporting terrorist movements. This sort of interference in other states “created friction between states, conflict between states” and these sort of threatening circumstances “sometimes devolve into armed clashes.”<sup>103</sup> When states admit and allow terrorists to organize, when terrorists are “praised and defended in the press,” and their terrorist acts are “indulged” by the courts, “all this creates a breeding ground” that enables terrorism to exist.<sup>104</sup> A year earlier,

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<sup>101</sup> *Ibid.* (“Osobennost'iu ètogo roda noveishego terrorizma, --skazal t. Litvinov,-- iavliaetsia to, chto on pochtì vseгда podgotovliaetsia i osushchestvliaetsia no chuzhoi territorii, finansiruetsia iz inostrannykh istochnikov i soznatel'no ili bessoznatel'no stanovitsia orudiem inostrannoï politiki. . .my imeem zdes' delo s iavlennem, iavno ugrozhaiushchim miru.”)

<sup>102</sup> *Ibid.*, 140.

<sup>103</sup> *Ibid.*, 141. (“Na pochve takikh aktov sozdaiutsia treniia, intsidenty, konflikty mezhdu gosudarstvami, ugrozhaiushchie inogda perekhodit v vooruzhennye stolknoveniia.”)

<sup>104</sup> *Ibid.* (“Dopushchenie otkrytoi deiatel'nosti i organnizatsii terroristov, voskhvalenie ikh i zastupnichestvo za nikh v presse, travlia predpolagaemykh zhertv pokushenii, opravdanie terroristicheskikh aktov sudom ili sniskhoditel'noe k nim otnoshenie,-- vse èto sozdaet tu pitatel'nuiu sredu, vne kotoroi terrorizm ne mozhet sushchestvovat'.”)

Trainin had written about the relationship between fascism, aggression, and terrorism for *Izvestiia*, warning about the Gestapo working “hand in hand” with terrorists against the Soviet state.<sup>105</sup> Trainin thus approves of the League of Nation’s moves toward criminalizing this form of terrorism, that is, according to Trainin, terrorism that is “directed against peace.” While Trainin weakly argues that earlier prohibitions were really just a “campaign against the communist movement under the guise of combating terrorism,” Trainin argues that prohibiting this form of terrorism helps to encourage the “peaceful coexistence of peoples.”<sup>106</sup>

In this, we can see one clear advantage to Trainin’s positivist style of argument—many of the Soviet Union’s worst atrocities are excluded from the realm of international law through a reliance on sovereignty. That is, many of the Soviet Union’s worst crimes were directed inward, toward the Soviet people, rather than outward.<sup>107</sup> Moreover, while the Soviet Union clearly interfered in the domestic affairs of other states (such as in the Spanish Civil War, as well as in their support of Communist parties around the world), and would continue to participate in this sort of interference, which could and did often include terrorism, it was officially denied by the Soviet state, and thus acceptable to be legally condemned.

Shifting from an emphasis on positivism to the goals of functionalism, Trainin concludes his study by looking for ways to enforce his desired prohibition on “crimes against peace.” As one would expect, consistent with his earlier positivist arguments, Trainin proposes both an International Conference as well as for national laws to incorporate crimes against peace.<sup>108</sup>

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<sup>105</sup> Trainin, “Fascism, Terrorism, Aggression,” (Fashizm, terrorizm, agressiia), *Izvestiia*, Sept. 6, 1936, p2.

<sup>106</sup> Trainin, *Zashchita Mira*, (1937), 145. (“Takim obrazom možno konstatirovat’, chto formula, razrabotannaia Komitetom Ligi, predumativaiushchaia terrorizm individual’nyi, terrorizm importnyi, terrorizm, ostrye kotorogo napravleno protiv mira, dala novuiu postanovku vsej probleme bor’by s terrorizmom: vmesto godami podgotovliavshegosia unifikatorami pokhoda protiv kommunisticheskogo dvizheniia pod vidom bor’by s terrorizmom teper’ v pervye stavitsia vopros o bor’be s podlinnym tyerrorizmom kak internatsional’nym deliktom, posiaigaiushchim na mirnoe sozhitel’stvo narodov.”)

<sup>107</sup> See, e.g. Norman Naimark, *Stalin’s Genocides*, (Princeton: Princeton University Press, 2011).

<sup>108</sup> Trainin, *Zashchita Mira*, (1937), 159.

Perhaps in an acknowledgement of functionalists like Lauterpacht, Trainin recognizes “gaps” (*probel*) in international law. However, he claims that the “main gap in the theory of international criminal law is the lack of a clear understanding of the basic concepts of international criminal law: namely concepts of international *crimes* [emphasis mine].” (“delikta”)<sup>109</sup> By this, Trainin presumably references the aforementioned historical distinction in international law between what is criminal and what is merely “illegal.” While this seems strange to contemporary ears, international law had long distinguished between the illegal and the criminal. (The illegal, while frowned upon, did not enable other states to punish or otherwise enforce international law. The criminal, meanwhile, could be punished.) Trainin wants to declare concepts like crimes against peace to be ‘criminal’ (rather than simply ‘illegal’), and to punish their violations accordingly.<sup>110</sup> Throughout *Defense of Peace*, Trainin refers to crimes against peace as “delikta,” (the “delicts” or “crimes” of Lemkin’s work). As described earlier, calling an offense a “delict” implied that it was a crime that could and more importantly *should* be punished. In this, Trainin blurs the difference between the “illegality” of war under Kellogg-Briand and an actual “criminal” punishment for its violation.<sup>111</sup>

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<sup>109</sup> *Ibid*, 160. (“Osnovnym problemom teorii mezhdunarodnogo ugolovnogo prava iavliaetsia otsutstvie chetkogo ponimaniia osnovnogo poniatiiia internatsional’nogo ugolovnogo prava, poniatiiia internatsionalnogo delikta.”)

<sup>110</sup> See, e.g. Kirsten Sellars, *Crimes against Peace’ and International Law* (Cambridge: Cambridge Press, 2015) for different examples of the distinction between the illegal and the criminal in international law.

<sup>111</sup> See, e.g. Hersch Lauterpacht, “International Law- The General Part,” *Collected Papers of Hersch Lauterpacht*, Eli Lauterpacht ed., (Cambridge: Cambridge University Press, 1970), 134. Lauterpacht, while in favor of criminalizing aggression, did not believe war was itself prohibited by international law. See Hersch Lauterpacht, “The Pact of Paris and the Budapest Articles of Interpretation,” *Transactions of the Grotius Society*, Vol. 20, (1934), 178-206. Lauterpacht makes a persuasive analogy to domestic law in refuting claims that aggression is too difficult to define. “The objections to a definition of aggression are in the long run calculated to make more difficult the establishment of an effective system of international obligations in the domain of observing and securing the observance of pacific settlement. In the sphere of municipal law we do not usually object to defining murder or manslaughter for the reason that a definition may on occasions prove insufficient or unjust. We put our trust in the skill of the draftsmen and the wisdom of the Courts. It is therefore to be hoped that international lawyers will devote their attention less to piling up objections based on somewhat ingeniously devised possibilities showing the difficulties of a definition than to assisting progress by helping to frame a definition of aggression so as to provide, as far as the nature of that task permits, for unforeseen contingencies, including the unavoidable residuum of discretion for the adjudicating agency. Lauterpacht, “The Pact of Paris and the Budapest Articles of Interpretation,” 200-201.

If crimes against peace were just that- crimes-who was to be held responsible for their violation? Here Trainin argues that states are sovereign, and given his positivist predilections, cannot be held responsible. However, individuals can be held responsible for acts they committed while acting as the sovereign.<sup>112</sup> That is because individuals are the ones who engage in the acts of aggression. As international law is, by Trainin's definition, something that they have already consented to be bound by, they are aware that they may be punished for violating it (satisfying the principle *nullum crimen sine lege*, no crime without punishment, but not, perhaps, the second part of the principle: *nulla poena sine lege*, no punishment without law). Here, Trainin diverges from strict positivism by claiming that individuals may be held responsible even when they are committing the acts in their role as sovereigns.<sup>113</sup>

Trainin called for international laws to be broadened (“*rasshirena*”) in order to protect crimes against peace. While individual perpetrators could be punished under national laws, given the capitalist nature of most countries, this was unlikely.<sup>114</sup> Here, we have an implicit acknowledgement of a “gap” in international law, and an explicit call to close it. How should one close this gap and expand international law?

In a move that would warm a functionalist's heart, Trainin calls for an International Court on Crimes Against Peace:

As the establishment of the concept and the system of international criminal law becomes clear, not only will a particular form of crime against peace (terrorism, aggressive propaganda, etc.) [be prosecuted], but every instance of a crime against peace will become the subject of an International Criminal Court. Thus the League of Nations, which in any case has the task of protecting peace, should create an International Criminal Court as the highest court to combat crimes encroaching on the peaceful coexistence of peoples.<sup>115</sup>

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<sup>112</sup> Trainin, *Zashchita Mira*, (1937), 110.

<sup>113</sup> See, e.g. David Luban, *Legal Modernism*, (Ann Arbor: University of Michigan Press, 1997), 338.

<sup>114</sup> Trainin, *Zashchita Mira*, (1937), 160, 165.

<sup>115</sup> *Ibid*, 177. (“S ustanovleniem poniatia i sistemy internatsional'nykh deliktov stanovitsia iasnym, chto ne dela o tom ili inom konkretnom vide poshiagatel'stv protiv mira (o terrorizme, propogande agressii i dr.), a dela o vsiakom

However, courts are not without potential problems, as “it is well known the extent that courts in modern capitalist countries, and especially in fascist countries, are obedient tools of government policies.”<sup>116</sup> Given that the Soviet Union “is the only socialist state, in opposition to the capitalist world,” a “special vigilance” is required “when it comes to the creation of an international arbitration or judicial body.”<sup>117</sup> With this vigilance in mind, Trainin concludes that an international criminal court “can and should therefore, play a role in the struggle for peace,” though perhaps only if controlled by the Soviet Union, ipso facto a peace-loving nation.<sup>118</sup> Trainin’s support for an international criminal court contains an explicit limitation on sovereignty. It is true that Trainin claims that the sovereign has to consent to participate in the court, because sovereignty is paramount. But he calls for an international court to be truly normative—that is, which could truly force states (via the individuals who represent them) to obey international law—and reveals the limitations that he would place on the sovereign. Trainin’s positivist style of argument cannot completely hide the contradiction between his recognition of the importance of sovereignty that ran alongside his functionalist end-goals.

Trainin’s contradictions are in one way extremely prescient. They herald the form of international law that would come to characterize the late-twentieth century and on—still a slave to the concept of sovereignty but at the same time yearning for a truly prescriptive international

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takom posyatayelstvye pri nalichii uslovii, predmomu Mezhdunarodnomu ugovnomu sudu. Tem camym i liga natsii, kotoroia vo vsiakom sluchae imeet svoei zadachei zashchitu mira, obretet v Mezhdunarodnom ugovnom sude vysshuiu sudebnuiu instantsii dlia bor’by s prestupleniiami, poshiagaiushchimi na mirnoe sozhitel’stvo narodov.”)

<sup>116</sup> *Ibid.*, 165. (“Dalee, khorosho izvestno, v kakoi mere sovremennyi sud v kapitalisticheskikh stranakh i, razumeetsia, prezhde vsego v stranakh fashistskikh iavliaetsia poslushnym orudiem pravitel’svennoi politiki.”)

<sup>117</sup> *Ibid.*, 177. (“Takoe polozhenie, estestvenno, obiazyvaet k osoboi bditel’nosti, Sovetskii soiuz, protivostoiashchii, kak edinstvennoe sotsialisticheskoe gosudarstvo, vsemu kapitalisticheskomu miru, estestvenno, dolzhen proiavliat’ ostorozhnost’ vsiakii raz, kogda rech’ idet o sozdanii mezhdunarodnykh treteiskikh ili sudebnykh instantsii.”)

<sup>118</sup> *Ibid.* (“No v kachestve instantsii, napravlennoi protiv vseh podzhigatelei voyny, Mezhdunarodnyi internatsional’nyi sud mozhet i, sledovatel’no, dolzhen sygrat’ svoiu rol’ v bor’be za delo mira.”)

law. In Trainin's case, the primary crime for which an international body was needed to enforce was "crimes against peace."

Not long after the publication of 1937's *The Defense of Peace and Criminal Law*, in November 1938 by a Resolution of the Supreme Attestation Commission, Trainin received the degree of a Doctor of Legal Sciences (without defending a dissertation).<sup>119</sup> That same year, Trainin began working in the USSR Academy of Sciences' Institute of Law, the Soviet Union's premier legal institution, and was appointed head of the Department of Criminal law, an unusual appointment given that he did not belong to the Communist Party (unlike most high-ranking Soviet social scientists, who did).<sup>120</sup> For the next four years Trainin worked as a senior researcher there, and in December 1942 he became the head of the Division of Criminal Law at the Institute of Law at the Academy of Sciences, just as the Battle of Stalingrad was deciding Europe and the world's fate.<sup>121</sup> Even though the Battle of Stalingrad was turning the tide of the war in favor of the Soviets, the events that would become known as the Holocaust were still ongoing, and showed no signs of ending.

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<sup>119</sup> ARAN, f. 1711, op. 1, no. 13, l. 2.

<sup>120</sup> ARAN, f. 1711, op. 1, no. 8, l. 1-3.

<sup>121</sup> *Ibid.*

#### **Chapter 4: ‘For Which There is No Name in Any Human Language:’ Hitlerite Responsibility Under Criminal Law**

On September 17, 1939, following the earlier German invasion of western Poland that launched World War II, the Red Army invaded eastern Poland. The atrocities of this invasion are well-known, with the massacre of thousands of Polish nationals in the Katyn Forest by the Soviet secret police the most infamous of the crimes. A little over two months later, the Soviet Union, coveting Finland’s territory, invaded, in what came to be called “the Winter War.” A few weeks after the invasion, the Soviet Union was expelled from the League of Nations (Germany had left the league in September 1933, following the Nazi Party’s rise to power). Rather than the easy military victory that the Soviets expected (as they had many times more men and weapons than the Finns), the Soviets struggled, but still managed to seize some land concessions from Finland in March 1940. A few months later, the Soviet Union invaded the Baltic states in an attempt to recover the lands of the former tsarist empire, killing tens of thousands of Latvians, Lithuanians, and Estonians in the process. Shortly after this bloody conquest, the Soviet Union also occupied Bessarabia, Northern Bukovina, and Hertza regions of Romania.

It would appear that the Soviet Union was aware that their actions were inconsistent with Trainin’s concept of crimes against peace—the phrase “crimes against peace” went from appearing frequently in newspapers throughout the 1930s, to disappearing from 1939 until its dramatic reappearance in 1944, when they reappeared in Trainin’s legal writings, and then in newspapers the following year, when discussion about postwar trials of the Axis Powers became common.<sup>1</sup> Crimes against peace were thus an appropriate way to conceptualize crimes

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<sup>1</sup> While the concept of “crimes against peace” (*prestupleniia protiv mira*) appears in Soviet newspapers throughout the 1930s, it disappears after the Soviet invasion of Poland in 1939, only to reappear in 1945, at the same time as discussions on the postwar trials became common. See, e.g. *Pravda*, Feb. 1, 1937, p.5; *Pravda*, Feb. 11, 1939; and the gap in discussion in *Pravda* until Oct. 19, 1945. *Izvestiia*’s coverage is similar, with “crimes against peace,” appearing in *Izvestiia* on Nov. 11, 1936, p.2, and disappearing until *Izvestiia*, Feb. 2, 1945, p.3.

committed against Soviet peoples, so long as it was clear the Soviet Union would be victorious, and thus could institute victor's justice, safe from the threat of being accused of crimes against peace themselves for their actions in Poland and elsewhere.

Yet this was years in the future. Following the German invasion of Poland on September 1, Raphael Lemkin joined the Polish Army, in an attempt to defend Poland from the Germans. His home on Kredytowa Street in Warsaw was bombed on September 6, 1939, as part of the coordinated efforts of Germany and the Soviet Union to carve up Poland.<sup>2</sup> During the German siege of Warsaw, he was shot in the hip. The German army took approximately 140,000 Polish soldiers as prisoners of war during the Warsaw siege alone, and 18,000 Warsaw residents were killed. Lemkin, however, avoided capture by the Germans, because he, like so many other Polish Jews fearing a German occupation, fled east, where he eventually encountered the Red Army, which had occupied eastern Poland on September 17. Interrogated by a Soviet soldier, Lemkin avoided imprisonment by adopting the manner of a Belarussian peasant.<sup>3</sup> Avoiding the death sentence of many other Polish intellectuals, Lemkin first escaped over the Lithuanian border, making his way by train to Latvia, where he then flew to Sweden.<sup>4</sup> From Sweden, Lemkin would begin his roundabout journey to the United States. Lemkin, on his way to America however, first flew to Moscow—the only route available to him at the time and the very government he was running from in Poland.

In Moscow, Lemkin walked around Red Square, and described Moscow as a land where “there was no room for a smile” and everyone was besieged by “collective anxiety.”<sup>5</sup> From Moscow, Lemkin and other refugees boarded the Trans-Siberian railroad, from where they

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<sup>2</sup> Lemkin, *Totally Unofficial*. 25

<sup>3</sup> *Ibid*, 45. Lemkin says that Belarussian (what he called “White-Ruthenian”) was “a language I spoke well in my childhood.”

<sup>4</sup> *Ibid*, 70.

<sup>5</sup> *Ibid*, 83.

witnessed what he described as villages full of “deep melancholy” and children begging for bread who reminded him of “hungry pigeons.”<sup>6</sup> Lemkin did enjoy visiting Lake Baikal in southern Siberia, which he praised as possessing “unbelievable beauty” and whose brilliant tones of blue “created a symphony that was almost hypnotic.”<sup>7</sup> The train also stopped in Birobidzhan, the administrative center of the autonomous Jewish republic established in 1928. He described the Soviet Union’s attempt to create a Jewish republic as a “handful of displaced people cut off from their roots.”<sup>8</sup> From Birobidzhan, the train went onto Vladivostok, where Lemkin boarded a boat to Japan for a three-day voyage on a stormy sea. The boat ride was uncomfortable, and the refugees’ situation was epitomized by “the disheveled state” of man from a prominent banking family who had been a Polish senator. His “nose was always running in a most remarkable way” and he kept asking “What do you think is really happening? What is the significance of all this?” As Lemkin recalled, the man “seemed to believe there must be logical explanations for this illogical, chaotic situation.” Or perhaps, Lemkin offered, “he was voicing protest at having ceased to be an individual, at having been lumped into this mass of humanity floating on the choppy Japanese sea.”<sup>9</sup>

Lemkin spent a week in Japan, traveling from his port in Yokohama to Kyoto where he experienced a tea ceremony, attended the theater, appreciated cherry blossom season, and would later praise Japan’s “union of aesthetics and botany.”<sup>10</sup> From Kyoto, Lemkin briefly stopped in Tokyo before returning to Yokohama. In Yokohama, Lemkin boarded the *Heian Maru*, a ship which took him to Seattle.<sup>11</sup> Lemkin found the sea voyage relaxing, although he was troubled by

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<sup>6</sup> *Ibid*, 85.

<sup>7</sup> *Ibid*, 86.

<sup>8</sup> *Ibid*, 87.

<sup>9</sup> *Ibid*, 88.

<sup>10</sup> *Ibid*, 91.

<sup>11</sup> *Ibid*, 96.

a conversation he had with a Japanese naval officer who expressed his desire that Japan colonize Australia.<sup>12</sup>

Lemkin recalled his arrival in America warmly. He spent his first evening in the Seattle home of a friend of a fellow Polish passenger he had met on the ship. The following day he took a train bound for North Carolina, where he met up with Malcolm McDermott at Duke University, with whom he had worked years earlier on translating Poland's penal codes.<sup>13</sup> It was April 1941, over a year and half since Lemkin had left his hometown, chased first by the Germans, then by the Soviets. Lemkin described experiencing an "enveloping feeling of peace and dreamlike reality" upon his arrival in the United States.<sup>14</sup> Meanwhile, during his travels, his brother Elias and his wife were sent to a Soviet labor camp, ironically saving them from the subsequent German occupation of the region.

The Soviet Union also occupied Hersch Lauterpacht's birthplace of Zhovkva (Zolkiew) in eastern Poland, a small town that would eventually be annexed to the Soviet Republic of Ukraine, just as Lwów, the town of his youth, would become Lviv.<sup>15</sup> Rumors circulated about atrocities committed by the Soviet occupation forces in Poland, including the murder of thousands of Polish nationals by the NKVD (Soviet secret police) in the Katyn forest. In the wake of these presumed atrocities, the proponents of functionalism (not to mention those advocates of natural law) received powerful ammunition. The positivist approach that put sovereignty at the basis of international law had once again failed to prevent a barbaric war.

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<sup>12</sup> *Ibid*, 96-97.

<sup>13</sup> *Ibid*, 99-102.

<sup>14</sup> *Ibid*, 98.

<sup>15</sup> The city became the capital of the Lviv Oblast in 1939 with Soviet occupation and many Ukrainization policies were initiated. In 1941 Lviv was occupied by the Germans. For reading on the history of Lviv including the relationship between German occupation and Ukrainian nationalists see Karel C. Berkhoff & Marco Carynnyk, "The Organization of Ukrainian Nationalists and its Attitude Toward Germans and Jews: Iaroslav Stets'ko's 1941 *Zhyttiepyss*" *Harvard Ukrainian Studies*, Vol. 23, No. 3/4 (December 1999), pp. 149-184 and Tarik Amar, *The Paradox of Ukrainian Lviv: A Borderland City between Stalinists, Nazis, and Nationalists*, (Ithaca: Cornell University Press, 2015).

Meanwhile, back in Moscow, which in September 1939 was showcasing parades of workers and celebrating the newest Soviet airplane (i.e. publicly oblivious to the violence taking place in its western border regions), Trainin's work temporarily moved away from "crimes against peace." Now that the Soviet Union was at peace with fascist Germany, it would hardly make sense to focus on the crimes of fascists. Instead, Trainin began work on the concept of "complicity," which culminated in his 1941 work *The Doctrine of Complicity*.<sup>16</sup>

The doctrine of complicity, recently advocated by Vyshinsky during the Moscow Show Trials, was used to hold people accountable for the actions (or intended actions) of others. Though Trainin did not emphasize, and may not even have considered, the international implications of the doctrine of complicity, it contained an early seed that would germinate to become international criminal responsibility at Nuremberg.<sup>17</sup> Trainin's writings helped to support the legal premise for holding individuals responsible for crimes that they had *knowledge* of, even if they did not commit the actual crimes themselves. This concept would later be applied to the occupation that began that very summer.

On June 22, 1941, the German army launched Operation Barbarossa with a blitzkrieg that included the bombing of cities in Soviet-occupied Poland and ground troops crossing the border. The Nazi invasion of the Soviet Union had begun, and Soviet denials and incompetence allowed the Germans to make quick progress militarily.

The Germans occupied Trainin's birthplace of Vitebsk on July, 10 1941. Occupation authorities created a ghetto near the Vitebsk railway station shortly after the Germans took

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<sup>16</sup> Though *The Doctrine of Complicity* was not published until 1941, Trainin presented his early work on complicity to his ARAN colleagues on October 22, 1939. ARAN, f. N 1934, op. N1, d., 129, l. 1.

<sup>17</sup> The questions about Trainin's work focused on domestic applications as well as more abstract questions of responsibility and participation in a crime. ARAN, f. N 1934, op. N1, d., 129, l. 12, 16, and 26 for examples.

control of the town in July, housing around 16,000 Jews.<sup>18</sup> The inhumane living conditions in the Vitebsk ghetto provided a pretext for the Nazi occupiers to declare the ghetto a danger to the health of locals. The Nazis moved the Jewish occupants of the ghetto outside of town, where, between October 8 and October 10, 1941, the Nazis killed 4,090 Jews.<sup>19</sup> According to David Bergelson, a writer for the Yiddish-language Soviet newspaper *Eynikayt* (Unity), “by October 12, 1941, not more than eleven people were left alive, mostly medical workers, and of those four managed to escape with help from partisans.”<sup>20</sup> Bergelson interviewed two of the survivors, Esther Sverdlov and Khaye Polman, who he described as having “endured hunger, cold, fear and pain—pain without limit and without end—and they were ready at any moment to encounter, through the most extreme forms of suffering, death that could come sweeping down on them without warning.”<sup>21</sup>

Others did not die in Vitebsk, but in other equally unforgiving circumstances. Sam Davidoff, a Vitebsker contemporary of Trainin, was deported to Auschwitz, where he was murdered.<sup>22</sup> Some Vitebskers survived. Kasma Ljewschen, born in Vitebsk a few months after Trainin, was persecuted as an “asocial” but ultimately survived Dachau.<sup>23</sup> Rivka Pultusker, a homemaker found refuge in Uzbekistan along with hundreds of her neighbors from Vitebsk.<sup>24</sup>

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<sup>18</sup> Khasin, 122.

<sup>19</sup> Peter Longerich *Holocaust: The Nazi Persecution and Murder of the Jews*, (Oxford: Oxford University Press, 2010), 223. Though most of the Jewish population of the Vitebsk ghetto was killed in 1941, a Vitebsk Stalag was opened in January 1942 to hold prisoners of war. Stalags, (short for Stammlager), were meant to be camps for sergeants and enlisted prisoners of war. The Vitebsk Stalag held hundreds of POWs. See USHMM RG 22.002M, reel 8, page 386.

<sup>20</sup> See David Shneer, “From Mourning to Vengeance: David Bergelson’s Holocaust Journalism (1941-1945),” in *David Bergelson : From Modernism to Socialist Realism*. (Leeds: Legenda Press, 2008), edited by Joseph Sherman and Gennady Estraiikh, 248-268.

<sup>21</sup> *Ibid*, translating Bergelson, “From Mourning to Vengeance: David Bergelson’s Holocaust Journalism (1941-1945).”

<sup>22</sup> USHMM Holocaust Survivors and Victims Database, JUIFS NÉS EN RUSSIE ET DÉPORTÉS DEPUIS LA FRANCE VERS LES CAMPS NAZIS 1942-1945.

<sup>23</sup> USHMM Holocaust Survivors and Victims Database, Dachau Concentration Camp Records.

<sup>24</sup> USHMM Holocaust Survivors and Victims Database, RG-75.002, Registration cards of Jewish refugees in Tashkent, Uzbekistan during WWII.

Raisa Sinetskaya, 21 years old when the Germans invaded, was soon captured by the Germans and held at a Stalag (German prisoner-of-war camp) outside of Minsk where she worked as a nurse.<sup>25</sup> Lukereya Nikitichna Ivanova and her daughter Valentina were taken to Berleburg, Germany as forced laborers and survived the war and returned to Vitebsk.<sup>26</sup>

The German invaders and local collaborators committed similar atrocities throughout the Soviet Union. The Jewish population of areas under German occupation in Belarus, Ukraine, Russia, Latvia, Estonia, and Lithuania were devastated. Many Soviet civilians were killed shortly after the German invasion close to their homes (in what was later called “the Holocaust by bullets”), some in prisoner of war camps, while others were deported to concentration or extermination camps and others died from famine. At the same time, around 10 percent of the Soviet partisans (resisters who fought in German-occupied areas) were Jewish, others served on the front lines in the Red Army, and still others were saved by evacuation further east in the Soviet Union (although Jews were disproportionately less likely to be evacuated than Slavs, in spite of antisemitic propaganda that said otherwise).<sup>27</sup> By the end of the war, the vast majority (90 percent) of the Jewish population of the Baltic states was murdered, while 1.5 million Jews were murdered in Ukraine, 800,000 in Belarus, and over five million in Russia. Slavic Soviet citizens were not spared the horrors of German colonial occupation; around 3 million non-Jewish Soviet citizens were killed in the Ukraine.<sup>28</sup>

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<sup>25</sup> USHMM RG 22.002M reel 8, page 367/92/13. Raisa Sinetskaya was listed as being held in Stalag 352 as of May 11, 1942, along with three other female nurses and five washerwomen. In spite of their birthplaces which were Belarus, Ukraine, and Moldova, all nine women were described as “Russian prisoners of war.”

<sup>26</sup> USHMM Holocaust Survivors and Victims Database, Benjamin and Vladka Meed Registry of Holocaust Survivors.

<sup>27</sup> See Rebecca Manly, *To the Tashkent Station: Evacuation and Survival in the Soviet Union at War*, (Ithaca: Cornell University Press, 2009).

<sup>28</sup> Estimates of total Soviet war dead range widely, but most fall somewhere in the range of 20 to 28 million. See, e.g., Norman Davies, *Europe at War, 1939-1945: No Simple Victory*, (New York: Viking, 2007), 367.

A few weeks after the German invasion, a number of Soviet academics, including Trainin, signed an open letter published in *Izvestiia*. The letter condemned the invasion by the “bloody enemy,” who attacked “the culture of this country and the cultures of many other countries.”<sup>29</sup> However, “our country is rich in talent,” and the party of Lenin and Stalin would “lead to victory.”<sup>30</sup> At the time, of course, victory was at best uncertain, and seemed unlikely to many. The German Army continued its advance through Soviet territory, eventually crossing into pre-1939 Soviet territory, and reaching Trainin’s most recent hometown of Kaluga, on the outskirts of Moscow. Kaluga was occupied by German forces from October 12 but retaken in December, 1941, as a result of Soviet counteroffensive at the Battle of Moscow.<sup>31</sup>

Lemkin, now safe in the United States, was devastated upon learning in June that the German army invaded his hometown in eastern Poland. Lemkin recalled that the invasion “meant burning villages and columns of bluish-brown dust rising quickly after artillery shells had fallen on the ground. Like a wounded animal, the earth in my town of Wolkowysk cried out for having been desecrated for the third time in this century. The blood of meat and of animals is red; the blood of a town is yellow-brown tinged with blue, and it mounts skyward, as if complaining to God of the folly of men.”<sup>32</sup>

In London, Lauterpacht was working as a legal advisor to the British government, and surely knew about the danger to his family in Ukraine. However, Lauterpacht said little publically regarding the destruction of Jews in his homeland. His birthplace of Zhovkva became part of the Reichkommissariat Ukraine and by 1939, the town’s 4,500 Jewish citizens had been

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<sup>29</sup> “All Knowledge, All Power- To Fight against the Fascist Bandits,” (Original” Vse znaniia, vse sily—na bor’bu s fashistskimi banditami”), *Izvestiia*, July 24, 1941, p2.

<sup>30</sup> *Ibid.*

<sup>31</sup> See e.g., USHMM RG 22.002M reels 6 and 17 for details on the German occupation of Kaluga. See also David Stahel, *Operation Typhoon: Hitler’s March on Moscow*, (Cambridge: Cambridge University Press, 2013) for a narrative of the Battle of Moscow.

<sup>32</sup> Lemkin, *Unofficial Man*, 110.

joined by great numbers of Jewish refugees from German-occupied Poland. Shortly after the Germans took over the town in the end of June 1941, local Ukrainians and Poles carried out a pogrom, killing over 3,000 people.<sup>33</sup> A few weeks later on July 5, the Gestapo and SS (the *Schutzstaffel*, or “Protection Squadron”) arrived in Zhovka, where they immediately stripped the town’s synagogue of its valuables, murdered Zhovka’s Grand Rabbi—who had gone to the synagogue in an attempt to prevent the Germans from pillaging it—and set the synagogue on fire.<sup>34</sup> Throughout 1942, thousands of Jews in Zhovka were either shot on the spot or deported to Belżec. The following year, the ghetto and remaining labor camps were liquidated and the town’s remaining Jewish inhabitants were either sent to the Janev camp in L’viv, shot on the spot, or killed in a nearby forest. Only around 70 Jewish citizens, one of whom was Lauterpacht’s cousin Gedalo, survived the war in Zhovka.<sup>35</sup> Thus, in the hometowns of all three men, their relatives and neighbors were subject to the events that became known as the Holocaust.

### ***Legal Responses to the Holocaust from Afar***

While the Axis powers and their local collaborators committed numerous atrocities across eastern Europe, the three lawyers tried to make sense of these events, and rethink international law in a way to ultimately punish the perpetrators. Raphael Lemkin had been offered a position with the U.S. government as chief consultant to the Board of Economic Warfare in June, 1942. Eager to do his part in the war effort, Lemkin moved from North Carolina to Washington, D.C. Later in the war Lemkin took a position as an expert in the War

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<sup>33</sup> Clara Kramer, *Clara’s War: One Girl’s Story of Survival*, (London: Ebury Press, 2008), 38.

<sup>34</sup> *Ibid*, 41-42.

<sup>35</sup> Omer Bartov, *Erased: vanishing traces of Jewish Galicia in present-day Ukraine*, (Princeton: Princeton University Press, 2007), 187-190. Gedalo Lauterpacht, a cousin of Hersch, survived along with 17 other residents by hiding in the basement of a sympathetic Polish family. Kramer, 116.

Crimes Office of the War Department, for \$25 a day.<sup>36</sup> While in the U.S. capital, Lemkin tried to alert leaders about Nazi Germany's attempt to annihilate the Jewish people. These attempts were in vain, which Lemkin attributed to an inability to comprehend the crimes of the Nazi regime.<sup>37</sup> Along with his work with the government, Lemkin took classes at Georgetown Law School, in which he did remarkably poorly, receiving a 70 in his area of expertise, Criminal Law.<sup>38</sup> Perhaps Lemkin was overburdened with both work and worry for the fate of his family in Poland or his poor grades were due to the antisemitism of the Georgetown law faculty, something he was familiar with from his time in Lwów . During this time Lemkin was also finishing up his book on the Nazi regime, which he hoped would force the world to stop the Nazi atrocities against the Jewish people.<sup>39</sup>

Lauterpacht also had reason to fear for the fate of his family, still in Lwów, the worry of which he referred to as “the thing” that “is constantly with me like a nightmare.”<sup>40</sup> This reference was the rare occasion in which he acknowledged his family's fate. In Lauterpacht's words he “did not like to express my sentiments,” and found it “astonishing how a human being can spilt his personality!”<sup>41</sup> While Lemkin tried to make changes through lobbying political leaders, Lauterpacht tried to make his own changes in international law, through arguments in favor of individual rights.

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<sup>36</sup> Lemkin, *Totally Unofficial*, 112. AJHS Archives, Lemkin Papers, Box 1, Folder 13.

<sup>37</sup> Lemkin, *Totally Unofficial*, 113-115.

<sup>38</sup> Lemkin received D's in Constitutional Law and Wills and Administration, a 70 in Criminal Law, a 72 in Statutes, and an 81 (his highest grade) in Sales Law. AJHS Archives, Lemkin papers, Box 1, Folder 13, Georgetown Law School final grades, 1944-1945. Lemkin had also been a poor student at the University of Lwów, a fact that some have attributed to the likely antisemitism of his law professors. See Phillipe Sands interview with Dean Shust of Lviv University, Sands, 154 regarding antisemitism among Lwów professors.

<sup>39</sup> While much of Lemkin's wartime focus was on the development of international criminal law he still found time to write about domestic European criminal law and family law around the world, as seen in the articles “The Treatment of Young Offenders in Continental Europe,” *Law and Contemporary Problems*, vol. 9, No. 4, The Correction of Youthful Offenders (Autumn, 1942), 748-759, and “Orphans of Living Parents: A Comparative Legal and Sociological View,” *Law and Contemporary Problems*, Vol. 10, No. 5, Children of Divorced Parents (Summer, 1944), 834-854.

<sup>40</sup> Letter from Lauterpacht to his wife Rachel, *Life of*, 175, July 13, 1941.

<sup>41</sup> *Ibid.*

On December 7, 1942, Lauterpacht presented a paper before the Grotius Society, a British society in London eponymously named for one of the founders of international law.<sup>42</sup> Arguing that international law owed much of its development to conceptions of individual rights, Lauterpacht claimed that “the founders of international law” were “instrumental in stressing the value and importance” of the rights of man.<sup>43</sup> He acknowledged that “international law does not at present recognize, apart from treaty, any fundamental rights of the individual” except in respect to aliens.<sup>44</sup> Observing the paradox that the positivist emphasis on sovereignty meant that “the individual in his capacity as an alien enjoys a larger measure of protection by international law than in his character as the citizen of his own State,” Lauterpacht concludes by calling for recognition of individual human rights in international law through an International Bill of the Rights of Man.<sup>45</sup> The suitability of recognizing individual rights in international law is exemplified by the resurgence in natural law thinking, perhaps encouraged by opposition to the “pagan absolutism as perfected in the German state” who wish to “find a basis of the law more enduring than the enforceable will of the sovereign.”<sup>46</sup> The American Jewish Committee encouraged Lauterpacht’s zeal for individual rights by commissioning him to write a book on the subject. That the American organization would commission a British citizen for the book also reflected Lauterpacht’s sustained connection with the broader Jewish community.<sup>47</sup>

While Lauterpacht was presenting his paper to the Grotius Society in London, the brutal Battle of Stalingrad had just dragged into its fourth month. Since August, Soviet and German

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<sup>42</sup> The paper was published the following year as “The Law of Nations, the Law of Nature and the Rights of Man,” in *Transactions of the Grotius Society*, Vol. 29, 1-34.

<sup>43</sup> Lauterpacht, “The Law of Nations, the Law of Nature and the Rights of Man,” 22-23.

<sup>44</sup> *Ibid*, 27-28.

<sup>45</sup> *Ibid*, 1, 28, 32. A similar observation was also made by Hannah Arendt who argued that the stateless person was dependent upon international law for protection. Arendt, *On the Origins of Totalitarianism*, (New York : Harcourt, Brace, 1951).

<sup>46</sup> Lauterpacht, “The Law of Nations, the Law of Nature and the Rights of Man,” 21.

<sup>47</sup> Lauterpacht , *Life of*, Letter to wife Rachel, May 30, 1942, 199.

troops had engaged in close combat for control of the city of Stalingrad. Air raids on civilians had terrorized the remaining civilian population. Many military experts regard Stalingrad as the bloodiest battle in the history of warfare. December represented the turning point of the battle, in which the Soviets were able to take the offensive against the Germans. Lauterpacht, as a valued legal advisor to the British government, and whose extended family was now in Soviet Ukraine, was likely following the news from the Soviet Union closely.

### ***Soviet War Crimes Trials During the War: Krasnodar and Kharkov***

In February 1943, the long and bloody Battle of Stalingrad finally ended more than five months after it began. The Soviet Union repelled the German advance and the battle was indisputably a morale boost for the Soviet Union and its citizens, who were now able to view German defeat as only a matter of time.<sup>48</sup> With the turning point of Stalingrad, Krasnodar, a major city in southwestern Russia, on the banks of the Kuban River, repulsed the German occupiers and returned to Soviet control in February 1943. The Extraordinary State Commission, created by the Council of People's Commissars, in November 1942, began to investigate the occupier's crimes. The Commission members were mainly composed of academics, including Ilya Pavlovich Trainin, who, while no relation to Aron, was certainly acquainted with him and his work (as were the other academics on the Commission).<sup>49</sup> Though many of the worst crimes of the war had not been witnessed yet by Soviet eyes, the primary purpose of the Commission was to punish *collaborators*—i.e. Soviet citizens who participated in

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<sup>48</sup> Georgii Zhukov, the Soviet General who commanded the First Belorussian Front during the war, pointed to Stalingrad as a turning point in his memoirs, and historians have reiterated this interpretation. See Georgii Zhukov, *Marshal of Victory*, (London: Pen and Sword Books, 1974), Vol. 2, 110-111, and see also Jochen Hellbeck, ed., *Stalingrad: The City that Defeated the Third Reich*, (New York: Public Affairs, 2015).

<sup>49</sup> Ilya Trainin had worked at the Institute of Law since 1931 and served as director from 1942 to 1947. ARAN, f. 586, op. 2, d. 15. Ilya Trainin's own work focused on Marxist-Leninist legal theory and the state. See e.g. ARAN, f. 586, op.1, d. 1-30.

the occupying forces' crimes—and thus dissuade Soviet citizens still under occupation from collaborating with the Germans.<sup>50</sup> Two months later, the Presidium of the USSR Supreme Soviet released a Decree (*ukaz*) as a warning not just for the German occupiers but for their Soviet collaborators. The April 19, 1943 decree was titled: “On penalties for German Nazi villains responsible for the killings and torture of civilians and Soviet prisoners of war, for spies, traitors from among Soviet citizens and their accomplices.”<sup>51</sup> Members of Stalin’s inner circle wrote the *ukaz*, which declared that

The Red Army's liberation of towns and villages from Nazi invaders revealed many facts, unspeakable atrocities, and heinous acts of violence perpetrated by the German, Italian, Romanian, Hungarian, Finnish fascist monsters, along with Nazi agents, spies, and traitors from among Soviet citizens against the peaceful Soviet population and Red Army prisoners. Many tens of thousands of innocent women, children and the elderly, as well as prisoners of war were brutally tortured, hanged, shot, and burned alive on the orders of commanders of military units and units of the gendarmerie corps of Hitler's army, the chiefs of the Gestapo, mayors and military commanders of towns and villages, chiefs of prisoner-of-war camps and other members of the Nazi authorities.<sup>52</sup>

The *ukaz* proclaimed that although the criminals were “guilty of committing massacres against the peaceful population and Soviet Red Army prisoners of war,” actions already prohibited by Soviet *domestic* law, the punishment called for by existing laws “did not correspond to the level of violence” of these “most shameful and serious crimes.” The *ukaz* subjected “German, Italian, Romanian, Hungarian, and Finnish Nazi villains” as well as “Soviet traitors” to death by hanging and Soviet accomplices—those whose offenses were less severe than the traitors—to “exile to

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<sup>50</sup> See, e.g. Alexander V. Prusin, “Fascist Criminals to the Gallows!: The Holocaust and Soviet War Crimes Trials, December 1945-February 1946,” *Holocaust and Genocide Studies*, 17.1 (2003), 1-30, 3.

<sup>51</sup> April 19, 1943 *ukaz* of the Presidium of the Supreme Soviet.

<sup>52</sup> *Ibid.* The *ukaz* was first drafted by Bochkov, Galiakov (then chairmen of the USSR Supreme Court), and Gorkin. Their draft was edited by Malenkov, a member of Stalin’s inner circle. Stalin made minor edits to the *ukaz* and it was approved by the Politburo. Andreas Hilger, Nikita Petrov, Günther Wagenlehner, “Der ‘Ukaz 43’: Entstehung und Problematik des Dekrets des Präsidiums des Obersten Sowjets vom 19. April 1943,” in A.Hilger, ed., *Sowjetische Militärtribunale. 1, Die Verurteilung deutscher Kriegsgefangener 1941-1945* (Köln : Böhlau, Schriften des Hannah-Arendt-Instituts für Totalitarismusforschung (17), 2001), 180-185.

penal servitude for a term of 15 to 20 years.”<sup>53</sup> The villains were to be judged by military courts, created by existing military divisions. The death sentence of the guilty parties was carried out in public, and the hanged bodies were to be left on the gallows for several days as a warning to those who would “betray their homeland.”<sup>54</sup>

A few months later in July 1943, the Krasnodar trial marked the fulfillment of this warning: eleven Russians and Ukrainians were charged with treason and all were found guilty. Importantly, no Germans were put on trial in Krasnodar, as the Soviets were apparently waiting until the Tehran Conference in November to discuss the issue of German punishment with their Allies.<sup>55</sup> The Krasnodar trial was covered heavily by the Soviet press in all the major newspapers, and the coverage made clear who the trial was directed at—Soviet citizens.<sup>56</sup> Sentenced under the auspices of the April *ukaz* which provided for the defendants to be tried by the military division in their area,<sup>57</sup> eight of those Soviet collaborators found guilty were sentenced to death, which was carried out the day after the trial ended, July 18, in the city square before tens of thousands of people. The remaining three were sentenced to at least twenty years of prison.

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<sup>53</sup> April 19, 1943 *ukaz* of the Presidium of the Supreme Soviet.

<sup>54</sup> *Ibid.*

<sup>55</sup> The British and U.S. governments were largely in favor of legal prosecutions of Germans, in contrast to Stalin’s suggestion that they be sought without trial. After the Tehran Conference where legal prosecutions were agreed upon, the Soviet Union began trying captured German soldiers and officers.

<sup>56</sup> See USHMM, RG-06.025, Central Archives of the Federal Security Services (former KGB) of the Russian Federation records relating to war crime trials in the Soviet Union, Krasnodar Trial, reel 17. Though Jeremy Hicks argues that the Krasnodar Trial (which took place from July 14-17, 1943) did not receive very much coverage due to the Kursk Battle, Tanja Pentler shows otherwise. Compare Jeremy Hicks, “Soul Destroyers’: Soviet Reporting of Nazi Genocide and its Perpetrators at the Krasnodar and Khark’kov Trials,” *History*, Vol. 98, Issue 332, (New York: Oct. 2013) 530-547 with Tanja Pentler, “Local Collaborators on Trial: Soviet War Crimes Trials under Stalin (1943-1953),” *Cahiers u Monde russe*, Vol. 49, No. 2/3, *Sortie de guerre: L’URSS au lendemain de la Grande Guerre patriotique* (Apr.-Sep., 2008), 341-364.

<sup>57</sup> For the Krasnodar trial, this division was the North Caucasian Military Front.

Yelena Konoenko, the *Pravda* correspondent covering the Krasnodar trials, asked the question that many Soviet readers were wondering, “Who were these ‘Soviet citizens?’”<sup>58</sup> These “Soviet citizens” were all men, mostly in their twenties and thirties, who had collaborated with the fascist occupiers in the killings of Soviet civilians and as important Soviet POWs.<sup>59</sup> Both Russians and Ukrainians, they had worked under the SS (the *Schutzstaffel*, or “Protection Squadron”) special units primarily responsible for implementing Hitler’s Final Solution.

These men participated in various atrocities against Jews, communists, and partisans, including murder by gas vans and firing squads, but these horrors were not the emphasis of the trial.<sup>60</sup> Because the defendants were charged with treason, a domestic rather than international crime, the Krasnodar trial often focused on the defendants’ actions against Soviet partisans, or even more damningly, against “Soviet power.” The trial records label the victims of the crimes as “peaceful Soviet citizens.” That phrase would generally be used only when the Soviet Union was denoting an act as an international criminal offense, not a domestic one.

As Jeremy Hicks and other scholars of Soviet history have noted, Krasnodar was not a forerunner to Nuremberg.<sup>61</sup> Since all of the defendants were Soviet citizens, and they were tried for treason, not murder, they can be classified as domestic Soviet legal proceedings, in spite of

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<sup>58</sup> USHMM, RG-06.025, Central Archives of the Federal Security Services (former KGB) of the Russian Federation records relating to war crime trials in the Soviet Union, Krasnodar Trial, reel 17. Konoenko inquires “who are they?” [Kto oni?] and subsequently refers to the defendants as “Soviet citizens” [Sovetskikh grazhdan] using quotation marks to imply that they were not deserving of the term.

<sup>59</sup> *Ibid*, reel 15. As Tanja Pentec has observed, the Soviet definition of collaborator could be a broad one, ranging from those who participated in mass murder to *Ostarbeiter* could be accused of treason. Tanja Pentec, “Local Collaborators on Trial: Soviet War Crimes Trials under Stalin (1943-1953),” *Cahiers u Monde russe*, Vol. 49, No. 2/3, *Sortie de guerre: L’URSS au lendemain de la Grande Guerre patriotique* (Apr.-Sep., 2008), 341-364, 351. Pentec gives by way of example a 1942 Voroshilovgrad trial of ten former *Ostarbeiter* who were found guilty of treason and sentenced to seven to twenty years in a forced labor camp. Their treason consisted of voluntarily working in German where they also delivered anti-Soviet speeches, and, upon their return to Ukraine, spoke about good living conditions in Germany.

<sup>60</sup> As Jeremy Hicks has noted, the Krasnodar trial characterized some key features of later representations of the Holocaust including the industrialized approach to mass murder. See Jeremy Hicks, “Soul Destroyers’: Soviet Reporting of Nazi Genocide and its Perpetrators at the Krasnodar and Khark’kov Trials,” *History*, Vol. 98, Issue 332, (New York: Oct. 2013) 530-547.

<sup>61</sup> *Ibid*.

the fact that they were tried before a military tribunal. In other words, Krasnodar is not reflective of Soviet ideas of international law.<sup>62</sup>

On one level this is understandable—the Soviet government wanted Krasnodar to serve as a warning to the Soviet population against collaborating with the enemy, and thus the offense of treason was the focus. At the same time, this primary focus on domestic crimes seems viciously narrow. After all, the April 1943 *ukaz* had named murder as an offense, and to ignore the defendants' role in the commission of atrocities reveals the Soviet government's true concern—collaboration with the enemy was a much more important worry than the “extermination of peaceful Soviet citizens.” Soviet power, not the Soviet people, was the primary concern.

While the war was beginning to turn in favor of the Red Army and the Soviet Union, many Soviet citizens still lived under German occupation. In Trainin's birthplace of Vitebsk, the year 1943 witnessed the continued violent occupation by the Axis occupiers. In fall 1943, at least “six thousand Soviet civilians living in the railway area of Vitebsk, were imprisoned in a camp” and “shot by the Nazi scum.”<sup>63</sup> The “fascist scoundrels” took the corpses of executed

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<sup>62</sup> The main similarities between international legal trials of Nazis and the Krasnodar Trials is the attempted use of the superior orders defense. The superior orders defense alleged that the defendants should not be held responsible for their actions because they were “only following orders.” The plea was rejected outright by Soviet judges at Krasnodar and other domestic trials, as well as by Trainin. Traditionally the defense was founded on whether or not the defendant “ought to know” that the order was illegal under international law. The superior orders defense was accepted not as a proper defense but as a mitigating factor at Nuremberg. The defense had been used prior to the Nazi trials but with unpredictable results. See Hilaire McCoubrey, “From Nuremberg to Rome: Restoring the Defense of Superior Orders,” *The International and Comparative Law Quarterly*, Vol. 50, No. 2 (April 2001), 386-394 for an overview of superior orders. In addition to rejecting the superior orders defense, Trainin also claims Krasnodar is significant for establishing jurisdiction over Hitlerite criminals, although this is not really true. The Krasnodar defendants were Soviet citizens who committed atrocities in the Soviet Union, and thus Soviet jurisdiction was never really in question.

<sup>63</sup> USHMM RG 22.002M reel 8, page 506. The Extraordinary Commission documents mention these large scale atrocities, but they also mention describe individual stories when they are available. For example, the Commission describes the 1943 arrest and shooting of a suspected teenage partisan, Vladimira Lagyenia, as well as the subsequent arrest, imprisonment in a camp, and torture of her father, Evgeniy. USHMM RG 22.002M reel 8, page 507.

victims, “doused them with flammable liquid and burned them.”<sup>64</sup> These atrocities followed the other atrocities locals witnessed, including the construction and burning of the Vitebsk ghetto and the mass execution of Soviet POWs.<sup>65</sup>

Far from Vitebsk, Trainin spent that fall lecturing on the crimes of the Nazis, including the recent Krasnodar trials. For tickets costing only a few rubles, listeners could hear Trainin speak on Pushkin Street in Moscow about the *criminal* (as opposed to merely illegal) responsibility of the Hitlerites. By “criminal responsibility,” Trainin implied that the tribunals were trying the Hitlerites for crimes of international law, atrocities committed on Soviet territory during the war. These atrocities would not be brushed away as simply acts committed in the course of war, but would be treated as criminal offenses *that needed to be punished*.<sup>66</sup> Trainin’s speech, echoed ideas from the new book he was writing, *Hitlerite Responsibility under Criminal Law*. While the Krasnodar trial itself did not focus on the Hitlerite fascist crimes against “peaceful citizens,” both Trainin and Soviet newspapers were already positioning these acts as criminal violations of international law.<sup>67</sup>

However, the Kharkov trials, which took place a few months after Krasnodar, are more exemplary of Soviet international law. Though both the Krasnodar and Kharkov trials were military trials based on the same *ukaz*, the Krasnodar trials were military tribunals of domestic crimes committed by Soviet offenders. At the Kharkov Trials, on the other hand, Soviet prosecutors put on trial three low-ranking German defendants (Reinhard Retzlaf, Wilhelm Langheld, and Hans Ritz) and one Soviet collaborator (Mikhael Petrovitch Bulanov).

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<sup>64</sup> *Ibid.*

<sup>65</sup> See, e.g. *Ibid.*

<sup>66</sup> Lecture on the theme of the Criminal Responsibility of the Hitlerites,” in *Pravda*, Sept. 8, 1943, p4. Krasnodar was not mentioned in the announcement but it was mentioned in *Pravda*’s Sept. 13 review of the lecture.

<sup>67</sup> ““The Criminal Responsibility of the Hitlerites,” A Lecture by Doctor of Juridical Science Professor A.N. Trainin,” *Pravda*, Sept. 13, 1943, p4.

The Kharkov court found that the defendants “treacherously attacked the Soviet Union and temporarily occupied part of Soviet territory with Nazi troops on the direct orders of Hitler's government. Despite the international conventions on the rules of war that were signed and ratified by Germany, Germany brutally exterminated the peaceful population, seized into slavery hundreds of thousands of Soviet civilians, and robbed, burnt and destroyed the material and cultural treasures of the Soviet people.”<sup>68</sup> We now hear echoes of the way Germany violated international law that were not heard at the Krasnodar Trial. The mention of Germany's international obligations support Trainin's claim that the Kharkov trials, and not Krasnodar, reflect Soviet international law. Rather than looking to domestic Soviet law to charge the German soldiers, the court looked to Germany's international obligations and found all three German defendants guilty on the basis of international law. The guilt of the Soviet collaborator on the other hand, was found under Soviet law.

Mikhael Petrovitch Bulanov, the Soviet Ukrainian collaborator, was found to be “a traitor to the Socialist Motherland,” (*“izmennik sotsialisticheskoi rodine”*), who “voluntarily defected to the enemy, entered the service of the enemy, joined the Germans through the Kharkov branch of the Gestapo as a chauffeur, personally participated in the extermination of Soviet civilians by means of ‘gas vans,’ brought about the execution of peaceful Soviet civilians and participated in the shooting of around 60 children.”<sup>69</sup> While being a traitor was a domestic offense, Bulanov's

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<sup>68</sup> USHMM, RG-06.025, Central Archives of the Federal Security Services (former KGB) of the Russian Federation records relating to war crime trials in the Soviet Union, Kharkov Trial, RG-06.025\*64, fiche 6 “Verolomno napav Sovetskii Soiuz i vremenno okkupirovav chast' ego territorii, nemetsko-fashistskie voiska po priamomu ukazaniu gitlerovskogo pravitel'stva, vopreki podpisannykh i ratifitsirovannykh Germaniei mezhdunarodnykh konventsii o pravilakh vedeniia voiny, zverski istrebliali mirnoe naselenie, ugnali v nemetskoe rabstvo sotni tysiach sovetskikh grazhdan, grabili, szhigali i razrushali material'nye i kul'turnye tsennosti sovetskogo naroda.”

<sup>69</sup> *Ibid*, (“dobrovol'no pereshel na storonu vraga, postupil k nemtsam na slujbu shoferom Charkovskogo otdeleniia gestapo, prinimal lichnoe uchastie v istreblenii sovetskikh grazhdan posredstvom ‘dushegubki’, vyvozil na rasstrel mirnikh sovetskikh grazhdan i uchastvoval v rasstrele 60-ti detei.”)

other actions rose to the same level of the international crimes of the Germans. Altogether, the four men were all found guilty and sentenced to death under the April 1943 *ukaz*.<sup>70</sup>

In the Kharkov trials we can see that “crimes against peaceful Soviet citizens” was used as a description of the victim of this international crime.<sup>71</sup> “Peaceful Soviet citizens” marked the victims as both Soviet citizens and civilians.<sup>72</sup> The term was redundant, because their Soviet citizenship meant that they were presumptively peaceful, which is why I will be translating “grazhdan,” which in day-to-day use means “citizen” as civilian (as opposed to military combatant) in the context of victims of international crimes. As we will see in Trainin’s work, this victim category was also used to mark a new conceptual category of a crime and was related to legal work to portray the entire Soviet Union as a peaceful socialist state.

The language of crimes against “peaceful citizens” or “peaceful civilians” was a uniquely Soviet formulation. While using the term “peaceful citizens” to refer to an unarmed or unresisting civilian population had been used before Soviet time, the word “spokoiynyi” rather than the Soviet-era “mirnyi” was the more popular formulation.<sup>73</sup> “Spokoiynyi” is translated as peaceful, but also as more commonly translated as calm, restful, and easygoing. Why the “mirnyi” formulation of the term gained prominence in the twentieth century is beyond the scope of this work, but one suspects that “spokoiynyi”’s association with passivity was one that would hardly merit its inclusion in the phrase “peaceful Soviet civilians.” Instead, “mirnyi” an

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<sup>70</sup> For example, Wilhelm Langheld, one of the German defendants was declared to have “actively participated in the executions and atrocities against military prisoners and the peaceful population, tortured and goaded prisoners of war during interrogations and sought from them false testimony.” *Ibid*, (“primal aktivnoe uchastie v rasstrelakh i zverstvakh nad voenno-plennymi i mirnym naseleniem, pri doprosakh voennoplennykh putem istiazanii i provokatsii dobivalsia ot nikh vymyshlennykh pokazanii.”)

<sup>71</sup> See e.g., regarding Bulanov’s crimes, *Ibid*, fiche 5.

<sup>72</sup> The language to categorize victims reflected the findings of the Extraordinary Commission, which used “peaceful civilians” as the standard phrase to describe victims of Nazi atrocities. See USHMM RG 22.002M reel 8, 435 & 438 for examples of peaceful civilians language regarding victims in the Vitebsk region.

<sup>73</sup> See, e.g. In Leo Tolstoy’s *War and Peace*, originally published in *The Russian Messenger*, 1865-1867. *Voyna i mir*, Tom IV, Chast’ II, Glava IX (in English-language versions, published in Book 13, Chapter 9). Tolstoy’s Napoleon refers to the “peaceful inhabitants” of Moscow in a proclamation, (“spokoinye zhiteli”, a formulation that would in Soviet times and today be rendered using the adjective “mirnyi”).

adjective more commonly associated with peace (as in, not taking up arms), was easily associated with action was used to describe Soviet citizens. Soviet civilians' failure to take up arms was part and parcel of Soviet socialism. It is a principled peacefulness borne of socialism, rather than a passive one.

Trainin tied the Kharkov trials to international law via the trials' use of "peaceful Soviet civilians." Trainin's earlier concept of "crimes against peace" evolved to include "crimes against peaceful civilians," of the sort represented by the Kharkov trials, as described below.<sup>74</sup>

### ***Hitlerite Responsibility Under Criminal Law***

Trainin presented the Kharkov trials as a significant legal development in his 1944 book, *Hitlerite Responsibility Under Criminal Law*.<sup>75</sup> As Professor Durdenevsky, who reviewed Trainin's book for *Izvestiia*, noted, Trainin's book attempts to answer many questions, such as "what form should Hitlerite criminal responsibility take?" and "what sort of state organization should try and punish international crimes?"<sup>76</sup> Remarking that many in America have studied these questions, Durdenevsky proclaims Trainin's superior depth and scope, praising his "systematic answers" to the major contemporary questions in international criminal law.<sup>77</sup> Given

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<sup>74</sup> In agreeing with Trainin that Kharkov was representative of Soviet international law I am not disagreeing with those scholars who believe that the Soviet war crimes trials (and Soviet law in general) was in instrument of the Stalinist state. Soviet international law was indeed such an instrument: my focus is on how this law was conceptualized and represented as "law," both domestically and internationally. Nor am I disagreeing with scholars like Alexander V. Prusin who have observed that Soviet war crimes trials don't reflect international law norms (by which Prusin means Western international law). See Alexander V. Prusin, "Fascist Criminals to the Gallows!: The Holocaust and Soviet War Crimes Trials, December 1945-February 1946," *Holocaust and Genocide Studies*, 17.1 (2003), 1-30. Instead, I am simply observing that the Soviet war crimes trials do reflect Soviet legal norms.

<sup>75</sup> I based my English translations on the published English version of the book, although I made some minor changes. Aron Trainin, *Hitlerite Responsibility Under Criminal Law*, transl. Andrew Rothstein, (London: Hutchinson & Co., 1945).

<sup>76</sup> V. Durdenevsky, "New Books" (Novie Knigi), *Izvestiia*, Sept. 6, 1944, p3. The reviewer is apparently Vselod Durdenevsky, who later served as a Soviet representative at the Genocide Convention.

<sup>77</sup> *Ibid.*

that the struggle with Hitlerism was coming to an end, Trainin's new book was one that "Soviet scholars needed to know."<sup>78</sup>

Not only would Soviet legal scholars become familiar with Trainin's work, but so would the Western international legal community. *Hitlerite Responsibility Under Criminal Law* became Trainin's most influential work internationally, published the following year in a number of languages including English, French and Italian, and read especially closely by the Allies, including Supreme Court Justice Robert Jackson. Jackson served as the United States' chief counsel at the Nuremberg Trials.<sup>79</sup>

*Hitlerite Responsibility Under Criminal Law* builds off of Trainin's earlier work on crimes against peace outlined in his 1937 book *Defense of Peace*, but applies these legal concepts to the ongoing war. In other words "crimes against peace" had been committed long ago, on June 22, 1941 when Germany invaded the Soviet Union. In its attempt to prevent atrocities by preventing war, "crimes against peace" was not sufficient to prosecute the actual commission of atrocities during war. In legal terms, Trainin moves from *casus belli*, the Latin phrase for that which can lead to war, to *jus in bello*, the way war is meant to be conducted once it breaks out.

First Trainin establishes that the German individuals could be held responsible for their behavior under international law. Reviewing the precedent for holding German leaders

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<sup>78</sup> *Ibid.*

<sup>79</sup> See Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945* (Washington D.C., 1949), 99, 126, 299, 379, 416, (both Jackson and the British representative cite Trainin's work multiple times). See also Memorandum from the United Nations War Crimes Commission, "Report Made by Dr. Ecer on Professor Trainin's Book", November 11, 1944. Rosenman Papers, War Crimes File. October, 1944-November, 1945. (Harry S. Truman Presidential Museum & Library). The United States War Crimes Commission was composed of Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, Poland, Union of South Africa, United Kingdom, United States, and Yugoslavia. The author of the Commission's report on Trainin's work concluded that "in spite of some defects which are only natural in view of the gigantic and some respect unprecedented nature of the subject," the book is "one of the most creative and progressive contributions" [the emphasis is Dr. Ecer's] to the punishment of war criminals.

responsible for atrocities committed during wars,<sup>80</sup> Trainin notes that “already in her previous wars Germany had invariably applied the ‘strategy’ of cruelty and destruction.”<sup>81</sup> Citing Marx and Engels, Trainin illustrates German atrocities during the First World War and concludes that “the greedy, predatory nature of German imperialism developed, and the destructive power of military technique increased, the bloodthirsty and destructive ‘Prussian’ tendencies of German imperialism assumed greater and greater dimensions.”<sup>82</sup> With the end of the World War I, the Treaty of Versailles punished “the brigand methods of waging warfare practiced by Germany in 1914-1918.” As we saw earlier, and as Trainin reminded the reader in 1944, the Versailles Treaty created a special tribunal to try Kaiser Wilhelm II, and other persons for war crimes.<sup>83</sup> Thus it was established that statesmen and soldiers were criminally responsible for offenses “against ‘international morality,’ and for committing acts ‘in violation of the laws and usages of war.’”<sup>84</sup> His use of the word “morality” suggests a return of natural law in Trainin’s approach to international law, albeit not from the heavens but on earth. 20<sup>th</sup> century natural law advocates had moved away from the source of morality being God and Christianity in favor of a more universal sense of what “civilized” humanity finds “morally objectionable,” in Trainin’s case, communist morality.

In Trainin’s desire to make international law more robust and effective, more functional, he begins to establish international legal precedent, citing the Versailles Treaty as a way to charge Nazi leaders with various international offenses. Responding to accusations that

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<sup>80</sup> Trainin also reflects on the apparently inherent “barbarity” of the German peoples, a common aspect of Soviet propaganda prior to the end of the war. See Berkhoff, *Motherland in Danger*, 173-179.

<sup>81</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 17.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, 18.

<sup>84</sup> *Ibid.*, 21. While Trainin’s legal contemporary and Nazi Party member Carl Schmitt would also famously mark the Treaty of Versailles as a break it was for notably different reasons. Schmitt used Versailles to mark the imposition of victor’s justice—no longer would international law be composed of sovereign states with the ability to wage war. Rather victorious states could impose their own versions of morality on the rest of the world. Trainin’s use of Versailles as a break however, speaks favorably of “international morality,” marking him as a supporter of expanding conventional international law (like Lauterpacht and Lemkin), rather than a critic like Schmitt.

punishing Germans would be seen as “victor’s justice,” in fact Trainin shows international law prohibits the commission of certain atrocities, and that there is historical precedent for statesmen and soldiers to be punished for these atrocities. While the period after the Great War did not see Kaiser Wilhelm on trial, other war criminals were charged, tried, and punished. (True, none of those on trial were from the victorious side, making it appear that “victor’s justice” is the precedent for international law.)<sup>85</sup>

With the precedent established to try the Nazi leaders, Trainin then focuses on the international law that Nazi leaders violated in his chapter titled “The Conception of International Crime.”<sup>86</sup> He rejects positivism and its defense of sovereignty in international law as having to failed to prevent international crimes.

The system of monstrous crimes which characterizes the Hitlerite methods of waging war revealed to the world the barrenness and impotence of formal constructions in the sphere of international crime and of the formal structures of pre-war jurisprudence.”<sup>87</sup>

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<sup>85</sup> *Ibid*, 21-23.

<sup>86</sup> Trainin first cites his beloved expert Prof. Pella (as discussed in Chapter 1, Pella, along with Lemkin, would become one of the three experts consulted for the Secretariat’s draft of the Genocide Convention) on the definition of an international crime: “International crime is action or inaction visited with a punishment proclaimed and applied in the name of an alliance of States.” *Ibid*, 26. Trainin categorizes this definition as a “formal” definition, common to the criminal law of capitalist countries. This formal definition “mechanically transported into the realms of international criminal law, inevitably proves to be even more deprived of any real content.” This is because national courts typically rely upon precedent and tradition in interpreting any gaps in existing criminal codes. Trainin claims that international law has no such precedent to rely upon because “here there is no experience, there are no traditions, there are no ready-made formulae. . . This is a region where criminal law is only beginning to penetrate, and where conceptions of what is criminal are only beginning to be formed.” *Ibid*, 26-27.

<sup>87</sup> *Ibid*, 27-28. While Trainin rejects strict positivism he maintains a formal adherence to sovereignty as the foundation of international legal order. Trainin states that it is important to remember that “in the international sphere there have not existed and there do not exist legislative bodies standing above States and competent to issue norms binding on individual States.” Thus, in “the international sphere the main source of law, and in this sense the sole law-making act, is the treaty—an agreement binding on every State which has adhered to that treaty (*pacta sunt servanda*- treaties must be observed.” Trainin notes that Germany “attempted to undermine the binding character and force of international agreements.” *Ibid*, 33. Treaties are the foundation of international law, and Trainin cites approvingly Litvinov’s statement that “Absolute sovereignty and entire liberty of action only belong to such States as have not undertaken international obligations. Immediately a State accepts international obligations it limits its sovereignty.” *Ibid*, 34. Citing the Hague and Geneva Conventions to which Germany was bound, Trainin concludes that “criminal responsibility for breach of the laws and usages of warfare is not only possible but obligatory.” *Ibid*, 35.

Trainin goes on to explain, “The conception of international crime and the struggle against international crimes must now be built up on the basis of the experience of the war against Hitlerism, on principles inspired by real care for the reinforcement of peaceful collaboration between the peoples.”<sup>88</sup> The new international legal order needed to be based on preserving peace, and informed by the experience of Hitlerism, rather than on protecting sovereignty. As victims of Hitlerism, perhaps the paramount victims, as implied by the emphasis of Trainin’s book, the Soviet people would, or maybe even should, one may presume, have the most important role to play in formulating international law.

As a part of this rejection of pre-war international law, Trainin continued to advance his argument, outlined back in 1937 in *The Defense of Peace*, in favor of holding *individuals* responsible for state actions. On the issue of responsibility, Trainin notes the complicated nature of showing who is responsible for many war crimes, but ultimately he thinks that individuals, rather than the fiction of the State itself, commit the actual atrocities. Thus Trainin asks, “can a State bear criminal responsibility?”<sup>89</sup> While many legal scholars such as Pella answer in the affirmative, Trainin finds that “neither the principles of material criminal law nor the forms of criminal procedure—in short, not a single foundation of criminal justice—can be referenced in an attempt to commit to a criminal court such a complex and peculiar ‘figure,’ which includes a mass of the population running into many millions, as the modern state.”<sup>90</sup>

In spite of the difficulties of holding a state criminally responsible, Trainin notes that this does not mean that states can act without regard to international law. Rather, the Hitlerite state

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<sup>88</sup> *Ibid*, 32.

<sup>89</sup> *Ibid*, 72.

<sup>90</sup> *Ibid*, 74. This position is also consistent with evolving Soviet propaganda that no longer condemned the German “race” as a whole. While earlier wartime propaganda demonized the Germans, with the changing tides of war the Hitlerites were now solely responsible for the horrors of the war, while the German masses were sympathetic to the Soviet people. Berkhoff, *Motherland in Danger*, 179-182.

“must bear the maximum responsibility for the consequences of its criminal actions—it must be destroyed.”<sup>91</sup> Explaining why he focuses on the role of Hitler, Trainin reminds the reader that the individuals who represent the state and act in its name must be held criminally responsible for their actions. Because Hitler also oppressed the German masses, Trainin claims that “the criminal responsibility of persons acting in the name of the State, natural in any form of structure of the State, is particularly just in Germany, where tyranny has dominated, where the people are silent and policy has been determined by the personal will of the tyrant and the interests of the groups supporting him.”<sup>92</sup>

Rejecting the classical positivist arguments against holding individuals responsible on expansive understandings of state sovereignty, Trainin argues that if individuals are not held responsible for the misdeeds they made in the name of the state, there would be no incentive to follow the law. On this point, he clearly puts forth a functionalist argument.<sup>93</sup> Thus, individuals must be held responsible for the crimes they committed in the name of the state.

Related to this question of responsibility is the issue of complicity. Complicity arises when a group of people, rather than one individual, commit a crime. Thus, the issue of complicity is paramount to systematic atrocities committed during the war. While noting that many of the individuals of the “Hitlerite clique” did not perform the physical crimes of murder or rape themselves, they are still the perpetrators of the crime “although in another special and more dangerous sense. . . In the hands of international criminals, masses of people become an instrument of the most heinous crimes, just as a knife becomes an instrument of crime in the hands of a murderer.”<sup>94</sup> Thus, while the “German soldier who kills peaceful Soviet civilians,

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<sup>91</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 74.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, 76.

<sup>94</sup> *Ibid.*, 79.

rapes a woman, or sets fire to collective farm buildings answers precisely for these crimes,” the “responsibility of the superiors is of another kind and another quality. They are guilty both of other crimes committed by themselves personally, and of crimes still more atrocious—the creation and application of a policy which represents one continuous outrage against the foundations of international law.”<sup>95</sup>

Trainin had written about complicity in depth a few years earlier. His 1941 book, *The Doctrine of Complicity (Ucheniye o souchastii)* explored the doctrine in Soviet criminal law in depth. The doctrine had a sordid history in Soviet criminal law, used prominently by Vyshinsky in the Moscow Trials to find the guilt of alleged conspirators.<sup>96</sup> While it is not clear whether or not Trainin recognized the possible international legal uses of complicity in 1941 (if he did, he never mentioned them in the work or his public discussion of it), by 1944 the doctrine of complicity was at the forefront of Soviet international legal thought and policy, receiving an entire chapter in *Hitlerite Responsibility Under Criminal Law*.<sup>97</sup>

Finally, Trainin proposes the creation of an international criminal court, calling for “the investigation, trial and punishment of persons guilty of committing the above-mentioned international crimes” by means of “a special procedure, provided by a special convention concerning responsibility for international crimes.”<sup>98</sup> Trainin welcomes the possibility of having an international criminal court that will try fascist defendants.<sup>99</sup> In this way, Trainin is in step with functionalists like Hersch Lauterpacht with their desire to close the “gaps” in international law. However, Trainin, consistent with the 1943 Moscow Declaration, also explains that “the

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<sup>95</sup> *Ibid*, 80-81.

<sup>96</sup> See, e.g. Francine Hirsch, “The Soviets at Nuremberg: International Law, Propaganda, and the Postwar Order,” *American Historical Review* (June 2008), 701-730.

<sup>97</sup> Aron Trainin, *Uchenie o Souchastii*, (Moscow: Institut prava AN SSSR/ Urid. Izd-vo NKU SSSR, 1941).

<sup>98</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 99.

<sup>99</sup> *Ibid*, 100-101.

crime should be tried by the State on the territory of which it was committed.”<sup>100</sup> According to this principle, Trainin calls for trials in the Soviet Union, Belgium, Czechoslovakia, Greece, and “other countries” (the reader may wonder if Poland is one of these “other countries.”) Recognizing that the German people may be hesitant to try themselves, Trainin finds that in this instance, the nationality of the (presumably non-German) victims should determine jurisdiction.<sup>101</sup>

In many ways, *Hitlerite Responsibility Under Criminal Law* both rejects positivism, in its call for an international body to prosecute international crimes, and also embraces state sovereignty for its defense of the Soviet Union’s inherent pacifism. While Trainin proclaimed the U.S.S.R. to be a “defender of sovereignty and equality of large and small states,” Trainin also claimed that “the Hitlerites must and shall bear stern responsibility for their misdeeds”, implying a moral (and thus “civilizing”) component to international law.<sup>102</sup> One of course needs to recognize the absurdity of declaring the USSR to be a defender of sovereignty for large and

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<sup>100</sup> *Ibid*, 90-91. This was consistent with the positions of the Allied powers outlined in the 1943 Moscow Declaration, which warned that enemies who committed atrocities would be tried and punished. .

<sup>101</sup> Trainin, quoting Garner, in *Ibid*, 92. Citing the Versailles Treaty for support (though the interests of a state in its citizens was well established in international law), Trainin finds that jurisdiction is appropriate in these instances based on the nationality of the victims. While Trainin bases jurisdiction on violations of state sovereignty, and thus international law, the laws Trainin uses to articulate these violations are domestic Soviet laws: the aforementioned April 19, 1943 *ukaz* being the main source of law. Trainin also notes that “according to the particular features of individual cases, the crimes of the Hitlerites may be considered under the articles of the “Statute on Military Crimes” of 1927. In this Statute and in the valid Criminal Codes of the Union Republics, there are a number of provisions on the basis of which crimes by military personnel in war conditions are punished. These include, first and foremost: Article 193, Clause 28 of the Criminal code of the R.S.F.S.R. (and the corresponding articles in the Criminal Codes of the other Republics) inflicting punishments, up to and including execution by shooting, for “brigandage, robbery, illegal destruction of property and violence, and likewise illegal alienation of property on the pretext of military necessity, committed against the population in the theatre of military operations”; Article 193, Clause 29, inflicting punishment for maltreatment of prisoners, repeatedly committed or accompanied by particular cruelty, or directed against the sick and wounded”; Article 193, Clause 17, providing penalties for various forms of abuse of military authority, and others. Among the provisions of the general criminal law which cover the atrocities of the Hitlerite invaders, mention must be made in the first place of Article 59, Clause 3, of the Criminal Code of the R.S.F.S.R., which punishes banditry, Articles 165-167 punishing brigandage and robbery, Article 136—murder, Article 153—rape, Articles 79 and 175—arson and other forms of destruction of property. Such, in the main, are the norms by which is determined the responsibility of the Hitlerites for cases coming under the jurisdiction of the Courts of the Soviet Union.” *Ibid*, 95-96.

<sup>102</sup> *Ibid*, 13, 15.

small states, especially for Poland, the Baltic states, Czechoslovakia, Hungary, Romania, and Bulgaria, among other states.

For Trainin, international crimes fall into two main groups—the first, crimes against peace, and the second, resulting from the first, crimes connected with aggressive war.<sup>103</sup> Crimes against peace constituted the “first group of international offences,”<sup>104</sup> as “peace is a very great social value.”<sup>105</sup> There were various forms of crimes against peace, one of which was aggression which “directly breaks the peace, and forces war on the peoples.”<sup>106</sup> Therefore, aggression is “the most dangerous international crime.”<sup>107</sup>

Reminding the reader of his already well-developed concept of “crimes against peace,” Trainin looks to the 1928 Kellogg-Briand Pact in which a number of states, including Germany, declared that they condemned and renounced war.<sup>108</sup> The Hitlerite government broke this pact first when they “seized Austria”—the fact that Austria consented was apparently not relevant in Trainin’s account—again when they invaded Czechoslovakia, and then again in Yugoslavia.<sup>109</sup> Citing the “Soviet-German treaty” of 1939, Trainin claims that this treaty reinforced peaceful relations between the two states.<sup>110</sup> Perhaps unsurprisingly, there is no mention of Poland in the discussion of crimes against peace or the Soviet-German Pact. The Soviet Union had justified their mutual invasion of Poland as self-defense, and this self-serving explanation continued to stand among Soviet lawyers.

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<sup>103</sup> *Ibid.*, 43.

<sup>104</sup> *Ibid.*, 39.

<sup>105</sup> *Ibid.*, 37.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*, 44.

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*, 45. Molotov had replaced Litvinov as Minister of Foreign Affairs in an effort to placate members of the German government who refused to work with a Jewish Minister of Foreign Affairs.

The second group of crimes, crimes connected with the war, occurred when, “after criminally destroying peace, the Hitlerites transformed war into a carefully thought-out and methodically applied system of crimes, a system of militarized banditry.”<sup>111</sup> Trainin builds off of the Geneva Conventions, describing four types of crimes: 1) crimes against war prisoners and wounded and sick soldiers; 2) the destruction of towns, 3) the destruction of cultural treasures, and 4) crimes against “peaceful civilians.”

What Trainin classifies as “crimes against war prisoners, wounded and sick soldiers” echoes the earliest recognized war crimes. Citing both international conventions, Trainin, quoting the Martens Clause from the 1899 Hague Convention, finds that the Hitlerite Germans had obligations resulting “from the usages established between, civilized nations, from the laws of humanity, and the requirements of the public conscience” in waging war.<sup>112</sup> These included prohibitions against killing or injuring wounded, sick, or captured soldiers or forcing prisoners to work in German military operations. In this way, Trainin largely echoes traditional international law’s conventional understandings of war crimes.<sup>113</sup> He illustrates multiple violations of these obligations including torturing and killing Red Army soldiers and forcing Red Army prisoners over minefields, killing many daily: “Murders, tortures, ill-treatment and humiliation of war prisoners, sick and wounded, constitute the ‘everyday life’ of the Hitlerite troops.”<sup>114</sup>

The second group of crimes committed during the war was the “Destruction of Towns and other Inhabited Places,” or what Trainin also refers to as “banditry”: “The ancient Russian town of Staritsa was reduced to ruins. Out of 866 buildings in the town of Bogoroditsk, 534 were completely destroyed by fire. At Stalinogorsk the damage to housing alone is valued at 278

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<sup>111</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 45-46.

<sup>112</sup> *Ibid.*, 48.

<sup>113</sup> *Ibid.*, 47.

<sup>114</sup> *Ibid.*, 48-50.

million rubles. . . The same planned destruction took place in dozens of other towns of Russia, Ukraine, Byelorussia, Moldavia, the Karelo-Finnish Soviet Socialist Republic.”<sup>115</sup> As with his description of other atrocities, Trainin maintains that such banditry took place according to a plan, citing multiple German orders including one titled “A Program of Destruction,” which called for numerous villages to be mined and burned.<sup>116</sup>

Trainin’s third category of war crimes was the “Plundering and Destruction of Cultural Treasures.”<sup>117</sup> Quoting the Hague Convention of 1907, Trainin notes that “in sieges and bombardments all necessary steps should be taken to spare, as far as possible, buildings devoted to religion, art, science and charity, historic monument. . .”<sup>118</sup> Having established the legal precedent, he illustrates how the Hitlerites’ violated it: “On the territory of those districts of the Moscow region which were temporarily occupied by the Fascists, the latter destroyed and plundered 112 libraries, 4 museums, 54 theatres and cinemas. The Hitlerites plundered and burned the famous museum at Borodino. . . For six weeks the Germans plundered or destroyed the manuscripts, books and pictures belonging to Leo Tolstoy at *Iasnaia Poliana*. The German barbarians defiled the grave of the great writer.”<sup>119</sup> His focus on the destruction of culture as a war crime mirrored what was already covered extensively in the Soviet press.<sup>120</sup> Reflecting the wartime Soviet openness to Orthodox Christianity and its role in Soviet culture, Trainin notes the destruction of hundreds of churches (but does not mention synagogues or mosques, which were not considered cultural treasures). Finally, Trainin claims that the Hitlerites were motivated by

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<sup>115</sup> *Ibid*, 65.

<sup>116</sup> *Ibid*, 66.

<sup>117</sup> *Ibid*, quoting article 27 of the 1907 Hague Convention.

<sup>118</sup> *Ibid*.

<sup>119</sup> *Ibid*, 67.

<sup>120</sup> See e.g. David Shneer, *Through Soviet Jewish Eyes*, (New Brunswick, N.J.: Rutgers University Press, 2011), Vasily Grossman, *A Writer at War*, ed. and transl. by Antony Beevor and Luba Vinogradova, (New York: Pantheon Books, 2005), and Karel C. Berkhoff, *Motherland in Danger: Soviet Propaganda During World War II*, (Cambridge: Harvard University Press, 2012), especially 132 (describing the Soviet press’ portrayal of the “wanton destruction of cultural heritage sites” by the enemy.)

“a bitter hatred of Russian culture and of the Soviet people,” reflecting the idea that Russia provided the primary cultural value of the Soviet Union.

Under the category of “crimes against peaceful civilians” Trainin alleges murder and other acts of violence, such as deportation and robbery, against civilians.<sup>121</sup> While not clearly defining “peaceful civilians” as a concept, Trainin states, “In international law it is considered as generally recognized that war is carried on by the armed forces of the belligerent States, and that peaceful civilians remaining on territory occupied by the enemy cannot be regarded as victims whom the occupation authorities may with impunity plunder, torture, murder, “export” as living commodities to other countries, etc.”<sup>122</sup> As with the war crimes trials, peaceful civilians are separate from partisans, but not clearly separate from terms like “unarmed civilians” or “defenseless civilians.” Here, the adjective “peaceful” serves three functions. It reinforces the civilian nature of the victims, fits clearly with Soviet notions about the alleged “peacefulness” of socialist peoples, and additionally has the advantage of relating to Trainin’s concept of crimes against peace. While crimes against peaceful civilians were within the category of “crimes connected with the war,” their very occurrence was interrelated with the commission of crimes against peace.<sup>123</sup>

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<sup>121</sup> Deportation and forced labor, or what Trainin classified as the “Establishment of a regime of slavery and serfdom and deportation into captivity,” was one such crime. As Trainin notes “Millions of free Soviet civilians—Russians, Ukrainians, Byelorussian, Poles, Lithuanians—were driven from their lands and homesteads, compulsorily deported to Germany, and there transformed into slaves, at the complete disposal of their German ‘lords.’” Trainin, *Hitlerite Responsibility Under Criminal Law*, 61. The final category of crimes committed against peaceful civilians was robbery. Citing German documents, Trainin reveals the German policy of realizing “Hitlerite officers as highway robbers.” *Ibid*, 62. Quoting a German order calling for the deliverance of grain, salt, kerosene, gramophones, and other commodities to the Military Command, Trainin notes that the penalty “For note surrendering such a ‘military objective’ as a gramophone—execution.” Trainin finds that “methodically and systematically plundering the population, the Hitlerite hordes carried off from the territories they temporarily occupied enormous stores of property accumulated by the labor of the Soviet people.” *Ibid*.

<sup>122</sup> *Ibid*, 54.

<sup>123</sup> It is this relationship with crimes against peace that partially distinguishes “crimes against peaceful civilians” from the modern conceptual category of “crimes against humanity.” Crimes against humanity may be committed in times of peace or in times of war. However, at the time of their conception, crime against humanity included a

As legal precedent for “crimes against peaceful civilians,” Trainin again cites the Hague Convention as well as German authorities on international law who note that the military must respect “the human rights of civilians.”<sup>124</sup> In seeing how the Hitlerites’ behavior measures up to this legal standard, Trainin proclaims, “On Soviet territory the atrocities of the Hitlerites acquired the character of the mass extermination of the innocent.”<sup>125</sup> Quoting Molotov, Trainin agrees, “The massacres of the civilian Soviet population by the Hitlerites have eclipsed the most bloody pages in the history of humanity and of the present World War, and completely exposed the criminal and bloody plans of the Fascists for the extermination of the Russian, Ukrainian, Belorussian and other peoples of the Soviet Union.”<sup>126</sup> Here, in Molotov’s quote, Jewish civilians of the Soviet Union are eclipsed under the term “other peoples of the Soviet Union.” Following this statement with examples of fascist crimes against the Soviet people, Trainin lists both mass murders such as Babi Yar (the Jewish identity of the victims is not mentioned), and other singular atrocities such as one that allegedly occurred in the village of Donetsk. In this village in the Orel region “the Hitlerites bound a 17-year-old girl, Nadezhda Maltseva, and ordered her own mother, Maria Maltseva, to put straw around her daughter and set fire to it.”<sup>127</sup> In this instance, and many others, a Slavic surname illustrates the tragedy of Soviet victims, rather than a Jewish surname. Trainin concludes that in all, “the Germans murdered in the U.S.S.R. more than 2,000,000 peaceful civilians.”<sup>128</sup>

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wartime element, as discussed below, blurring Trainin’s crimes against peace with early formulations of crimes against humanity.

<sup>124</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 54.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, 55.

<sup>127</sup> *Ibid.*, 56.

<sup>128</sup> *Ibid.*, 58.

Elsewhere, however, Trainin reminds the reader of particular Jewish persecution, something rare in Soviet discourse by the end of the war.<sup>129</sup> “Among the atrocities committed by the Hitlerites against the Jewish population of the territories they occupied, the system of wholesale massacre reached such dimensions as are difficult for the human consciousness to realize.”<sup>130</sup> Citing the wartime Information Bureau of People’s Commissariat for Foreign Affairs,<sup>131</sup> Trainin relays that

Over the course of just two days—August 26 and 27—the German Fascist murders organized a blood bath in the following Ukrainian towns. At Lutsk 20,000 Jews who had been herded together on the pretext of undergoing registration were shot. At Sarny, in the spring of 1942, together with thousands of Ukrainians and Russians, 18,000 Jews were executed. Later, over 14,000 Jews were brought together from neighbouring hamlets and villages, and were executed on August 26 . . . At Kiev and Dnepropetrovsk, the Germans during their occupation killed more than 60,000.

Continuing his discussion of Jewish persecution, Trainin states that

The Jewish people during the thousands of years of its existence has more than once been subjected to persecution; but the Hitlerite villainies against the Jews far exceed in their inhumanity everything that is known to history. The Hitlerite atrocities against the Jews do not represent a policy of ‘divide and rule.’ They are not the result of antisemitism of war excesses. They represent a blood bath organized by means of the machinery of the State, in broad daylight, under the eyes of shocked humanity. Great will be the responsibility for these atrocities.<sup>132</sup>

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<sup>129</sup> As Karel Berkhoff has shown, the language of “peaceful Soviet citizens” was common from the very beginning of the war in the Soviet Union. “In his October Revolution Day speech in November 1941 [Stalin] said the invaders ‘kill and violate the peaceful inhabitants of our country, with no mercy toward women, children, and elderly.’” In the same speech, “came Stalin’s one and only personal wartime reference to Jews—‘the Hitlerites organize medieval Jewish pogroms just as eagerly as the tsarist regime used to do.’” Berkhoff, *Motherland in Danger*, 118-119. While Berkhoff and other scholars have shown that explicit references to Soviet Jewish persecution made it past state censorship to wide audiences, making Trainin’s statement similar to many others, such as much of Ilya Ehrenburg’s writings from the same time, Trainin’s is notable in its focus on particularly Jewish suffering. Usually sentences about the suffering of Jews were immediately marginalized by the suffering of other groups, such as Russians or Ukrainians. Berkhoff, *Motherland in Danger*, 139. See also Kiril Feferman, *Soviet Jewish Stepchild: The Holocaust in the Soviet Mindset, 1941-1964*, (Saarbrücken, Germany: VDM Verlag, 2009). While Trainin’s focus on Jewish persecution occurred after his quote by Molotov on the “extermination of the Russian, Ukrainian, Byelorussian and other peoples of the Soviet Union,” Trainin’s writings on Jewish persecution receive much more extensive and specialized attention in this exploration of “crimes against peaceful civilians.”

<sup>130</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 58.

<sup>131</sup> Berkhoff, *Motherland in Danger*, 147.

<sup>132</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 58-59.

Again quoting the Information Bureau, Trainin repeatedly references the Hitlerites' "plan for the extermination of the Jewish population in Europe."<sup>133</sup> By his (eventual) in-depth focus on Jewish persecution under the concept of crimes against peaceful civilians, Trainin makes clear that, at least in this account, crimes against the Soviet Jewish population are explicitly mentioned as falling under this concept of crimes against "peaceful Soviet civilians."<sup>134</sup>

Another notable aspect of Trainin's focus on Jewish persecution as a crime against peaceful civilians is his emphasis on the inability of contemporary language to express the scale and monstrosity of the crimes. The extermination of "peaceful civilians" is a crime "for which there is no name in any human language."<sup>135</sup> Trainin's description of the extermination as something ineffable prefigures the religious language of later philosophers who described the events of the Holocaust as something unrepresentable and ultimately incomprehensible.<sup>136</sup>

In this description, we can see a distinct evolution from Trainin's earlier articulation of aggressive propaganda. While the crime of "aggressive propaganda" called for the extermination of groups like peaceful Soviet peoples, at the time it was only a theoretical legal issue. The war had seen its realization. The extermination itself, rather than the propaganda calling for it, became the crime to focus on, just as Trainin's focus moved from crimes against

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<sup>133</sup> *Ibid.*

<sup>134</sup> This can be contrasted with the work of Amir Weiner who argues that Soviet Jews were excluded from the concept of Soviet citizens, and race was both the reason for their murder and the reason for their exclusion from memory. Amir Weiner, "When Memory Counts: War, Genocide, and Postwar Soviet Jewry," in *Crimes of War: Guilt and Denial in the Twentieth Century*, ed. Omer Bartov, Atina Grossman, and Mary Nolan, (New York: New Press, 2002). While Weiner's argument is highly persuasive as to Soviet culture more generally, Trainin's work complicates this broader narrative.

<sup>135</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 58.

<sup>136</sup> See e.g. B. William Owen, "On the Alleged Uniqueness and Incomprehensibility of the Holocaust," *Philosophy in the Contemporary World*, 2:3 (1995), 8-16. Owen discusses a number of philosophers who conclude that the Holocaust is ultimately incomprehensible, including the French-born philosopher George Steiner (himself a Holocaust survivor), who, in answer to the question of whether or not "there is a human form of language adequate to the conceptualization and understanding of Auschwitz," concluded that only the metaphysical poetry of fellow Holocaust survivor Paul Celan could explain the Holocaust. Owen, 11, citing George Steiner's "The Long Life of Metaphor: An Approach to the 'Shoah,'" in *Writing and the Holocaust*, ed. Berel Lang, 154-171, 155. (New York: Holmes and Meier, 1988.)

peace to crimes committed against peaceful Soviet civilians, actual human victims of crimes. Trainin attempted to conceptualize the crimes (*delicta*) committed against Soviet civilians as offenses against international *criminal* law that not only could, but should be prosecuted. While the victim group of “peaceful Soviet civilians” was commonly described by the Soviet presses throughout the war, it was Trainin’s 1944 book in *Hitlerite Responsibility* that for the first time tied the victim group to his concept of “crimes against peace.” Therefore, rather than read the phrase as a politically motivated, cynical Soviet obfuscation of the racially oriented mass murder of Jews, who happened to be Soviet citizens, we need to see the phrase “peaceful Soviet civilians,” which explicitly included Jews, as deeply embedded in a Soviet approach to international law.

### ***Axis Rule in Occupied Europe***

The same year as Trainin’s book, Raphael Lemkin published *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Like Trainin, who created a new legal concept, “crimes against peaceful civilians,” to describe the realization of a theoretical legal concept from the 1930s, crimes against peace, Lemkin created a new concept in international law to describe the realization of unprecedented violence of Nazi occupation, genocide, that similarly grew out of his 1930s theoretical concept, crimes of barbarity. Lemkin dedicated an entire chapter to “Genocide,” which he defined as “the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word *genos* (race, tribe) and the Latin *cide* (killing).”<sup>137</sup>

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<sup>137</sup> Lemkin, *Axis Rule in Occupied Europe*, 79.

Unlike Trainin, whose book maintained the importance of state sovereignty, Lemkin strongly repudiated concepts of strict sovereignty in international law. For Lemkin, the doctrine of sovereignty is *responsible* for the scourge of genocide. And yet, Lemkin tries to ground his new concept in international legal precedent, justifying it in a cornerstone of international law, the Hague Convention and Regulations. Lemkin states that “Genocide is the antithesis” of the Hague Regulations. The philosophy behind the Hague Regulations “holds that war is directed against sovereigns and armies, not against subjects and civilians. In its modern application in civilized society, the doctrine means that war is conducted against states and armed forces and not against populations.”<sup>138</sup> Lemkin’s reference to “civilized society,” shows that he accepts classical international law’s fundament, as shown in Chapter One, in which “civilized societies” have the right “instruct,” with use of force if necessary, the “uncivilized” world. For Lemkin, genocide concerns the protection of minority groups in civilized societies, not to colonial “barbarians” for whom genocide would not apply. As Lemkin explained,

It required a long period of evolution in civilized society to mark the way from wars of extermination, which occurred in ancient times and in the Middle Ages, to the conception of wars as being essentially limited to activities against armies and states.<sup>139</sup>

Unfortunately, the German occupiers had disobeyed the requirements of civilized society.

In a review of Lemkin’s book, Lauterpacht claimed that *Axis Rule in Occupied Europe* “cannot accurately be [called] a contribution to the law,” given that it was largely a survey of German actions, but that it possessed value “as a scholarly historical record.”<sup>140</sup> Lauterpacht’s dismissal of genocide corresponds with what Lauterpacht’s son Elihu recalled in an interview with international lawyer Phillippe Sands. Elihu remembered that his father thought Lemkin was

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<sup>138</sup> *Ibid.*, 80.

<sup>139</sup> *Ibid.* “In the present war, however, genocide is widely practiced by the German occupant.”

<sup>140</sup> Hersch Lauterpacht, Review: “*Axis Rule in Occupied Europe*” by Raphael Lemkin, *The Cambridge Law Journal*, Vol. 9, Issue 1, (March 1945), p140-140.

“a compiler, not a thinker,” and that the concept of genocide was “impracticable, an unrealistic approach.”<sup>141</sup>

Such a view was consistent with Lauterpacht’s functionalist legal thought, which emphasized efficacy. He considered Lemkin a utopian. Lemkin was a natural law advocate who believed in protecting groups rather than individuals as such. While natural law rhetoric was later used in favor of individual rights, early natural law theorists like Vitoria spoke in terms of group rights, noting that Spanish peoples were owed the right of hospitality by indigenous peoples. The failure of indigenous peoples to give hospitality (as a group), meant that indigenous peoples (as a group) could be conquered as a group, regardless of how hospitable the actions of individual conquered peoples were. Natural law theory’s imperial bias meant that the division of people into protected and unprotected groups was a part and parcel of the historical structures of international law.<sup>142</sup> Lemkin’s insistence on group rights rather than individual rights was likely part of why Lauterpacht damned *Axis Rule* with faint praise in his review.

By the time *Axis Rule* appeared in 1944, nearly all of Lemkin’s family members had been murdered, although their deaths were unknown to him at the time. His German occupied hometown of Wołkowysk housed a concentration camp and a Jewish ghetto. The Red Army liberated Wołkowysk in September 1944, two months before *Axis Rule* was published. With the Red Army victory, Lemkin’s hometown again rejoined the Soviet Union as part of the Belarussian Soviet Socialist Republic as the borders of Poland moved further west, allowing the Soviet Union to re-incorporate the land they gained from the Soviet-German Pact, and then some. Lemkin and Lauterpacht’s university town of Lviv was reoccupied by the Soviet Union,

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<sup>141</sup> Sands, 110.

<sup>142</sup> See Chapter 1 for an overview. See also Mark Mazower, “The Strange Triumph of Human Rights, 1933-1950,” *The Historical Journal*, 47, 2 (2004), pp. 379–398, for an overview of minority rights treaties as a limitation on state sovereignty.

and this occupation would complete the transformation of Lviv begun by the German Generalgouvernement, away from a vibrant multicultural and predominately Polish and Jewish city and into one dominated by Ukrainian nationalism.<sup>143</sup> In addition to changing the face of Europe, Red Army victories also forced the Allies to decide how to deal with the vanquished Nazi powers. The Allies decided to try the major Nazi figures at Nuremberg, a conclusion reached during negotiations in London over the summer of 1945.<sup>144</sup>

### ***London and the Road to Nuremberg***

Trainin and General Iona Nikitchenko, a Soviet judge and military lawyer who had presided over many of the Great Purge Trials that Trainin's mentor Vyshinsky had prosecuted, represented the Soviet Union in the London negotiations to create what would become the International Military Tribunal at Nuremberg.<sup>145</sup> Lauterpacht served in a similar advisory capacity for the British government, and Lauterpacht and Trainin almost certainly met each other over the course of the summer.<sup>146</sup> Even though Lemkin was not physically in the negotiating

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<sup>143</sup> See Tarik Youssef Cyril Amar, *The Paradox of Ukrainian Lviv: A Borderland City between Stalinists, Nazis, and Nationalists*, (Ithaca & London: Cornell University Press, 2015).

<sup>144</sup> For English-language accounts of the Nuremberg Trials see Bradley Smith, *Reaching Judgment at Nuremberg*, (United States: Basic Books, 1977), Jon Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, (Oxford: Oxford University Press, 2011), Kim C. Priemel and Alexa Stiller, eds., *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (New York and Oxford: Berghahn Books, 2012), Lawrence Douglas, *Memory of Judgment*, (New Haven: Yale University Press, 2001). For a prominent contemporary Russian account of the Nuremberg Trials see A. G. Zviagintsev, *Glavnyi Protsess Chelovechestva* "Moskva: OLMA Media Grupp, 2011).

<sup>145</sup> "On the establishment of an International War Tribunal for the trial of the Main War Criminal of the European Axis Countries," *Pravda*, Aug. 9, 1945, p2.

<sup>146</sup> Both Lemkin and Lauterpacht attended the International Law Associations Forty-First Conference held in Cambridge the week of August 19, 1946, although if they met no record survives. See International Law Association, *Report of the Forty-First Conference*, (Cambridge: Crampton & Sons, 1948). I became aware of this source thanks to Sands, 341.

room the summer of 1945, he was in London, lobbying the insiders involved with the London negotiations.<sup>147</sup>

The International Military Tribunal at Nuremberg, the postwar trial of major Nazi figures by the four Allied governments of Britain, the U.S., the Soviet Union, and France, adopted Lemkin's language of genocide in their indictment. The indictment proclaimed that the Nazis "conducted deliberate and systematic genocide" through their "extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others."<sup>148</sup>

The indictment charged that the genocide occurred during "the period of [the German] occupation of territories overrun by their armed forces."<sup>149</sup> In this way, the "genocide" practiced by the Nazis had to be connected with the war in some way, thus limiting its scope. While genocide was a new word, war crimes as a concept prohibited by international law had a robust heritage, including the Hague and Geneva Conventions, and its inclusion in the Nuremberg Charter was uncontroversial.<sup>150</sup> Perhaps the greatest innovation regarding the concept of "war crimes" at Nuremberg was simply creating the conceptual title and classification of "war crimes." The Nuremberg Charter's clear classification of crimes (war crimes, crimes against

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<sup>147</sup>Sidney Alderman, the ranking American official at Nuremberg later remembered that Lemkin was "constantly coming to see me, trying to be sure that his word genocide was used in indictment. Finally, over some opposition from other members of our staff, I got the word genocide into the last draft of the indictment, and I am quite certain that Prof. Lemkin has always been greatly pleased that it appeared in that document. The British particularly thought it was too fancy a word to put in a legal document, and some of their graduates of Oxford University said that they couldn't understand what the word meant." Barrett, "Raphael Lemkin and 'Genocide' at Nuremberg," in *The Genocide Convention Sixty Years after its Adoption*, 35-54, ed. by Safferling, Christop, and Conze, Eckart, (The Hague: TMC Asser Press, 2010), 44-45, citing H.B. Phillips (ed.), *The Reminiscences of Sidney S. Alderman*, (New York, Columbia University Oral History Research Office 1955), 818.

<sup>148</sup> Nuremberg Indictment, Count III, Article VII(a) October 6, 1945.

<sup>149</sup> *Ibid.*

<sup>150</sup> See, e.g. the 1899 and 1907 Hague Conventions and the 1864, 1906, and 1929 Geneva Conventions. See also, *Jackson Report*, "Report to the President by Mr. Justice Jackson," June 6, 1945, p50, "the rules of warfare are well established and generally accepted by the nations."

humanity, and crimes against peace) was suggested by Jackson, and the classification had been proposed by “an eminent scholar of international law,” i.e., Lauterpacht.<sup>151</sup>

Though Lemkin was thrilled that genocide was mentioned in the indictment, he had to be less than pleased that it was included under the category of “war crimes,” as an example of the “murder or ill-treatment of civilian populations.” Lemkin believed genocide could occur in the absence of a declared war, and he wanted Nuremberg to reflect that.

The Nuremberg Charter also outlined a second violation of international law for which the Nazis would be punished: crimes against peace.<sup>152</sup> Trainin, of course, had written extensively about crimes against peace for the past decade and would continue to do so long after the postwar trials ended. Likewise, Lauterpacht wrote about the “crime of aggression”—which was often used interchangeably with “crime against peace”<sup>153</sup>—in 1942 in a paper presented to the Cambridge-based International Commission for Penal Reconstruction and Development, arguing that Nazi leaders could be tried for aggression and other crimes based on international law.<sup>154</sup> Lauterpacht’s memorandum, first seen by British and American officials, along with Trainin’s extensive work defining crimes against peace, persuaded Allied leaders to prosecute crimes against peace at Nuremberg.<sup>155</sup> Addressing the concept of crimes against peace, Lauterpacht claimed:

The law of any international society worthy of the name must reject with reprobation the view that between nations there can be no aggression calling for punishment. It must consider the responsibility for the premeditated violation of the General Treaty for the Renunciation of War as lying within the sphere of criminal law.<sup>156</sup>

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<sup>151</sup> *Jackson Report*, “Minutes of Conference Session of August 2, 1945,” 416.

<sup>152</sup> Nuremberg Charter, Article 6, August 8, 1945.

<sup>153</sup> See Kirsten Sellars, *Crimes against Peace and International Law*, (Cambridge: Cambridge University Press, 2015).

<sup>154</sup> *Ibid*, 50, footnote 12. A version of Lauterpacht’s memorandum was subsequently published in the 1944 *British Yearbook of International Law* under the title of “The Law of Nations and the Punishment of War Crimes.”

<sup>155</sup> See Lauterpacht, *Life of*, Letter to Stephen Gaselee, May 30, 1942, 188.

<sup>156</sup> Lauterpacht, “The Law of Nations and the Punishment of War Crimes,” 81, footnote 1.

In this statement, Lauterpacht acknowledges the lack of a clear official prohibition of aggressive war in international law. However, Lauterpacht argues in favor of prosecuting aggressive war for the sake of the “law of any international society worthy of the name.” Lauterpacht believes that in order to have an effective international legal “society,” aggression must be criminally punished. Without criminal punishment, states would have little motivation to follow their treaties and otherwise obey international law. Lauterpacht reiterated this argument in his work at Nuremberg, writing that to the extent that “the Charter implies an innovation in international law, it is a desirable and beneficent innovation fully consistent with justice” while at the same time maintaining, with little support, that any arguments about Nuremberg retroactively criminalizing aggressive war were an “absurdity” in light of Nazi atrocities and hostility to international law.<sup>157</sup>

Lauterpacht’s focus on making international law effective pushed him towards calling for the punishment of aggressive war, as he blurred the international legal distinction between illegal and criminal. Trainin had also made arguments in favor of holding individuals responsible under international law for actions that many objected were not clearly prohibited by international law. While Trainin’s background in Soviet criminal law perhaps makes his resistance to these objections comprehensible, Lauterpacht’s position is less so. Just as Trainin represented Soviet values in international law, Lauterpacht had firmly adopted the classical Anglo-American liberal values of the individual, including the rights of the defendant in criminal law, though he was willing to ignore them in the sphere of international law.<sup>158</sup>

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<sup>157</sup> Hersch Lauterpacht, “Draft Nuremberg Speeches,” *Cambridge Journal of International and Comparative Law*, (Vol. 1, 2012) 45-111, 61.

<sup>158</sup> As Darryl Robinson has observed, Western international law is built upon contradictory assumptions and methods of reasoning—while wanting to protect the “liberal values” of the individual endowed with human rights, international criminal law has partially ignored the prescriptions of liberal values in criminal law, including fair warning, individual culpability, and strict construction. Darryl Robinson, “The Identity Crisis of International Criminal Law,” *Leiden Journal of International Law*, Vol. 21, (2008) 925–963. Lauterpacht mediates these contradictions between criminal liberal law and his desire to protect individual human rights much like Trainin

Lauterpacht also maintained that criminalizing war “restored the position as it existed at the dawn of international law, at the time when Grotius was laying the foundations of the modern law of nations and established the distinction, accompanied by profound legal consequences in the sphere of neutrality, between just and unjust wars.”<sup>159</sup> Just as the Soviet Union maintained a distinction between “revolutionary” (and thus justified) wars, and “fascist” wars, (which were inherently aggressive and thus unjustified), Britain, France, and other imperial states also had a long tradition of distinguishing among wars in a manner that benefited themselves.<sup>160</sup>

Comparing Lauterpacht’s writings with Trainin’s helps to reveal the analogous structure of legal argument regarding “unjust” wars between Soviet and classical international law.<sup>161</sup> Trainin and Lauterpacht, who each advocated for criminalizing aggressive war before Nuremberg, (based on blurring the distinction between “illegal” and “criminal”), made very different arguments about international law that nonetheless converged at Nuremberg.

The third violation of international law outlined at Nuremberg was crimes against humanity. The legal concept of crimes against humanity, was essentially a completely undeveloped one, and the term appears to have been offered as an alternative to the Soviet concept of “crimes against peaceful civilians.”<sup>162</sup> The head of the American delegation in London, U.S. Supreme Court Justice Robert Jackson, advocated for the use of the phrase “crimes

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rejects objections to his form of international criminal law- he denies the validity of the objections of criminal liberal law.

<sup>159</sup> Lauterpacht, “Draft Nuremberg Speeches,” 51.

<sup>160</sup> See e.g., Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2005), on the Western bias in international law as seen in the writings of the founders of international law like Vitoria and Grotius and continuing to the present-day “war on terror.”

<sup>161</sup> Lauterpacht also continued writing on international legal issues beyond the development of international criminal and human rights law during the war and in the immediate postwar period. See, e.g. Hersch Lauterpacht, “Recognition of States in International Law,” *The Yale Law Journal*, Vol. 53, Issue 3 (June 1944), pp. 385-458; “De Facto Recognition, Withdrawal of Recognition, and Conditional Recognition,” *British Year Book of International Law*, Vol. 22, pp. 164-190; “Recognition of Governments: II,” *Columbia Law Review*, Vol. 46, Issue 1 (January 1946), pp. 37-68; “Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens,” *Cambridge Law Journal*, Vol. 9, Issue 3 (1947), pp. 330-348.

<sup>162</sup> See e.g., *Jackson Report*, “Draft Showing Soviet and American Proposals in Parallel Columns”, 169 and “Revision of Definition of Crimes, Submitted by American Delegation, July 31, 1945,” 395.

against humanity,” after a meeting with Lauterpacht. As David Luban has noted, the two men, who had a close professional relationship, “decided to leave their deliberations unrecorded, apparently to avoid courting controversy.”<sup>163</sup>

In 1915, the French, Russian, and British governments alleged “crimes against civilization and humanity,” in their rebuke of Turkey’s then on-going massacre of Armenians, later known as the Armenian genocide, though the Turks were not tried for the offense, partially due to the opposition of the United States on the basis that “the laws of humanity” had “no specific content.”<sup>164</sup> “Crimes against humanity” (having dropped the “civilization” element) then appeared four years later in a letter written by French Prime Minister Georges Clemenceau on behalf of the Allied Powers negotiating an end to the war.<sup>165</sup> Apparently, “crimes against humanity,” a term that previously had “no specific content,” was viewed as an acceptable concept for the Nuremberg court to organize the crimes of the Nazis under international law.<sup>166</sup>

The Allies’ definition of crimes against humanity included

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

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<sup>163</sup> Luban “A Theory of Crimes Against Humanity,” in *The Yale Journal of International Law*, Vol. 29 (2004), 85-167, 86. Lauterpacht and Jackson had a relatively close and friendly relationship, see e.g. Lauterpacht, *Life of*, Letter from Jackson to Lauterpacht, Aug. 13, 1941, 177-178; Letter from Lauterpacht to Gaselee, March 30, 1942, 187-188, referring to his “advantageous contact with Mr. Jackson;” Letter from Jackson to Lauterpacht, May 30, 1945, 272, asking for the benefit of Lauterpacht’s “good judgement” in London as regards the Nuremberg Charter; Letter from Jackson to Lauterpacht, August 23, 1945, 272, thanking Lauterpacht for his help in London.

<sup>164</sup> David Luban “A Theory of Crimes Against Humanity,” in *The Yale Journal of International Law*, Vol. 29 (2004), 85-167, 86.

<sup>165</sup> See Clemenceau to Brockdorff-Ranizau, “Letter to the President of the German Delegation covering the Reply of the Allied and Associated Powers,” Paris, June 16, 1919, in Allied and Associated Powers, *Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace*, No. 144 (New York: American Association for International Conciliation, Nov. 1919), 5, which stated that “the war which began on August 1, 1914, was the greatest crime against humanity and the freedom of peoples that any nation, calling itself civilized, has ever consciously committed.”

<sup>166</sup> Luban, 86. Luban also notes that the “term “crimes against humanity” appeared in some Latin American penal codes in the 1920s, and the states that employed it asserted universal jurisdiction over such crimes. Harvard Research Project on Criminal Jurisdiction, 29 *Am. J. Int’l L.* 435, 571 (Supp. 1935) (citing penal codes of Costa Rica and Venezuela).” The term had also been used the previous year by President Roosevelt to refer to Nazi atrocities. *Jackson Report*, “Statement by the President” [released by the White House, March 24, 1944], 12.

jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated...<sup>167</sup>

The Nuremberg Charter, drafted in London, would articulate “crimes against humanity” as a variety of crimes (including murder, extermination, and deportation) committed against civilians during wartime. Like crimes against peaceful “citizens” in the Soviet Union, crimes against humanity served as a catch-all for horrific crimes against civilians. The Soviet team at Nuremberg, responsible for presenting evidence of “crimes against humanity,” likely conceptualized the term as analogous to Trainin’s “crimes against peaceful civilians,” for in fact, crimes against humanity was essentially the same offense but without the Soviet’s socialist ideological underpinning. Crimes against humanity would both play an important role at Nuremberg and would become perhaps the most important legacy of Nuremberg to international criminal law.<sup>168</sup> As many legal scholars have noted, crimes against humanity have expanded to prosecute atrocities for which genocide was too difficult to show.<sup>169</sup>

Trainin himself soon traveled to Nuremberg in an official advisory position to the Soviet delegation, as did Lauterpacht for the British. Lemkin, still working for the United States War Department but increasingly indifferent to ordinary concerns like paying his rent, traveled to Nuremberg on his own personal mission.<sup>170</sup> At Nuremberg, Lauterpacht’s and Trainin’s mutual interest in the concept of crimes against peace and atrocities against civilians took precedence over Lemkin’s concept of genocide.

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<sup>167</sup> Nuremberg Charter, August 8, 1945.

<sup>168</sup> See e.g. Jon Kevin Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, (Oxford: Oxford University Press, 2011.)

<sup>169</sup> See, e.g., Leila N. Sadat, “Crimes Against Humanity in the Modern Age,” *107 American Journal of International Law*, (April 2013), 334- 377. Some scholars have also suggested Lemkin’s influence on the concept of crimes against humanity. Barrett suggests that the Allies’ definition of crimes against humanity, which does not use the word genocide, nonetheless “adopted much of Lemkin’s insight, legal definition and argument for the future of international law,” though Lemkin certainly did not view the Nuremberg charter in this way. Barrett, 42.

<sup>170</sup> AJHS Archives, Lemkin papers, Box 1, Folder 13.

## *Nuremberg*

While Lemkin was in Nuremberg for much of the court's preparation, his role was decidedly more peripheral than either Lauterpacht or Trainin's official advisory positions. He was relegated to the sidelines, sending his book to lawyers on the inside and asking for their assistance in recognizing genocide as its own separate crime.<sup>171</sup> Occasionally, Lemkin met with success. When British prosecutor David Maxwell Fyfe cross-examined the German defendant Konstantin von Neurath, he used the term "genocide," which he defined as "the extermination of racial and national groups," outlined in the "well-known book of Professor Lemkin."<sup>172</sup> Lemkin's hopes were surely buoyed by the closing arguments at Nuremberg. Though the American prosecutors did not use the term, the British, Soviet, and French prosecutors referred to the defendants' commission of genocide, "the greatest crime of all."<sup>173</sup> Soviet prosecutor Rudenko—who, after the Tribunal, became commander of an NKVD camp used to hold political prisoners in the former concentration camp Sachsenhausen and under whose care approximately 12,500 prisoners starved to death—condemned the defendants who "made enslavement and genocide their aim."<sup>174</sup>

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<sup>171</sup> See, e.g. AJHS Archives, Lemkin papers, Box 1, Folder 18, correspondence with Henri Donnedieu de Vabres (the main French judge at Nuremberg) and correspondence with David Maxwell Fyfe (British prosecutor at Nuremberg).

<sup>172</sup> *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, (London : Published under the authority of H.M. Attorney-general by H.M. Stationery Office, 1947), Vol. 17, p61. I became aware of this particular cite thanks to Sands, 325.

<sup>173</sup> French prosecutor Charles Dubost used the term in his final speech, which he referred to as "the greatest crime of all," *Trial of the Major War Criminals before the International Military Tribunal*, vol. 19, 562, and his fellow French Prosecutor Auguste Champetier de Ribes also used the term repeatedly, *Ibid*, 531, 550, 551, 562, 563. The British prosecutor Shawcross did include the term repeatedly in his closing speech, noting that "Genocide was not restricted to extermination of the Jewish people or of the gypsies. It was applied in different forms to Yugoslavia, to the non-German inhabitants of Alsace-Lorraine, to the people of the Low Countries and of Norway." *Ibid*, 497, 509, 515.

<sup>174</sup> *Ibid*, 570. After the Tribunal, Rudenko became commander of an NKVD special camp No. 7, which was used to hold political prisoners in the area of the former concentration camp Sachsenhausen. Between 1945 and the camp's closure in 1950, approximately 12,500 prisoners starved to death under Soviet care, the majority of whom were children, adolescents, and the elderly. See Stephen Kinzer, "Germans Find Mass Graves at an Ex-Soviet Camp," *The New York Times*, Sept. 24, 1992.

A few months into the Nuremberg trials, Lauterpacht learned that nearly all of his family had been killed in the atrocities he was helping to prosecute, with the exception of his niece Inka, who eventually came to live with him in Cambridge.<sup>175</sup> His wife Rachel described Lauterpacht's reserve in a letter to their son Elihu from this time, noting that "Daddy does not say much. He never displays much emotion."<sup>176</sup> As international legal scholar Martti Koskenniemi has observed, of all of the British international lawyers, Lauterpacht "was most vulnerable to the charge of special pleading," precisely because he had a personal investment in seeing the crimes of Nazi Germany punished.<sup>177</sup> In spite of, or rather because of this, Lauterpacht's opening draft for the British prosecutor omits any mention of Jewish persecution, and his closing draft, which runs to nearly 40 pages, mentions it only once. There, he refers to the "five million civilians" murdered or starved to death "for no other reason than they were of Jewish race or faith."<sup>178</sup>

Writing from Nuremberg in December, Trainin proclaimed the city and its tribunal to be the place where "international criminal justice was born."<sup>179</sup> Nuremberg's Tribunal was setting an important precedent in international criminal law, especially regarding "criminal organizations." The concept of a criminal organization, which reflects Trainin's idea of complicity as a way to prosecute a group of people rather than just the individual, was essential for holding high-ranking individuals, such as Göring, responsible for the crimes of their underlings. In response to the trials, Trainin wrote in *Pravda* that the Gestapo, SS and other Nazi groups "implemented terror, violence, and atrocities" for their own venal motives, qualifying

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<sup>175</sup> Lauterpacht, *Life of*, 266, 297-298.

<sup>176</sup> Lauterpacht, *Life of*, Letter from Rachel Lauterpacht to son Eli, May 12, 1945, 266.

<sup>177</sup> Koskenniemi, "Hersch Lauterpacht (1897-1960)," in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, 601-661, ed. by Jack Beatson, and Reinhard Zimmerman, (Oxford: Oxford University Press, 2004), 389.

<sup>178</sup> Lauterpacht, "Draft Nuremberg Speeches," 74. Koskenniemi observes that Lauterpacht's drafts are "characteristic in their absence of emotion and concentration on doctrinal detail." Koskenniemi, "Hersch Lauterpacht," 388.

<sup>179</sup> Aron Trainin, "The Organized Crimes of Hitlerism," in *Pravda*, Dec. 23, 1945, p3. (Internatsional'naia ugolovnaia iustitsiia rodilas' vmeste s Mezhdunarodnym Voennyim Tribunalom . . .)

them as criminal organizations for whose actions the leadership was responsible.<sup>180</sup> This issue of criminal responsibility was one of the most important questions facing the Nuremberg judges, and Trainin concluded that “freedom-loving peoples wait anxiously for their judgment.”<sup>181</sup>

### *On Criminal Offenses*

Trainin’s work at Nuremberg informed a significant part of his next major work, published shortly after the Nuremberg verdict was released in 1946. *Uchenie o sostave prestupleniia* (translated as *A Study of Criminal Offenses* or *A Study of Corpus Delicti*) includes Trainin’s early reflections on Nuremberg. It diverges substantially from his prewar draft of the same book, presumably in light of how international legal concepts were prosecuted in action at Nuremberg.<sup>182</sup> A November 1940 presentation to his Institute of Law colleagues however, focused exclusively on theories of domestic criminal law in socialist and bourgeois legal systems.<sup>183</sup> In *A Study of Criminal Offenses*, then, Trainin was able to join together his earlier work on the nature of domestic Soviet criminal law with his new focus on international criminal law.<sup>184</sup> The recent Great Patriotic War provided a bridge between these two fields of law. The ongoing Soviet war crimes trials were occurring under the rhetorical auspices of international law, but were determined by the Soviet domestic laws that provided for their existence.<sup>185</sup>

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<sup>180</sup> Trainin, “The Organized Crimes of Hitlerism,” in *Pravda*, Dec. 23, 1945, p3, (“Poèтому v gitlerovskoi Germanii deistvoval riad nadelennykh ogromoi vlast’iu organizatsii—gestapo, SS, SA i drugikh,— uchastniki kotorykh osushchestviali terror, nasiliia, zlodeistva v poriadke pribylnoi gosudarstvennoi sluzhby.”)

<sup>181</sup> *Ibid.*, (“Svobodoliubivye narody napriazhenno zhdu spravedlivogo prigovora Mezhdunarodnogo Voennogo Tribunala.”)

<sup>182</sup> Compare Aron Trainin, *Uchenie o Sostave Prestupleniia*, (Moscow: Legal Publishing House of the USSR Ministry of Justice, 1946) and ARAN, f. N 1934, op. N1, d., 190, l.1-30.

<sup>183</sup> ARAN, f. N 1934, op. N1, d., 190, l. 23. Trainin’s colleagues were especially curious about bourgeois legal theory and asked many questions.

<sup>184</sup> ARAN, f. N 1934, op. N1, d., 190, l. 1-30.

<sup>185</sup> Trainin, *Uchenie o Sostave Prestupleniia*, 181.

In addition to influencing the Nuremberg process and domestic Soviet views on international law, Trainin tried his hand at influencing the general English-speaking public in his article, “Fundamental Principles of Soviet Criminal Law,” first published in *The Law Journal* of Aug. 11<sup>th</sup>, 1945 and subsequently reprinted by the Society for Cultural Relations with the Soviet Union (SCR), a British fellow-traveler organization.<sup>186</sup> Trainin’s piece in the journal clearly reflected official Soviet positions on the representation of domestic law, given that it was published abroad. In the article, Trainin attempted to normalize Soviet law in his overview, and indeed, Trainin’s overview makes Soviet criminal law seem reasonable and innocuous. Trainin portrays the Soviet criminal code as very similar to the United States and Western Europe, while acknowledging that “At the same time, to correspond with the special character of the social and political system of the U.S.S.R., particular crimes and groups of crimes unknown to foreign law are to be found in the Criminal Code. Here, it is necessary to mention, above all, a special chapter—“economic crimes,” which includes a group of transgressions affecting Socialist economy.”<sup>187</sup> By portraying economic crimes to be the unique aspect of Soviet criminal law, Trainin is kindly ignoring the other decidedly “unique” aspects of Soviet criminal law, such as Stalin’s role in the legal system to both foment terror and destroy his enemies, real or perceived.

### ***Postwar Soviet Trials, December 1945: Minsk***

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<sup>186</sup> Emily Lygo has shown that “although the SCR was a pro-Soviet organization, its enthusiastic presentation of Soviet culture was not so much the result of Soviet manipulation behind the scenes as a reflection of the enthusiasm for the USSR that active members nurtured for a wide variety of reasons.” Emily Lygo, “Promoting Soviet Culture in Britain: The History of the Society for Cultural Relations between the Peoples of the British Commonwealth and the USSR, 1924-1945,” *The Modern Language Review*, Vol. 108, No. 2 (April 2013), 571-596, 572.

<sup>187</sup> “This includes the uneconomic running of an enterprise, the output of bad quality production, serving short measure and short weight to the consumer, etc. A special group of crimes is formed of infringements in respect of labour relations: violation of labour laws, placing of workers in conditions dangerous to life or health, etc.” Aron Trainin, “Fundamental Principles of Soviet Criminal Law,” *The Law Journal* of Aug. 11, 1945.

While Trainin provided legal advice at Nuremberg, the Soviet state continued prosecuting criminal violations as they had been doing since 1943. Throughout 1945 and into 1946 a number of trials occurred throughout the Soviet Union under the auspices of the April 19, 1943 edict allowing the occupying army divisions (using evidence gathered by the NKVD or secret police) to try Nazi war criminals and their collaborators for “murder” and “torture.” These hardly marked any new development in either domestic criminal or international law, especially based as they were on the April 1943 *ukaz*, which had little precedent for international law

In Trainin’s native Belorussian Soviet Socialist Republic, the occupying army division in Minsk (using evidence gathered by the NKVD or secret police) indicted German Gestapo and SS officers under the 1943 *ukaz*. The arrest order for Franz Karl Hess exemplified the Soviet conception of Nazi crimes, as articulated by Trainin. Hess, a thin, red-haired, thirty-six-year old German from the Sudetenland had joined the SS in 1939 and was placed with his battalion in Dachau, in France, and in Czechoslovakia prior to going to the Eastern Front, where, in Minsk and the surrounding areas, he participated in a number of atrocities.<sup>188</sup> The Commission alleged that:

On December 7, 1941, Hess and his team of special purpose "SS" participated in the execution of 200 mentally ill patients from Minsk hospitals

On December 9, 1941, Hess participated in the execution of 250 prisoners from the Kinskoi prison.

In February 1942, Hess personally shot 325 Soviet civilians in the city of Vileika

In April 1942, in the area around the city of Minsk Hess took part in the killing of 18,000 Soviet civilians in the gas chambers. Hess personally drove the people intended for gassing to the gas chambers.

In July 1942 Hess took part in the massacre of 2000 Soviet civilians of Jewish nationality in the town of Volojin where he personally shot 120 people.

In August 1942, Hess took part in the massacre of 1000 Soviet civilians of Jewish nationality in the town of Il’ya, where he shot 60 people.

In September 1942, Hess took part in the massacre of 2000 Jews in the city of Dolginovo. He personally shot 80 people.<sup>189</sup>

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<sup>188</sup> USHMM, RG-06.025 tom 16.

<sup>189</sup> *Ibid.*

Interestingly, Hess was not condemned for all of the atrocities he confessed to. For example, Hess confessed to participating “in shooting 2,000 Jews from the Minsk ghetto,” but no mention of this is found in the official finding of guilt.<sup>190</sup>

The Soviet Union at least partially (though somewhat schizophrenically) obscured the disproportionate number of Soviet Jews, who were victims of Nazi crimes. The victims of the crimes are described variously as “Soviet civilians,” “Soviet civilians of Jewish nationality,” and “Jews.” When Hess confessed to shooting “Jews”, the Soviet legal apparatus was unable to incorporate that notion—a Nazi racial term—into its way of understanding international criminal law. For confessions involving victim groups of “Soviet civilians” and “Soviet civilians of Jewish nationality,” Soviet law was able to better conceptualize the offense.

The postwar trials, like the Kharkov trials, are in other words, both prosecuting violations of international law and domestic Soviet crimes at the same time. By alleging torture and murder of “peaceful civilians” under international law, the Soviet war crimes trials were occurring under the conceptual auspices of Trainin’s “crimes against peaceful civilians” which encompasses murder and other acts of violence, such as deportation, torture, and robbery, against these civilians.<sup>191</sup> While the international legal language of “crimes against humanity” and “genocide” used in the Nuremberg Indictment are not used in these trials, their conception *did* rest on conceptions of international law- just a particularly Soviet conception of international law, in which “crimes against peaceful civilians,” encompassed both the offenses of “crimes against humanity” and “genocide”.<sup>192</sup> The postwar trials’ focus on violations of “international law and

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<sup>190</sup> *Ibid.*

<sup>191</sup> Trainin, *Hitlerite Responsibility Under Criminal Law*, 61-63.

<sup>192</sup> Other aspects of Trainin’s 1944 work reflected in the early postwar Soviet war crimes trials is the aforementioned refusal of the superior orders defense, and the doctrine of complicity, which allows individuals to be held responsible for crimes committed by others, (taken from domestic Soviet law). One divergence between Trainin’s

humanitarian norms,”<sup>193</sup> reveals that in *Hitlerite Responsibility* Trainin had simultaneously created a domestic legal structure for prosecuting crimes in violation of international law *that took place on Soviet territory* while also articulating a vision for international law that would reshape the global international legal order at Nuremberg.

While domestic laws provided the prosecution of German crimes, the crimes rose to the level of international criminal law because they “encroach[ed] on the foundation for the peaceful cooperation of peoples.”<sup>194</sup> While some international lawyers (like Lemkin) proclaimed that the crimes of the Nazis reached international concern because of the persecuted groups’ contribution (or potential contribution) to humanity, for Trainin, the reason for international concern is the struggle for peace.

Writing about Nuremberg in *A Study of Criminal Offenses*, it is clear that Trainin wanted to both mark Nuremberg as a break in international law (through its new developments in criminal responsibility) and a continuation of earlier trends like the trial of Kaiser Wilhelm (to foster legitimacy for Nuremberg). Trainin outlines the international crimes the Allies created at

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earlier international legal writings and the domestic Soviet trials is the lack of an international criminal court. The Nuremberg Process was ongoing while these trials were going on (or being prepared), which implies that the Soviet war crimes trials are not necessarily inconsistent with Trainin’s writings, they are just not the fulfillment of his writings. Soviet scholar Alexander v. Prusin has observed that these postwar Soviet war crimes trials not only did not reflect international legal norms they did often reflect Soviet legal norms. Rather than condemning the Soviet war crimes trials as merely politicized “victor’s justice,” Prusin astutely argues that the trials have some legal value. While I agree with Prusin’s observation that the trials reflect Soviet legal norms, I disagree that they do not reflect international law. They certainly do not reflect Western international legal thought, but they do reflect Soviet international legal thought, as outlined by Aron Trainin.

<sup>193</sup> In Smolensk, a city located on the Dnieper River, 200 miles from Minsk, ten former SS and Wehrmacht soldiers were tried under the 1943 law. One NKVD interviewer repeatedly inquired as to the violations of “international law and humanitarian norms,” making it clear that the validation for the Soviet *ukaz* (created after the commission of the crimes) was its source in Soviet international law. USHMM, RG-06.025\* Smolensk, reel 40, page 7/8/95 and 2/153. (“Vy otdavali sebe otchet chto, primimaia uchastie v ubiistve bezzashchitnykh plennykh, vy neslykhannym obrazom narushali vse norm mezhdunarodnogo i chelovecheskogo prava?” and “Vy otdavali sebe otchet v tom, chto prinimaia uchastie v ubiistve bezzashchitnykh voennoplennykh, tem samym neslykhannym obrazom narushali vse normu mezhdunarodnogo prava i chelovechnosti?”)

<sup>194</sup> Trainin, *Uchenie o Sostave Prestupleniia*, 174. “Thus, the question arises about whether the Nazi crimes qualify as international crimes, encroaching on the basis for the peaceful cooperation of peoples.” (Original: “Tem samym vstaet vopros o kvalifikatsii gitlerovskikh prestuplenii vopros o mezhdunarodnykh prestupleniiaikh, poshiagaiushchikh na osnovy mirnogo sotrudnichestva narodov.”)

Nuremberg- crimes against peace, war crimes, and crimes against humanity. Trainin does not use the term genocide yet, instead referring only to extermination as a crime against humanity.<sup>195</sup>

Thus, in Trainin's account of Nuremberg, he frames Nuremberg's definition of war crimes in light of his own work in *Hitlerite Responsibility*. Crimes against peace, previously featured in Trainin's analysis as a broad category that included propaganda and incitement, was narrowed the Nuremberg Charter, in which the Allies defined as the term as the

planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any [crimes against humanity or war crimes].<sup>196</sup>

Trainin accepted Nuremberg's narrow definition of the concept of "crimes against peace," even though the definition was at odds with his earlier work. Trainin's willingness to incorporate Nuremberg's conceptions of crimes into his work reflects his immediate awareness of the significance of Nuremberg to international law and the Soviet acceptance of this significance.

In Trainin's account, the development of international criminal law only takes place with the influence and prodding of Soviet criminal law. Trainin goes on to suggest that the purpose of

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<sup>195</sup> *Ibid*, 178. Trainin cites the Nuremberg Charter to define war crimes and crimes against humanity. War crimes are defined as the "violation of the laws or customs of war. These violations include murder, torture, or deportation to slave labor or for any other purpose of civilian population of the occupied territory; murder or torture of prisoners of war or persons at sea; killing of hostages; theft of public or private property; the wanton destruction of towns or villages; devastation not justified by military necessity, and other crimes. " (Original "narushenie zakonov ili obychev voyny. K étim narusheniám otnosiatsia ubiistva, istiazaniia ili uvod v rabstvo ili dlia drugikh tselei grazhdanskogo naseleniia okkupirovannoi territorii; ubiistva ili istiazaniia voennoplennykh ili lits, naxodiashchikhsia v more; ubiistva zalozhnikov; ograblenie obshchestvennoi ili chastnoi sobstvennosti; bessmyslennoe razrushenie gorodov ili dereven'; razorenie, neopravdannoe voennoi neobxodimost'iu, i drugie prestupleniia.") Crimes against humanity, on the other hand, are defined as "killing, 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." The full definition continues: "in order to implement or in connection with any crime within the jurisdiction of the Tribunal, whether or not these violate the domestic law of the country where they were committed." *Ibid*. (Original "ubiistva, istreblenie, poraboshchenie, ssylka i drugie zhestokosti, sovershyennye v otnoshenii grazhdanskogo naseleniia do ili vo vryemia voyny, ili presledovanie po politicheskim, rasovym ili religioznym motivam s tsel'iu osushchestvleniia ili v sviazi s liubym prestupleniem, podlezhshchim iurisdiksii Tribunala, nezavisimo ot togo, iavialis' li éti deistviia narusheniem vnutrennego prava strany, gde oni byli sovershyeny, ili net.")

<sup>196</sup> *Ibid*. (Original "planirovanie, podgotovka, razviazivanie ili vedennye agressivnoi voyny ili voyny v narushenie mezhdunarodnykh dogovorov, soglasheniia ili zaveryeniia, ili uchastie v obshchem plane ili zagovore, napravlennykh k osushchestvleniiu liubogo iz vysheizlozhennykh deistvii.")

international criminal law is to promote peace in society and in both legal regimes, peace is defined as only attainable through communism. Trainin spread this view of international law — the idea that to achieve peace, societies need to be communist—to his Soviet peers in academic lectures throughout 1945 and 1946 on his interpretation of the Nuremberg process and international law, including a special session for his Academy of Sciences colleagues on the “Legal Questions of the Nuremberg Process.”<sup>197</sup>

Although Trainin never joined the Communist Party, he still managed to rise to the heights of his profession. Trainin’s superiors recognized his increasingly high professional status by assigning him a desirable apartment, and he resided in the Arbat District of Moscow, an area then-known as the home of high ranking Soviet party functionaries.<sup>198</sup>

While Trainin was exploring the relationship between domestic Soviet and international law in *A Study of Criminal Offense*, and Lemkin advocated for genocide prevention in *Axis Power*, Lauterpacht promoted individual rights through international law with newfound zeal. In 1945, published his book—commissioned by the American Jewish Committee—*An International Bill of the Rights of Man* declaring it fitting “for many reasons, that the Committee should have actively interested themselves in the problem of an International Bill of the Rights of Man” for “[n]o people in history has suffered more cruelly from a denial of elementary human rights.”<sup>199</sup> Lauterpacht’s promotion of individual rights<sup>200</sup> distinguished him from

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<sup>197</sup> ARAN, f. 1711, op. 1, no. 14, l. 6-10.

<sup>198</sup> ARAN, f. 1711, op. 1, no. 8, l. 7-8. Trainin’s Moscow address is listed as Skatertniy per., d.5-a, kv.9 in 1946. Skatertniy is just a few streets north of Arbat Street (now occasionally referred to as Old Arbat Street), immortalized in Anatoly Rybakov’s 1987 novel, *Children of the Arbat*. (Deti Arbata). Rybakov’s novel, written between 1966 and 1983 (though not published until the era of glasnost) is set in the early Stalinist era and builds up to the Great Purges. The title refers to the children of the communist party functionaries who took over as the main residents of the area. The area had previously been home to a number of members of the intelligentsia, such as Alexander Pushkin and Andrey Bely, who themselves had taken over from the aristocrats.

<sup>199</sup> Hersch Lauterpacht, *An International Bill of the Rights of Man*, (New York: Columbia University Press, 1945), vii.

contemporaries like Trainin (who supported states' rights) and Lemkin (who focused on group rights).

The Nuremberg Tribunal released its judgment on October 1, 1946. Lemkin was in Paris attempting to include genocide in the clauses of the peace treaties.<sup>201</sup> Growing sick from the stress of his work, combined with his diagnosed hypertension, Lemkin was hospitalized in Paris, where he listened to the Judgment from his hospital bed. It must have been a profound disappointment to him. There was no mention of genocide.<sup>202</sup> Lemkin mourned the omission of his concept in the Nuremberg Judgment, later referring to it as his “Nuremberg nightmare.”<sup>203</sup>

Since the only crimes that were tried were those connected with aggressive war, crimes committed by a government against its own population—such as the Ottoman Empire against the Armenians, or the Soviet government against its own people—were still protected by the dictates of sovereignty in international law. After noting the frustrating limits of the Nuremberg verdict, Lemkin resolved to lobby for an explicit Convention on genocide that would prohibit and prevent genocide whether or not it was a state killing of segments of its own population or

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<sup>200</sup> In his 1946 article on Grotius, a seventeenth-century Dutch jurist and author of the 1625 treatise, *De Jure Belli ac Pacis*, “the first comprehensive and systematic treatise on international law.” Lauterpacht classifies Grotius as “not a pure positivist—a mere chronicler of events laboriously woven into a purely formal pattern of a legal system.” Neither is Grotius “a naturalist pure and simple for whom an irresistible law of nature is the overriding—or the only—rule of conduct.” As neither a pure positivist nor a pure naturalist, Lauterpacht identified with Grotius’ legal style, and used it to justify his own functionalism. Lauterpacht claims that for Grotius, the “individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him and that the development, the well-being, and the dignity of the individual human being are a matter of direct concern to international law.” Lauterpacht, “The Groatian Tradition in International Law,” 27. Through positing this analogy between individuals and states, and providing it legitimacy by tracing it to one of the earliest luminaries of international law, Lauterpacht positions the individual as a rights-bearing member of international society, completing his critique of positivism present in his earliest work.

<sup>201</sup> As Lemkin recalled “The delegates to the Peace Conference listened to me, but their minds were elsewhere. Under the stress of this work, I became ill and was confined to the American military hospital in Paris. It was there that I listened over the radio to the Nuremberg judgment which condemned the Nazis but failed to take into account an international law, the full moral, social, and humanitarian implications of Genocide as international crime.” Lemkin, *Totally Unofficial*.

<sup>202</sup> AJHS Archives, Lemkin papers, Box 1, Folder 13, Consultation request and report, July 19, 1944.

<sup>203</sup> American Jewish Archives, Cincinnati, Lemkin papers, Box 1, Folder 13. As Lemkin summarized Nuremberg: “In brief, the Germans were punished only for crimes committed during or in connection with the war of aggression.” Lemkin, *Totally Unofficial*, 119.

another state's population (in an act of war). He wanted to bring on the death knell for state sovereignty.<sup>204</sup>

Although the Nuremberg Verdict was a crushing defeat for Lemkin, it was a victory for both Lauterpacht and Trainin. Nuremberg's tie to aggressive war was due in part to Trainin's influence. Trainin's work was widely read by key figures in the United States and British governments, and Robert Jackson himself, along with the British representatives, cited Trainin's work in deliberations over the Nuremberg Charter.<sup>205</sup> In this way Nuremberg reflected Soviet international law as outlined by Trainin. Crimes committed against the civilian population (peaceful citizens) were directly tied to the commission of crimes against peace. It was also consistent with Trainin's vision of international law, which held that the only atrocities that rose to a level of international concern were those that infringed on peace, thereby protecting state sovereignty. This limited crimes against humanity to those committed during the perpetration of aggressive war, and excluded atrocities committed by the Soviet Union against its own citizens from the sphere of international law.

Likewise, the United States, and their close ally the United Kingdom, were happy to go along with the perspective that initiating an aggressive war was the preeminent offense in international criminal law, especially since the United States might have been brought up on crimes against humanity charges for dropping the first and only atomic weapon on Japan, and the United Kingdom for its fire bombing of civilian populations in Germany. The United States in

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<sup>204</sup> Lemkin, *Totally Unofficial*, 120.

<sup>205</sup> *Jackson Report*, 99, 126, 299, 379, 416. See also Memorandum from the United Nations War Crimes Commission, "Report Made by Dr. Ecer on Professor Trainin's Book", November 11, 1944. Rosenman Papers, War Crimes File. October, 1944-November, 1945. (Harry S. Truman Presidential Museum & Library). The United States War Crimes Commission was composed of Australia, Belgium, Canada, China, Czechoslovakia, France, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, Poland, Union of South Africa, United Kingdom, United States, and Yugoslavia. The author of the Commission's report on Trainin's work concluded that "in spite of some defects which are only natural in view of the gigantic and some respect unprecedented nature of the subject," the book is "one of the most creative and progressive contributions" [the emphasis is Dr. Ecer's] to the punishment of war criminals.

particular had been eager to avoid accusations of violating neutrality in international law prior to officially joining the Allies.<sup>206</sup> Legally declaring the Germans as aggressors and tying crimes against humanity to the initiation of an aggressive war, reinforced aggressive war as the paramount offense of the Nazis, and absolved the Allies of their own crimes.<sup>207</sup>

In an attempt to overcome this limitation of Nuremberg—tying atrocities to aggressive war—Lemkin began lobbying heavily for a Genocide Convention that would right the wrongs of Nuremberg, and prevent genocide from ever occurring again.

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<sup>206</sup>“Minutes of Conference Session of July 24, 1945,” *Jackson Report*, 363. Jackson explained his desire to include the “launching” of aggressive war in the Charter in order to show that “the German war was illegal in its inception and that therefore the United States was justified in departing from the strict rules of neutrality.” The Charter later included the “initiation” of aggressive war as a crime.

<sup>207</sup> *Jackson Report*, 360-362, (representatives from the US, the Soviet Union, Britain, and France agreeing to limit the Tribunal’s investigations to acts tied to aggressive war).

## Chapter 5: The Struggle of the Progressive Forces: The 1948 Genocide Convention

In the aftermath of World War II, many international lawyers believed that the war was a result of the failures of international law in the years leading up to it. There were two main criticisms of international law. The first criticism was that international law failed to address nationalism, the main cause of the war. The second major criticism concerned both the Holocaust and the huge number of civilian deaths that occurred during the war. International law had failed to protect individuals from the rapacity of states. Many international lawyers attributed these failures to the continued role of positivism and its protection of state sovereignty in international law, believing that this approach dominated international law since the Peace of Westphalia in 1648.

In the larger view, the horrors of World War I had provided some impetus for significant changes in international law (such as the creation of the League of Nations in the 1920s), but these had proven insufficient in light of the horrors World War II. These horrors made space for the rise of functionalism. Functionalism was supported by prominent international lawyers like Hersch Lauterpacht and J.L. Brierly, rejected the abstraction of positivism's defense of states' rights and sovereignty and instead looked to state interests (which might include activities occurring within the territory of other states). Functionalists believed that looking to states' interests would make international law more effective and create an international legal structure able to constrain the actions of states. And making international law more *effective* seemed imperative in the shadow of Nazi mass violence.<sup>1</sup>

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<sup>1</sup> International law at this time was also characterized by institution-building (e.g. international organizations like the United Nations). States were no longer the sole actors in international law, and the status of individuals and international institutions as subjects of international law, with rights and duties, was becoming a conceivable idea. This shift was enabled by functionalism, as positivism and its primacy of the state were no longer persuasive.

The 1945 United Nations Charter is a manifestation of a functionalist attempt to create a type of international law. Unlike the League of Nations' Charter, which begins with "we the nations," the implying that only state actors are bound by the League, the UN Charter's preamble begins with "we the peoples." One of the declared goals of the United Nations was to foster "respect for international law," a functionalist value. The UN Charter also had broad administrative functions in the organ of the Secretariat, which, headed by the Secretary-General, coordinated the General Assembly, Economic and Social Council, and the Security Council, and was in sharp contrast to the much weaker League of Nations.<sup>2</sup> The UN's administrative role was unprecedented in international law but was deemed necessary to support the new functions of the UN.<sup>3</sup> Thus, the UN charter reflected a postwar legal order much more amenable to constraining state sovereignty than in the past.

### *Lemkin and the United Nations*

Though Lemkin was disappointed in the Nuremberg Trials, he had more success at the newly created United Nations because the UN was more amenable to constraining state sovereignty. In October 1946, the newly formed international organization was meeting in Lake Success, New York. There, Lemkin met with UN delegates from Cuba, India, and Panama. He did not approach these UN delegates randomly. None of these delegates had participated in the Nuremberg Trials—which had been shaped by the US, USSR, Britain, and France—and were not aligned with either the U.S. or the Soviet Union in the emerging Cold War. Therefore, he presumed that these independent states would be more sympathetic to the idea of constraining

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<sup>2</sup> United Nations, Charter of the United Nations, 24 October 1945, available at: <http://www.unwebsite.com/charter> [accessed December 10, 2013].

<sup>3</sup> See David Kennedy, "The Disciplines of International Law," 12 *Leiden Journal of International Law* 9, 88-101 (1999).

state sovereignty by means of a UN convention on genocide, than those states aiming to maintain an international legal order determined to protect it.<sup>4</sup>

The delegates from Cuba, India, and Panama agreed to sponsor a resolution Lemkin drafted before the General Assembly on November 2, 1946.<sup>5</sup> Resolution 96(I) stated: “Genocide is a denial of the right of existence of entire human groups...The General Assembly therefore affirms that genocide is a crime under international law which the civilized world condemns, and for the commission of which principals and accomplices- whether private individuals, public officials or statesman, and whether the crime is committed on religious, racial, political or any other groups- are punishable.”<sup>6</sup> The Resolution then called for the Economic and Social Council of the UN to “undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide to be submitted to the next regular session of the General Assembly.”<sup>7</sup> Without any debate, the Resolution was passed unanimously on December 11, 1946. The lack of opposition to the Resolution was in part due to Lemkin’s careful overture to the Soviet bloc, despite his distrust of the Soviet Union. Through the Czechoslovak Foreign Minister, Lemkin made the argument to the Soviet Union that the Resolution was not a conspiracy against Soviet sovereignty any more than it was a secret way to constrain US sovereignty.<sup>8</sup>

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<sup>4</sup> Raphael Lemkin, “Genocide as a Crime under International Law,” *American Journal of International Law*, Vol. 41(1), (1947) 145-151, 148-149.

<sup>5</sup> *Ibid*, and 1<sup>st</sup> Sess., U.N. Doc. A/BUR/50 (Nov. 2, 1946). Indian delegates in particular, were especially adept in using the newly created United Nations in their struggle against imperialism. See Manu Bhagavan, *India and the Quest for One World: The Peacemakers* (London: Palgrave Macmillian, 2013) for a portrayal of India’s leadership role in the early United Nations.

<sup>6</sup> The Working Papers of the Genocide Convention, published by Hiram Abtahi and Philippa Webb, eds., *The Genocide Convention: The Travaux Préparatoires*, (Leiden & Boston: Martinus Nijhoff Publishers, 2008), 34.

<sup>7</sup> General Assembly Resolution 96(I). There was much debate during the drafting of GA Resolution 96(I) between delegating responsibility to the Economic and Social Committee or the Human Rights Committee. The HR Committee was determined to have an already too full docket, and so this pragmatic reason determined the Economic and Social Committee’s responsibility for the Genocide Convention. Working Papers, 164.

<sup>8</sup> Anton Weiss-Wendt, “Hostage of Politics: Raphael Lemkin on ‘Soviet Genocide,’” *Journal of Genocide Research*, Vol. 7, No. 4 (2005), 551-559, 551.

Many countries believed that rather than a Genocide Convention, the international legal community should focus on further developing and codifying the “Nuremberg Principles.” Lemkin viewed this position as ominous for the prohibition of genocide. Not only did the “Nuremberg Principles” not acknowledge genocide as the paramount crime in international law, but it made genocide dependent upon aggressive war and was in danger of being subsumed by crimes against humanity. Perhaps most ominously, the Nuremberg Principles were supported by the Soviet Union. Even though the United Kingdom also supported the Nuremberg Principles, Lemkin saw the Soviet Union as their primary advocate, whose goal was presumably to avoid their own domestic responsibility for genocide.<sup>9</sup> In Lemkin’s mind, only a genocide convention would ensure that states, including the Soviet Union (importantly, he did *not* mention the United States) could avoid prosecution for committing the crime of genocide. In the emerging Cold War, Lemkin was firmly on the side of his adopted country, the United States.

Throughout 1947, Lemkin worked directly with the Canadian legal scholar John Peters Humphrey, the Director of the newly formed United Nations Division of Human Rights, within the UN Secretariat to draft a proposed text for the Genocide Convention. Lemkin was one of three experts Humphrey consulted, along with the Romanian scholar Vespasian Pella who had influenced Lemkin’s conception of genocide through his “crime of barbarity,” and the French jurist at Nuremberg, Henri Donnedieu de Vabres. The Secretariat’s draft, rather than providing a workable text, was more of a collection of concepts meant to assist the General Assembly, and included Lemkin’s three proposed forms of genocide, physical (e.g. killings), biological (e.g. prevention of life), and cultural (e.g. mass destruction of churches, works of art and culture, or forced assimilation). The groups protected by genocide were racial, national, or religious

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<sup>9</sup> Working Papers, 403-404. The United Kingdom’s delegation also maintained that Nuremberg showed that genocide was already illegal under international law, and thus a convention was unnecessary.

groups. The Secretariat's draft also proposed an international court to prosecute genocide around the world, and thereby help prevent its occurrence.<sup>10</sup>

In addition to rousing the diplomatic world to action, Lemkin worked to alert the public at large about genocide, meeting with the "American Committee for an International Genocide Convention," whose members included the Pulitzer-prize winning author Pearl S. Buck. The organization's goal was to realize a genocide convention, but one that closely reflected Lemkin's conception.<sup>11</sup> Lemkin also wrote prolifically at this time, raising awareness among both the public and legal specialists of the necessity of a genocide convention.<sup>12</sup> In 1947, he published "Genocide: A Modern Crime," in the popular magazine *Free World*, and in "Genocide as a Crime under International Law," a publication reaching a more specialized legal audience.

In that essay, Lemkin described his attempts to have genocide recognized as a crime under international law, beginning with his 1933 presentation to the League of Nations on the "crime of barbarity."<sup>13</sup> As Lemkin presented the issue: "The question arose whether sovereignty goes so far that a government can destroy with impunity its own citizens and whether such acts of destruction are domestic affairs or matters of international concern. Practically speaking, should the moral right of humanitarian intervention be converted into a right under international law?"<sup>14</sup> Unsurprisingly, and consistent with his natural law inclinations, Lemkin finds the answer to be yes. One of the failures of the defense of state sovereignty was the commission of genocide, which could be seen in "the realities of European life in the years 1933-45 [which]

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<sup>10</sup> See e.g. *Ibid*, 67-115.

<sup>11</sup> AJHS archives, Lemkin papers, Box 2, Folder 12. The committee appears to have been most active during the spring of 1948.

<sup>12</sup> Lemkin also worked as an advisor on foreign affairs in the United States War Department at this time.

<sup>13</sup> Lemkin, "Genocide as a Crime under International Law," *American Journal of International Law*, Vol. 41(1) (1947), 145-151. This is one of many articles Lemkin published on genocide during his advocacy for a Genocide Convention. Lemkin published widely in his advocacy work, similar articles that he authored can be found in *The American Scholar*, *Belgium Review of Penal Law and Criminology*, and the Norwegian magazine *Samitisen* (Modern Times), among others.

<sup>14</sup> Lemkin, "Genocide as a Crime under International Law," 145-146.

called for the creation of such a term and for the formulation of a legal concept of destruction of human groups.”<sup>15</sup>

In the Soviet Union, Trainin followed Lemkin’s advocacy carefully, as *Pravda* and *Izvestiia* reported on preparations for a special UN commission to criminalize “the extermination of racial groups” in June 14, 1947 articles.<sup>16</sup> Initial Soviet reports on the UN developments did not use the word “genocide.” This presentation of the Genocide Convention as a Convention “combating the extermination of racial groups,” continued into April, 1948.<sup>17</sup> A month later, Trainin, writing for *Izvestiia*, provided a literal translation of genocide, introducing Soviet readers to the concept. Trainin defined *genos* as “*rod*.” *Rod* can indeed be translated as either genus or race. However, its most common usage is race.<sup>18</sup> Without mentioning the possibility of protecting political groups from genocide, Trainin stated that the Genocide Convention would protect all races and nations from genocide.<sup>19</sup> What was the basis for protecting these groups? “Maidanek and Auschwitz,” Trainin wrote, as he discussed the massive number of people killed at the death camps Auschwitz and Maidanek, as well as the shootings at Babi Yar. According to Soviet newspapers, the racial theories of the Hitlerites were responsible for these deaths. These racial theories aimed at destroying races and nationalities, not religious or political groups.

The Soviet focus on race may seem strange on its face. However, it was a logical focus that stemmed from Marxist theories of racism. Orthodox Marxist theory portrayed racism as a

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<sup>15</sup> *Ibid*, 147.

<sup>16</sup> June 14, 1947 editions of *Pravda* (p4) and *Izvestiia* (p3) refer to a Convention to “criminalize and name a crime connected with the extermination of racial groups,” (“Sekretariat organizatsii Ob’edinennikh natsii (OON) zaiavil predstaviteliam pechat’, chto on opublikoval proyekt konventsii o predotvrashchenii i nakazanni prestuplenii, sviazannikh s istrebleniem rasovix grupp.”)

<sup>17</sup> Rabota spetsial’noi komissii OON po bor’be istrebleniem rasovyx grupp,” (The work of the special UN commission to combat the extermination of racial groups) April 9, 1948 edition of *Izvestiia*.

<sup>18</sup> Originally, “*rod*” in an article titled “Genocide” (“genotsid”) in the May 4, 1948 edition of *Izvestiia*. The “ocide” component was defined as “*ubivat*”, “to kill” or “to slaughter.” Professor Aron N. Trainin, an eminent international lawyer, played a substantial role for Soviet Union during the Nuremberg Tribunals.

<sup>19</sup> “Vne ètikh grupp zhertv genotside; vnutreètoi gruppy- kazhdyi chelovek- zhertva, daby pogble vse- vse narod, vsia natsiia.” (Not only these groups of victims of genocide, but within this group, each individual of the victimized group, so all will be protected-all the people, the whole nation).

capitalist and imperialist phenomenon that resulted from the colonization of Africa. Because of Africa's relative military and political weakness, Africans were easier to enslave than other peoples, and racism developed to explain and justify the institution of slavery. A convention to punish and ultimately prevent the extermination of peoples was therefore a convention to protect oppressed peoples around the world from capitalist aggression.

In the most recent world war, "peaceful Soviet civilians" were the ultimate victims of capitalist aggression. In retrospect, the victim group of "peaceful Soviet citizens" conveniently coincides with both the Western and Soviet understandings of genocide. Though "peaceful Soviet civilians" cannot be classified as a "race," nor is Soviet a "nationality" in the Soviet understanding of the term, Soviet civilians were nationalities of the various Soviet nations—Russian, Belorussian, Ukrainian, Latvian, Jewish, and so on. In this way, "peaceful Soviet civilians" elides the Jewishness of Nazi murder on Soviet soil. "Peaceful Soviet civilians," encompassing all the nationalities of the Soviet Union, could be victims of extermination motivated by nationality, while at the same time, ignoring the specific nationalities that were persecuted. For aggression against specific nationalities was not the underlying cause of genocide. Genocide was ultimately motivated by capitalist aggression, and the only true opponents of capitalist aggression were socialist peoples. Anticipating Hannah Arendt's attempt to trace the Holocaust back to imperialism in *The Origins of Totalitarianism*, Trainin and other Soviet writers tie the Holocaust to capitalistic imperialism and forefront the natural victims of capitalism—peaceful Soviet peoples.<sup>20</sup>

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<sup>20</sup> While Arendt traces an element of the Holocaust to imperialism, she argues that the racism of imperialism—for example, the Boers in South Africa—ultimately took precedence over economic considerations. See Arendt, *Origins*, 204 (the Boers remained the undisputed masters of the country: whenever rational labor and production policies came into conflict with race considerations, the latter won.”).

While Trainin was introducing the Soviet public to the concept of genocide, the Economic and Social Committee created an Ad Hoc Committee for drafting the Convention, composed of member states of the Economic and Social Committee.<sup>21</sup> At a meeting in New York on February 21, 1948, Venezuela proposed that the five permanent members of the Security Council (the United States, the Soviet Union, China, France, and Great Britain) have positions on the Ad Hoc Committee.<sup>22</sup> Great Britain declined Ad Hoc membership in favor of two countries that had professed a greater interest in the Genocide Convention, Lebanon and Venezuela, which were also expected to represent the Arab and South American countries, respectively.<sup>23</sup> The Soviet Union requested that Poland—which had recently become an example of “real, existing socialism” by means of Stalinist economic and social reconstructions—serve on the Committee.<sup>24</sup> With this addition of Poland, the Ad Hoc Committee came into being on March 3, 1948 and was composed of representatives from seven countries—the United States, the Soviet Union, Poland, China, Lebanon, France and Venezuela.<sup>25</sup> These countries would have the most direct influence on the creation of the Genocide Convention, and thus, the legal definition of genocide.

Platon Morozov, an eminent Leningrad lawyer who later became a judge on the International Court of Justice, represented the Soviet Union at the Genocide Convention. Morozov’s initial proposal stated that “genocide, which aims at the extermination of particular groups of the population on racial, national (religious) grounds is one of the gravest crimes against humanity. The crime of genocide is organically bound up with Fascism-Nazism and other similar race “theories” which preach racial and national hatred, the domination of the so-

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<sup>21</sup> Working Papers, 285.

<sup>22</sup> *Ibid*, 601.

<sup>23</sup> *Ibid*, 601-619. Obviously there was no representative for African countries.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*, 619.

called “higher” races and the extermination of the so-called “lower” races.”<sup>26</sup> Thus, the Soviet Union’s definition seemed to require a connection with the “race theories” of a Fascist-Nazi state. In other words, fascist states were almost ipso facto genocidal, for their determination to extermination races and nationalities.<sup>27</sup>

The Soviet proposal outlined three types of genocide to be prohibited, and mirrored Lemkin’s proposals from the Secretariat’s draft : “The convention should include as instances of genocide such crimes as group massacres or individual executions on the grounds of race, nationality (or religion); the creation of conditions aimed at the extinction of the groups of people subjected to those conditions, mutilations and biological experiments, the restriction of births by sterilization or compulsory abortion.”<sup>28</sup> The section referring to massacres and executions came to be known as “physical genocide.” The section referring to subjecting groups of people to conditions aimed at their extermination, restricting births, and compulsory abortion came to be known as “biological genocide.”

The Soviet Union also proposed the prohibition of a third type of genocide, which came to be known as “cultural genocide.” The Soviet Union was apparently motivated by political considerations, believing Jim Crow laws in the American South to be such a clear example of cultural genocide, that they were willing to overlook their own occasions of cultural genocide. The Soviet proposal declared that: “The concept of genocide must also cover measures and actions aimed against the use of the national language or against national culture (so-called “national-cultural genocide”), e.g.:

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<sup>26</sup> *Ibid*, 696.

<sup>27</sup> While the Soviet proposal could have been interpreted as only acknowledging that fascist ideology was likely to lead to genocide, the proposal was by the states at the Convention as requiring a fascist link, and the Soviet Union’s representative did not dissuade states from this interpretation. The Soviet Union has also moved away from describing “Hitlerite” Germany to describing “Fascist Nazi” Germany, most likely in part because Hitler was now dead.

<sup>28</sup> Working Papers, 697.

- a) The prohibition or restriction of the use of the national tongue in both public and private life; the prohibition of teaching in schools given in the national tongue;
- b) The destruction or prohibition of the printing and circulation of books and other printed matter in the national tongues;
- c) The destruction of historical or religious monuments, museums, documents, libraries and other monuments and objects of national culture (or of religious worship).”<sup>29</sup>

The Soviet Union’s proposal also stated that: “The convention should state that cases of genocide shall be heard by the national courts in accordance with the domestic legislation of the country.”<sup>30</sup> In other words, states should prosecute their own genocides, just as the Soviet Union was prosecuting international crimes through its 1943 *ukaz*. This differed significantly from the Secretariat’s draft, which proposed an international court to hear cases of genocide.

Finally, the Soviet Union proposed that racist propaganda should be criminalized by the Convention, given that such propaganda inevitably, the Soviets argued, led to genocide against races perceived as “lesser.” Again, the Soviet Union saw the criminalization of racist propaganda as a way to criticize the United States and other capitalist countries, Jim Crow laws in the American South and apartheid in South Africa being prime examples of such racist propaganda put into genocidal action.

The Soviet Union argued that its proposals should be given special consideration given their own experience of genocide during the war. As Soviet representative Vsevolod Durdenevsky stated, “We know what genocide is. The USSR had to deal with the perpetrators of genocide on its own territory. We know all about Maidanek and Babi Yar.”<sup>31</sup> Durdenevsky contrasted this experience of mass violence with representatives of countries who had no experience of genocide (at least from the perspective of victims), such as the United States and

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<sup>29</sup> *Ibid*, 696-697.

<sup>30</sup> *Ibid*, 698.

<sup>31</sup> *Ibid*, 459.

the United Kingdom.<sup>32</sup> In this way, the Soviet Union claimed, perhaps rightly, an intimate knowledge of what genocide looks like, and therefore a more accurate understanding of what needed to be done to prevent it from occurring again. As a result of this experience, the Soviet Union included a Nazi-fascist element in their proposal. The element defined genocide as something perpetrated by fascists. Trainin, writing about the Soviet proposal in *Izvestiia*, described the opposition to a fascist requirement by the American representative, who stated that it was outside the scope of the Convention. Responding in *Izvestiia*, Trainin declared: “I must be frank: it is really bad if he needs a special declaration that his government does not support fascism.”<sup>33</sup> For the Soviet Union, the fascist element was a necessary requirement to continue both the fight against fascism and the fight against genocide, because fascism was linked to capitalism in Leninist-Stalinist theory.

### ***The Drafting Process of the Convention***

The Ad Hoc Committee produced a draft of the convention through the spring of 1948.<sup>34</sup> It was then submitted to the General Assembly’s Third Session in Paris in September 1948.<sup>35</sup> From September to October 1948, the Legal Committee of the General Assembly made changes to the draft.<sup>36</sup> The General Assembly made a few final changes before unanimously approved

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<sup>32</sup> *Ibid.*

<sup>33</sup> “Nado priamo skazat’: plokho delo, esli trebuetsia spetsial’naia deklaratsiei o tom, chto ego pravitel’stvo ne podderzhivaet fashizma.” Trainin writing in *Izvestiia*, May 4, 1948.

<sup>34</sup> Working Papers, 657- 1109. After meeting 28 times, the Ad Hoc Committee presented the draft to the entire Economic and Social Committee on May 10, 1948. With little discussion and no changes, the Economic and Social Committee approved the Ad Hoc Committee’s draft on August 26, 1948. *Ibid*, 1252.

<sup>35</sup> *Ibid.* In meetings between September 21 and December 10, 1948, the Legal Committee of the General Assembly discussed the Ad Hoc Committee’s draft and made some significant changes to the draft.

<sup>36</sup> Contrast the Ad Hoc Committee Draft and Commentary, Working Papers, 1110-1160, with the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 UNTS 277. The Legal Committee of the General Assembly approved the draft 30 to 0, with the Soviet bloc and Britain abstaining, on December 2, 1948. *Ibid*, 1922-1942.

the final draft of the Genocide Convention in December of 1948.<sup>37</sup> Lemkin beamed a big smile when in December 1948, the General Assembly voted 55 to 0 to approve the final draft of the Genocide Convention. He likely did not realize the outsized role the Soviet Union played in the process or he would not have been so happy.

The final version of the Convention possessed some significant similarities with the Soviet proposal, as well as significant differences. The groups to be protected from genocide were largely a reflection of the Soviet proposal—racial, national, and religious groups, along with ethnic groups. Both Soviet proposed forms of physical and biological genocide ended up in the Convention’s definition of genocide, although “cultural genocide,” did not. The Soviet proposal to limit genocide prosecutions to national courts was also rejected by the Convention, as the Convention provided for prosecution by a future international criminal court. Finally, the final draft rejected both the Soviet Union’s attempts to criminalize racist propaganda and the fascist element. The fascist requirement in particular, was never seriously entertained by any country outside the Soviet bloc, given that it would impermissibly narrow the definition.<sup>38</sup>

Why did some aspects of the initial Soviet proposal first made to the ad hoc committee make it through the committee revision processes into the final version and others did not? While much of the concept of genocide the Convention ended up creating ran counter to Soviet wishes, the issues in which the Soviet Union succeeded were those that had the support of functionalist international legal argument. When the Soviet Union focused their arguments on how to make laws against genocide effective, they were supported by Western and nonaligned countries.

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<sup>37</sup> Convention on the Prevention and Punishment of the Crime of Genocide. The vote was 55-0 with no abstentions. Prior to submission to the General Assembly, the Economic and Social Committee approved the Ad Hoc Committee’s draft with little discussion and no changes on August 26, 1948.

<sup>38</sup> Working Papers, 1863.

### ***Who Has Jurisdiction for the Crime of Genocide?***

The Ad Hoc Committee members vehemently debated the issue of domestic versus international prosecution (and the creation of an international criminal court). The Soviet Union argued on the grounds of state sovereignty that genocide should only be prosecuted by the state where the act occurred. While this would have easily won the day thirty years prior, after the atrocities of World War II, the positivist approach had been thoroughly discredited.<sup>39</sup>

Functionalists wanted to extend the “domestic analogy” of international law fully to the international sphere.<sup>40</sup> Following the “domestic analogy” all the way through would require that just as sovereign individuals give up their rights and consent to the authority of the state, states should give up some of their rights and consent to some form of world government. Historically, the concept of a “domestic analogy” in international law has been a misnomer, for classic liberal scholars argued that the analogy did not apply to international law, given the greater resources of the state compared to an individual, and the existence of an international order that states comply with naturally. In other words, prominent international legal scholars had been arguing for some sort of world court or government capable of enforcing international law.<sup>41</sup> This would be a court with more teeth than other earlier international courts, (such as the Permanent Court of International Justice), for whom participation was largely optional.

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<sup>39</sup> This may have been a winning argument even 25 years earlier, see e.g. *The Case of the S.S. Lotus (France v. Turkey)*, Permanent Court of International Justice (1927). In the *Lotus* case the PCIJ applied a classical liberal approach to state sovereignty, rather than a functionalist approach. The case was reviled by many international legal academics at the time of its decision for being out-of-step with current legal thought.

<sup>40</sup> See Emer de Vattel, *The Law of Nations* ([1758] Bela Kapossy & Richard Whatmore, eds. (2008) for a classical liberal view of international law, one that refuses to fully extend the domestic analogy to the international sphere. See Hersch Lauterpacht, “The Grotian Tradition in International Law,” 23 *British Yearbook of International Law* 1, 18-30 (1946) for a modern international lawyer’s view arguing for the full of the domestic analogy into international law.

<sup>41</sup> The lack of a clear enforcement mechanism in international law has long been one of the main anxieties of international lawyers, see e.g. David Bederman, *The Spirit of International Law*, (Atlanta: University of Georgia Press, 2002), 1-10.

In the eighteenth and nineteenth centuries, positivists had rejected any kind of limitation on state sovereignty to some sort of international entity.<sup>42</sup> However, in the twentieth century, after two world wars, international lawyers embraced the need to limit state sovereignty and to make international law truly effective by creating a sort of world government, while politicians and peace activists echoed this trend in the One World movement.<sup>43</sup> Given the resources and coordination the act of genocide entails, state participation or consent is almost always necessary to perpetrate genocide, thereby necessitating a limitation on state sovereignty if one has any hope to “prevent and punish” genocide.<sup>44</sup>

The American representative at the Convention pointed out the seemingly obvious point that by leaving the prosecution of genocide in domestic courts, those same states that perpetrated genocide would be forced to prosecute themselves, and therefore the Convention was unlikely to be effective.<sup>45</sup> For the functionalist, state sovereignty must be violated if it makes international law stronger and more effective. Thus, the Ad Hoc Committee followed the postwar influence of functionalism in agreeing to allow for international prosecution of genocide (in a future international criminal court), if domestic prosecution failed to occur.<sup>46</sup> While the Soviet Union brought up their concern with international prosecution of genocide again during the General Assembly meetings, it was again defeated by the same arguments.<sup>47</sup>

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<sup>42</sup> Positivists believed states shouldn't renounce to a higher entity because states are different than individuals: states are more self-sufficient than individuals, and there is a natural community among states that made renunciation unnecessary anyway. See Vattel, *The Law of Nations*.

<sup>43</sup> While the One World movement has a long history, the movement received new support following World War II. In 1947, peace activists and One World supporters formed the United World Federalists (currently named Citizens for Global Solutions). One World supporters believed that the UN did not go far enough in limiting state sovereignty.

<sup>44</sup> Many scholars argue that only states can perpetrate genocide. See e.g. Levene, *Defining Genocide*.

<sup>45</sup> See Working Papers, 815 for functionalist argument by the American representative. The role of the state in committing genocide was recognized by states at the General Assembly as well: see e.g. New Zealand representative, *Ibid*, 1235, recognizing state complicity in genocide.

<sup>46</sup> See *Ibid*, 816, for the American argument against the Soviet proposal during the Ad Hoc Committee meetings.

<sup>47</sup> *Ibid*, 1627 for opposition to Soviet proposal in the General Assembly. Later, presumably realizing the futility of their arguments, the Soviet Union proposed giving the UN Security Council power to decide whether genocide was

While Mark Mazower has categorized the Genocide Convention's partial rejection of state sovereignty as a relic of an earlier period of international law (in which international law had some teeth), I argue that this categorization is misplaced.<sup>48</sup> Rather than echo a romantic past, the Genocide Convention reflected the postwar period's apex of functionalism in international law. Rather than limiting the sovereignty of a few select and explicitly mentioned states (such as Minority Treaties of the interwar period in Poland and Czechoslovakia) the Genocide Convention applied, in theory, to all countries in the world. Therefore, the Genocide Convention's innovative universal limitation on state sovereignty was both novel and forward-looking.

### ***What Groups Were Protected by the Genocide Convention and Why?***

Although the victorious powers of World War II condemned the race science of the 1920s and 1930s advocated by Nazi Germany, race science was still influential among the Allies in the immediate postwar period.<sup>49</sup> The ability of racial science to masquerade itself is evident in

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occurring and how to proceed to punish it. This proposal echoed an earlier position originally held by the Soviet Union, France, and the United Kingdom (and opposed by the United States) when drafting the Nuremberg Charter. The United States wanted to define aggression in the Charter (using the Soviet definition of aggression outlined in 1933) but this was opposed by the other powers who wanted to protect their newly-created UN Security Council powers. As legal scholar Kirsten Sellars recounts, "The Soviet and French response was understandable. Both countries had previously been international pariahs—under Stalin in the interwar decades and under Petain during the war decades—and both now had a huge stake in the preservation of their newly acquired Security Council prerogatives. Mindful of Article 39 of the UN Charter, which invests the Security Council with the power to determine the existence of, and make recommendations on, 'any threat to the peace, breach of the peace, or action of aggression,' they had no wish to create a competing source of authority. . ." Kirsten Sellars, *Crimes against Peace and International Law*, (Cambridge: Cambridge University Press, 2013), 99-100.

<sup>48</sup> Mazower, *No Enchanted Palace*, 130-132.

<sup>49</sup> See, e.g. Carleton Stevens Coon, *The Races of Europe*, (New York: MacMillan, 1939) for an influential example of racialized Western thought in the mid-twentieth century. For an example of the use of immediate postwar race science in Western Europe see the 1949 report of the Royal Commission on Population, a group set up by the British government following the war because of concern about a declining British long-term birth rate, investigated concerns over declining Western birth rates, in contrast to the growing birth rates of the 'Oriental world.' Clare Hanson, "Biopolitics, Biological Racism and Eugenics," 106- 117, in Stephen Morton & Stephen Bygrave, eds., *Foucault in an Age of Terror: Essays on Biopolitics and the Defence of Society*, (New York: Palgrave MacMillian, 2008), 108.

the groups protected at the Convention.<sup>50</sup> While on the face of it, the Genocide Convention is intended to prevent genocide, its list of protected categories—race, ethnicity, nation, and religion—is based on race science that the Allies condemned. While race is now widely recognized to be culturally constructed, such a viewpoint was a minority in the 1940s, in spite of biological and anthropological research suggesting otherwise.<sup>51</sup> The participants at the Convention believed in protecting racial, national, religious, and ethnic groups because of their stability, because in the 1940s, there was consensus that race science posited essential differences among groups. The endorsement of race science supports the view of populations as divided among essentially different groups which must fight for their own interests (and even survival). This view contributed to sympathies for Nazi policies and the commission of genocide. While the Genocide Convention rejected Nazi policies in reaction to race science, they accepted the foundational *basis* of race science—namely, that racial groups are inherently distinct, separate, and largely immutable. Even though Lemkin seemed to view race as a cultural concept, writing that race was “a vague [concept],” and that many presumed racial differences “are the product of physical and social environment, not of heredity,” he nonetheless endorsed the Convention’s decision to limit protections to “immutable” groups.<sup>52</sup>

### **Which Groups Were Not Protected by the Genocide Convention?**

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<sup>50</sup> While the biological existence of race has been soundly refuted by geneticists, more recent work also illustrates the complete arbitrariness and instability of national and ethnic groups. For example, Kate Brown’s *A Biography of No Place: From Ethnic Borderland to Soviet Heartland*, (Cambridge: Harvard University Press, 2004), shows how the Soviet state could assign nationalities somewhat randomly.

<sup>51</sup> For example, American anthropologists (as well as, historically, the Soviet state) like Alison Davis viewed race as a social construction. Davis was influenced not only by his own experiences as an African-American (with a mother and a brother who could “pass” as white) but also by his work with geneticists in London in the 1920s who established that there was no biological basis for race. See David A. Varel, *The Lost Black Voice of the Chicago School: Alison Davis in American Social Thought* (forthcoming, University of Chicago Press).

<sup>52</sup>Lemkin, *Lemkin on Genocide*, ed. Steven L. Jacobs, (Landham, MD: Lexington Books, 2012), 39.

Most of the categories of groups protected by the Convention—national, religious, ethnic, and racial—were uncontroversial both in the Ad Hoc Committee and at the wider Convention.<sup>53</sup> What was the difference between the groups that were protected by the Genocide Convention, such as racial, religious, national, and those that were not, like political groups?

The postwar period saw the last remaining gasps of racial science, which presumes and accepts a biological basis for the differences between races and nationalities (and perhaps even religions, with Jews presumed to be a separate race as well.)<sup>54</sup> Despite our contemporary understanding of “religion” as a malleable set of beliefs, at the time, religion was seen as a highly stable characteristic of groups, influenced by family and upbringing and thus also frequently associated with race or nationality. Sweden proposed the inclusion of “ethnic groups,” which were defined as a collective distinction within races, and therefore based on scientific differences.

Indeed, aspects of the initial Soviet draft to the Ad Hoc Committee were consistent with the international law as commonly understood. The Soviet Union proposed “race, nationality (religion)” as protected groups, with an extended explanation for why religion should be considered a subset to nationality. UN members outside the Soviet bloc easily rejected the Soviet proposal to relegate religion to a sub-category of nationality during the Ad Hoc Committee and General Assembly.<sup>55</sup> States outside the Soviet bloc interpreted the attempt to classify religion as a sub-category of nationality as the atheistic Soviet Union wrongly downplaying the importance of religion. And yet, the fact that religion appeared as a category at

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<sup>53</sup> Sweden proposed “ethnic” groups during the Economic and Social Committee’s review of the Ad Hoc Convention’s draft, due to the opposition to “political” groups. Working Papers, 1359.

<sup>54</sup> See Francine Hirsch, *Empire of Nations: Ethnographic Knowledge and the Making of the Soviet Union* (Cornell University Press, 2005) for a depiction of the Soviet Union’s attempt to scientifically categorize its various nationalities.

<sup>55</sup> Working Papers, 1413.

all in the initial Soviet proposal for the Genocide Convention, however, is nonetheless noteworthy. Most important, the remainder of the Soviet draft appealed to many states. The Soviet proposal viewed groups protected from genocide as those characteristics seen as immutable, with a “scientific” basis for their existence.<sup>56</sup>

The Ad Hoc Committee had narrowly rejected the Soviet Union’s desire to exclude political groups on the fact that it was not an immutable trait.<sup>57</sup> Once the proposal reached the General Assembly, many states also expressed concern that including political groups would muddy the definition of “genocide proper.”<sup>58</sup> That is, “genocide proper” required the “destruction of groups of human beings which were the product of circumstances beyond their control.”<sup>59</sup> Since one could change one’s political beliefs, this was entirely in their control and therefore not amenable to functionalists at the General Assembly.

Additionally, a different group of states including Iran, Venezuela and Belgium was concerned that the inclusion of political groups as a protected category would make states less willing to ratify the Convention because of concerns related to the legitimate suppression of internal uprisings.<sup>60</sup> If the Convention failed to achieve sufficient support from the international community of states, it would be rendered ineffective. As a result of these misgivings, the General Assembly voted to remove political groups as a group protected by the Genocide Convention.<sup>61</sup> The majority that voted to remove political groups was made up of diverse states, many of which had little interest in the Soviet Union.<sup>62</sup>

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<sup>56</sup> *Ibid*, 1397.

<sup>57</sup> The Ad Hoc Committee vote was 4-3, with Venezuela voting with the USSR and Poland against including political groups. *Ibid*, 1045.

<sup>58</sup> E.g. Swedish representative, *Ibid*, 1357; Egyptian representative, *Ibid*, 1358.

<sup>59</sup> Polish representative, *Ibid*, 1405.

<sup>60</sup> See e.g. Iran representative, *Ibid*, 1391; Venezuelan representative, 1356; Belgium representative, 1402.

<sup>61</sup> *Ibid*, 1411.

<sup>62</sup> E.g. Lebanon, Venezuela, the Philippines, Iran, the Dominican Republic, Uruguay, Sweden, Norway, Brazil, Peru, Chile, Egypt. Working Papers, 1411. The exclusion of political groups was also supported by the World Jewish

What this majority had in common was that their professed reasons for excluding political groups were about applicability and effectiveness.<sup>63</sup> From the functionalist standpoint, the primary goal of international law is to be effective, meaning it must track state behavior and be clear to apply and enforce. Thus, excluding political groups on the basis of difficulties of identification (e.g., their lack of stability and the difficulties with identifying such groups) fits into a functionalist's approach to international law.

The Soviet Union and the many states pushing for the elimination of political groups from the protected category list were not alone in this desire. In his consultations with the UN's Secretary General on genocide, Lemkin himself expressed his reservations about "the advisability of including political groups. He pointed out, on the one hand, that political groups do not have the permanency and the specific characteristics of the other groups referred to and, on the other hand, that the Convention on Genocide being of general interest, it should not run the risk of failure by introducing ideas on which the world is deeply divided. He also pointed out that in practice the human groups most likely to suffer from genocide as history has shown, are racial, national and religious groups."<sup>64</sup> Therefore, Lemkin offered three reasons to opposing including political groups: the first, the imprecision of political groups; the second, the efficacy of a convention that included political groups; and the third, a practical observation about the groups most likely to suffer from genocide.

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Congress. *Ibid*, 567. Schabas, *Genocide in International Law*, 160, notes that this diversity of groups belies the impression that the Soviet Union was the main reason for the exclusion of political groups but fails to provide any explanation for the popularity of this view.

<sup>63</sup> Schabas, *Genocide in International Law*, 160, claims "It is clear that political groups were excluded from the definition for 'political' reasons rather than reasons of principle." Schabas' support for this statement is the ILC report that said "political groups were excluded by the General Assembly 'because this type of group was not considered to be sufficiently stable.'" Schabas does consider that this argument is allowed to be persuasive in part because of the structure of international law.

<sup>64</sup> *Ibid*, 230.

Lemkin also wrote a number of letters to the editorial page of *The New York Times*, and these are the most thoughtful expositions on defining genocide that appear in any major American newspaper at the time.<sup>65</sup> Lemkin's most notable letter regarding political groups and their relationship to genocide is found in the June 12, 1947 edition of *The New York Times*, around the same time that Lemkin was advising the Secretariat on his draft of the Genocide Convention.<sup>66</sup>

Lemkin notes genocide:

...can be physical (deprivation of life, direct or indirectly), biological (prevention of life through sterilization, forced separation of the sexes), and cultural (for example: forced elimination of cultural and religious leaders of communities, mass destruction of churches, works of art and culture). Genocide is essentially an ethnico-cultural concept. Racial, national or religious groups are better defined in international law than political groups. They are predominantly groups of an unchangeable nature whereas a political group is a more fluctuating notion. Moreover, in the actual ideological division of the world it might be difficult for all nations to agree on the inclusion of political groups. In this case the omission of political groups will not stand in the way of adopting the genocide convention.<sup>67</sup>

The *New York Times* editorial page would reiterate this argument over a year later, categorizing political groups as an unnecessary "stumbling block" to the approval of the Convention.<sup>68</sup> Moreover, the removal of political groups during the course of 1948 received brief coverage.<sup>69</sup> Nor was the debate over political groups portrayed as an overtly politicized

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<sup>65</sup> During the span of the Genocide Convention's meetings, Lemkin was mostly in the United States, titled as a visiting professor at Yale Law School, though he apparently did not receive a professor's salary and was instead funded primarily by benefactors from outside the law school. AJHS Archives, Lemkin Papers, Box 1, Folder 13 (appointment as visiting lecturer).

<sup>66</sup> Raphael Lemkin, "Letters to the Times: For Punishment of Genocide," *The New York Times*, June 12, 1947, 24.

<sup>67</sup> It must be noted that this was a practical decision for Lemkin, based on political considerations. Lemkin's opposition to the inclusion of political groups was in part because of Soviet opposition, rather than simply coinciding interests with the Soviet Union. Lemkin had previously (though inconsistently) included political groups in his definition of genocide. See, e.g. AJHS Archives, Raphael Lemkin papers, Box 6, Folder 12, undated (though presumably sometime between 1946 and 1948), notes on the relation between the Genocide Convention and Nuremberg. "Genocide is a specific crime directed not against any human group, but against specific human groups, based upon race, religion, nationality or political belief. These groups are not casual gatherings of people, but groups which occupy a special place in the world. Just because of their specific nature, these groups throughout history have been subjected to destruction."

<sup>68</sup> "The Genocide Treaty," *The New York Times*, Nov. 26, 1948, 22.

<sup>69</sup> Instead, the Soviet Union's unsuccessful attempts to include a propaganda ban on inciting racial and national hatred received far more detailed coverage. See, e.g. "Genocide Motion Fails: Russia Loses in U.N. on Plan to Ban Media Inciting Hatred," *The New York Times*, Oct. 30, 1948, 2.

issue. Given the Cold War-era debate over the “shocking” absence of political groups, it is notable that the American media regarded it as a largely inconsequential issue, and it was one thing that there was general consensus on among the members of the UN.

Like Lemkin, American Jewish organizations all weighed in on the shape the genocide convention would take. Most of them also opposed including political groups. The Consultative Council of Jewish Organizations cited its desire that the Convention not be “delayed by differences of opinion as to the definition of political groups,” echoing Lemkin’s objection.<sup>70</sup> The World Jewish Congress also submitted a memorandum on the Draft Convention to the Economic and Social Council in July of 1947. While not explicitly bringing up political groups, the memorandum requested that “the law of genocide be coordinated with and not overlap into the field of human rights which is within the special competence of the Commission on Human Rights.”<sup>71</sup> While this request could be interpreted as concern for over jurisdiction in the bureaucracy of the UN, it also foreshadows one of the subsequent objections to the inclusion of political groups. That objection was the belief that political opinions were more properly the domain of the Human Rights Declaration, and the failure to include political groups in the definition of genocide hardly meant that government were allowed to persecute people on the basis of their political opinions.<sup>72</sup>

Moreover, the World Jewish Congress subsequently commented upon the Secretariat’s draft, requesting the “exclusion of political groups,” believing that it “should be made clear that such groups come under the Convention only to the extent to which they are identical with racial, religious, or linguistic groups.”<sup>73</sup> In this way, we see that not only did the most prominent

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<sup>70</sup> Working Papers, 469.

<sup>71</sup> *Ibid*, 471.

<sup>72</sup> See, e.g. *Ibid*, 1305.

<sup>73</sup> *Ibid*, 582.

Jewish organization involved in lobbying at the Genocide Convention agree with Lemkin's opposition to political groups, but we see the curious alliance between these groups and the Soviet Union. Perhaps aware of this commonality, the Soviet Union supported allowing non-governmental organizations such as the World Jewish Congress a voice at the Convention, not an uncontroversial position. Largely due to the Soviet Union's insistence, these groups were permitted to lobby at the Convention.<sup>74</sup>

### ***What is Prohibited by the Genocide Convention?***

One major controversy at the Convention was whether or not to prohibit the destruction of culture as genocide. The Soviet proposal included cultural genocide, which was defined as the restriction of the use of the national tongue, prohibition or destruction of books in the national tongue, and/or the destruction of historical or religious monuments and objects of national culture (or of religious worship).<sup>75</sup> While the Soviet Union pointed to the destruction inflicted on them by German occupation during World War II as an example of the need to prohibit cultural genocide, Soviet newspaper writers pointed to political motivations. A writer in *Izvestiia* referred to apartheid in South Africa as genocide on April 29, 1948, apparently under the category of cultural genocide,<sup>76</sup> and a few weeks later *Trud*, a Soviet peasant newspaper, similarly referred to racial segregation in the United States as cultural genocide.<sup>77</sup>

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<sup>74</sup> *Ibid*, 689.

<sup>75</sup> *Ibid*, 696-697.

<sup>76</sup> *Izvestiia* applies the term of genocide to racism in South Africa in "Racial Discrimination is 'legally based'" (Rasovaia diskriminatsiia "na zakonnom osnovanii") April 29, 1948 edition. The article states: "bolee chem umestno napomnit' ob ètoi rezolutsii i o polozenie natsional'nykh men'shinstv v Uzhnoi Afrike voobshe." ("It is more than appropriate to recall the [General Assembly's] resolution [to combat genocide] and the situation with national minorities generally in South Africa.")

<sup>77</sup> The May 15, 1948 edition of *Trud* applies the term of genocide to racism in America (genocide "is an on-going policy on relations of Negroes in the US") (politikoi provokimoi po otnoshenii k negram v SShA).

Lemkin's proposal also included cultural genocide. He believed that cultural destruction was part and parcel of physical destruction, and thus a necessary component of the definition of genocide. Not surprisingly, the United States opposed it for similar reasons that the Soviet Union and Lemkin opposed political groups. The Americans considered cultural genocide too imprecise.<sup>78</sup> The majority of Ad Hoc Committee members decided against including cultural genocide in the draft, many using the same functionalist arguments that opposed including political groups.<sup>79</sup> Though the Soviet Union again raised the issue of cultural genocide during the General Assembly, it was summarily voted down.<sup>80</sup>

### ***Incitement and Propaganda***

Incitement to commit genocide was included without controversy in the Genocide Convention. The Secretariat's first draft prohibited "public direct incitement to genocide, whether followed or not by genocide."<sup>81</sup> Similarly, the Soviet draft requested the prohibition, "on equal terms with genocide, of . . . [d]irect public incitement to commit genocide, regardless of whether such incitement had criminal consequences."<sup>82</sup> The question was not whether to include incitement—everyone agreed that prohibiting the encouragement of genocide was a necessary step to prevent genocide. This was reflected, without controversy, in the final Genocide Convention, which duly prohibits "Direct and public incitement to commit genocide."<sup>83</sup> The question was what forms of encouragement should be prevented, termed "indirect" incitement. That is, language that while not clearly promoting genocide, may have

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<sup>78</sup> See Working Papers, 1246 for United States opposition; 1321 for French opposition

<sup>79</sup> *Ibid*, 726-732.

<sup>80</sup> *Ibid*, 1306.

<sup>81</sup> *Ibid*, 117.

<sup>82</sup> *Ibid*, 697.

<sup>83</sup> Genocide Convention, Article III (c).

encourage or lead to its commission. This category could include racist propaganda, as such propaganda could lead to violence and even genocide against or among races.

Trainin long ago included aggressive propaganda as a crime against peace, and portrayed the crimes of the Nazis in the Soviet Union as aggressive propaganda in action. The Soviet Union's proposal included an article that would criminalize engaging "in any form of propaganda for genocide (the press, radio, cinema, etc.) aimed at inciting racial, national or religious enmity or hatred and also designed to provoke the commission of acts of genocide."<sup>84</sup> The criminalization of propaganda was distinguished from the incitement article because it was "indirect," rather than "direct" propaganda.

While the Soviet representatives' were drafting their proposals, Trainin was working on presenting his latest works to his colleagues at the Institute of Law.<sup>85</sup> On May 10, the same day as the Ad Hoc Committee presented its draft to the entire Economic and Social Committee, Trainin was due to present his most recent findings on "Criminal Liability for Promoting Aggression" (*Ugolovnaia otvetstvennost' za propagandu agressii*).<sup>86</sup> Though the discussion ended up revolving around Trainin's recently published monograph on theories of criminal law, the real frontline of Soviet international criminal law lay with Trainin's little discussed pamphlet on aggression.<sup>87</sup> The Soviet proposal on genocidal propaganda is essentially analogous to Trainin's work on aggressive propaganda, the significant distinction being that rather than designed to disrupt peace, the propaganda had to be designed to provoke genocide. Taken

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<sup>84</sup> Working Papers, 697.

<sup>85</sup> ARAN, f. N 1934, op. N1, d. 352, l. 1.

<sup>86</sup> *Ibid.* Trainin also discussed his earlier work, 1946's *Uchenie o Sostave Prestupleniia*.

<sup>87</sup> ARAN, f. N 1934, op. N1, d., 352, l. 74 (see E.A. Korovin's comments on the bulk of the discussion).

together, the crime of incitement along with propaganda for genocide correspond to Trainin's "aggressive propaganda."<sup>88</sup>

The Soviet proposal would not sail smoothly through the committees. The first criticism of this article came from the United States representative Maktos, and was based on the First Amendment's protection of the freedom of the press. In response, Morozov "pointed out that he had not the least desire to make an attack on the freedom of the Press" but "was merely anxious that culpable acts of this nature should be prevented and repressed, in exactly the same way as some of the articles of the penal code of the State of New York provided for limitations of the freedom of the Press."<sup>89</sup> The French representative, Mr. Ordonneau, was sympathetic to the Soviet Union's proposal, noting in response to a question by the Lebanese representative about the legitimacy of attacking an enemy during war to raise morale, that "the point [of the proposal] was to repress propaganda aimed, for instance, at the total destruction of an enemy country as such. Incitements of this nature went beyond the limits of war itself, which was not without certain laws."<sup>90</sup> Morozov also replied to the Lebanese representative, stating that

...while not contesting the right to wage war, he was opposed to the violation of the laws of war. He had in mind particularly the crimes committed by Hitler, who sought to exterminate millions of human beings, because he wished to bring about the destruction of the national or racial group to which they belonged. . . Hence, proceedings should be taken against propaganda when it preached the domination of the so-called "inferior" races by the so-called "'superior' races."<sup>91</sup>

However, the Soviet Union was ultimately unsuccessful in its attempt to criminalize racist propaganda. For one, the US objected to it for violating the US constitution. The American representative stated that "he was unable to commit his Government beyond conspiracy and incitement to commit genocide. Those questions came under the fundamental

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<sup>88</sup> See, e.g. Trainin, *Zashchita Mira* (1937), 133.

<sup>89</sup> Working Papers, 733.

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

legislative provisions of the United States Constitution.”<sup>92</sup> This made it dangerous territory for functionalism, because it likely would not be effective.<sup>93</sup> Moreover, it was too imprecise.

### ***What is the Standard of Intent?***

Another area of controversy was whether genocide should require merely general intent, that is the intent to commit the *actions* that result in genocide; or a specific intent to commit genocide by means of these actions, i.e. destroy a protected group as such in whole or in part). The United States argued for specific intent, and the justification that for the severity of the crime (the “crime of crimes”) the higher standard was warranted.<sup>94</sup> This is somewhat credible under international law given the perceived impracticality of prosecuting the most severe international criminal crime with only general intent. Specific intent ensures that genocide is considered an extremely serious crime. Lebanon also argued that specific intent was a reflection of the collective nature of the crime.<sup>95</sup>

United States representative Maktos proposed the following text, based on the Chinese draft and incorporating suggestions of the Polish and Lebanese representatives:

“In this convention, genocide means any of the following acts directed against a national, racial, religious or political group as such:

1. With the intent to destroy the physical existence of the group, killing members thereof;
2. With the intent to destroy the physical existence of the group, subjecting members of the group to such conditions or measures as will causes their deaths or prevent the propagation of the group;
3. With the intent (cultural genocide).”<sup>96</sup>

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<sup>92</sup> *Ibid*, 736-737.

<sup>93</sup> The Soviet Union’s unsuccessful attempts to include a propaganda ban on inciting racial and national hatred received detailed coverage in the United States. See, e.g. “Genocide Motion Fails: Russia Loses in U.N. on Plan to Ban Media Inciting Hatred,” *The New York Times*, Oct. 30, 1948, 2.

<sup>94</sup> Working Papers, 861.

<sup>95</sup> *Ibid*, 1326.

<sup>96</sup> *Ibid*, 861.

Subparts 1. and 2. would become the basis for the standard of intent in the final Convention. Subpart 3., thanks in part to United States opposition to included cultural genocide (discussed above) would not be included. This approach to specific intent reflects not only the abovementioned functionalist arguments. There are also elements of Anglo-American views of fairness and justice—undergird by natural law—in this approach. The emphasis on specific intent in these legal traditions is able to infuse a functionalist argument through the normative values of “what is fair and just?” in addition to “what is effective?”

The Soviet and French representatives were willing to have a lower standard of intent. Both the Soviet justice system and the French civil system usually required only general intent.<sup>97</sup> The lower standard of intent is common for international criminal law, (e.g. war crimes require only general intent.) Arguably, many of the crimes since committed on political grounds could be considered genocide with a general standard of intent.<sup>98</sup>

A functionalist could go either way on this question of the level of intent. For instance, the difficulty of prosecuting specific intent could result in many acts of genocide going unpunished, implying that the effectiveness of the Convention could be harmed by a higher standard. Such an argument was advanced by both the Soviet Union and France, and is a decidedly functionalist one.<sup>99</sup> Though proponents and opponents both utilized functionalism, the underlying normative values of countries’ respective domestic legal systems were what was

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<sup>97</sup> See, e.g. Gerhard O.W. Mueller, ed., *The French Penal Code*, (Littleton, CO: F.B. Rothman, 1960).

<sup>98</sup> E.g. with the Holodomor the Soviets had a clearly political intent, but the impact that had was on a nationalist group, i.e. Ukrainians. The Soviet massacre at Katyn was also a result of political intent but the impact was on the Polish as a national group. The mass murders committed by the Khmer Rouge had political motivations but with the impact on destroying the Khmer peoples in part (if the concept of autogenocide is accepted, than the Khmer Rouge reign could be considered perpetrating genocide on the basis of Cambodian nationality or Khmer ethnicity). The Stalinist terror had a political intent with destructive national impacts.

<sup>99</sup> Working Papers, 866.

ultimately decisive.<sup>100</sup> The United States, allied with China, were able to assert their position, based in part on domestic American legal tradition. This would have a major impact on the prosecution of genocide, with the difficulties of proving specific intent considered one of the highest barriers to conviction. In spite of its importance, the decision to require specific intent has received relatively little discussion in the historiography.<sup>101</sup>

### ***Trainin's Portrayal of Concept of Genocide on the International Stage***

Written concurrently with the Genocide Convention, and published the same year, a pamphlet titled *The Struggle of the Progressive Forces against the Destruction of National and Racial Groups*, concisely provides Trainin's portrayal of genocide to both the Soviet public and international audiences.<sup>102</sup> The pamphlet is from a New York Conference on the "Struggle Against Genocide," (*za borbu s genotsida*) and emphasizes the neologic aspect of the term genocide while narrowly defining the groups protected from genocide- races and nations.

This emphasis is found in Trainin's introduction, as Trainin declares genocide to be "one of the most serious crimes committed by Nazi Germany during the Second World War—the organized mass extermination of national and racial groups."<sup>103</sup> The evil the Germans committed against "Soviet peoples" was not only a "crime against humanity" but a "crime of aggression," a vile and "treacherous attack on our peace-loving socialist population."<sup>104</sup> This "predatory" attack not violated laws and the customs of war, but was carried out systematically,

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<sup>100</sup> That is, both sides advanced functionalist legal arguments. It appears that political sway, rather than legal reasoning, determined the outcome of this disagreement.

<sup>101</sup> See e.g. Working Papers, 843. See also Schabas, *Genocide in International Law*, 303.

<sup>102</sup> Aron Trainin, *Borba progresivnix sil : protiv unishtożhayaneto na natsionalni grupi i rasi : konferentsiata v Niu Ĵork za borba s genotsida : stenograma na publicna leksiia* (Moskva, 1949), (*The Struggle of the Progressive Forces against the Destruction of National and Racial Groups: Conference in New York on the Struggle Against Genocide.*)

<sup>103</sup> Trainin, *The Struggle*, 3. (Original: "Oдно iz camykh tiazhkikh prestuplenii, covrshënykh fashistskoi Germaniei vo vtoroi mirovoi voine,—organizovannoe massovoe istreblenie natsional'nykh i rasovykh grupp.")

<sup>104</sup> *Ibid*, 4. (Original: "Verolomnom napadenii na nashu miroljubivuiu sotsialisticheskuiu naselenie.")

and designed to result in the extermination of entire peoples, nations, races, physical destruction of historical races and nations.”<sup>105</sup>

As according to Hitler’s plan, targeted groups were the “Slavic peoples—Russians, Ukrainians, Belorussians, Czechs, and others,” who were subject to mass killings.<sup>106</sup> However, for Trainin these were not Hitler’s only victims; other European nations were targeted as well. In the period from May 1, 1940 to December 1, 1943, 2.5 million Jews were “destroyed” (*unichtozheno*) at Auschwitz alone, and overall around 6 million Jews were “destroyed.”<sup>107</sup> Overall, the fascist terror resulted in the deaths of 12 million “peaceful citizens.”<sup>108</sup> Such a result was inevitable (*podobnii rezul’tat neizbezhen*) given the Nazi propaganda system. Nazi doctrine taught that “the Slavic race was a lesser race, and Jews—they were not people.” In this way we see that Trainin’s presentation of the World War II encompassed the Holocaust, rather than either ignoring the horrors of the Holocaust or separating the Holocaust from the war itself. In this way, both Slavs and Jews are joined together by their low places in the Nazi racial hierarchy. Thus, for Trainin, propaganda was the main driver of the horrors of genocide, justifying the Soviet attempts to criminalize racist propaganda at the Convention.

While Soviet representations of the Holocaust were different from most other countries, the elevation of genocide as a distinctly terrible crime was common to both the West and the Soviet Union. Trainin asks for the reader “What is so special about this new type of crime?”<sup>109</sup> Was it “the destruction of individuals?” Trainin rejects this explanation, noting that genocide “is the destruction of “entire peoples, entire races, entire nations, and the destruction of individuals

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<sup>105</sup> *Ibid.* (“khishchnicheskuiu, podliuu agryessiiu, ne tol’ko narushali i obychai vedeniia voyniy, no provodili sistematicheskie meropriiatiia, rasschitanye na istreblenie tselykh narodov, natsii, ras, fizicheskoe unichtozhenie istoricheski slozhivshikhsia ras i natsii.”)

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*, 5. (“V chëm zhe osobeinost’ ètogo novogo vida zlodeianii?”)

is only” a means to that end.<sup>110</sup> Trainin then outlines the concept of genocide according to the Soviet worldview, reflecting his earlier explanations for newspaper readers. Trainin, like Lemkin, includes cultural genocide in his definition. Trainin then brings up the discussion over including political groups in the definition of genocide. Trainin unsurprisingly rejects the inclusion of political groups, noting that genocide is a result of fascist theories of racial superiority. Political groups, thus, have no reason to be included in the discussion on genocide, and their proposed inclusion reflects a failure to recognize racism and fascism in the commission of genocide.<sup>111</sup> In this way, we see that Trainin’s earlier writings on crimes against peace can fit quite consistently with Soviet positions on the concept of genocide.

### ***The Historiographical Portrayal of the Genocide Convention***

Most of the historiography on the development of international criminal law following World War II and the Holocaust focuses on the Anglo-American role.<sup>112</sup> The dominance of these studies raises the question of how much the Cold War influenced the view that the Soviet Union is responsible for the weaknesses of the legal definition of genocide.<sup>113</sup> Only more recently has the international legal historiography acknowledged some of the inaccuracies of the traditional narrative, such as the incorrect perception that only the Soviet bloc opposed the inclusion of

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<sup>110</sup> *Ibid.*

<sup>111</sup> *Ibid.*, 9. (“V predlozheniiakh sovetskoi delegatsii podchërkiivalos’, chto prestupleniia genotsida nerazryvno sviazany s fashizmom-natsizmom i analogichnymi rasistskimi ‘teoriiami.’ Èto—istoricheski polnost’iu podtverzhdënnyi tezis, tezis politicheski vernyi, èto—fakt, kotoryi nabliudali narody vsego mira v period vtoroi mirovoi voiny, kogda velos’ massovoe istreblenie narodov i natsii.”)

<sup>112</sup> Perhaps part of the reason for the ignorance of international law in the historiography of the Genocide Convention is the fact that the Convention was drafted under the auspices of the Economic and Social Committee, rather than the International Law Commission. That is, the Ad Hoc Committee was officially composed of government representatives, rather than lawyers. Nonetheless, these government representatives were all trained as lawyers.

<sup>113</sup> See, e.g., Ervin Staub, “Genocide and Mass Killing: Origins, Prevention, Healing and Reconciliation.” *Political Psychology*, Vol. 21, No. 2 (June 2000), pp. 367-384; Van Schaack. “The Crime of Political Genocide: Repairing the Genocide Convention’s Blind Spot,” *The Yale Law Journal*, Vol. 106, No. 7 (May 1997): 2259-2291.

political groups.<sup>114</sup> Even so, these works portray the Genocide Convention as an act purely of politics, without taking into account the process of the Convention and the international legal argument in the immediate post-World War II period.<sup>115</sup> In particular, most scholars contend that the exclusion of political groups occurred for “‘political’ reasons rather than reasons of principle.”<sup>116</sup>

Such a depiction of the Convention is entirely free of analysis regarding the influence of international legal argument. The historical tendency of international law to privilege the worldviews and roles of select countries (generally Western Europe and the United States) has been replicated in the traditional narrative of the Genocide Convention, in which the United States nobly advocates for its definition of international law against the barbaric Soviets.<sup>117</sup>

While the Soviet Union has been blamed for the weaknesses of the legal definition of genocide, these weaknesses can also be traced to functionalist desire for clarity and effectiveness in international law.<sup>118</sup> Even though Hersch Lauterpacht opposed the concept of genocide,

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<sup>114</sup> William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 2009); Christoph Safferling & Eckart Connze eds., *The Genocide Convention Sixty Years after its Adoption*, (The Hague: Asser Press, 2010); John Quigley, *The Genocide Convention: An International Law Analysis*, (England: Ashgate Publishing, 2006); Anton Weiss-Wendt “The Soviet Perspective on the Drafting of the UN Genocide Convention” in *The Genocide Convention: The Legacy of 60 Years*, (Leiden, the Netherlands: Koninklijke Brill, 2012) 187-197.

<sup>115</sup> William A. Schabas, *Genocide in International Law*; Safferling & Connze eds., *The Genocide Convention Sixty Years after its Adoption*; Quigley, *The Genocide Convention*; Weiss-Wendt “The Soviet Perspective on the Drafting of the UN Genocide Convention,” 187-197.

<sup>116</sup> Schabas, *Genocide in International Law*, 160. See also Weiss-Wendt, “The Soviet Perspective on the Drafting of the UN Genocide Convention,” 188, stating the Genocide Convention “breathes politics.”

<sup>117</sup> Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge Univ. Press 2005); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004). This Cold War narrative fits well with one view of international law, that international law does somehow not apply to certain nation-states given their internal affairs. This is an approach to international law known as “liberal anti-pluralism” and has inglorious origins in developing international law so that it could justify and prop up colonialism and imperialism. Liberal “pluralism” on the other hand, views all states as members of the international legal order regardless of internal characteristics. While liberal anti-pluralism has made a return recently in international law (e.g. the United States government’s characterization of Iraq in 2003, the current United States President’s characterization of Syria in 2013), it was in retreat during the immediate post-World War II period. (I.e. liberal pluralism was the norm.)

<sup>118</sup> This made the Soviet Union a participant in the development of international criminal law, rather than merely an opponent or propagandist using “lawfare.” The use of the term “lawfare” has been heavily criticized by

preferring to focus on individual human rights, the functionalist style of legal argument that he exemplified helped to define genocide.<sup>119</sup>

The portrayal of the Soviet position both to the Soviet public and the international audience, as exemplified especially in Trainin's writings, reveals the consistency between Trainin's early articulation of crimes against peace, conceptualization of the crimes of the Hitlerites as committed against "peaceful Soviet civilians", and Soviet understandings of genocide. In addition to buffering the concept of crimes against peace, the victim category of "peaceful Soviet civilians," elided the contradictions between the Soviet portrayal of the Holocaust as motivated by nationality, and the Soviet portrayal of genocide as primarily motivated by race.

In spite of functionalism's reign at the Convention, the Genocide Convention is also representative of a larger turning point in international law. The Soviet Union (and the United States) employed different styles of legal arguments depending upon their audience and position. While functionalism was still the most persuasive, we can see the emergence of legal styles as a tool for lawyers, rather than a largely unquestioned way of thinking about Western international law. In this way, the Genocide Convention augurs the emergence of contemporary international legal thought, in which different legal styles are employed by the same lawyers and legal scholars, without concern for larger theoretical coherence.<sup>120</sup>

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international legal scholars for being purely rhetorical. See Leila Sadat and Jing Geng, "On Legal Subterfuge and the so-called "Lawfare" Debate," 43 *Case Western Reserve Journal of International Law* 153 (2011).

<sup>119</sup> See Hersch Lauterpacht, Review: "Axis Rule in Occupied Europe" by Raphael Lemkin, *The Cambridge Law Journal*, Vol. 9, Issue 1, (March 1945), p140-140, for Lauterpacht's lack of enthusiasm for both the concept of genocide and its founder.

<sup>120</sup> See e.g., David Kennedy, "When Renewal Repeats: Thinking Against the Box," *New York University Journal of International Law & Policy*, (Vol. 32, 2000) 335-500, 344, "The discipline is both tenaciously attached to the classic definition of international law as "law among sovereign states" and full of denunciations of international law's fetish-like attachment to states and to "sovereignty." These two attitudes are brought together by the expertise, the integrity, the judgment, and the professional voice of the international lawyer. When an international lawyer carries on a real or fantasy discussion with an interlocutor elsewhere in the establishment, he or she will sometimes need to

In the decades to come, the Genocide Convention would determine what atrocities met the definition of genocide, and what atrocities were relegated to areas of domestic, rather than international concern. Following the Convention, Lemkin, Lauterpacht, and Trainin, all continued to advocate for their own understandings of international law, all with varying degrees of success.

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emphasize international law's commitment to sovereignty, just as he or she should sometimes frame international law as a harbinger of an international community which has left sovereignty far behind. When international lawyers address one another, we repeatedly find polemics castigating the field for having stayed too long with the classic definition, just as we find insistence that moving away from sovereignty would, perhaps unfortunately, be premature." To some extent, this contemporary oscillation between sovereignty and normative international law is simply a new regurgitation of a problem inherent to Western international law, but with slightly different norms and assumptions of what Western international law is and should be. See e.g. Martti Koskenniemi, *From Apology to Utopia: The Structure of Legal Argument*. As Kennedy notes, "it is unusual to find anyone close to the end of either spectrum. Most everyone acknowledges the importance of both rules and broader principles; everyone sees a situation for both sovereign autonomy and international community. No international lawyer imagines law in mechanical terms, just as no international lawyer would see it simply as an expression of natural values or religious principles. International lawyers who criticize one another also often do so in multiple ways - European international lawyers might well characterize Americans as both too squishy about "policy" or "soft law" and as too literal about formal commitments, or as both hegemonically committed only to our own sovereignty and too idealistic about the possibilities for international community. As a result, interpreting positions on the spectrum between formal law/sovereign autonomy and functional law/international community in progressive or ethical terms runs into a sort of Zeno's paradox. Since everyone is situated in some way between the extremes of these spectrums, one may approach without ever quite reaching rules or institutions that clearly signal the presence of an international community; one may downplay, but never quite eliminate, rules or institutions that seem to express the imperatives of legal form." Kennedy, 371.

## Chapter 6: When the Genocide Convention Meets the Cold War: The Last Years of Trainin, Lemkin, and Lauterpacht

On December 9, 1948, the General Assembly approved the Genocide Convention. Upon learning of the passage of the Genocide Convention, Lemkin wept with joy. Lemkin later categorized the day that the Convention went into force as “a day of triumph for mankind and the most beautiful day in my life.”<sup>1</sup> The Soviet Union, however, had the opposite reaction.

Even though Soviet newspapers consistently covered the Convention during the deliberation period, there was no mention in any of the three major papers of *Izvestiia*, *Krasnaia Zvezda*, or *Pravda* in the days and weeks following the passage of the Genocide Convention. *Trud* printed a small notice of the General Assembly’s approval of the Genocide Convention. The notice did not praise the Genocide Convention. Instead, the notice simply lamented the Convention’s failure to prohibit cultural genocide as well as the lack of a fascist requirement for genocide.<sup>2</sup> This near blackout is all the more striking when contrasted with the heavy coverage the UN’s Declaration of Human Rights received the following day.<sup>3</sup>

On December 10, one day after the United Nations General Assembly adopted the Genocide Convention, as a part of a celebration of Vyshinsky’s 65<sup>th</sup> birthday put on by the Soviet Academy of Sciences, Trainin gave a presentation on questions of the theory of state and law in his mentor Vyshinsky’s work.<sup>4</sup> At the same moment that Trainin celebrated Vyshinsky, the United Nations General Assembly adopted the Universal Declaration of Human Rights. In contrast to the Soviet Union’s taciturn coverage of the Genocide Convention, the Universal

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<sup>1</sup> AJHS Archives, Raphael Lemkin papers, box 6, folder 2, statement dated Jan. 12, 1951, the day the Genocide Convention entered into force.

<sup>2</sup> *Trud*, December 11, 1948.

<sup>3</sup> The General Assembly passed the Declaration of the Rights of Man the day after the Genocide Convention, and was viewed as a companion to the Genocide Convention. See *Pravda*, *Izvestiia*, *Krasnaya Zvezda*, and *Trud* on December 12, 1948, all giving extensive multi-page coverage to the General Assembly’s passage of the Declaration of the Rights of Man.

<sup>4</sup> ARAN, f. 1711, op. 1, no. 14, l. 13.

Declaration of Human Rights received extensive coverage upon its passage on December 10. Vyshinsky gave multiple speeches before the UN, where he warned against the Declaration's attack on sovereignty, its failure to condemn Nazism and fascism (reminiscent of many Soviet critiques of the Genocide Convention), and the fact that it "ignores the most important principle for a Human Rights Declaration—the right of nations to self-determination."<sup>5</sup>

The product of over two years work by 18 members of the Commission on Human Rights, the Declaration included a variety of different rights, from political and civil to economic and social. The events of the Holocaust and World War II were used to justify the inclusion of nearly all of the proclaimed rights of the individual that needed protecting.<sup>6</sup> While Eleanor Roosevelt was the most famous member of the drafting commission, and Canadian John Peters Humphrey and Frenchman René Cassin the most lauded of the drafters, India's Hansa Mehta, the Republic of China's P.C. Chang, and Lebanon's Charles Malik have also been recognized as playing significant roles in the formulation of human rights through the Declaration.<sup>7</sup> At the final General Assembly vote on the Universal Declaration of Human Rights, the Soviet bloc abstained from voting.<sup>8</sup>

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<sup>5</sup> Vyshinsky, "O proekte Deklarazii prav cheloveka," *Izvestiia*, Dec. 14, 1948, p3. (Original "ignoriruet vazhneishii printsip Deklaratsii prav- -pravo natsii na samoopredelenie.")

<sup>6</sup> The members of the drafting commission represented the countries of Australia, Belgium, the Byelorussian Soviet Socialist Republic, China, the Republic of China, Egypt, France, India, Iran, Lebanon, Panama, Philippines, the United Kingdom, the United States, the Union of Soviet Socialist Republics (represented by Alexandre Bogomolov), Uruguay and Yugoslavia. Thus, the commission included several members of communist countries as well as former colonized countries. The most striking omission is of course, that there are no representatives from the continent of Africa. The Declaration's preamble contains a reference to the events of the Holocaust, stating that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people..." UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>7</sup> For accounts of the drafting process of the Declaration see Manu Bhagavan, *India and the Quest for One World: The Peacemakers* (London: Palgrave Macmillian, 2013) and Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2011).

<sup>8</sup> The Soviet state, with other members of the Eastern bloc (along with Saudi Arabia and South Africa) had thus abstained from voting in favor of the Declaration. The Saudi Arabian delegation abstained because of the wording of Article 16 on equal marriage rights and the clause in Article 18 which states that everyone has the right to change his religion or belief. These articles had not prevented other countries like Syria, Iran, and Pakistan from voting in

At the last meeting on the Declaration before the final vote, Vyshinsky gave a speech which criticized many aspects of the Declaration.<sup>9</sup> The Declaration's failure to include a right of self-determination and to condemn Nazism and fascism—and therefore to allow their propagation through a right to freedom of speech, thus encouraging aggression and war) received the brunt of Vyshinsky's scorn.<sup>10</sup> The Soviet Union had proposed an article “which would declare the inalienable right of every person freely to express and disseminate democratic views” and “the only limitation to freedom that it required was the limitation of fascist propaganda and fascist activities.”<sup>11</sup> Opposition to the Soviet proposal in the name of complete freedom was “tantamount to applying the same attitude to laws which restrained the activities of various types of criminals, murderers, thieves, rogues” and so on.”<sup>12</sup>

Moreover, in a strong defense of state sovereignty, Vyshinsky claimed that while:

the declaration contained a number of positive elements and was not without merit it did not befit the General Assembly to issue such a document on behalf of the United Nations, precisely because of the significance that a declaration of human rights had to have. The USSR delegation had pointed out that a number of articles completely ignored the sovereign rights of democratic Governments. . .<sup>13</sup>

Vyshinsky's positivist defense of sovereignty entailed the rejection of “the entirely false theory that the principle of national sovereignty was a reactionary and out-dated idea, and that the repudiation of that principle was an essential condition of international cooperation.”<sup>14</sup> Noting that the draft appeared to endorse this “reactionary view directed against national sovereignty,” it

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favor of the Declaration. The South African delegation apparently opposed the Declaration because of their defense of the system of apartheid, which violated a number of the outlined rights. The series of telegrams sent between Vyshinsky and Molotov reveal Soviet attempts to postpone the Universal Human Rights Declaration. Hoover Institution Archives, fond 89, opis 38, no. 66-74.

<sup>9</sup> Plenary Session of the Third General Assembly, December 10, 1948.

General Assembly (third session), 183rd plenary meeting, last changes and voting on final text – GAOR, Third Session, notes available at [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/PV.183](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/PV.183)

<sup>10</sup> *Ibid*, 927.

<sup>11</sup> *Ibid*.

<sup>12</sup> *Ibid*.

<sup>13</sup> *Ibid*, 923.

<sup>14</sup> *Ibid*.

was therefore “entirely inconsistent with the principles of the United Nations,” which were grounded in national self-determination.<sup>15</sup> Vyshinsky then pivots to a functionalist denunciation of the Declaration, because it includes no means of enforcement. Vyshinsky argues that the Declaration:

should not only proclaim the equality of human rights, but also guarantee their observance by definite concrete means. A document such as the declaration of human rights could not be expected to have the force of a national constitution; nevertheless, it should not remain within the narrow confines of abstract statements of principle.<sup>16</sup>

This functionalist critique of Vyshinsky echoed Lauterpacht’s own condemnation of the Declaration. But Lauterpacht was not in the room. He had been considered as a possible British delegate on the Declaration’s commission but as legal scholar Jochen von Bernstorff relayed,

the British Foreign Office found that only a ‘very English Englishman imbued throughout his life and hereditary to the real meaning of human rights as we understand them in this country’ could represent the UK in this body and therefore could not be persuaded that ‘anybody with Professor Lauterpacht’s past antecedents could possibly be the right sort of representative for the U.K. in a matter of this kind.’<sup>17</sup>

Here Anglo-American jurisprudence revealed its ugly emphasis on Christian natural law as that which defined international law. Denied a position as a British delegate on the basis of his eastern European and Jewish origins, (i.e. less civilized and clearly not British), Lauterpacht instead submitted his own proposal for the Declaration to the drafting committee, based heavily

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<sup>15</sup> *Ibid*, 923-924. Vyshinsky continued, arguing that “It was sometimes argued that the declaration of human rights should not touch on matters of national significance because it was devoted to the rights of individual human beings. It was impossible to agree to such a view, if only because human rights could not be conceived outside the State; the very concept of right and law was connected with that of the State. Human rights meant nothing unless they were guaranteed and protected by the State; otherwise they became a mere abstraction, an empty illusion easily created but just as easily dispelled.”

<sup>16</sup> *Ibid*, 925.

<sup>17</sup> Jochen von Bernstorff, “The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law,” *European Journal of International Law*, Vol. 19, no. 5 (2008), 903-924, 905, citing the British Foreign Office Minutes of Aug. 10, 1946. FO 371/39740 (National Archive, London).

on his 1945 book, *An International Bill of the Rights of Man*.<sup>18</sup> Here, Lauterpacht argues that the “enthronement of the rights of man” was one of the “major purposes” of World War II.<sup>19</sup> This task “is of greater difficulty and complexity than the question of international organization conceived as an instrument for securing peace through the prohibition of war.”<sup>20</sup>

Many of Lauterpacht’s proposed rights were replicated in the Universal Declaration of Human Rights: political and civil rights like freedom of speech, freedom of religion, equality before the law, and even economic and social rights such as the right to work and the right to an education. Unlike the final declaration, these rights would be enforced on an international level by an international court.<sup>21</sup>

Lauterpacht was furious with the Declaration and wrote a widely-read journal article condemning it. After outlining the laudatory language used by the Declaration’s silence on the question of enforcement, Lauterpacht notes that those who proclaimed its importance “were as yet unwilling to give the dignity and the force of an obligation binding upon them in the sphere of law as well as in that of conscience.”<sup>22</sup> Fuming at the Delegates’ self-congratulation, Lauterpacht claimed that while “the delegates gloried in the profound significance of the achievement whereby the nations of the world agreed as to what are the obvious and inalienable rights of man,” but “declined to acknowledge them as part of the law binding upon their states

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<sup>18</sup> Hersch Lauterpacht, *An International Bill of the Rights of Man*, (New York: Columbia University Press, 1945). Lauterpacht notes that the publication of this book was assisted by the American Jewish Committee. Lauterpacht declares that “It is fitting, for many reasons, that the Committee should have actively interested themselves in the problem of an International Bill of the Rights of Man. No people in history has suffered more cruelly from a denial of elementary human rights.” *Ibid*, vii.

<sup>19</sup> *Ibid*, v.

<sup>20</sup> *Ibid*.

<sup>21</sup> See Hersch Lauterpacht, *International Law and Human Rights*, (Hamden, Conn.: Archon Books, 1968, 321 for discussion of, and 313 for his proposed draft.

<sup>22</sup> Hersch Lauterpacht, “The Universal Declaration of Human Rights,” 25 *British Yearbook of International Law*, 354-381, (1949), 355.

and governments.”<sup>23</sup> Though the delegates occasionally acknowledged an inconsistency between recognizing fundamental human rights and refusing to enforce them, this inconsistency “was fully resolved by the acknowledgement of their validity in the realm of conscience and ethics.”<sup>24</sup>

Lauterpacht’s critique of the Declaration (not to mention the smug self-congratulation of its delegates) was thus solidly based in his functionalism. Because there was no real means for enforcement, no gap was being filled, rendering the Declaration meaningless in international law, at least as he understood its goals. For Lauterpacht the noble proclamations of the Declaration were likely reminiscent of earlier positivist approaches to international law. Many actions were declared “illegal” but not “criminal” and thus could not be punished or prevented, dependent as they were upon the good will of sovereigns. Because states gave up none of their sovereignty in the Declaration, Lauterpacht declared it immoral, stating, “The moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of sacrifice of the sovereignty of states which it involves.”<sup>25</sup>

If the 1948 Genocide Convention showed the continued influence of functionalist legal thought, the 1948 Declaration of Human Rights displayed its limits and augured its ultimate downfall. While Lauterpacht’s writings, and functionalist legal thought in general, was persuasive to many legal advisors and to those states without a history of imperialism, the willingness of a state to truly relinquish sovereignty was in direct relationship to its current political power. In other words, strong states like the Soviet Union and the United States saw little benefit to limiting their sovereignty, and even comparatively weak postcolonial states were

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<sup>23</sup> *Ibid*, 356-357.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*, 371. Lauterpacht rejected the view point forth by the Soviet representative that the Declaration had an “indirect” legal authority. 365-369.

often unwilling to limit their newfound sovereign powers. In light of the Holocaust, the Genocide Convention was viewed as something truly necessary, even by, or especially by, powerful states. The Declaration of Human Rights, with its mixture of civil, political, and social and economic rights, seemed more clearly utopian. States would consent not to commit genocide, a more realistic if still elusive goal, because it made relatively few demands on the domestic legal apparatus. But in the Declaration of Human Rights, strong states refused to consent to changing many domestic laws and giving up what seemed like much of their sovereignty.

After the passing of the Declaration, Lauterpacht published *International Law and Human Rights* in 1950, which argued that individuals can be subjects in international law. Lauterpacht believed that the Nuremberg Charter paved the way for the recognition of human rights.<sup>26</sup> Lauterpacht observed that “crimes against humanity are crimes regardless of whether they were committed in accordance with and in obedience to the national law of the accused.” Such acts “violate the sanctity of human personality to such a degree as to make irrelevant reliance upon the law of the State which ordered them.” Therefore, Lauterpacht argues that to punish crimes against humanity is to “assert the existence of rights of man grounded in a law superior to the law of the State.” Thus, Nuremberg “signifies the acknowledgement of fundamental rights of the individual recognized by international law.”<sup>27</sup> In other words, crimes against humanity is by definition a crime against each human being. For Lauterpacht, the

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<sup>26</sup> Lauterpacht, “The Universal Declaration of Human Rights”. Lauterpacht continued to write and publish frequently throughout the late 1940s and 1950s. See, e.g. Hersch Lauterpacht, “The Nationality of Denationalized Persons,” *The Jewish Yearbook of International Law*, Vol. 1, (1948), 164-185; “The Problem of Jurisdictional Immunities of Foreign States,” *British Yearbook of International Law*, Vol. 28, (1951), 220-272; “Sovereignty over Submarine Areas,” *British Yearbook of International Law*, Vol. 27, (1950), 376-433; “The Problem of the Revision of the Law of War,” *British Yearbook of International Law*, Vol. 29 (1952), 360-382; “The Limits of the Operation of the Law of War,” *British Yearbook of International Law*, Vol. 30 (1953), 206-243; “Some Possible Solutions of the Problem of Reservations to Treaties,” *Transactions for the Year*, Vol. 39, (1953), 97-118; “Codification and Development of International Law,” *American Journal of International Law*, Vol. 49 (January 1955), 16-43.

<sup>27</sup> Lauterpacht, *International Law and Human Rights*, (Hamden, Conn.: Archon Books, 1968), 36.

Holocaust and Nuremberg ushered in the possibility of a new international order based upon the rights of the individual instead of the rights of the state.<sup>28</sup>

While Lauterpacht's focus now centered on the cause of human rights, he did not abandon his earlier work at Nuremberg on aggressive war. In "The Limits of the Operation of the Law of War," Lauterpacht defended Nuremberg from accusations of it being merely a demonstration of "victor's justice." He claimed that the fact that the victorious states judged the losers as aggressors, "does not necessarily mean that it is a test altogether devoid of value." This is especially true, because "the victors represented the overwhelming majority of States, so that their action can be conceived as being in the nature of enforcement of international law."<sup>29</sup>

Lauterpacht admits the seemingly circular nature of his own argument, when he says that "if the aggressor emerges victorious, he will rely on the doctrine here propounded for his own purposes, namely, for penalizing the defeated victim of aggression." However, Lauterpacht continues,

This is no reason for embarrassment. All law and all legal doctrine presuppose the victory of right. Should, in any general conflagration, physical force wholly alien to the principles of the Charter of the United Nations and of international law as we know it emerge triumphant, a new legal order (if it may be so termed), dictated by the victor will arise. Juridical thinking can make no provision for that contingency. It is necessarily confined to the existing legal order and to the consequences flowing from it. Once these basic assumptions are granted, there is room for the adoption and application of principles which discourage lawlessness and penalize aggression.<sup>30</sup>

Lauterpacht's candor here is unusual for an international lawyer. Rather than portraying Nuremberg as something other than victor's justice, Lauterpacht acknowledges that victor's justice is part and parcel of international law. Of course, the mixture of pragmatism and hope

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<sup>28</sup> This somewhat obscures the difference between international criminal law, of which crimes against humanity are a part of, and can apply anytime, during war or peace, and human rights law, which only applies during times of peace.

<sup>29</sup> Hersch Lauterpacht, "The Limits of the Operation of the Law of War," *British Yearbook of International Law*, Vol. 30 (1953), 206-243, 235.

<sup>30</sup> *Ibid*, 236.

behind such a view is entirely consistent with Lauterpacht's broader functionalist approach to international law.

During this period Lauterpacht also revisited the Zionism of his youth, drafting a proposal for Israel's Declaration of Independence.<sup>31</sup> Lauterpacht's enthusiasm for the new state of Israel was consistent with the strong Jewish identity of his youth, when he desired to live in Palestine and teach at the Hebrew University.<sup>32</sup> The text of Lauterpacht's proposed draft for Israel's Declaration of Independence resembles Lemkin's writings, including a focus on group rights, rather than his usual focus on individual rights. Lauterpacht invokes "the natural right of the Jewish people to national existence" and the "law-abiding will of the Jewish people" against "the powers of aggression and destruction."<sup>33</sup> Thus, Lauterpacht called for "an independent state in its ancient home, to preserve the life and the culture of the Jewish race, to carry on the torch of its contribution to the spiritual values and to the welfare of mankind, and to provide for the survival and the happiness of the anguished remnants of the most cruel massacre in history."<sup>34</sup> While Lauterpacht's calls for a Jewish homeland evoke Zionism, they are also reminiscent of Trainin and Vyshinsky's calls for national self-determination. Lauterpacht also invokes the concept of the Jewish race, showing how in the postwar period, racial science still held sway despite how the Nazis had used it for nefarious ends.

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<sup>31</sup> See Martti Koskenniemi, "Hersch Lauterpacht (1897-1960)," in *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain*, eds. Jack Beatson & Reinhard Zimmerman, (Oxford: Oxford University Press, 2004), 601-661, 657 and Eliav Lieblich and Yoram Shachar, "Cosmopolitanism at a Crossroads: Hersch Lauterpacht and the Israeli Declaration of Independence," *The British Yearbook of International Law*, (2014), 1-81 for differing interpretations of Lauterpacht's involvement.

<sup>32</sup> Reut Yael Paz, "Making it Whole: Hersch Lauterpacht's Rabbinical Approach to International Law," *Goettingen Journal of International Law*, Vol. 4 (2), (2012), 417-445, 420. See also "Letter from Lauterpacht to the Zionist Executive in London," June 10, 1920, in *Life of*, 15-16.

<sup>33</sup> See Lauterpacht's Draft, published in annex to Lieblich and Shachar.

<sup>34</sup> Interestingly, Lauterpacht drafted the proposed Declaration during the height of the Genocide Convention drafting discussions, but did not use the term "genocide," though he was undoubtedly familiar with it. Perhaps Lauterpacht doubted the lasting permanence of the term, and did not want to include such a new term in a document that he wanted to be eternal.

At the same time, this embrace of Jewish sovereignty is not necessarily a contradiction with his earlier work, though it may reveal Lauterpacht's deeply rooted Zionism. As Lauterpacht wrote in a draft for a never-delivered lecture, sovereignty is "divisible, modifiable, elastic."<sup>35</sup> Lauterpacht viewed sovereignty as a tool of international law, rather than the foundation of international law.<sup>36</sup> For Lauterpacht, sovereignty could be used as means to an end. A Jewish state, in Lauterpacht's eyes, may have been a desirable pragmatic goal for a world in which functionalism had yet to achieve its goals, the apotheosis of this flawed international order culminated in the Holocaust, echoing Hannah Arendt's claim from the same era that human rights were only rendered visible in international law as they were protected through national rights. If Lauterpacht advocated for the right for Jewish sovereignty as manifested in the state of Israel, Trainin advocated for the sovereignty of the Soviet Union in the developing Cold War. Beginning in 1948, Soviet writers began applying the term "genocide" to actions of the United States, such as segregation in the Jim Crow-era South and interference in foreign countries.

With the onset of the Korean War in 1950, Trainin increasingly applied the appellations of genocide as well as "crimes against peace" to American actions. In a July 1950 *Izvestiia* article Trainin declared history to be repeating itself in Korea. That is, the fascist aggression of World War II was being replicated by the United States in Korea.<sup>37</sup> A month later, Trainin again wrote about aggression under international law in reference to the "Korean question."<sup>38</sup> The North Koreans, he maintained, were taking part in a "people's war," rather than a war of

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<sup>35</sup> Hersch Lauterpacht, "Sovereignty and Federation in International Law," in *The Collected Papers of Hersch Lauterpacht*, ed. and arranged by Eli Lauterpacht, vol. 3, (Cambridge: Cambridge University Press, 1977), exact date of draft unknown, but likely spring of 1940.

Paz, 420. This is analogous to Lauterpacht's occasional use of natural law rhetoric (particularly in reference to human rights). Both natural law and sovereignty could be used as means to an end, provided that end was functionalism.

<sup>37</sup> Aron Trainin, "Povtorenie proidennogo," *Izvestiia*, July 18, 1950, pg. 3.

<sup>38</sup> While Trainin's article was an analysis of international law ultimately designed to support the Soviet position, he recognized different schools of international thought regarding the crime of aggression.

aggression in that they were fighting for control of one state internally. An aggressive war occurred when one state disturbed the peace of another sovereign state.<sup>39</sup> Trainin classified the United States' involvement in Korea as a "crime against peace and humanity" given its "interference with the internal affairs of another state," thus reminding of his reader of his positivism. Despite of these US acts of war, Trainin concluded on an optimistic note, proclaiming that in spite of it all, "peace is invincible."<sup>40</sup>

While Trainin maintained this visible presence in the Soviet press in the immediate postwar period, his status—ever vulnerable as a prominent Jew in Stalin's postwar Soviet Union—would soon be threatened. While signs of official antisemitism appeared in 1946, Stalin's campaign against "rootless cosmopolitans" did not really begin until 1948 and continued to accelerate to the infamous "Doctors' Plot" trials of 1952.<sup>41</sup> While Trainin was able to publish widely and even travel abroad in the late 1940s, by the early 1950s Trainin appears less frequently in public.<sup>42</sup> He no longer wrote newspaper articles about genocide. Instead, other writers wrote about genocide for *Izvestiia*, applying the label to segregation and white opposition to the civil rights movement in America.<sup>43</sup> Nonetheless, Trainin published a new book in 1951.<sup>44</sup>

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<sup>39</sup> This focus on "between states" as necessary for aggressive war to exist was continued in the concept of peaceful coexistence. See, e.g. Leon Lipson, "Peaceful Coexistence," *Law and Contemporary Problems*, Vol. 29, No. 4, The Soviet Impact on International Law, (Autumn, 1964), 871-881, 875.

<sup>40</sup> Aron Trainin, "Mezhdunarodnoe pravo ob agressii," *Izvestiia*, Aug. 15, 1950, pg. 3. ("Delo mira nepobedimo.") A few days earlier, Trainin signed an open letter to UN General Secretary Li which called for both an end to US actions in Korea and for the communists to represent China at the United Nations. "A Letter from the International Association of Democratic Jurists to Trugvye Li," *Izvestiia*, Aug. 12, 1950, pg.4.

<sup>41</sup> See generally Konstantin Azadovskii and Boris Egorov, "From Anti-Westernism to Anti-Semitism: Stalin and the Impact of the "Anti-Cosmopolitan" Campaigns on Soviet Culture," *Journal of Cold War Studies*, 4.1 (2002), 66-80; Denis Kozlov, *The Readers of Novyi Mir: Coming to Terms with the Stalinist Past* (Cambridge: Harvard University Press, 2013), 40-41, 205; Orlando Figes, *The Whisperers*, (New York: Metropolitan Books, 2007), 494.

<sup>42</sup> Even though campaigns against "cosmopolitans" were fully under way by 1948, Trainin was still able to travel outside the Soviet Union to Prague in 1949 for a presentation to Czechoslovakian lawyers and the Prague legal faculty. ARAN, f. 1711, op. 1, no.22, l. 4. While Prague was of course still part of the Eastern bloc it implies that Trainin at this point had still not been targeted as a cosmopolitan.

<sup>43</sup> See "Obrashchenie amerikanskogo 'Kongressa bor'by za grazhdanskije prava,' k Generalnoi Assamblee OON," *Izvestiia*, Nov. 13, 1951, pg. 4. (See e.g. Original: "'Kongress bor'by za grazhdanskije prava' opublikoval obrashenie k Generalnoi Assamblee OON, v kotorom prosit ee osudit' SShA za genocid (unichtozhenie otdelnykh grupp naseleniia po rasovym motivam.—Red.)")

*Sostav prestupleniia po sovetskomu ugovnomu pravu*, (*The Structure of Soviet Criminal Law*, also translated as *The Corpus Delict in Soviet Criminal Law*), returns Trainin to his earlier focus on domestic Soviet criminal law, explored in both his earliest works and in his 1946 book of a similar title, *Uchenie o sostave prestupleniia* (*A Study of Criminal Offenses*).

*The Structure of Soviet Criminal Law* is grounded in Marxist-Leninist-Stalinist interpretations of capitalist law.<sup>45</sup> In his introduction Trainin describes law as superstructure in bourgeois capitalist countries, where, of course, the legal system represses and kills workers.<sup>46</sup> In Trainin's portrayal of American criminal law, race and class are related. Just as American laws are meant to oppress the workers, they are also meant to elevate the white race above American "negros."<sup>47</sup> In these repressive domestic criminal laws there exists a relationship with external aggression, specifically in Korea.<sup>48</sup> For Trainin (and Soviet legal theory in general), domestic and international law and policy are inextricably intertwined, with the racism of capitalist countries serving to encourage imperialism.<sup>49</sup>

Because domestic and international law are linked, Trainin includes a section on international criminal law.<sup>50</sup> Previously, crimes against peace, or crimes against peaceful Soviet civilians, provided the normative framework for understanding both genocide and other atrocities—in both the Soviet war crimes trials and the Nuremberg Tribunal, the crime of

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<sup>44</sup> He was also still receiving positive reviews of his work at both Moscow State University and the Institute of Law during the early stages of the anti-cosmopolitan campaign. A December, 17, 1948 report on Trainin's work from a Moscow State legal faculty meeting categorized Trainin's tenure at the University as his "many years of fruitful and valuable scientific and pedagogical work." ARAN, f. 1711, op. 1, no.20, l. 1.

<sup>45</sup> While Vyshinsky had made clear the merits of socialist law to support the Soviet state (and thus, as being more than superstructure), the critiques of Pashukanis and the antilaw group remained apt for capitalist states.

<sup>46</sup> Aron Trainin, *Sostav prestupleniia po sovetskomu ugovnomu pravu*, (1951), 14 ("Èti sistematicheskie urodovaniia i ubiistva millionov rabochikh v kapitalisticheskikh stranakh ...")

<sup>47</sup> *Ibid*, 48.

<sup>48</sup> *Ibid*, 48-51.

<sup>49</sup> This belief that domestic economics determined international behavior was also found among American policymakers. See e.g. Christopher Layne, *The Peace of Illusions: American Grand Strategy from 1940 to the Present*, (Ithaca: Cornell University Press, 2006), 43.

<sup>50</sup> International criminal law is the focus of the section titled "Sostav prestupleniia i prestupleniia protiv chelovechestva," or "The Corpus Delict and Crimes against Humanity."

aggression provided justification to try to Nazis and their collaborators. “Crimes against peace” is no longer the most important concept in international law. Rather, both crimes against peace (1937) and what occurs when crimes against peace are put into practice—the crime of genocide (1948)—are now enveloped within the larger concept of crimes against humanity.

“The gravest crime against humanity,” according to Trainin, is crimes against peace.<sup>51</sup> One such especially egregious crime against peace is the aforementioned conflict in Korea. As with Trainin’s earlier descriptions of crimes against peace, his use of language evokes the concept of genocide: the “systematic annihilation” by the United States of “one million Korean people, including the elderly, women and children,” who were “crushed or burned under the ruins of their cities and villages.”<sup>52</sup> The similarities between crimes against peace and genocide in Trainin’s descriptions is not an unintentional blurring of categories. Crimes against peace are actions which threaten international peace. When those violent threats turn into violent actions, the result is genocide. The alleged genocide in Korea is a direct result of American aggression, or what Trainin termed the “newly revived destructive fascist policy,” concluding that “genocide is fascism in action. And it is the fascist crime of genocide committed by the American aggressors in Korea.”<sup>53</sup> Genocide is thus still a result of crimes against peace, but it is situated within the concept of crimes against humanity.

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<sup>51</sup> Trainin, citing Lenin referring to imperialist wars, *Sostav prestupleniia*, (1951), 357. (Original “tiagchaishim prestupleniem protiv chelovestva.”)

<sup>52</sup> *Ibid*, 365-366. (Original, referring to the United Nations sanctioning American action in Korea, “Ona sanktsionirovala i prikryla svoim avtoritetom sistematiceskoe unichtozhenie amerikanskimi vooruzhennymi silami pochti milliona liudei—starikov, zheishii i detei Korei, rasdavlenikh ili sgorevshikh pod razvalinami sboikh gorodov i dereven!”)

<sup>53</sup> *Ibid*, 384. (Original “Ob”ektom gyenotsida dolzhna byt’ priznana gruppa liudei, sviazannaia natsionalnoi ili rasovoi obshchnost’iu. Imenno v étom—priamoi smysl termina ‘genotsid,’ oznachaiushchego unichtozhenie roda, plemeni (genus- rod, plemia). Imenno v étom—to novoe i zloveshchee, chto chelovechestvo davno izzhilo i chto vnov’ voskresila istrebitelnaia politika fashizma.” . Genotsid—éto fashizm v deistvii. I éto fashistskoe zlodeianie— genotsid —sovershaetsia amerikanskimi agressorami v Koree.”) This party line was also repeated in subsequent newspaper articles by other authors. See, e.g. “Zaiavlenie chlenov komissii Mezhdunarodnoi assotsiatsii uristov-demokratov,” *Izvestiia*, March, 25, 1952, pg. 4 (referring to genocide in Korea including the “annihilation of the fatherland,”); “Doklad komissii Mezgdunarodnoi assotsiatsii uristov-demokratov o primenenii amerikantsami

This switch from “crimes against peace” as an overarching framework of international criminal law to “crimes against humanity” was acceptable to the Soviet Union because “crimes against humanity” was at that time still believed to be tied to the existence of aggressive war. As Nuremberg tied its jurisdiction to Germany’s aggressive war, crimes against humanity were assumed to be tied to war. In this way, crimes against peace is still the operative concept for understanding crimes against humanity. From the Soviet perspective, crimes against humanity could not occur without crimes against peace.<sup>54</sup>

Even though much of *The Structure of Soviet Criminal Law* was a very standard overview of Soviet law and legal theory, synthesizing concepts that had previously been written about before by both Trainin and other scholars, his work recent harsh critiques from his colleagues at the Institute of Law in the spring of 1952.<sup>55</sup> While the notes and transcripts of Trainin’s other presentations at the Institute reflect a single evening’s discussion and run to less than 50 pages, the critiques of *The Structure of Soviet Criminal Law* approaches 300 pages and took place over the course of several evenings in May. Though the sheer number of critiques differentiated this discussion from others, B. Man’kovskiy, the discussion’s chairman, appeared sympathetic to Trainin and his work and apparently tried to begin the discussion on a cordial tone.<sup>56</sup> *The Structure of Soviet Criminal Law* was discussed at great length and with numerous critiques.

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bakteriologicheskogo oruzhiia na tyerritorii Severo-Vostochnogo Kitaia,” *Izvestiia*, April 9, 1952, pg. 4 (alleging genocide in both Korea and north-east China by the United States).

<sup>54</sup> This portrayal of crimes against peace as a crime against humanity was not yet apparently representative of an official set Soviet position—an *Izvestiia* article published the following year documented the alleged crimes of the United States in Korea subsumed all of the crimes under the concept of “aggressive war,” or crimes against peace. Within these aggressive offenses were two types of crimes: 1) war crimes and 2) crimes against humanity, of which genocide was the most serious. See “Doklad komissii Mezgdunarodnoi assotsiatsii uristov-demokratov o rassledovanii prestuplenii amerikanskikh agressorov v Koree,” *Izvestiia*, April 11, 1952, pg. 3.

<sup>55</sup> ARAN, f. N 1934, op. N1, d., 515.

<sup>56</sup> *Ibid*, l. 1-2.

Given what Trainin witnessed during the Great Purges and the rising tide of antisemitism, Trainin cannot have been too shocked *The Structure of Soviet Criminal Law* received virulent critiques. The most common critique of *The Structure of Soviet Criminal Law* was the vague condemnation that it was “theoretically” weak, (i.e. insufficiently Marxist-Leninist-Stalinist and even “neo-Kantist” in its abstraction—while Old Bolsheviks like Lenin and Bukharin had valued theories and ideas for their own sake, under Stalin too much theory had become suspect). Various academics spent hours attacking details in the book, focusing disproportionately on Trainin’s writings on bourgeois law, a comparatively short chapter.<sup>57</sup> Trainin’s writings on the principle of “social danger” in a crime also received a great deal of attention. He was accused of incorrectly defining “social danger” (i.e. a defendant may be judged not by what they have done, but what they might do) though his critics, he noted, did not offer any alternative definitions themselves.<sup>58</sup> (Trainin’s interpretations of international law were not the focus of the critiques, and thus stood essentially unscathed).

Trainin, perhaps unused to this degree of criticism, did not meekly accept the criticism of his colleagues and instead responded directly to their critiques, even accusing his critics of willfully misunderstanding his words, “greedily grabbing phrases” rather than “delving into the content of his words.”<sup>59</sup> Trainin even explicitly addressed the difficult political environment writers experienced in the Soviet Union, noting that “no one was safe from such critics,” and asked these critics what they were trying to do to help understand and prevent crime.<sup>60</sup> In the end, though, Trainin appeared to be a bit flustered from the sheer number of attacks he faced, and

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<sup>57</sup> ARAN, f. N 1934, op. N1, d., 515, l. 282. See Stephen F. Cohen, *Bukharin and the Bolshevik Revolution: A Political Biography 1888-1938*, (London: Wildwood House, 1971), 83, for a description of how Old Bolsheviks embraced theory and ideas.

<sup>58</sup> *Ibid*, 279.

<sup>59</sup> *Ibid*, 282.

<sup>60</sup> *Ibid*, 279.

conceded that he may have been mistaken about various assertions in the book. At the same time, he still told his critics, “You do not want to listen, because it would debunk your accusations.”<sup>61</sup>

Vyshinsky had apparently abandoned him, unwilling to put a good word in for his longtime colleague.<sup>62</sup> A few months later, Trainin, along with fellow law professor M. Strogovich, was publically alleged to be a leader of “cosmopolitans” at Moscow State University, echoing the post-1905 purge of the law faculty by the tsarist government as well as the recent “Doctor’s Plot.” Strogovich, like Trainin, was a prominent and well-published scholar of criminal law who taught at Moscow State University’s Law Institute. Like Trainin, Strogovich was a well-respected legal scholar, though Strogovich focused solidly on domestic Soviet criminal law and socialist legal theory, writing works such as *Logic and the Law (Logika i pravo, 1949)*, *Material Truth and Forensic Evidence in Soviet Criminal Trials, (Material’naya istina i sudebnye dokazatel’sтва v sovetsokom ugolovnom protsesse, 1953)*, and *Theory of the State and Law: Fundamentals of Marxist-Leninist Teachings on State and Law (Teoriya gosudarstva i prava: Osnovy marksistsko-leninskogo ucheniya o gosudarstve i prave, 1961)*.<sup>63</sup> Strogovich and Trainin appeared to have a cordial working relationship and in 1947, Strogovich wrote a laudatory review of Trainin’s of life and work.<sup>64</sup>

Trainin’s fall from grace included public shaming. While the early stages of this torment took place largely behind closed doors, a January 1953 *Izvestiia* article titled “Overcoming Lags

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<sup>61</sup> *Ibid*, 245 and 282 (“Vy slushat’ ne khotite, potomu chto eto razvenchivaet vashi obvineniia.”)

<sup>62</sup> While just a few years earlier Vyshinsky was extolling the importance of Trainin’s work as “timely” and “of great global significance,” similar words of support during Trainin’s time of exile are not found, although this is to be expected of a figure who understood the vagaries of Stalin and his associates. ARAN, f. 1711, op. 1, no.21, l. 1-2.

<sup>63</sup> See ARAN, f. 1839, op. 1, no. 4, 6, 10.

<sup>64</sup> ARAN, f. 1711, op. 1, no.22, l. 1-2. Strogovich referred to Trainin as a “public-spirited” and “wonderful comrade.” *Ibid*. Strogovich’s remarks were published in the Institute of Law’s Gazette, *Sotsialisticheskoe pravo* no.11, Nov. 1947.

in Jurisprudence” publicized Trainin’s and Strogovich’s downfall.<sup>65</sup> The anonymous writer detailed the struggle of Soviet domestic and international law against bourgeois forces. The newspaper alleged that “the monopoly position of some scholars,” listing Aron Trainin, Strogovich, and others by name, “stinks of the suppression of dissenting views” and “interferes with the proper growth of cadres.”<sup>66</sup> Professors E. Korovin, B. Man’kovskiy, N. Alyeksandrov and N. Farberov were alleged to have been led astray by Trainin and Strogovich. The results of these professors’ inadequate work can be seen in the “poor quality” of legal works produced by these institutions.<sup>67</sup> The writer proclaimed that Trainin’s work “did not reach the high level of scientific work” required by the Institute.<sup>68</sup> These failures stood in sharp contrast with “the duty of Soviet scholar lawyers [to] respond with attention and care to the party” and create work “worthy of the great era of the building of communism.”<sup>69</sup>

The smears on Trainin were a complete reversal with the accolades that his work had received in previous years. In addition to the positive reception of his academic work, Trainin’s role as a dissertation advisor and mentor for graduate students had also been especially praised. Only seven months before the *Izvestiia* article was published, Trainin received official recognition of his “leadership of the scientific cadre” and his work with graduate students specially acknowledged.<sup>70</sup> Trainin, Strogovich, and others were dismissed from their jobs, but

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<sup>65</sup> “Overcoming Lags in Jurisprudence,” *Izvestiia*, Jan. 23, 1953, pg2-3. (Original title: “Preodolet’ otstavanie pravovoi nauki.”)

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.* (Original: “Étim, v chastnosti, ob” iasniasia tot fakt, chto ukazannye nauchnye tsyentry ne spravilis’ s zadachei sozdaniia visokokachestvennikh uchebnikov po riadu profiliriushchikh pravovykh distsiplin i iz goda v god prodolzhaui vypuskat’ nyedobrokachestvennuiu nauchnuiu produktsiiu, kotoraiia podvergaetsia surovoi, no spravedlivoi kritike v nashei presse.”)

<sup>68</sup> *Ibid.* (Original: “a takzhe chleny-korrespondenty Akademii nauk SSSR A Trainin i E. Korovin za vse vremia raboti v Institute prava Akademii nauk SSSR ne vyrastili dlia instituta ni odnogo vysokokvalifitsirovannogo nauchnogo robotinka.”)

<sup>69</sup> *Ibid.* (Original: Dolg sovetskikh uchenikh-uristov- otvetit’ na vniianie i zabotu partii i pravitel’sstva sozdaniem nauchnykh issledovani, dostoinykh velikoi epokhi stroitel’sstva kommunizma.”)

<sup>70</sup> ARAN, f. 1711, op. 1, no. 5, l. 1-8. The recognition is dated May 26, 1952. Trainin had received thanks and recognition for his work with graduate students throughout his career. See e.g., Sept. 23, 1950, letter thanking

were ultimately spared any further indignities and likely legal trials by Stalin's death two months later.<sup>71</sup>

While Trainin was working in an increasingly hostile atmosphere in the Soviet Union, in America, Lemkin was speaking out against Stalin's campaign of antisemitism, stating that the "communist persecution of the Jews" was clearly an example of the crime of genocide," thereby echoing Trainin's accusation against the US involvement in Korea.<sup>72</sup> Lemkin was enjoying a fairly high profile in the United States—he had recently been nominated for the Nobel Peace Prize, and the American press described the then Yale law professor as a "veteran of the underground fight against the Nazi invaders of Warsaw who scored a personal triumph in the United Nations in 1948 when it adopted a convention outlawing genocide—[sic] word he coined for race extermination."<sup>73</sup>

Following his Nobel nomination and condemnation of Stalin's antisemitism, Lemkin continued to bring awareness to genocide and tried get the United States (among other countries) to ratify the convention.<sup>74</sup> The General Assembly's passage of the Genocide Convention was

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Trainin for his work with a graduate student who successfully defended the first dissertation on criminal law in Azerbaijan and a July 2, 1940 recognition of his work with both graduate students and the general public through lectures. *Ibid*, 1 and 5.

<sup>71</sup> While Stalin's death and the resulting thaw in the Soviet Union was obviously a relief for many of his victims and potential victims), it was also a time of great uncertainty and apprehension over what would come next. See, e.g. Stephen Bittner, *The Many Lives of Khrushchev's Thaw: Experience and Memory in Moscow's Arbat*, (Ithaca: Cornell University Press, 2008).

<sup>72</sup> "Lemkin Call Soviet Guilty of Genocide," *The New York Times*, Jan. 18, 1953, pg 13.

<sup>73</sup> "Yale Law Professor Among Candidates for Nobel Peace Prize," *The Boston Globe*, March 7, 1952, pg. 2. Of the twenty-seven nominees that year, six were living in America. In addition to Lemkin, the Sicilian-born University of Chicago professor Giuseppe A. Borgese was the other foreign-born American nominee. Borgese, an expert on international law and world literature, in true functionalist mode, had drafted a constitution for world government along with ten other academics. The 1952 Nobel Peace Prize was awarded to Albert Schweitzer, a French physician (born in Alsace in 1875, then part of the German Empire) and missionary who founded the Lambarene Hospital in Gabon. In the 1950s he became an opponent of nuclear weapons. He was known for his philosophy of "reverence for life," and was an opponent of colonialism, although his critics accuse him of racism. He was a Bach aficionado and developed what is called "the Schweitzer Technique" for recording performances of Bach's work.

<sup>74</sup> Lemkin was in regular contact with the representatives of various governments and NGOs in order to try and ratify the Convention, and was involved in detailed strategizing and lobbying efforts. See, e.g. AJHS Archives, Lemkin papers, Box 2, Folder 4. In spite of the support of the executive branch of the United States government for the Genocide Convention (President Truman signed the Convention two days after its approval and submitted it to

just the beginning for Lemkin. States needed to consent to the Convention according to their domestic laws in order to make it valid. At a September 1953 Memorial demonstration to those killed during the war, Lemkin called for the US to ratify the Convention. Lemkin, along with “an estimated 10,000 Americans of Ukrainian descent” marched up Fifth Avenue and “appealed to the people of America to support the Ukrainians and other captive peoples behind the Iron Curtain.”<sup>75</sup> After the march, Lemkin spoke before a rapt audience of three thousand at the Manhattan Center in New York City, where he condemned the Soviet Union as evil for its role in what became known as the *Holodomor*, or the Great Famine in Ukraine, which killed millions between 1932 and 1933.<sup>76</sup> Lemkin termed the *Holodomor* the “classic example of Soviet

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the Senate on June 16, 1949), it took nearly forty years for the United States Senate to ratify the Convention. Steven V. Roberts, “Reagan Signs Bill Ratifying U.N. Genocide Pact,” *The New York Times*, Nov. 5, 1988. For the twenty years prior to ratification, William Proxmire, a Democratic Senator from Wisconsin, gave a speech every day the Senate was in session, arguing for the necessity of ratifying the Genocide Convention. William Proxmire, Testimony before the Senate Foreign Relations Committee, May 24, 1977, available at <http://content.wisconsinhistory.org/cdm/ref/collection/tp/id/58727> [last accessed April 28, 2014]. The United States finally ratified the Convention on February 11, 1988. President Ronald Reagan subsequently signed the ratification on November 4, 1988. The Senate’s opposition to the Genocide Convention had stemmed mainly from conservative Republicans who opposed the possibility of subjecting the United States to the dictates of international law. See e.g. Lawrence J. LeBlanc, *The United States and the Genocide Convention*, (Durham and London: Duke University Press, 1991), 119-150. Some also suggested that the Soviet Union’s relatively quick ratification and support for the Genocide Convention implied that some sort of “Communist plot” was afoot. *Ibid.* This sort of reasoning can be seen in a 1953 *Chicago Daily Tribune* editorial titled “Betrayal of a Pledge.” The author condemns the United States delegate to the United Nations for voting in support of a resolution that called for the timely ratification of the Genocide Convention. The writer alleges that the “fact that the vote has been cast is an errant betrayal of the [Eisenhower] administration’s promises” not to “abuse” the treaty power. Noting that genocide can be understood as “race killing,” the writer notes that “it does not cover intent to destroy a political or economic group and therefore sanctions the eradication by Russia or any totalitarian government in power anywhere of all political opposition or any dissent whatsoever. The genocide treaty has aptly been described as a Pandora’s box out of which international criminal prosecutions may come for even such vague and peripheral activities as causing “mental harm” to members of a group—i.e. referring disparagingly to an individual of any race, religion, or nationality. Even to advocate birth control is to run the risk of being cited for an offense against this ill conceived code.” “Betrayal of a Pledge,” *Chicago Daily Tribune*, Oct. 10, 1953, pg. 14. Notwithstanding the gross inaccuracies of the editorial, it illustrates rather well the general approach taken by American legal positivists—the United States should not consent to be bound by any outside norm.

<sup>75</sup> Ukrainians March in Protest Parade: 10,000 Here Mark Anniversary of the 1933 Famine—Clergy Join in the Procession,” *New York Times*, Sept. 21, 1953, pg.10.

<sup>76</sup> Lemkin also took the opportunity to declare British occupation policies in Ireland to be genocide. See “Ukrainians March in Protest Parade: 10,000 Here Mark Anniversary of the 1933 Famine—Clergy Join in the Procession,” *New York Times*, Sept. 21, 1953, pg.10. While today scholars disagree about the role of nature and economic policy in the famine, most agree that the famine was intentionally exacerbated by Stalin through his agricultural policies that confiscated grain from the starving Ukrainians. However, the existence of the famine was

genocide, its longest and broadest experiment in Russification—the destruction of the Ukrainian nation.”<sup>77</sup> As scholar of Soviet legal history Anton Weiss-Wendt has shown, Lemkin’s use of the term “genocide” was influenced by political considerations, and in his call to condemn the Soviet Union for the *Holodomor*, he inadvertently diluted much of the concept’s significance.<sup>78</sup>

The Soviet and American adoption of genocide as a tool of Cold War rhetoric was only one of many threats to the Genocide Convention. In Lemkin’s view, the other most serious threat to the Convention was also Soviet-related. This was the UN International Law Commission’s Draft Code of Crimes against the Peace and Security of Mankind and Nuremberg Principles. The Draft Code was the result of a request by the United Nations General Assembly (originally proposed by the Soviet Union) to formulate the principles of international law in 1947.<sup>79</sup> Many governments wanted to ensure that Nuremberg would not be simply an aberration in international criminal law, but the foundation of something new. Eager to codify the

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covered up by the Soviet state and officially denied in the Soviet Union until Gorbachev’s glasnost policies fifty years later.

<sup>77</sup> Raphael Lemkin papers, Manuscripts and Archives Division, The New York Public Library, reel 3. Lemkin then detailed what he called the four-prong attack of the Soviet Union against the Ukrainian people, an attack determined to muffle budding Ukrainian nationalism. The first attack was the persecution of Ukrainian intellectuals (the “Brain” of Ukraine). The second attack was aimed at the “Soul” of Ukraine- the Ukrainian Greek Catholic clergy, which nourishes the Brain. In this way, the persecution of the clergy, also harms the intellectual class. The third prong of the attack was aimed against the farmers, “the large mass of independent peasants who are the repository of the tradition, folk lore and music, the national language and literature, the national spirit, of the Ukraine.” The weapon used in this attack was perhaps “the most terrible weapon of all”- starvation. Lemkin alleged that while the “crop that year was ample to feed the people and livestock of the Ukraine,” “famine was necessary for the Soviet and so they got one to order, by plan, through an unusually high grain allotment to the state as taxes.” Finally, the last step in the Soviet’s process of genocide was the “fragmentation of the Ukrainian people at once by the addition to the Ukraine of foreign peoples and by dispersion of the Ukrainians.” Lemkin concluded that these were the main steps of “the systematic destruction of the Ukrainian nation, in its progressive absorption within the new Soviet nation.” While so far “there have been no attempts at complete annihilation, such as was the method of the German attack on the Jews” the Soviet war against Ukrainian nationalism meant that if successful, “the Ukraine will be as dead as if every Ukrainian were killed, for it will have lost that part of it which has kept and developed its culture, its beliefs, its common ideas, which have guided it and given it a soul, which, in short, made it a nation rather than a mass of people.” *Ibid.*

<sup>78</sup> Anton Weiss-Wendt, “Hostage of Politics: Raphael Lemkin on ‘Soviet Genocide,’” *Journal of Genocide Research* 7(4), (2005), 551-559, 557.

<sup>79</sup> As anticipated by Lemkin and other proponents of the Genocide Convention, declaring the “Nuremberg Principles” would be a heady and time-consuming task for the International Law Commission. Not wanting to delay the criminalization of genocide further, Lemkin encouraged the Genocide Convention. Now however, years later, the International Law Commission was finally ready to work on stating the Nuremberg Principles in this Draft Code.

Nuremberg Judgement and to justify the application of its principles in the future, the International Law Commission—a UN organization working to codify international law—got to work. Lemkin’s opposition to the Draft Code stemmed from its very purpose that others thought so positive—the codification of Nuremberg. For Lemkin, Nuremberg represented the *failure* of the international legal community to grasp the full horrors of genocide. The Draft Code did nothing to assuage Lemkin’s fears of a threat to his beloved Genocide Convention. Genocide was considered a type of crime against humanity, and made crimes against humanity dependent upon an act of aggressive war.<sup>80</sup> This would both limit the application of the Genocide Convention, and make genocide “merely” a type of crime against humanity. What Trainin found so desirable about Nuremberg, Lemkin found appalling.

In various memo drafts, Lemkin outlines the features of the Draft Code and notes that it “is inspired by the Soviet Union and persons who unwittingly helped to achieve the goals of communism.” It also “sanctions Soviet territorial acquisitions in Europe and Asia and formally perpetrates enslavement of the captive nations.”<sup>81</sup> Moreover, the Code encroached on a number of specifically American interests including “outlaw[ing] help to nations enslaved by the Soviet Union” and “legaliz[ing] Soviet territorial acquisitions.”<sup>82</sup> Most ominously for Lemkin, the code, and the entire concept of crimes against peace, “would destroy the Genocide Convention.”<sup>83</sup> While Nuremberg had based its right to try the accused on the Nazi’s commission of aggressive war (never actually defined), the Draft Code went even further, introducing “the broad concept of aggression, as distinct from ‘aggressive war,’ which is

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<sup>80</sup> While Nuremberg had made crimes against humanity dependent upon the event of war, this is no longer a requirement. See e.g. the Rome Statute of the International Criminal Court, Part 2, Article 7.

<sup>81</sup> Lemkin papers, NYPL, reel 4.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

narrower in concept.”<sup>84</sup> In other words, according to Lemkin, the Draft Code was more similar to Trainin’s concept of crimes against peace, which included such broad concepts as aggressive propaganda, rather than narrow acts of war. In this act, the Commission

...has thereby enlarged the area of vagueness, indefiniteness and extra-legal thinking. Aggression can be termed any inimical act which must not necessarily produce an armed conflict, but a definition of the act and intent is lacking. In the term ‘aggressive war,’ at least the element of ‘the use of armed force’ can be recognized, but its intent remains undefined.<sup>85</sup>

In tracing the origins of the Draft Code, Lemkin looks first to Vespasian Pella, the late Minister Observer in the United Nations for the Romanian (“Rumanian”) Government and his discussions at Nuremberg with other international judges.<sup>86</sup> With the support of the Soviet Union as well as Francis Biddle, an American judge at Nuremberg and former Attorney General, Pella prepared a draft code of offenses against peace.<sup>87</sup> Elsewhere, Lemkin describes Pella as “an active member” of a “communist-front organization,” leaving no doubt that in spite of Biddle’s support for the Draft Code, it was still primarily the result of communist plotting.<sup>88</sup> It is also a bizarrely harsh characterization of a man who would shortly flee communist Romania “under a death sentence,” and whose writings on international law, including the concepts of “barbarity” and “vandalism” had so influenced Lemkin in his conception of genocide, though it is perhaps the reason why Lemkin never credited Pella with helping lay the foundations of his own ideas.<sup>89</sup>

However, Lemkin’s main opposition stemmed to the similarities between one of the outlined crimes against peace and the crime of genocide. Because the Draft Code did not name

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<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> See “Vespasian V. Pella,” *New York Times*, Aug. 25, 1952, pg.17.

the offense as genocide or recognize the jurisdiction of the Genocide Convention Lemkin argued that “the Genocide Convention for all practical purposes covers the situation.”<sup>90</sup> Lemkin stated that a Convention “which has been already ratified by 43 nations should be rather enforced than weakened through overlapping projects, formulated in dangerously vague terms.”<sup>91</sup>

Lemkin’s draft memoranda reveal both the reason for his opposition to the concept of crimes against peace—the neutering of the Genocide Convention—and his main tool of opposition—arguing that “crimes against peace” was a political, rather than legal concept.<sup>92</sup> Lemkin imagined the political realities of accepting this politicized concept as law- the draft code would

have to be enforced by United States courts, or even by an international criminal tribunal. The US District Attorney and every policemen would be called upon to cooperate in the code’s enforcement. And the Soviet Union would be entitled to request an account of our activities to the United Nations if a formal accusation were made.<sup>93</sup>

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<sup>90</sup> Lemkin papers, NYPL, reel 4.

<sup>91</sup> *Ibid.* Lemkin outlined his concerns thusly:

- 1) “All offenses in the draft Code of Offenses are highly controversial and political in nature.
- 2) The above code deals with crimes as committed among states, while genocide is a crime which is committed within the boundaries of one state.
- 3) The preventative force of the Genocide Convention will be lost if this greatest of crimes against civilization were to be treated as one of the many offenses.
- 4) The Genocide Convention has been ratified by some states which are not members of the United Nations. In doing so, they ratified a specific international law and their rights, and high intentions as ratifiers should be respected, without the confusion of overlapping laws to which they would not be parties.
- 5) If the crime of genocide were to appear in two documents, which one would be invoked in a concrete case?

Bulgaria, Rumania, Poland and Czechoslovakia have ratified the Genocide Convention. These countries are now guilty of genocide because of their kidnaping of Greek children. Although these countries have ratified the Convention, with reservations. . . These governments should not be relieved of the responsibility. . . which would occur if the Genocide Convention were to be scuttled or confused.” *Ibid.*

<sup>92</sup> *Ibid.* Lemkin argues that “Article 2, section 1 of the draft code which deals with aggression, does not constitute a legal definition of aggression. It reads, ‘Any action of aggression, including the employment by the authorities of a state of armed forces against another state for any purposes other than national or collective self-defense or in pursuance of a decision or recommendation by competent organ of the United Nations.’ A general statement establishing the criminality of any act of aggression is made without defining such act. Moreover, ‘the employment of armed force’ is qualified as aggression when such force is used for any purpose other than national or collective self-defense. As in domestic criminal law, self-defense is a matter of fact and not of definition.”

<sup>93</sup> *Ibid.*

Lemkin's worst case scenario—the Soviet Union interfering in domestic American affairs, and perhaps even holding the United States to account before an international criminal court—possesses curious similarities to arguments adopted by American opponents to the Genocide Convention. While for Lemkin, the Genocide Convention required an international criminal court, crimes against peace, a concept advocated by Trainin and other Soviets, did not merit the same level of respect. As with so many natural law adherents, Lemkin adopted classical liberalism as his standard of how to judge whether something was inherent to natural law. Anything supported by the Soviet Union was thus understandably viewed with suspicion. At the same time, according to Trainin, anything supported by the US was tainted with fascism and racism.

In spite of Lemkin's opposition, the Draft Code was adopted by the International Law Commission in 1954.<sup>94</sup> In the end, the Draft Code did not prove to be the death knell to the Genocide Convention that Lemkin feared. The code languished in the International Law

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<sup>94</sup>In addition to the Draft Code, Lemkin's other main perceived threat to the Genocide Convention at this time were proposed Chinese revisions to it. China, no longer represented by the American-supported nationalist government, was now supported by the communists. While China was independent of the Soviet Union, their aligned interests reveal themselves here. The Chinese delegate to the United Nations proposed to replace the term genocide (in the Chinese text) with the words "destruction of human groups in a ruthless manner." A 1952 *New York Times* letter to the editor from representatives of a number of American-eastern European organizations such as the Ukrainian Congress Committee of America and the American Lithuanian Council reveals positions reminiscent to Lemkin's. Declaring that "this is a bridge which leads direct to the formulation of crimes against humanity" and that "the ultimate result that both [genocide and crimes against humanity] will be punishable only in connection with aggressive war." Describing the similarities between the Chinese proposal and the Draft Code of Offenses Against Peace and Security of Mankind, as well the Soviet Union's original 1947 proposal to scrap the Genocide Convention in favor of outlining the Nuremberg Principles, the authors conclude that "As a result of this action, if successful, hundreds of millions of people in the Soviet Union will be deprived of legal protection, because technically the Soviet Union is not at war with these peoples or with their neighbors." Bela Varga, Dr. Piu Grigatis, Andrew J. Valucek, Michael Piznak, Hassan Dosti, "Letters to Times: Genocide Convention Status, U.N. Urged to Reject Any Attempt to Revise the Official Text," *New York Times*, Dec. 17, 1952, pg 32. A memorandum, presumably authored by Lemkin cites this letter and notes the similarities between the proposed Chinese revisions and the Draft Code of Offenses. The Draft Code, Lemkin alleges, with its formulation of crimes against humanity, was preferred by the Soviet Union because: 1. "Crimes against humanity do not mention nations, races and religious groups as a subject of protection, but speak in general about civilian populations, and they are punishable only in connection with aggressive war. 2. Such a formula would remove all responsibility for crimes committed by the Soviets in time of peace or even in time of war, if the Soviets can claim that they were not aggressors in war." Lemkin papers, NYPL, reel 4.

Commission until it was finally approved in 1996, and is at the time of this writing, still languishing in the General Assembly.<sup>95</sup>

While Lemkin continued to struggle against the Genocide Convention's enemies (both real and perceived), Lauterpacht was involved with the Draft Code that Lemkin so feared. Lauterpacht participated in the drafting session in 1954 for the United Nation's International Law Commission's Draft Code. The Draft Code returned to Trainin's concept of crimes against peace, using Nuremberg's terminology of aggressive war in the aforementioned Draft Code so loathed by Lemkin. Naturally, the Draft Code produced by the ILC attempting to legally define "crimes against peace" possessed many similarities with the work of Trainin and Lauterpacht.<sup>96</sup>

Another controversial clause defined a State's intervention in the affairs of another "by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind" as a crime against peace. Lauterpacht's position was that while one State should not intervene in the affairs of another, "the text adopted by the Commission was far too broad for it meant that perfectly legitimate and normal manifestations of

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<sup>95</sup> General Assembly Press Release, "Draft Code of Crimes Against Peace, Security of Mankind Under Consideration in Legal Committee," GA/L/3014, Nov. 4, 1996. The press release states that the Draft Code was adopted by the ILC and the General Assembly's Sixth Committee (Legal) was asked to decide upon the appropriate form for the draft code. While most representatives favored an international convention or treaty, it was also suggested that the Committee should wait until after the details of the International Criminal Court had been ironed out. See also Martin C. Ortega, "The ILC adopts the Draft Code of Crimes Against the Peace and Security of Mankind," *Max Planck Yearbook of United Nations Law* (Vol. 1, 1997), 283-326, for an overview of the Draft Code's journey from 1947 to 1996.

<sup>96</sup> In spite of the similarities, Lauterpacht abstained from voting on the draft and disagreed with sections of it pertaining to crimes against peace. Lauterpacht's objections pertained to paragraphs 5 and 9 of Article 2 and Article 4. Article 2 read in relevant part: "The following acts are offences against the peace and security of mankind:"... "(5) The undertaking or encouragement by the authorities of a State of activities calculated to foment civil strife in another State, or the toleration by the authorities of a State of organized activities calculated to foment civil strife in another State.....

(9) The intervention by the authorities of a State in the internal or external affairs of another State, by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind."

Lauterpacht argued that "civil strife" was too ambiguous and that "civil war" would be a better choice. 271<sup>st</sup> meeting notes p151. Article 4 read: "The fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order."

international life were to be regarded as offences.” Because “[i]nternational political activity consisted to a large extent of economic or political measures taken by one State to exert pressure on another”, international law “should merely impose certain restrictions on these measures, or, in other words, prohibit [only] the use of force.”<sup>97</sup>

Moreover, “If the Commission treated these legitimate acts as crimes it would deprive its condemnation of real crimes of all meaning. Intervention—assuming that the meaning of the term was clear—was an unlawful act. It was an excess of zeal to render it criminal.”<sup>98</sup> Here, Lauterpacht has reinstated the old illegal/criminal distinction that he had earlier ignored in much of his writings on aggression. Instead, Lauterpacht “agreed that it was necessary to devise a formula forbidding brutal and unjustified acts of intervention,”<sup>99</sup> but thought that the Draft Code went too far in its prohibitions.<sup>100</sup>

In spite of these objections, Lauterpacht professed his hope that the Draft Code would be adopted.<sup>101</sup> It did, after all, embrace his concept of crimes against humanity, that he felt augured well for the development of human rights. Trainin likely felt the same—if anything, the Draft Code was more similar to his articulations of crimes against peace, broadly defined to include economic intervention.

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<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> Though Lauterpacht’s arguments on the illegal/criminal distinction had changed since Nuremberg, he remained consistent in his opposition to a superior orders defense that was allowed by Article 4 of the Draft Code. Lauterpacht argued that the language of the Article was “dangerously retrograde” and that “The defence was admissible in time of war, but not in time of peace. The draft code was, in fact, concerned primarily with peacetime conditions. Under the formulation as adopted the accused might escape punishment for the reason that “it was not possible for him” not to comply with the order for fear of losing his post, or forfeiting a chance of promotion, or displeasing his superiors, or incurring the odium of disobeying a decision of his party, and the like. *Ibid.*

<sup>101</sup> *Ibid.*

In the remaining few years of Trainin's life, he returned to his university position and continued to work on issues of international criminal law.<sup>102</sup> Though Stalin was dead, Trainin's Jewish background meant that his status in the Soviet Union would likely forever be uncertain.<sup>103</sup> Meanwhile, his former mentor, Vyshinsky was dismissed from his post in the Central Committee Presidium and was "sent into honourable exile to New York as the Soviet Union's permanent delegate to the United Nations."<sup>104</sup>

Following Stalin's death, Trainin's writings reappeared in newspapers, as he authored an article on communist persecutions in the United States in 1955, where he revealed that anti-communist laws exposed the American struggle against democracy, socialism, and peace.<sup>105</sup> Outside of his traditional expertise of international criminal law, Trainin returned to his earliest roots in domestic criminal law to provide a legal underpinning for Soviet propaganda. In addition to condemning Western countries, Trainin worked on another failsafe topic in domestic Soviet law, conducting archival research on Vladimir Lenin's early work as a lawyer in Samara.<sup>106</sup>

Trainin was also able to return to his roots in international criminal law. In 1956 Trainin published an article in *Pravda* titled "Ten years later..." In it, he looked back on the Nuremberg

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<sup>102</sup> For further reading on the immediate post-Stalinist period see Sheila Fitzpatrick, *On Stalin's Team: The Years of Living Dangerously in Soviet Politics*, (Princeton and Oxford: Princeton University Press, 2015).

<sup>103</sup> See, e.g. Gal Beckerman, *When They Come for Us, We'll be Gone: The Epic Struggle to Save Soviet Jewry*, (Boston: Houghton Mifflin Harcourt, 2010) for a depiction of the perilous status of Soviet Jews in the post-Stalin years.

<sup>104</sup> Vaksberg, 310. Vaksberg's description of both Vyshinsky's role at the UN and changes in Soviet policy is evocative: "After Stalin's death and the changes in the Kremlin, his audience expected to hear new proposals each time from the Soviet Union's delegate, and so listened most carefully to every word, trying to detect between the lines new tendencies in the foreign policy of one of the great powers. And, evidently they did detect a difference; the speaker's vocabulary changed before their very eyes, the abusive sobriquets and coarse epithets gradually diminished and then completely vanished, and his vocabulary became more civilized and decorous." *Ibid*, 311-312.

<sup>105</sup> Trainin writes about anti-communist laws in New York in *Pravda*. In this "American variant of fascism" the ideology of bourgeois "democracy"—the scare quotes are Trainin's—the lowest classes of society are oppressed. Aron Trainin, "Razoblachennoe 'Pravosudie,'" *Pravda*, May, 20, 1955, pg3.

<sup>106</sup> ARAN, f. 1711, op. 1, no.19, l. 7. Lenin's life and legal work was a relatively "safe" topic for someone who had recently been exiled/persecuted, though of course no matter the topic and presentation, there was always a possibility for condemnation.

Tribunals and the development of international criminal law. Trainin gave some general background on the Nuremberg Tribunals, including a brief overview of the concepts of crimes against peace, war crimes, and crimes against humanity. Consistent with the Draft Code and current Soviet positions on genocide, genocide was included, but only as a crime against humanity. As far as the Nuremberg Principles, outlined in the Draft Code, Trainin concluded that the opponents of these principles were “opponents of the peaceful coexistence of nations,” who were “trying to undermine the Nuremberg verdict, leave it in the past.” But this was a “vain hope,” because—tying crimes against peace to peaceful coexistence—the Nuremberg verdict “lives in history and in the minds of people as a stern warning to all who encroach upon the peace and security of mankind.”<sup>107</sup>

That same year, Trainin published *The Defense of Peace and the Struggle with Crimes against Humanity (Zashchita mira i bor'ba s prestupleniiami protiv chelovechestva)*.<sup>108</sup> While Trainin borrowed heavily from his earlier influential work, *The Defense of Peace and Criminal Law*, this newest work focused on the theoretical problems of criminal liability for international crimes in great detail. There were two parts, the first focusing on general crimes against humanity (*obshchee uchenie o prestupleniakh protiv chelovechestva*); the second part was a study of the different types of crimes against humanity (*uchenie o vidakh prestuplenii protiv chelovechestva*). In this second part, genocide, aggression, and war crimes, are, as in Trainin's

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<sup>107</sup> Aron Trainin, “Desiat' let spustia. . .”, *Pravda*, Oct. 9, 1956, pg3. “Itak, so vremena vyneseniia niurnbergskogo prigovora proshlo 10 let. Za eto desiatiletie sily mira gigantski vyrosli, i “niurnbergskie printsipy” imi tverdo vziaty na vooruzhenie v bor'be za mir i bezopasnost' narodov. Protivniki mirnogo sosushchestvovaniia gosudarstv, seiately mezhduнародnoi smuty, naprotiv, vsiacheski pytaiutsia podorvat' niurnbergskii prigovor, otbrosit' ego v proshloe. Tshchetnye nadezhdy! Niurnbergskii prigovor zhivet v istorii i v soznanii narodov kak groznoe predosterezhenie vsem, kto derznet posiagnut' na mir i bezopasnost' chelovechestva.” (“So, from the time of issuance of the Nuremberg Judgement, 10 years have passed. During this ten-giant world power grew, and the “Nuremberg principles” or firmly taken on board in the fight for peace and international security. Opponents of the peaceful coexistence of nations, sowers of international turmoil, on the contrary, are trying to undermine the Nuremberg verdict, drop it in the past. Vain hope! The Nuremberg verdict in the history lives in history and in in the minds of people as a stern warning to all who dare to encroach upon the peace and security of mankind.”)

<sup>108</sup> Aron Trainin, *Zashchita mira i bor'ba s prestupleniiami protiv chelovechestva*, (1956).

1951 work, all subsumed under the conceptual framework of crimes against humanity, but Trainin provides a more detailed explanation of these crimes, particularly aggression.

Trainin's description of aggression, formerly referred to as crimes against peace, was now termed "crimes against the foundations of peaceful coexistence among peoples (*prestupleniia protiv osnov mirnogo sushchestvovaniia narodov*), a further development from the 1930s crimes against peace and then the 1940s crimes against peaceful Soviet civilians.<sup>109</sup> Here we can observe one important change in Trainin's description of crimes against peace—the return of the term "peaceful coexistence."

The term "peaceful coexistence" had been used by Soviet officials, including Lenin, as early as 1920, who viewed it as a useful tactic for the survival of the young socialist state. The state was weak both militarily and economically following the revolution and numerous wars.<sup>110</sup> While the emphasis of Soviet foreign policy on peaceful coexistence (also known as "peaceful cohabitation" or *mirnoe sozhitel'stvo* in its early phase) varied throughout the 1920s and 1930s it remained a constant of official Soviet policy. Its influence can be seen in Trainin's concept of crimes against peace. However, it was not until 1956, three years after Stalin's death, that Nikita Khrushchev brought back "peaceful coexistence" as a foundation of Soviet policy.<sup>111</sup>

The Yale professor Leon Lipson observed the changing definition of peaceful coexistence, observing that in 1961 peaceful coexistence was defined as varied as

renunciation of war as a means of settling international disputes and their solution by negotiation; equality, mutual understanding and trust between countries; consideration for each other's interests; non-interference in internal affairs; recognition of the right of every people to solve all the problems of their country by themselves; strict respect for the

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<sup>109</sup> Aggression, rather than "crimes against peace" was the term generally used at the Nuremberg and Tokyo Tribunals, and thus the aggression was used as the now more popular term.

<sup>110</sup> Evgeny Chossudovsky, "Genoa Revisited: Russia and Coexistence," *Foreign Affairs*, Vol. 50, No. 3 (April, 1972), 554-577, 560-561.

<sup>111</sup> Jon Jacobson, "Essay and Reflection: On the Historiography of Soviet Foreign Relations in the 1920s," *The International History Review*, Vol. 18, No. 2 (May 1996), 336-357, 339.

sovereignty and territorial integrity of all countries; promotion of economic and cultural cooperation on the basis of equality and mutual benefit.<sup>112</sup>

Here we can observe similarities between the concept of “crimes against peace” and “peaceful coexistence.” Both concepts grew from the idea that socialist peoples were inherently peaceful. Both included the renunciation of (non-“revolutionary”) wars, proclaimed non-interference in the affairs of other countries (as long as they were not “anti-revolutionary”), emphasized the dictates of sovereignty and its resulting rights and duties, included economic and cultural issues within their spheres, and emphasized equality among peoples.

At least according to Trainin, what motivated this new emphasis on “peaceful coexistence” in international law was clear—the new atomic age. The United States’ atomic power “makes possible the destruction of communist Russia.”<sup>113</sup> This “nuclear blackmail,” as a crime against peaceful coexistence, was itself also a crime against humanity.<sup>114</sup> While these are new weapons, the threat of outside destruction was nothing new for the Soviet Union. As Trainin argued, “after the defeat of fascist aggression” and “decades” of “subversive activities by reactionary imperialist circles,” history has shown that “one of the most dangerous weapons of militant reactionary circles are crimes against humanity.” Such crimes against humanity included “aggression and preparation of acts of aggression war propaganda, violation of laws and customs of war, interference with other states, nuclear blackmail, a crusade against democracy under the guise of ‘anti-communism’ and so on.”<sup>115</sup> There is a consistency in Soviet peace

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<sup>112</sup> Lipson, 874.

<sup>113</sup> Trainin, *Zashchita mira i bor'ba s prestupleniami protiv chelovechestva*, (1956), 8. (Original: “spособna unichtojit' kommunisticheskuiu Rossiu.”)

<sup>114</sup> *Ibid.*, 8-9.

<sup>115</sup> *Ibid.*, 9. (Original: V techenie istekshego—poslye razgroma fashistskoi agressii—desiatiletiiia puti i formi podryvnoi deiatel'nosti reaktsionnykh imperialisticheskikh krugov, vsia politika pokazala, chto odnim iz ves'ma opasnykh orudii voinstvuiushchikh reaktsionnykh krugov iavliaiutsia prestupleniia protiv chelovechestva—agressiia i agressivnye akty podgotovki propagandi voiny, narushenie zakonov i obychaev vedeniia voiny, vmeshatel'stvo v zhizn' drugikh gosudarstv, atomnyi shantazh, krestovyi poход protiv demokratii pod maskoi “antikommunizma” i dr.)

propaganda from the 1930s through the 1950s. In fact, the war itself does not disrupt this propaganda: from the 1930s through the war, crimes against peaceful Soviet civilians were the ultimate offense.

By 1956, Trainin's portrayal of genocide had also evolved. Unlike the Draft Code, Trainin uses the term "genocide," as a distinct concept, rather than simply describing it as a crime against humanity. The recent war revealed it to be "the most serious crime against humanity: the extermination of entire nations and peoples—Poles, Czechs, Jews, and others."<sup>116</sup> As in the original Soviet proposal for the genocide convention, Trainin re-introduces three types of genocide- physical, biological and cultural. While Trainin references the 1948 Genocide Convention, he does not cite the final Convention itself, but rather the Soviet delegate's positions, thereby giving the authority for cultural genocide, which had been left out of the final convention. At the same time, the entirety of the 1948 Genocide Convention was printed in the back of the book, giving the interested reader an opportunity to observe that cultural genocide was not found anywhere in the entirety of the Convention.<sup>117</sup>

Trainin also focuses on "contemporary genocides" taking place in the 1950s. Following the Soviet Union's early applications of the concept of genocide in the late 1940s, in which racism and segregation in the US were classified as genocide, Trainin shows that these were still *au courant* views in official Soviet legal thought and propaganda.<sup>118</sup> The "imperialistic" cultural

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<sup>116</sup> *Ibid*, 222. (Original: "tiachaishego prestupleniia protiv chelovechestvo: istreblenie tselykh natsii i narodov--poliakov, chekhov, evreev i drugikh.")

<sup>117</sup> *Ibid*, 239. Trainin does acknowledge that the Convention does not include cultural genocide explicitly in the book (and condemns it for this omission). He also critiques the Convention for its lack of national-cultural genocide; fascist acknowledgement and for lack of liability for propaganda. (See original: "prezhde vsego suzhenno samo poniatie genotsida—vypal natsional'no-kul'turnyi genotsid. Dalee otsutstvuet vazhneishee politicheskoe polozhenie o sviazi genotsida s fashizmom i trebovani rospuska fashistskikh organizatsii. Nakonetsi, otsutstvuet trebovanie ustanovleniia otvetstvennosti za propaganda genotsida.")

<sup>118</sup> *Ibid*, 231-232. Trainin notes that imperialist countries did everything they could to prevent combating genocide while the USSR and the other "people's" democracies fought for combating genocide, stating "But as soon as UN's General Declaration was transferred to the development of specific measures to combat genocide, two opposing

policies of South Africa also constituted genocide, Trainin alleged. In his allegations here and elsewhere, Trainin continued to show that fascists, imperialists, racists, and others who were all capitalists and thus by definition not the Soviet Union, committed genocide.<sup>119</sup> The persistence of genocide in the world was due to imperialism. Only the “fighting camp of democracy and socialism against the criminal forces of reactionaries and fascism will bring the complete freedom to all nations, all races and nations.” This ultimately “victorious struggle of the colonial and semi-colonial world for freedom and independence will put an end to the actual differences “higher” and “lower” and organized criminal mockery of man by man.”<sup>120</sup> Trainin concludes that “genocide is the offspring of racism,” that went hand-in-hand with imperialist hierarchies.<sup>121</sup>

Just as Trainin emphasized a political definition of genocide that expanded beyond the legal definition to include the United States, the United States paid lip service to the legal definition while moving towards an expansive definition of genocide that focused on communist

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camps were defined: the USSR and the people’s democracy, fighting for the adoption of the Convention to ensure the elimination of genocide even in all its shapes and forms, and the imperialist countries, striving to reduce and trim the Convention and thereby deprive the Convention of real means to combating genocide.” (“No, kak tol’ko OON ot obshchikh delkaratsii pereshla k razrabotke konkretnykh mer bor’by s genotsidom, opredelilis’ dva protivopozhnykh lagyeria: SSSR i strany narodnoi demokratii, boriushchiesia za priniatie konventsii, obespechivaiushchei ustranenie genotsida vo vsekhn ego vidakh i formakh, i imperialisticheskie strany, stremiashchiesia vsiacheski ogranichit’ i urezat’ konventsiiu i tem camym lishit’ konventsiiu realnykh sredstv bor’by s genotsidom.”)

<sup>119</sup> While Trainin may have been motivated by politics to point his finger at a relationship between “imperialists” and genocide, this was an odd commonality between Trainin’s work and that of the especially anti-Soviet theorist Hannah Arendt. Arendt first posited connections between imperialism and genocide in her work *On Totalitarianism*. Today, scholars like Isabel Hull and Elazar Barkan have returned to Arendt’s work, recognizing that colonialism, imperialism and genocide are often intertwined, and other scholars additionally maintain that the Holocaust was only possible because of Nazi Germany’s attempt to colonize Europe. Essays by Isabel Hull and Elazar Barkan give accounts of the relationship between genocide and imperialism (both involve the genocide of the Herero in German South West Africa and follow in the footsteps of Hannah Arendt). Robert Gellately and Ben Kiernan, *The Specter of Genocide: Mass Murder in a Historical Perspective* (Cambridge: Cambridge University Press, 2003).

<sup>120</sup> Trainin, *Zashchita mira i bor’ba s prestupleniiami protiv chelovechestva*, 241. (Original: “bor’ba lageria demokratii i sotsializma protiv prestupnik sil reaktzii i fashizma prineset polnoe osvobodhenne vsem narodam mira, vsem racam i natsiiam. Razvernushchiesia pobedonosnaia bor’ba kolonial’nogo i polukolonial’nogo mira za svobodu i nezavisimost’ polozhit konets fakticheskomu razlicheiu ‘vysshikh’ i ‘nizshikh’ i prestupnomu organizovannomu glumeniiu cheloveka nad chelovekom.”) This also explains the continued existence of genocide in spite of the Genocide Convention and the Universal Declaration of Human Rights—because imperialism continues in the world. (Original: “konventsiiia po bor’be s genotsidom zakliuchena, deklaratsiia prav cheloveka provozglasheno, a genotsid v raznykh i vidakh prodolzhaetsia vo mnogikh stranakh imperialisticheskogo mira.”)

<sup>121</sup> *Ibid*, 222 (“genotsid est’ porozhdenie rasizma.”)

countries. As Lemkin showed, the Soviet Union was the initial target of allegations of genocide, and communist-era Rouge Cambodia would later be named a genocide, but Indonesia's attempt to incorporate post-colonial East Timor, which had a similar death rate as Cambodia, was not.

In spite of Trainin's emphasis on genocide—or rather, because of Trainin's emphasis on the relationship between genocide and aggressive war—his most urgent focus is on war and its prevention, in particular the aforementioned prevention of “capitalist” war.<sup>122</sup> While Lemkin focused on genocide, and Lauterpacht on human rights, peace remained the operative concept for Trainin, consistent with Soviet propaganda in general. Crimes against peace, as outlined at Nuremberg, would prove to be Trainin's most lasting influence, though his role was not widely acknowledged.<sup>123</sup>

In February 1957, Trainin suffered a heart attack and died in his adopted hometown of Moscow. *Izvestiia* ran an obituary full of praise for Trainin with no mention of his persecution that had taken place in the late Stalin period. The newspaper correctly described Trainin as “one of the first Soviet legal professors,” who was active for many years as a professor at Moscow State University, and did much work in connection with the “struggle against aggression.” His role in the Nuremberg Tribunal was noted, and the obituary writer declared that everyone who knew Trainin appreciated his “deep humanity, sensitivity, and tenderness.”<sup>124</sup>

In the years after Trainin's death, both Lemkin and Lauterpacht found themselves busy with work though in possession of widely differing levels of influence. Lauterpacht had been elected to the International Law Commission in 1953 and the following year was named a judge

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<sup>122</sup> Seemingly out of character with a state driven by socio-economic explanations of crime, Trainin's description of the groups protected from genocide maintained the ideas of race science apparent at the Genocide Convention. These groups must be of an “objective character, i.e. there must be stable, objective evidence distinguishing this group from others.” And these characteristics “should be classified as belonging to a particular nation or race.” It is “in this literal sense of the term called ‘genocide,’ that is, the destruction of a clan or tribe.” *Ibid*, 224.

<sup>123</sup> Francine Hirsch is one notable except to this. See Francine Hirsch, “The Soviets at Nuremberg: International Law, Propaganda, and the Postwar Order,” *American Historical Review* (June 2008), 701-730.

<sup>124</sup> ARAN, f. 1711, op. 1, no.24, l. 16 published as “A.N. Trainin,” *Izvestiia*, Feb. 10, 1957, p10.

to the new International Court of Justice at the Hague in 1954.<sup>125</sup> In 1956 he was knighted, becoming Sir Hersch Lauterpacht in 1956, a rapid turnaround for the man, who just 8 years earlier was considered not “British” enough to play the role of British representative. Just as years earlier Trainin had nearly seen his life’s work undone by antisemitism, Lauterpacht too had overcome antisemitism. A few years later he published his final work, *The Development of International Law by the International Court*, an expanded revision of his 1935 work on the Permanent Court of International Justice.<sup>126</sup>

Meanwhile Lemkin still struggled to persuade states to ratify the Genocide Convention including his adopted country of America. In his advocacy for the Genocide Convention, Lemkin continued to oppose the Draft Code of Offenses against Peace and Security of Mankind. The Secretary General of the United Nations intermittently circulated the draft code requesting opinions, and Lemkin duly wrote passionate memoranda opposing it, especially the particular articles that overlapped with genocide.<sup>127</sup> Lemkin also came to oppose not just crimes against peace, but concepts of human rights that he viewed as overlapping with genocide. Lemkin repeatedly warned against the proposed Covenant of Political and Civil Rights especially its provision against the arbitrary “deprivation of life.”<sup>128</sup> While Lauterpacht apparently did not write directly on the proposed Covenant’s provision against the arbitrary deprivation of life, he advocated strongly for the Covenant as a whole, stating that an “effective and enforceable” Bill

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<sup>125</sup> While at the ICJ, Lauterpacht wrote separate opinions in the *South-West Africa* cases (1955 and 1956), the *Guardianship Convention* case (1956) and *Certain Norwegian Loans* (1957) and dissenting opinions in *Interhandel Case (Preliminary Objections)* (1959) and the *Aerial Incident Case* (1959).

<sup>126</sup> During this time Lauterpacht also worked on editing, revising, and updating Lassa Oppenheim’s reference volumes on international law. Hersch Lauterpacht, ed., *Oppenheim's International Law, Vol. 1: Peace*, 8th ed., 1955.

<sup>127</sup> See e.g., Lemkin papers, NYPL, reel 4.

<sup>128</sup> *Ibid.*

of Human Rights would “be a powerful contribution to international peace,” though he recognized the proposed Covenant was just one step towards a “true Bill of Rights.”<sup>129</sup>

Elsewhere, Lemkin adopted Lauterpacht’s rhetoric about human rights for the prohibition of genocide. In an undated (but presumably written sometime in 1946) and unpublished article draft arguing for the international prohibition of genocide entitled “The Protection of Basic Human Rights of Minorities in the Forthcoming Peace Treaties,” Lemkin co-opts the language of “human rights” to mean the protection of minorities from genocide.<sup>130</sup> Lemkin alleged,

Some U.S. supporters of the draft covenant on Human Rights are unfriendly to the Genocide Convention and have endeavored to block its ratification in the U.S., believing, apparently, that the U.S. Congress would not accept two covenants, one after another. These persons will try to include elements of the Genocide Convention in the Human Rights covenant, in a changed form. This has already been done in Article 3 of the Human Rights covenant, which establishes the international responsibility for taking life. Actually, this provision is not necessary in the covenant on Human Rights because the mere fact of taking life can be treated exclusively by domestic jurisdiction. Why should the murder of one drunkard by another become a matter of international concern?<sup>131</sup>

Lemkin’s categorization of what would become Article 6 of the 1966 Covenant as “the murder of one drunkard by another” is not entirely accurate. The Article declares that “No one shall be arbitrarily deprived of his life” and provides limits on the imposition of the death penalty.<sup>132</sup> The Article is clearly intended to limit arbitrary imposition of the death penalty by governments, rather than overlap with domestic criminal law. Lemkin surely recognized this. But no possible

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<sup>129</sup> Hersch Lauterpacht, *The Collected Papers of Hersch Lauterpacht*, “Towards an International Bill of Rights,” vol. 3, 410-415, 413-414, Lauterpacht first gave this talk on the BBC in October 1949, and it was subsequently published in the *The Listener*, vol. 42, no. 1084 (Nov. 3, 1949), pg 747-748.

<sup>130</sup> See “The Protection of Basic Human Rights of Minorities in the Forthcoming Peace Treaties;” Raphael Lemkin Collection; P-154; Box 7; Folder 2; American Jewish Historical Society, New York, NY, and Boston, MA.

<sup>131</sup> Lemkin papers, NYPL, reel 4. Lemkin’s speech to the United Nations was reported on in the article “Genocide Pact Warning: Author Says Proposed Covenant Endangers Accepted Ideas,” *New York Times*, March 8 1954, pg. 3

<sup>132</sup> Article 6 of the International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx> [last accessed December 11, 2015].

overlap with the Genocide Convention, no matter how tangential, incidental, or speculative, was acceptable to Lemkin. For Lemkin, genocide was the “crime of crimes.”<sup>133</sup>

In addition to his lobbying work, Lemkin spent his days working zealously on his autobiography and his projected three-volume book project on genocide. Both of these works would remain incomplete and unpublished in Lemkin’s lifetime. Lemkin spent the summer of 1959 in Spring Valley, New York, working on his autobiography. On August 27, Lemkin left Spring Valley to visit his book publisher in New York City the next day. It was in the publisher’s public relations office that Lemkin died of a heart attack, only 58 years old.<sup>134</sup>

After learning of his death *The New York Times* published an editorial titled “Raphael Lemkin: Crusader.” The author declared,

Diplomats of this and other nations who used to feel a certain concern when they saw the slightly stooped figure of Dr. Raphael Lemkin approaching them in the corridors of the United Nations need not be uneasy anymore. They will not have to think up explanations for a failure to ratify the Genocide Convention for which Dr. Lemkin worked so patiently and so unselfishly for a decade and a half. Government by Government, until the number of ratifications approached threescore, this devoted man did more than any other individual to win formal acceptance of the principle that it is criminal to injure or destroy “national, ethnical, racial or religious groups.” Raphael Lemkin, once a successful lawyer in Warsaw, had suffered the loss of all his family, except one brother, at the hands of the Nazis. In this country he had a distinguished career as a teacher, lecture and writer, but the burden of his days was his crusade against slavery, degradation and murder. It was a heavy burden, and last Friday it killed him at the age of 58. Death in action was his final argument—a final word to our own State Department, which has feared that an agreement not to kill would infringe our sovereignty.<sup>135</sup>

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<sup>133</sup> As noted earlier, Lemkin was especially sensitive to any overlap between genocide and human rights. Lemkin believed that it was necessary to distinguish between “the right of existence and the rights of development. [The emphasis is Lemkin’s.] The rights of existence imply factually the right to live. It might conceptually imply the right not to be deprived or not to be put in such conditions when the loss of life is imminent or possible, (Concentration Camps, deportations, ghettoization). The rights to development imply the rights to economic opportunity, the right of free speech, the rights of cultural and religious expression and so forth. This distinction might create some academic difficulties to professors but not to the victims of Auschwitz and [sic] Maidanek.” AJHS Archives, Lemkin’s papers, Box 6, Folder 2.

<sup>134</sup> “Raphael Lemkin, Genocide Foe, Dies: International Law Professor Instrumental in Pushing Convention Through U.N.,” *New York Times*, Aug. 30, 1959, pg. 82.

<sup>135</sup> “Raphael Lemkin: Crusader,” *New York Times*, Aug. 31, 1959, pg. 20.

Despite the high profile public notice of his death, Lemkin died penniless and few people attended his funeral.<sup>136</sup> Many who had worked with Lemkin were undoubtedly pleased not to have to interact with him any longer.<sup>137</sup> While Lemkin's cause was noble, his inability to accept any international legal principles that overlapped with genocide at best lacked pragmatism and at worst was irrationally jealous. While his opposition to crimes against peace can easily be defended, his opposition to certain human rights principles (such as the prohibition against the arbitrary taking of life) is more inexplicable. At the time of Lemkin's death, Lauterpacht was one of fifteen judges sitting at the International Court of Justice at the Hague.

Lauterpacht died of a heart attack in his adopted home of London in 1960. *The New York Times* declared Lauterpacht to be a "leading British authority on international law" and indeed Lauterpacht's legacy in international law has been one of especial renown.<sup>138</sup> Hersch Lauterpacht's son, Sir Elihu Lauterpacht, followed in his father's footsteps and became a scholar of international law in his own right. After his father's death, Eli replaced him as editor of the *International Law Reports*. Like his father, Eli served as a judge at the International Court of Justice and taught as a Professor of Law at Cambridge.<sup>139</sup> In 1983, as part of the Faculty of

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<sup>136</sup> Lemkin apparently had trouble living within his limited means. See, e.g. AJHS Archives, Lemkin Papers, Box 1, Folder 13. See, e.g. a Dec. 22, 1949 letter from Wesley A. Sturges to Russell H. Grele, Lemkin's agent. Sturges, then-Dean of Yale Law School, notes "the Doctor's extreme devotion to the cause of Genocide and the invaluable work that he has done and is doing in that connection" but has "discussed this matter of what I would call extravagance with him and I see no reform in sight."

<sup>137</sup> Most remembrances of Lemkin in the diplomatic and legal community were not very sympathetic to him. One exception is that of Stephen J. Spingarn's, an Assistant to the Special Council of President Truman, who recalled that "a Polish emigre, if I'm not mistaken, a very fine man, named Doctor Lemkin, I think it was Raphael Lemkin," came to see him several times regarding the signing and ratification of the Genocide Convention. Spingarn stated that "you couldn't help sensing the deep feeling this man had about this matter." Oral History Interview with Stephen J. Spingarn by Jerry N. Hess, Washington, D.C., March 29, 1967. (Harry S. Truman Presidential Museum & Library).

<sup>138</sup> "Sir Hersch Lauterpacht Dead; Member of International Court," *The New York Times*, May 10, 1960, 37.

<sup>139</sup> As a judge at the ICJ, Eli Lauterpacht continued his father's work as he confronted questions of how to conceptualize violence. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, International Court of Justice, 13 Sept. 1993, Separate Reasons of Judge *ad hoc* Lauterpacht, p. 431, para. 69 Lauterpacht argued that ethnic cleansing, at least as committed in the case of Bosnia, was a form of genocide. The court found that while ethnic cleansing may be genocide, it is not necessarily genocide. See also Larry May, *Genocide: A Normative Account*, (Cambridge:

Law, Eli Lauterpacht established a research center at Cambridge focused on promoting research and the development of international law. Initially called the “Research Centre for International Law,” it is now known as the “Lauterpacht Centre,” in honor of his father, Sir Hersch Lauterpacht.<sup>140</sup> Lemkin, along with Lauterpacht, has been memorialized among legal scholars for their contributions to international legal thought.

Aron Trainin has been deprived of such credit. With the fall of the Soviet Union and the end of the Cold War, Soviet legal scholarship has been by and large dismissed as irrelevant. In this ignorance, Trainin has been twice injured--first by the Soviet Union, which discarded him during the anti-cosmopolitan purges, and second, by historians who overlook the way in which the Soviet Union influenced, interacted with, and challenged reigning international legal concepts. While Trainin has been the most overlooked figure of the three men, he was also not spared the Khrushchevian era of de-Stalinization that destroyed the reputation of his mentor Vyshinsky.<sup>141</sup> Vyshinsky, who had died in 1954, was strongly condemned for his role in Stalin’s

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Cambridge University Press, 2010), 105 for a discussion of Lauterpacht’s interpretation. International legal scholar William Schabas, as May notes, has argued against Lauterpacht’s interpretation, claiming that there is a sharp distinction between genocide and ethnic cleansing as genocide is intended to destroy the group and ethnic cleansing is intended to displace it. William Schabas, *Genocide in International Law*, 200.

<sup>140</sup> See “*Conversations with Professor Sir Elihu Lauterpacht, Fourth Interview: The Eighies*,” interviewed by Lesley Dingle on March 20, 2008

<https://www.repository.cam.ac.uk/bitstream/handle/1810/197069/Eli%20Lauterpacht%20interview%204%20transcript%20-%2020%20March%202008.pdf?sequence=3> (last accessed August 19, 2016).

<sup>141</sup> This is exemplified by the publication of a 1969 collection of Trainin’s previously published work in the Soviet Union. The work was titled *The Defense of Peace and Criminal Law (Zashchita mira i ugovolnyi zakon)*, the same title as his groundbreaking 1937 work on crimes against peace, and praises Trainin’s work, life, and legacy. Unsurprisingly the editors’ biography does not mention his Jewish heritage or cultural involvement, but it does note his support for the October Revolution (his “revolutionary credentials”) and especially lauds his 1944 work *Hitlerite Responsibility Under Criminal Law*. Trainin’s role as Soviet representative at the London Conference establishing Nuremberg, as well as his legal skills at Nuremberg and in general, were praised. *Hitlerite Responsibility* received especial commendation for its “scientific analysis of all of the most serious crimes committed by Hitler’s clique, from preparation and unrestrained aggression, the legal classification of the crimes committed by the Nazis during the war, to the development of norms and principles of criminal responsibility for such crimes.” Trainin, *Zashchita mira*, (1969), 11. (Original: “V 1944 g. A.N. Trainin publikuet svoe novoe proizvedenie ‘ugolovnaia otvetstvennost’ gitlerovtsev.’ Èto nauchnyi analiz svei sistemy tiachaishikh prestuplenii, sovershennykh gitlerovskoi klikoi, nachinaia s podgotovki I raziavaniia samoi agressii, uridicheskoi kvalifikatsii prestuplenii, sovershavshikh natsistami v khode voiny, i konchaia razrabotkoi sistemy norm i printsipov ugovolnoi otvetstvennosti za podobnyi prestupleniia.”) Much of the credit for the perceived success of Nuremberg was given

persecutions.<sup>142</sup> A new focus on “legality” was heralded by not just lawyers and experts but by the public at large.<sup>143</sup> Parallel with trends in France and West Germany this “new attention to legal procedure originated in a widespread perception that distortions of law had been a major cause of twentieth-century mass violence.”<sup>144</sup>

As a part of the new prominence of “legality,” discussion about the presumption of innocence intensified throughout the 1950s and 60s and the 1934 Stalinist criminal code was replaced in 1961 with a new criminal code.<sup>145</sup> Human rights, the ideal so beloved by Lauterpacht, gained currency in the Soviet Union and arguably contributed to the end of the Soviet Union.<sup>146</sup> Benjamin Nathans has shown that in the 1960s Soviet legal scholars began to democratize the heroic Stalin-era version of the “Soviet person” as a rights and status bearing person. International factors increased this domestic development as the Soviet Union signed on to a number of international treaties.<sup>147</sup> While Lauterpacht had feared the impotence of the

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to Trainin and his writings on aggression were in large part responsible for aggression becoming “the gravest crime against humanity.” While Trainin was heavily praised, formulaic Soviet propaganda also required an acknowledgement of the “heroic Soviet army,” which made the Nuremberg process possible. Trainin, *Zashchita mira*, (1969), 11-12.

<sup>142</sup> See Vaksberg, *Stalin’s Prosecutor*.

<sup>143</sup> See Miriam Dobson, *Khrushchev’s Cold Summer: Gulag Returnees, Crime, and the Fate of Reform after Stalin*, (Ithaca: Cornell University Press, 2009).

<sup>144</sup> Denis Kozlov, *The Readers of Novyi Mir: Coming to Terms with the Stalinist Past*, (Cambridge: Harvard University Press, 2013), 243.

<sup>145</sup> *Ibid.* The new code rejected Vyshinsky’s 1930’s argument establishing confession as “decisive” proof of guilt in political “conspiracy” cases. *Ibid.* See also Ugolovnyi kodeks RSFSR 1960 goda. (The code was approved in October 1960, and went into power in 1961).

<sup>146</sup> A number of scholars date the flourishing of the human rights movement in the Soviet Union to the 1975 Helsinki Final Act. See e.g. Christian Philip Peterson, *Globalizing Human Rights: Private Citizens, the Soviet Union, and the West* (New York: Routledge, 2012). Peterson argues that human rights contributed to the fall of the Soviet Union and the end of the Cold War. Peterson argues that private citizens (many inspired by the Helsinki Final Act) helped to bring human rights issues to the forefront of the concerns of Soviet policymakers. See also Sarah Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge: Cambridge University Press, 2011). Snyder examines the transnational network that developed in the wake of the Helsinki Final Act. Snyder argues that the actual network itself (rather than human rights ideas in general) helped to end the Cold War, through its advocacy work both within and outside the eastern bloc. Benjamin Nathans dates the origins of the human rights movement in the Soviet Union a bit earlier to the 1960s.

<sup>147</sup> See Benjamin Nathans, “Soviet Rights-Talk in the Post-Stalin Era,” in Stefan-Ludwig Hoffmann, ed., *Human Rights in the Twentieth Century* (Cambridge, UK: Cambridge University Press, 2011): 166-190. Nathans cautions against dismissing Soviet rights talk and Soviet legal history. Nathans argues that following Stalin’s death, the Soviet Union moved from the “cult of the person” to the “rights of the person.” By the 1970s, this understanding of

Human Rights Declaration, human rights appeared to have some persuasion as rhetoric. Though not achieving the functionalist goals of accountability, Soviet citizens at least had a new language to articulate their grievances, one that did not depend upon the Soviet system for legitimacy.<sup>148</sup>

Though Trainin contributed little to this new Soviet discourse around human rights his writings on genocide and crimes against peace were part of the intellectual milieu in which human rights were conceptualized. Soviet citizens using the term genocide to condemn the *Soviet* regime can be seen in *samizdat*, or self-published, materials in the Soviet Union. Though *samizdat* readership was rather low, many of its participants were figures of significant cultural authority.<sup>149</sup> One such figure was Petr Grigorenko, a Soviet major general during World War II, who became a cybernetics professor at Frunze Military Academy in Moscow. In the early 1960s, Grigorenko began to criticize the Khrushchev regime and oppression in the Soviet Union, especially the repression of the Crimean Tatars of his native Ukraine. Throughout the 1960s and 70s, Grigorenko was repeatedly arrested and confined to mental institutions as a result of his dissident activities, diagnosed with “sluggish” schizophrenia (*vialotekushchaia shizofreniia*), the sole symptom of which could be political views in opposition to the Soviet regime.<sup>150</sup>

In a February 1968 *samizdat* essay, Grigorenko applied the term “genocide” to the Soviet Union, stating that: “[The atrocities of the 1930s] continue. It is true that they occur on a smaller

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human rights was influenced by outside understandings (through *samizdat*) and began to be invoked against the Soviet state by Soviet citizens. See also Kozlov, 239-262, (Chapter 8: “Discovering Human Rights: The Siniavskii-Daniel’ Trial.”)

<sup>148</sup> For an account of the “breakthrough” of human rights rhetoric in the 1970s see Jan Eckel & Samuel Moyn, eds., *The Breakthrough: Human Rights in the 1970s* (Philadelphia: University of Pennsylvania Press, 2013).

<sup>149</sup> Valeria D. Stelmakh, “Reading in the Context of Censorship in the Soviet Union,” *Libraries & Culture*, Vol. 36, No. 1, (Winter 2001), p.143-151, 147.

<sup>150</sup> R. Van Voren, “Abuse of Psychiatry for Political Purposes in the USSR,” in *Ethics in Psychiatry: European Contributions*, eds. Hanfried Helmchen & Norman Sartorius, (International Library of Ethics, Law, and the New Medicine, Vol. 45, 2010), 489-507, 492. See also Ada Korotenko & Natalia Alikina, *Sovetskaia Psikhiaitriia: Zablujdeniia i Umysel (Soviet Psychiatry: Fallacies and Intent)*, (Kiev: Sfera, 2002).

scale than under Stalin, but the genocide is no less outrageous. It has taken on particularly intolerable forms and methods in relation to the Crimean Tatars and the Volga Germans.”<sup>151</sup> Grigorenko refers back to the Soviet deportation and internal exile of these groups from their historical homelands.<sup>152</sup> By classifying these actions as “genocide,” the destruction that occurred was first and foremost cultural, though physical and biological destruction accompanied the deportations and forced labor camps. In this, Grigorenko follows Lemkin’s definition of genocide as the destruction of a group, including cultural destruction. While it is entirely possible that the well-read Grigorenko was familiar with this definition through Lemkin’s work, it seems more likely that Trainin’s newspaper writings introduced him to the concept of cultural genocide, as Trainin did for so many Soviet readers. For Grigorenko, as for many other Soviet dissidents producing *samizdat* literature, human rights, with their possible myriad formulations provided the most useful rhetoric to challenge Soviet power.<sup>153</sup>

Long an advocate for Soviet human rights groups, Grigorenko was a founding member and the de facto leader of the Moscow-Helsinki Group. While referring to both Stalin’s terror and the Soviet Union’s treatment of persecuted groups like the Crimean Tatars and the Volga

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<sup>151</sup> Petr Grigorenko, “Uchastnikam Budapeshtskogo Soveshchaniia” (“To the Participants of the Budapest Conference”) published outside the Soviet Union in *Mysli Sumasshedshego: izbrannye pisma i vystupeniia*, (Amsterdam: The Alexander Herzen Foundation, 1973); 103-126, 117. (See original: “Prodoljaetsia, Pravda, v men’shikh masshtabakh, chem pri Staline, no ne menee vozmutil’nyi genotsid. Osobenno nedopustimye formy i metody on prinial v otnoshenii krymskikh tatar i nemtsev Povolj’ia.”) I based my translated quotation (and diverged from) the English translation published in *The Political, Social and Religious Thought of Russian ‘Samizdat’ - An Anthology*, Michael Meerson-Aksenov and Boris Shragin eds., (Belmont, MA: Nordland Publishing Company, 1977) 50-75, 65.

<sup>152</sup> Both the Crimean Tatars and Volga Germans, considered to be politically unreliable, had been deported from their homelands during World War II by Stalin. More than 230,000 Tatars were deported during the war, most to the Uzbek republic. In 1941, shortly after the Nazi invasion of the Soviet Union, the entire German population of the Soviet Union’s Volga German Autonomous Republic was deported, the ethnically German inhabitants sent to various places in Siberia and Kazakhstan. Along with ethnic Germans from other areas of the Soviet Union, the displaced total of ethnic Germans far exceeded a half a million. The following year, the majority of the deported Germans were sent to labor camps with horrible working conditions. Decades after the expulsions, some Tatars and Volga Germans were allowed to return to their homelands, but without government assistance or reparations for their suffering.

<sup>153</sup> See, e.g. Valerii N. Chalidze “Important Aspects of Human Rights in the Soviet Union,” [published in *The Political, Social and Religious Thought of Russian ‘Samizdat’ - An Anthology*] p197-223 [written in 1970] for an example of human rights rhetoric used to challenge Soviet power.

Germans as genocide, human rights provided a more flexible rhetoric for everyday use. Genocide as a concept provided a lens to critique actions that were inherently morally wrong, even evil. While human rights rhetoric could challenge the more everyday indignities, compromises, and oppression of living in the Soviet Union, genocide endorsed a view of the Soviet regime in which there could be no doubt as to its immorality and wickedness. In this way, the use of genocide as a term of political rhetoric had both distinct differences and strong similarities to human rights as rhetoric. While genocide was reserved for especially horrific events, both concepts gave power to the dispossessed. Human rights and genocide could both radically defy authority by challenging their use of power as fundamentally illegitimate.

Even after Trainin's death, Soviet writers continued to compare contemporary sufferings to the Holocaust and their perpetrators to the fascist-Hitlerites. For example, Soviet coverage of the Six Day/June War, between Israel and its surrounding Arab countries, compared Israeli actions with "the Hitlerite atrocities in occupied countries during the Second World War" and specifically mourned for the "peaceful peasants" who were victims of Israeli aggression.<sup>154</sup> In this way, we can see that the use of the legal concepts of genocide, human rights, and crimes against peace ultimately helped entrench the Holocaust and World War II as the ultimate example of a crime against peace, a violation of human rights, and genocide in international criminal law.<sup>155</sup>

Moreover, even though the legal concepts were used in politicized ways, the use of the three terms implicitly acknowledged limitations on sovereignty. It is not just acceptable to

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<sup>154</sup> "Aggressors must answer for their crimes!" (Original: "Agressor otvetit za svoy prestupleniia!") *Izvestiia*, June 16, 1967, p1 (Original: "so zlodeianiami gitlerovtsev v okkupirovannykh stranakh vo vremya vtorom mirovoi voiny"). The article also condemned alleged Israeli crimes against "peaceful peasants" (mirnykh krest'yan).

<sup>155</sup> See Michael Rothberg, *Multidirectional Memory: Remembering the Holocaust in the Age of Decolonization*, (Palo Alto: Stanford University Press, 2009). Rothberg argues that comparing other events with the Holocaust does not necessarily relativize and banalize the Holocaust, but instead enhances understandings of both other atrocities and the Holocaust.

critique a country on “domestic” matters for moral reasons, but for legal reasons as well. The question of whose civilization shaped global discourse, as always, would be sticking point for whether or not the legal allegations are perceived as legitimate or not.

Finally, in spite of the use of the term genocide by prominent Soviet dissidents, its lack of use among both other dissidents and the general Soviet public should be kept in mind. Vasily Grossman, a prominent Soviet writer and journalist who served as a war correspondent for the Red Army newspaper *Krasnaia Zvezda* during World War II, witnessed many of the earliest liberations of the Soviet death camps.<sup>156</sup> Grossman’s mother had been murdered in Berdichev by the Nazis, along with tens of thousands of other Jews who had not been evacuated. In *Jizn’ i Sud’ba* (*Life and Fate*), Grossman’s magnum opus, completed in 1959, he never refers to such atrocities by the Nazis as genocide, but instead continues using the more familiar terms of extermination, destruction, and liquidation (*istreblenie*, *unichtozhenie*, and *likvidatsiia*). Likewise, Grossman applies those same descriptors to Soviet policies of the 1930s, making clear the similarities between Nazi fascism and Stalinism. For example, an SS officer tries to show his prisoner Mostovskoi the parallels between the two, claiming that Hitler learned from Stalin that

to build Socialism in one country, one must destroy the peasants’ freedom ... Stalin didn’t shilly-shally- he liquidated millions of peasants. Our Hitler saw that the Jews were the enemy hindering the German National Socialist movement. And he liquidated millions of Jews.<sup>157</sup>

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<sup>156</sup> See David Shneer, *Through Soviet Jewish Eyes: Photography, War, and the Holocaust*, (New Brunswick: Rutgers University Press, 2011) and Antony Beevor & Luba Vinogradova, eds. and translators, *A Writer at War: Vasily Grossman with the Red Army, 1941-1945* (New York: Pantheon, 2006).

<sup>157</sup> Vasily Grossman, *Life and Fate*, transl. by Robert Chandler, (New York Review Books: 1985), 402. *Life and Fate* (*Jizn’ i Sud’ba*) was first published in the Russian language in 1980 by French publisher L’Age D’Homme. The quoted excerpt appears on page 377 of the published Russian version, using the verb *likvidirovat’*. On the previous page (376), Grossman uses the word “exterminated” (*istrebliaia*) to refer to victims of Stalin’s terror. (A copy of Grossman’s manuscript had been saved by Grossman’s friend Semyon Lipkin and eventually smuggled out of the Soviet Union. The KGB had destroyed the manuscript Grossman submitted for publication to the magazine *Znamia* and *Novyi Mir*, as well as copies and rough drafts of the manuscript from Grossman’s home). The novel was not published in the Soviet Union until 1988. Interestingly, the English translations of *Life and Fate* (such as the cited version translated by Robert Chandler) sometimes use the term “genocide” to refer to the extermination of Jews, rather than translating Grossman’s language more literally (e.g., as extermination or liquidation.)

By avoiding the term genocide to refer to Nazi atrocities, Grossman is able to sidestep both the semantics around the legal definition of the term, and perhaps more importantly, avoid the definition promulgated by the Soviet press which denied that a socialist state could commit genocide. Though the Soviet censors prevented *Life and Fate* from being published during Grossman's lifetime, the work reveals the possibility of profoundly condemning acts of genocide without employing the actual term, and thus avoiding the politicized hazards of it, including the privileging of select groups. Because Grossman uses the same words to describe Nazi and Soviet victims of oppression, he implicitly raises the question of why victims of the Nazis should merit the use of the term genocide while victims of the Soviet state should not. Or to apply the issue of privileging select groups to Trainin's concept, why should crimes against peace apply only to Soviet victims, and not to victims of Soviet crimes?

## **Epilogue: The Russian Federation, the United States, and International Law Today**

With the collapse of the Soviet Union and the end of the Cold War, the Russian Federation, legal heir to the Soviet Union, inherited much of the property and legal status of the Soviet Union, such as its permanent membership on the UN's Security Council. Though the Soviet Union ceased to exist, Trainin's blend of positivism's defense of sovereignty with functionalism's aim at effectiveness and supranational bodies leads to the contemporary conundrum of international law. The approaches of American and Russian governments to international law bear striking similarities to Trainin's blend of positivism and functionalism. Though America espouses functionalism rhetorically, there is always positivist language of state sovereignty to prevent American involvement. International law is for other states to follow.<sup>1</sup> Under Putin's leadership, the Russian Federation espouses similar rhetoric about international law, with similarly self-serving results. Neither state has joined the International Criminal Court—an intergovernmental organization prosecuting genocide, crimes against humanity, and war crimes—both citing concerns about sovereignty.

One significant difference between the two states is the relative status of human rights discourse. Lauterpacht's legacy is entwined with the development of international human rights law and discourse. While human rights law did not emerge in full force during Lauterpacht's life, human rights discourse exploded in the 1970s.<sup>2</sup> Lauterpacht's writings on individual rights,

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<sup>1</sup> Of the nine core human rights treaties the United States has ratified only three: The International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, and the Convention against Torture. The unratified six treaties are as follows: the International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, the International Convention for the Protection of all Persons from Enforced Disappearance, and the Convention on the Rights of Persons with Disabilities.

<sup>2</sup> Samuel Moyn, *The Last Utopia: Human Rights in History*, (Cambridge: Harvard University Press, 2010), Christian Philip Peterson, *Globalizing Human Rights: Private Citizens, the Soviet Union, and the West* (New York: Routledge, 2012), Sarah Snyder, *Human Rights Activism and the End of the Cold War: A Transnational History of the Helsinki Network* (Cambridge: Cambridge University Press, 2011).

especially his argument that the individual is a subject of international law, provided a strong foundation for later human rights law and discourse. At the same time, the efficacy of international law to protect human rights is decidedly mixed. While the European Court of Human Rights does provide an enforcement venue for European member states (the Charter is greatly influenced by Lauterpacht's work), human rights are also routinely ignored by states around the world, even by member states like Russia. The Russian Federation, while a member state of the European Court of Human Rights, has received much criticism for not cooperating with the court. Many of the Russian cases before the court involved civilian victims of cleansing operations (*zachistki*) in Chechnya during which civilians regularly disappeared.<sup>3</sup> While many opponents to the Putin regime employ human rights rhetoric, and some law schools in Russia advocate for and teach human rights law, most law schools (and Russian international lawyers) continue to advocate for positivist approaches to law.<sup>4</sup>

With the end of the Cold War, the field of international law became more contested by various groups and even more divided among nations.<sup>5</sup> Nonetheless, the functionalist critique of positivism has held sway, and now limitations on state sovereignty, rather than sovereignty's paramount importance, is a popular approach of international law.<sup>6</sup> Thus, both the legal definition of genocide, a term that has come into widespread use since the end of the Cold War in the 1990s, and the on-going rejection of positivism render visible the continued influence of functionalism.

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<sup>3</sup> See, e.g. Ole Solvang, "Russia and the European Court of Human Rights: The Price of Non-Cooperation," Human Rights Brief 15, no.2 (2008): 14-17.

<sup>4</sup> Mälksoo, 82. Though some Russian law schools advocate for human rights, these are not the *grand écoles*, which still advocate strongly for state sovereignty.

<sup>5</sup> David Kennedy, "My Talk at the ASIL: What is New Thinking in International Law?" *Proceedings of the Annual Meeting (American Society of International Law)* Vol.94 (April 2000) 104-125, 115.

<sup>6</sup> See David Kennedy, "When Renewal Repeats: Thinking Against the Box," *New York University Journal of International Law & Policy*, (Vol. 32, 2000) 335-500, 383.

At the same time, despite the rhetorical yearning for functionalism, sovereignty remains a central aspect of international law and legal argument. While some scholars may view Soviet approaches towards international law as an archaic curiosity, Trainin's work, in particular 1944's *Hitlerite Responsibility Under Criminal Law*, is representative of much of international legal argument today: functionalist thought did not succeed in entirely getting rid of the shackles of sovereignty. In other words, *Hitlerite Responsibility* exposes the contemporary contradictions in international law, in which claims of sovereignty coexist uneasily and in contradiction with claims of universality.<sup>7</sup> While Trainin proclaimed the U.S.S.R. to be a "defender of sovereignty and equality of large and small states," adhering to a classical positivist international legal order with all of its moral neutrality, Trainin also claimed that "the Hitlerites must and shall bear stern responsibility for their misdeeds", implying a moral component to international law, such as a standard of civilization.<sup>8</sup> In this way, *Hitlerite Responsibility* and therefore Soviet international law of the wartime period foreshadowed contemporary American international law which is both firmly rooted in protecting state sovereignty, (as displayed by US refusals to join the International Criminal Court), but nonetheless limits that sovereignty in select ways through international organizations like the United Nations.<sup>9</sup> The contemporary approaches of the United States and Russia toward international law mirror Trainin's approach, albeit with an ideology of American and Russia exceptionalism in lieu of socialist ideological exceptionalism. All that remains is the desire to claim sovereignty, and renounce international obligations, while proclaiming moral universalism.

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<sup>7</sup> Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Helsinki, 1989), republished by Cambridge University Press in 2005.

<sup>8</sup> One of course needs to recognize the absurdity of declaring the USSR to be a defender of sovereignty for large and small states, especially for Poland, the Baltic states, Czechoslovakia, Hungary, Romania, and Bulgaria, among other states. Trainin, *Hitlerite Responsibility Under Criminal Law*, 13, 15.

<sup>9</sup> Of course this contradiction between sovereignty and claims of normativity is also seen in positivist thought, as Martti Koskenniemi shows in *From Apology to Utopia: The Structure of International Legal Argument*.

Genocide as a crime under international law was first prosecuted in the International Criminal Tribunal for Rwanda (ICTR), and subsequently in the International Criminal Tribunal for Yugoslavia (ICTY).<sup>10</sup> Other international tribunals, such as the Special Court for the Sierra Leone and the Ad Hoc Court for East Timor, investigated genocide but did not prosecute it. Only in 2002, as a result of the 1999 Rome Convention, which created an enforcement mechanism for the adjudication of international legal crimes, did the International Criminal Court come into existence. At long last an institution exists that fulfills functionalists' visions presented in 1948, at the time the Genocide Convention passed.

However, lawyers, academics, journalists, not to mention victims of mass atrocities have heavily criticized the legal definition of genocide outlined in the Convention. The heaviest criticism is directed at the concept's failure to include the mass killings of political groups and the difficulty of prosecuting genocide given the specific intent requirement, both features of the document that were fiercely debated at the time. Legal scholars formulated the concept of auto-genocide in part as a way to address the mass killings of political groups, such as in Cambodia under the Khmer Rouge. Auto-genocide is the mass killing or extermination by a regime of its own people. Auto-genocide posits that the perpetrator is of the same group as the victim. Under that view, the Khmer Rouge killed Khmers based on their nationality (as Cambodians) or ethnicity (as Khmers), even though they belonged to the same group and killed them based largely because of their political group. That is, even though politics provided the motivation for the killings, individuals were killed as Khmers, because the perpetrators wanted to bring on a

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<sup>10</sup> The first application of the Genocide Convention occurred in the 1994 ICTR case *The Prosecutor v. Jean Paul Akayesu* (ICTR-96-4-T) Judgment, (Sept. 2, 1998). Akayesu was found guilty of nine of the fifteen counts against him, including genocide and direct and public incitement to commit genocide. The court also held that rape can be a tool of genocide. Akayesu was sentenced to life imprisonment.

Khmer society untainted by western influences and therefore needed to kill the “traitorous” Khmers.

A number of prominent international legal academics advocate for auto-genocide as a concept, and it is not necessarily inconsistent with the Genocide Convention. The Convention does not contain any requirement that the perpetrator and victim group be distinct, although it is a clear attempt to find a work-around for the fact that the only clearly defined protected groups of the Genocide Convention are presumed “immutable” categories of people.

Despite the coining of the concept of auto-genocide, the Extraordinary Chambers in the Courts of Cambodia (ECCC) decided only to prosecute genocide for acts against ethnic Vietnamese and Islamic Chams, in other words, those groups that would have been clearly protected by the original Genocide Convention.<sup>11</sup> The concept of auto-genocide was considered inconsistent with the Convention. The “immutable” groups protected by the Convention was not the only problem with applying the concept of auto-genocide. The high level of intent required by the Genocide Convention, was as large of a barrier to the concept of auto-genocide as the Convention’s limited protected groups. Because the Genocide Convention requires that perpetrators intend to destroy the group “as such,” the ECCC choose to only prosecute genocide against minority groups, considering the high level of intent required for genocide too difficult to prove in regards to Khmers.

The failure of the ECCC to indict individuals involved in the Khmer Rouge for crimes of auto-genocide implies that the Genocide Convention’s definition is not likely to be expanded in the near future. The prosecution of genocide since the Convention has shown the rigid nature of the definition outlined by the Convention. Even though international law allows for the

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<sup>11</sup> See, e.g. Extraordinary Cases in the Courts of Cambodia, Case 002 Nuon Chea and Kheiu Samphan, Statement of the Co-Prosecutors- Final Submission in Case 002, OCP-02 ECCC Aug, 16, 2010.

definition of genocide to evolve, it has not. No court has been willing to take this step and there has not been sufficient political motivation for another convention. That is, even the mass murder of Khmers has not provided enough ammunition for the definition of genocide to advance, neither through treaty nor through the courts.

In contrast to its rapid change and evolution following World War II, today's international legal order is static and inflexible. Perhaps the lack of a distinct mode of international legal thought has contributed to this resistance to change. That is, functionalism's wide appeal allowed for a language of public international legal argument that was genuinely international. Even states that did not accept the foundations or implications of functionalism were still able to successfully formulate their positions via its rhetoric. Both the Soviet Union and the United States, in spite of their differences, were able to "speak" the same language of international law in the postwar period, providing it legitimacy. We see no such unifying spirit of international law today, perhaps contributing to the apparently static nature of the legal definition of genocide. Moreover, in contrast to postwar lawyers, contemporary lawyers lack a clear mandate for change in international law, probably because there has not been a crisis of such a global order as World War II to mandate it.

In place of genocide, crimes against humanity—a concept that has largely evolved through the courts rather than an international convention defining it—has proved to be easier to prosecute and has filled some of the gaps in international criminal law, including mass killings and persecution based on political group.<sup>12</sup> Today, the international prohibition of crimes against humanity is arguably more effective than genocide. As international legal scholar Leila Sadat notes, crimes against humanity prosecutions

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<sup>12</sup> Sadat, 337.

have been central to the success of the ad hoc tribunals [the ICTY and ICTR] both quantitatively and qualitatively: They are charged to capture key social harms; to address discriminatory and persecutory campaigns that cannot “qualify” as genocide; to avoid lengthy and unproductive discussions about whether a conflict is international or non-international in nature by eliminating armed conflict as an element of the crime; and perhaps most importantly, to provide broad protection for civilians against the depredations of States or organizations whose policy it is to attack them.<sup>13</sup>

Sadat observed that “in case after case genocide counts resulted in acquittals at the [ICTY], and it was, instead, largely the crimes against humanity counts alleging persecution based upon ethnic origin that captured this particularly grievous dimension of the conflict.”<sup>14</sup> Lemkin’s opposition to crimes against humanity now seems misplaced. The real roadblock to genocide prosecutions has been the Genocide Convention itself, which limited the groups protected from genocide and requires a high bar for courts to prove level of intent.<sup>15</sup>

The Genocide Convention has not prevented all genocides as its occurrence has hardly abated in recent years. In her book, *A Problem from Hell*, Samantha Powers recounts events that the media and others labelled genocide that have taken place in Cambodia, Iraq, Bosnia, Rwanda, and Kosovo. Darfur received much press attention for the alleged genocide occurring there. Today, Yazidi minorities in ISIL controlled areas are another possible victim of genocide, although if outside powers intervene it seems much more likely that it will be due to perceived threats at home, rather than due to the alleged genocide.

### ***Aggressive War in International Law***

In the years following the Nuremberg Tribunal (and its equivalent for crimes committed by the Japanese, the Tokyo Tribunal), neither aggressive war, nor indeed any other concept of

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, 344.

<sup>15</sup> The General Assembly postponed considering the draft code until the ILC completed its work on aggression, which did not happen until 1996, and it was never adopted.

international criminal law (genocide, war crimes, crimes against humanity) was prosecuted widely as an *international* crime. It was not until the 1990s, at the ICTR and the ICTY, that a genuinely international body, made up of judges representing many domestic legal systems, again adjudicated international criminal law. Some scholars have interpreted this international silence as a “culture of impunity” in international law. This move away from a culture of impunity, these scholars claim, began with the Nuremberg Trials, went underground during the Cold War, only to emerge again in the 1990s.<sup>16</sup>

However, these scholars are only looking at *international* tribunals. This viewpoint misses the myriad domestic courts prosecuting war criminals between Nuremberg and the 1990s, including Soviet trials through the 1950s, the Eichmann Trial in Israel, the Frankfurt Auschwitz Trials in Germany in the 1960s, and the Klaus Barbie Trial in France in the 1980s.<sup>17</sup> While many of these postwar trials were inconsistent in their application of international criminal law, especially regarding the concept of crimes against humanity, they nonetheless built off the foundations of Nuremberg.<sup>18</sup> Indeed, international law was being cited in domestic trials during the Cold War.

What is true is that the end of the Cold War allowed for the emergence of genuinely international bodies to adjudicate international law. The 1990s saw the establishment of the International Criminal Court (ICC) at a conference in Rome in 1998. Four years later, the “Rome Statute” came into force, and established jurisdiction over four crimes: genocide, war

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<sup>16</sup> James Crawford, “The Drafting of the Rome Statute,” in *From Nuremberg to the Hague: the Future of International Criminal Justice*, (Cambridge: Cambridge University Press, 2003), 109-156.

<sup>17</sup> Manfred Zeidler, *Stalinjustiz contra NS-Verbrechen: Die Kriegsverbrecherprozesse gegen deutsche Kriegsgefangene in der UdSSR in den Jahren 1943-1952: Kenntnisstand und Forschungsprobleme* (Dresden: Hannah-Arendt Institut für Totalitarismusforschung, 1996).

<sup>18</sup> Devin O. Pendas, “The Fate of Nuremberg: The Legacy and Impact of the Subsequent Nuremberg Trials in Postwar Germany,” in *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, Kim C. Priemel and Alexa Stiller, eds. (New York and Oxford: Berghahn Books, 2012), 249-275, 258.

crimes, crimes against humanity, and aggression. The ICC used the Genocide Convention to define genocide, built off of crimes against humanity defined by international criminal tribunals (such as Nuremberg, Rwanda, and Yugoslavia) and war crimes defined by the Hague and Geneva Conventions, as well as the aforementioned tribunals.

By the 1990s, international criminal law finally re-emerged but with one important distinction from the Nuremberg Trials. Aggressive war was nowhere to be found. As Devin Pendas has argued, international law's failure to eliminate aggressive war, one of the avowed Allied goals, shows how little Nuremberg actually accomplished.<sup>19</sup> The ICC ultimately defined aggression in a way that reflects earlier definitions of aggression proposed by figures like Trainin and Lauterpacht and draws particularly on a 1974 General Assembly Resolution defining aggression.<sup>20</sup> However, while agreeing to a broader definition of aggression, the General Assembly delegates forbade the ICC from prosecuting aggression until 2017. It remains to be seen how, if at all, the ICC will prosecute aggression.

On this last point about aggression, international law runs into the perennial problem of sovereignty and the imbalance between strong and weak states. Legal scholar Kirsten Sellars has identified “the problem for those who aspire to make aggression a crime. The force of the aggressor constitutes the offense, and brings the law into play; but the force of the *victor* is the precondition for the implementation of the law.”<sup>21</sup> Sellars is correct, but this observation of aggression's paradox can extend to all concepts of international criminal law and is the crux of the problem of enforcement that Lauterpacht tried to overcome.

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<sup>19</sup> Pendas, 249-275.

<sup>20</sup> Kampala defined the individual crime of aggression as the planning, preparation, initiation or execution by a person in a leadership position of an act of aggression and requires that the act of aggression is a manifest violation of the United Nations Charter. An act of aggression is the use of armed force by one state against another without authorization by the Security Council and/or in self-defense. The actions defining aggression draw heavily from the 1974 General Assembly definition of aggression and includes actions like invasion by armed forces, bombardment, and blockade.

<sup>21</sup> Sellars, 289.

Lauterpacht's adoration of rights rhetoric reflects his assimilation into Anglo-American values in international law, and as such, is not as neutral and universal as he claimed. Human rights reflect older echoes of imperial "civilizing missions" which ignored the realities of a diverse world.<sup>22</sup> Lauterpacht's view of human rights largely reflected the political milieu of his adopted homeland of Britain. To give credit to Lauterpacht, his views on human rights were much broader than those of the British government. For the British government, civil and political rights were what human rights meant. Lauterpacht however considered economic and social rights to be legitimate human rights.<sup>23</sup> All the same, the concept of human rights has its origins back where international law was first born, in Western Europe. As Anthony Pagden notes, in arguing for human rights, one argues for a Western European understanding of what it means to be human.<sup>24</sup>

Lemkin was equally a product of his time and experience. Interested in genocide as a concept from an early age, his experience as a Polish Jewish refugee eventually finding a home in America strengthened his early opposition to both Soviet power and claims of unlimited sovereign rights. Lemkin apparently never confronted the implications of his beliefs in natural

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<sup>22</sup> See Stephen Hopgood, *The Endtimes of Human Rights*, (Ithaca: Cornell University Press, 2013). Anthony Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," *Political Theory*, Vol. 31, No. 2 (April 2003), 171-199.

<sup>23</sup> At the same time, political and civil rights are the most important human rights in the view of most Westerners. For the role of the Soviet Union in the Universal Declaration of Human Rights see Jennifer Amos, "Embracing and Contesting: the Soviet Union and the Universal Declaration of Human Rights, 1948-1958," in Stefan-Ludwig Hoffmann, ed., *Human Rights in the Twentieth Century*, (New York: Cambridge University Press, 2011), 147-165.

<sup>24</sup> Noting objections to the concept of human rights ranging from the Middle East to part of Asia, Pagden claims that: "What all of these criticisms have in common is their clear recognition of-and objection to-the fact that" rights" are cultural artefacts masquerading as universal, immutable values. For whatever else they may be, rights are the creation of a specific legal tradition-that of ancient Rome, and in particular that of the great Roman jurists from the second to the sixth centuries, although both the concept and the culture from which it emerged were already well established by the early Republic. There is no autonomous conception of rights outside this culture." Pagden, 172. Pagden argues that human rights as a concept is a development with origins in natural rights. The modern understanding of natural rights evolved in Europe's struggle to legitimize its overseas empires. The French Revolution altered this understanding of natural rights, by joining human rights to the idea of citizenship, tying human rights to a political system of European origin. In arguing for human rights, one argues for a Western European understanding of the human.

law. For just as natural law could proclaim the criminality of genocide, it could also justify genocide.<sup>25</sup> The “standard of civilization” so beloved by nineteenth-century positivists had roots in natural law ideology. Natural law could be used, and has been used, to claim that “barbarians” have no rights, that war can be used to “exterminate all the brutes.”<sup>26</sup>

Unsurprisingly, the concepts of international law most associated strongly with our three main figures—aggressive war (Trainin), genocide (Lemkin), and human rights (Lauterpacht)—have been both problematic and constructive in application. Each concept can be used by the powerful and the powerless for completely opposing goals. At the same time, the background and lives of these three figures reveal both their own individual choices in applying or rejecting the dominant legal approaches of their milieu. While their professional lives as legal scholars revealed important similarities and differences among the three men, each one was deeply influenced by the fact of their birth and upbringing in the unstable eastern European imperial borderlands that always lacked clear national boundaries. In addition, because of their Jewish

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<sup>25</sup> One writer who made this observation was Kurt Vonnegut who wrote that “contemptible human law....insists that our government officials be guided by nothing grander than human law.” Kurt Vonnegut, *Palm Sunday*, 10-11 (New York: Delacorte Press, 1989). This human law (or positivism) is in contrast to divine and natural law of which “everybody knows that there are laws with more grandeur than those which are printed in our statute books. The big trouble is that there is so little agreement as to how these grander laws are worded. Theologians can give us hints of the wording, but it takes a dictator to set them down just right- to dot the *i*'s and cross the *t*'s. A man who had been a mere corporal in the army did that for Germany and then all of Europe, you may remember, not long ago. There was nothing he did not know about divine and natural law.” Vonnegut, 10. Here, Vonnegut ties natural law not to the punishers of the Nazis but to the Nazis themselves. Of course other contemporaries of Vonnegut, including legal specialists at Nuremberg, believed that Germany's turn away from natural law was responsible for the Nazis. Perhaps the most articulate and convincing cautionary tale against natural law is Dan Edelstein's *The Terror of Natural Right: Republicanism, The Cult of Nature, and the French Revolution*, (Chicago: University of Chicago Press, 2009). While Edelstein does not clearly define “natural rights,” he uses the term to refer to the nebulous rights that apply when a constitution does not, and thus one returns to a “state of nature with respect to the tyrant.” Edelstein, *Terror of Natural Right*, 150. Edelstein thus argues that the Terror is the result of the particular natural rights ideology that developed among elites. Edelstein finds many parallels between the French and Russian Revolutions, especially regarding the Terror, noting that [A]most immediately after seizing power, the Soviets created ‘people's courts,’ a practice that Lenin made official on November 22, 1917. Two days later, however, the Bolsheviks also created ‘revolutionary tribunals,’ for trying individuals suspected of being ‘enemies of the people,’ or for condemning those already outlawed by governmental decree. Edelstein, 267-268.

<sup>26</sup> See e.g., Sven Lindqvist *Exterminate All the Brutes*, transl. Joan Tate, (New York: New Press, 1996); see also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, (Cambridge: Cambridge University Press, 2005) depicting the lack of rights of “barbarians” under international law, as well as the justness of all-out wars of extermination against barbarians.

backgrounds, they all possessed an understanding of animus and the threat of violence against individuals because of their larger group membership. Perhaps their one clear common interest—that of the burgeoning field of international criminal law—stemmed from this common background.

### ***Genocide, Human Rights, and Aggressive War in the Conflict in Eastern Ukraine***

The conflict in eastern Ukraine has again exposed fissures in international law, and the ease in which international legal concepts can be manipulated. Both Ukraine and Russia lob accusations of genocide, aggression, and human rights violations against one another. Just as Trainin could allege aggressive crimes against peace against non-socialist states, Putin can allege aggression based on the build-up of NATO troops along Russia's borders. Claims of genocide too, abound, in ways that would make Lemkin furious. Sergei Glazyev, a Russian nationalist, has argued that ethnic Russians are in danger of becoming victims of genocide from neighbors like Ukraine and Estonia, as well as from the West. Glazyev cites declining living standards, health, and fertility rates for Russians, alleging that outside forces are conspiring to “smash” Russian civilization.<sup>27</sup> Even the pragmatic Lauterpacht's approach to human rights has been invoked by both sides. Despite official Russian unease with the concept of human rights, the breadth of the concept has provided an opportunity to criticize the Ukrainian government and their supporters, just as the broadness of human rights rhetoric was invoked by both the Soviet Union and the United States during the Cold War.

While the concepts of crimes against peace, genocide, and human rights were used politically by Trainin, Lemkin, and Lauterpacht, perhaps only Trainin, that student of Soviet

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<sup>27</sup> Sergei Glazyev, *Genocide: Russia and the New World Order*, (Washington, D.C.: EIR News Service, 1999).

politics, would not be surprised by ease in which opponents invoke the same concept for opposing ends.

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