

Stalin's Soviet Justice

"Show" Trials, War Crimes Trials, and Nuremberg

Edited by David M. Crowe

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Alexander Victor Prusin
(1955–2018)
'Of Blessed Memory'

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From Geneva to Nuremberg to New York: Andrey Vyshinsky, Raphaël Lemkin, and the Struggle to Outlaw Revolutionary Violence, State Terror, and Genocide

Douglas Irvin-Erickson

Raphaël Lemkin, the originator of the concept of genocide and a leader of the movement to outlaw genocide at the United Nations after the Second World War, has become increasingly recognized as a human rights hero. Yet, Lemkin was all but a footnote in the history of international criminal justice and human rights in the twentieth century until the 1990s. The arc of Lemkin's rising fame contrasts with the arc of the notoriety of Andrey Vyshinsky. A towering jurist in the Soviet Union, Vyshinsky served as prosecutor of the Russian Soviet Socialist Republic, was the architect of Stalin's Great Purge between 1934 and 1938, and is forever a symbol of Stalinist manipulations of the law in the service of political struggle. Lemkin, on the other hand, was a minor figure in the Polish prosecutor's office, and a modest professor of international law whose career was cut short by the Soviet and German conquest of Poland. In the United States in the 1940s, Lemkin devoted himself single-mindedly to his campaign to outlaw genocide at the UN. He succeeded in guiding the convention into law, but at a sharp cost. Lemkin's efforts prevented him from fulfilling his teaching and research duties at Duke, Yale, and Rutgers universities. Each showed him a polite exit. In his last years of life, he was in debt to his friends, living in a cold-water flat in New York, and the US government was working to undermine the UN Genocide Convention in the practice of international affairs.¹ By the time he sat down to write his autobiography, Lemkin thought his life's work had been for naught.

As the authors in this volume demonstrate, the Soviets played an important role in the development of international criminal justice during and after the Second World War. Nevertheless, if the Soviet role in shaping international law has been overlooked, it is probably because of the contradiction between the goals of twentieth-century international criminal law to limit state brutality on the one hand and, on the other hand, the mass violence committed by the Soviet state, where terror and mass violence against ethnic and national minorities were tools of nation-building, state-building, or empire-building.² Nevertheless, the Soviets helped usher into existence the twentieth century's system of international criminal law. After the Second World

War, the Soviets and the victorious powers certainly had no interest in limiting their own state sovereignty at the Nuremberg tribunals, where a general coconscious emerged that the Allies would only prosecute crimes committed by Axis powers in connection to the war and thus would only hold defendants accountable for what they did to foreign populations. At the UN, after the Nuremberg tribunal, the Genocide Convention expanded international criminal law in two important ways. First, because genocide was defined as a crime of peace and war, a treaty outlawing genocide would expand humanitarian protections beyond the purview of war crimes. And, secondly, the Genocide Convention allowed for the prosecution of crimes committed by state leaders against their own state's citizens and became the cornerstone of international efforts to establish a system of international law to limit the killing and suffering a state could inflict upon its own population under the shield of state sovereignty.

During their lifetimes, Vyshinsky dismissed Lemkin as an insignificant figure, unimportant in world affairs because he did not speak on behalf of a government. In Vyshinsky's mind, Lemkin's words and ideas were not supported by the hard power of a state, so ignoring Lemkin carried no consequences.³ By the time Lemkin and Vyshinsky arrived at the UN, Lemkin's tireless activism proved that civil society pressure could sway the foreign policy of democratic states, such as the United States and the United Kingdom. The Soviet delegation at the UN, however, was unmoved by Lemkin's appeals to outlaw genocide, yet they were still highly motivated to support the drafting of the Genocide Convention because they were concerned with the geopolitical consequences of what might happen if they withdrew from the drafting committees and United Nations still ended up passing the treaty anyway. This context—where the Soviet Union was a central geopolitical actor in efforts to create this system of international criminal law while simultaneously committing mass violence within its borders—put Lemkin and Vyshinsky on a collision course.

The relationship between these two jurists, Lemkin and Vyshinsky, and their personal disputes over the span of three decades, provides insights into the larger evolution of international criminal law before and after the Second World War. The portrait that emerges from their interactions, however, runs in contrast to much of the accepted wisdom presented in the scholarship of twentieth-century humanitarian law and international criminal law. As their ethical and humanitarian concerns could not have been more at odds, so too were their theories of the law and politics, and the relationship between the law and state power. As Valentyna Polunina argues in her chapter in this volume, Vyshinsky understood the law as a coercive instrument used by states to regulate human behavior. Lemkin, by contrast, saw the law not as a coercive instrument wielded by states but as a normative instrument enshrined into law through bottom-up social movements that could then be used to regulate human behavior—including the behavior of states themselves.⁴

Barbarism, vandalism, and capitalist intrigue

The occasion of Vyshinsky and Lemkin's first encounter was after Lemkin published his essay, "Akte der Barbarei und des Vandalismus als Delicate Juris Gentium."⁵

Lemkin intended to deliver the paper at the Fifth Conference for the Unification of Penal Law in Madrid in 1933, but the Polish government prohibited him from attending.⁶ The paper is now famous in the field of genocide studies for presenting the conceptual precursors of the word "genocide" that he would coin in the winter between 1941 and 1942. In his memoirs, Lemkin wrote that his colleagues at the Association Internationale de Droit Pénal, and many of his friends, discussed Hitler's *Mein Kampf* in the early 1930s and believed the German chancellor intended to carry out his promise to institute a regime of biological national purity. "Now was the time to outlaw the destruction of national, racial and religious groups," Lemkin wrote.⁷ Building on his works on the Soviet penal code, the proposal was Lemkin's first attempt to outlaw the destruction of nations.⁸ Lemkin's paper that he published in the conference proceedings listed five "new types of crimes" under the law of nations:

1. barbarity (*actes de barbarie*)
2. vandalism (*actes de vandalisme*)
3. provoking catastrophes in international communication (*provocation de catastrophes dans la communication internationale*)
4. disrupting international communication (*interruption intentionnelle de la communication internationale par Poste, Télégraphe, Téléphone, ou par la T.S.F.*)
5. spreading human, animal, or vegetable contagion (*propagation de la contamination humaine, animale, ou végétale*).⁹

In his text, Lemkin credited his colleague at the association, Vespasian Pella, with creating the concepts of barbarity and vandalism, and cited previous papers delivered by Pella and Henri Donnedieu de Vabres. Pella had used these concepts in his 1929 proposal to outlaw currency counterfeiting, to differentiate between modern crimes such as counterfeiting and fraud.¹⁰ Lemkin's writings gave the words their theoretical content.¹¹ Lemkin applied the principles of universal jurisdiction to these crimes that linked the legal concept of terrorism to the practice of state violence targeting national minorities. This was a direct response to the Nazi rise to power and terror against Jews in Germany, and a response to Soviet state terror.¹²

Lemkin defined barbarity as the attempt to destroy ethnic, religious, national, or other types of social collectivities. He included in this category brutalities that strike at the lives and dignity of individuals as part of a campaign to destroy the collectivity of which the victim is a member.¹³ A systematic and organized assault against whole populations, barbarity encompassed pogroms, massacres, mass rape, forced removal of populations, forced adoptions, and cruelties designed to humiliate the victims, or even attempts to destroy the economic existence of the members of a collectivity in order to destroy the collectivity. Vandalism, Lemkin wrote, was an attack targeting a collectivity taking the form of a systematic and organized assault against the heritage or unique genius and achievement of a collectivity. Vandalism was the crime of destroying a group's cultural works, including libraries and art, but also their unique rituals, ceremonies, and beliefs. The cultural creations, arts, and traditions of each nation contributed to the enrichment of all humanity, Lemkin

reasoned, and therefore belonged rightfully to humanity.¹⁴ Lemkin insisted the two crimes were intertwined in one process of attacking the physical and spiritual existence of nations.

In the existing laws of nations, Lemkin wrote, explaining his ideas on barbarity and vandalism, there were three categories of humanitarian protections under international law. The first category corresponded to attacks on individual rights and included "laws against slavery or the trade in women and children . . . to protect the freedom and dignity of individuals and prevent them from being treated as commodities." The second category of offenses "relates to the individual and the collectivity" and essentially amounted to minority rights treaties that he believed were inadequate. The third category concerned "the relationship between two or more collectivities" and encompassed "offenses against the laws of nations that seek to protect peaceful relations between collectivities, such as the outlawing of propaganda intended to incite wars of aggression, and have as their goal the maintenance of good economic and political relations between nations and groups."¹⁵ In his proposal to outlaw barbarity and vandalism, Lemkin offered a fourth type of violation—one he believed was a hallmark of Soviet terror and the kinds of violence defining Nazi politics in Germany.¹⁶ This fourth category was attacks committed against individuals with the intention of destroying a collectivity. In such cases, Lemkin wrote, "the goal of the perpetrator is to harm an individual while causing damage to the collectivity to which the individual belongs. These type of offenses bring harm not only to human rights, but also undermine the foundation of the society."¹⁷ Yet, in these matters, international law was silent. Lemkin grouped barbarity and vandalism together with laws against state terrorism; piracy; slavery; pornography; narcotics trade; counterfeiting money; disrupting international communication; and spreading human, animal, and vegetable contagions.

Vyshinsky, who at the time was the procurator general of the Soviet Federative Socialist Republic (SFSR), believed this grouping was illogical and amounted to a ruse. He denounced Lemkin as proposing ideologically and politically motivated laws to target the Soviet Union under the pretense of creating a neutral, apolitical body of unified international laws. In the introduction to a book by Aron Trainin covering the international movement for the unification of penal law, Vyshinsky wrote that the unification movement never mentioned actual struggles "with international crooks and charlatans of any stripe, not the fight with the bandits like Al Capone," but instead focused on abstract concepts like "terrorism." The concept of terrorism these Western liberals claimed to be fighting, Vyshinsky continued, "turned into the central problem of the bourgeois unification movement" because it created the basis for limiting state sovereignty and "removing the state from its pedestal." Vyshinsky went on to add that "no evasions and intricacies of such unifiers as Lemkin, who tried again to disguise the true purpose of the criminal interventionists with references to 'vandalism' and 'barbarism,' can mislead anybody" because "the true meaning of the unifiers' efforts is to legally and politically justify the right of the counterrevolutionary bourgeoisie to intervene in the internal affairs of any state, under the pretext that they are concerned for the fate of 'culture and civilization.'"¹⁸

The unifiers at the League of Nations

Who were these "unifiers" Vyshinsky thought were trying to use international law to wage political struggle against the Soviet Union, and protect a capitalist and imperialist international system against a socialist revolution?

In 1932, Lemkin's law school mentor Emil Stanislaw Rappaport brought Lemkin into the Association Internationale de Droit Pénal. The two collaborated to draft a new Polish criminal code in 1932. The code was highly unusual in that Article 113, which Lemkin wrote, criminalized the production and dissemination of propaganda intended to incite a domestic population toward aggressive war and violence.¹⁹ Just a few years earlier, in 1927, Hersch Lauterpacht had published an influential essay with the Grotius Society, finding that prohibitions on propaganda to incite war were not violations of international law but could be enshrined in national laws, and even in municipal laws, through reciprocal treaties.²⁰ Lemkin followed Lauterpacht's ideas in drafting Article 113, and he claimed the Polish penal code was the first in the world to outlaw propaganda to incite violence.²¹ In his commentary on the law, Lemkin argued that domestic laws could be instruments for international peace because war and political violence were aspects of state policy that had to first be legitimized domestically.

Lemkin's idea to criminalize hate speech and propaganda that incited violence drew on the works of Pella, who had authored a well-known book that argued that fanatical nationalists or religious groups were capable of seizing control of state institutions and directing state security forces to destroy internal opponents while moving the state toward aggressive war.²² The challenge of international law, Pella argued, was that these groups were closed societies with their own internal symbols and shared language that forced people to follow a "spirit of the group," thinking and acting in unified ways that inherently rejected international law as legitimate. Pella argued that such groups—from religious movements, to paramilitaries, cliques within armies, to criminal rings—could seize control of state institutions and use threats of violent repression or promises of favor to bring other social groups into the fold who could bestow legitimacy on the movement while disseminating the movement's values, such as teachers, religious leaders, and artists.

Pella believed the only way under international law to handle these movements was to hold the groups—and the state they controlled—collectively responsible for international crimes.²³ Pella saw nations as a group of people joined by language or custom, and he defined nations as equivalent to races, Lewis writes, so that he ascribed to nations an atavistic and timeless essence.²⁴ Pella argued that international criminal law could be used to prosecute individuals and nations, in order to prevent these groups from taking control of state institutions and mobilizing the state toward war and violence. When a state fell under the control of such movements and began suppressing competing nations or races within its borders, or even massacring entire groups, internationally sanctioned military intervention to remove the national or religious group from power was justified.²⁵ As Vyshinsky complained, Pella's formulation legalized aggressive war so long as a humanitarian pretext could be invented.

De Vabres, meanwhile, had authored a study of the stranger in international law from antiquity to the present, arguing that the modern state needed to develop a type

of criminal law that erased the distinction between citizens and foreigners and treated everyone who happened to pass within the state's borders equally under the law—regardless of their nationality, citizenship, or particular identity.²⁶ Pella, building on this work, pioneered the development of a new form of law for “collective state crimes,” to create a criminal justice system that could regulate the relationship between states.²⁷ With Pella and de Vabres leading the way, the Association Internationale de Droit Pénal became one of the most important organizations at the League of Nations, working to establish an international criminal court and write an international criminal code.

Lemkin was not entirely unknown when he joined the association. In the 1920s, he developed a reputation as an expert on Soviet terror. Indeed, he was well on his way to being a widely recognized expert on the way ruling political parties in governments used domestic criminal codes to repress political opponents in the name of protecting society. In his 1928 book, *The 1927 Criminal Code of Soviet Russia*, Lemkin noted that the reforms made to the Soviet Russian penal code after Lenin's death marked no substantive difference from the laws Lenin's party enacted in 1922. The only difference was that the new code drew on nineteenth-century Italian positivist legal theory to explicitly codify “social protection” as the purpose of the law, he wrote. The Soviet system conceived of the law as a form of social protection and not simply a system to punish individual crimes, Lemkin wrote.²⁸ He added that this legitimized the arrest and killing of people who had a social consciousness considered criminal. The Soviet legal code was not merely a tool for maintaining the gains of the proletarian revolution, he argued; the law was a means for the education of the proletariat in the new social order, and therefore it actively helped create the new Communist system by providing the state violence necessary for the destruction and transformation of the bourgeoisie.²⁹ This small, but crucial, observation would remain a central component of his study of state violence against identity-based groups and the law: he saw such repression and violence (whether he called it barbarism and vandalism, or genocide) as legitimized through the law under slogans of social protection—to remove ethnic and national minorities from society to either protect society or create new societies built around new social identities.

In his 1929 book on the Italian penal code, Lemkin concluded his description of the law with the argument that the legal code extended Italian sovereignty beyond Italy's borders through laws such as the criminalization of “insults to Mussolini committed by foreigners abroad.” This “exaggerated nationalism,” Lemkin wrote, cannot contribute to world peace in any sense of the word.³⁰ In addition to writing about Soviet and Italian state terror—and the way the criminal codes of both states provided the violence necessary for securing political gains of the ruling party, while directing state violence against national cultural minorities—Lemkin was also paying close attention to the rise of Hitler and the National Socialist Party in Germany. For Lemkin, the fate of peoples could not be left to humanitarian movements, and the existing laws of war were inadequate to handle the new forms of political violence afflicting the world.

Lemkin's 1933 proposal to outlaw barbarism and vandalism at the League of Nations, therefore, drew on robust intellectual and legal traditions. Vyshinsky saw this movement to create an international, unified system of criminal law that Lemkin was a part of as nothing but an attempt by capitalist countries to coordinate international repression

against economic and political adversaries. The keynote speaker on the Conference for the Unification of Penal Law in Madrid that Lemkin had wanted to attend, Vyshinsky wrote, proclaimed as the main objective “of the standardization” of international law the need to combat the communist movement. “And no evasions and intricacies of such unifiers as Lemkin,” Vyshinsky continued, “who tried again to disguise the true purpose of the criminal interventionists with references to ‘vandalism’ and ‘barbarism,’ can mislead anybody.” The true meaning of unifiers' efforts, he continued, is to “legally and politically justify the right to counter-revolutionary bourgeoisie to intervene in the internal affairs of any state, which condition can cause ‘concern’ for the fate of ‘culture and civilization.’”³¹

In the text, Trainin argued that Lemkin intended barbarity to also refer to the destruction and capture of railways, telegraphs, and the infrastructure of states, which were always tactics of revolution. The destruction of cultural artifacts entailed in Lemkin's idea of vandalism, Trainin continued, was a hallmark of revolution. Lemkin had thereby sought to collapse laws against terrorism into a law against barbarism and vandalism that was defined in such a way that the law encompassed revolutionary violence. Thus Lemkin, Trainin and Vyshinsky argued, was using the notion of barbarity and vandalism in order to outlaw revolutionary violence as a form of terrorism. The struggle against revolutionary violence was thereby given the label of “humanitarianism,” revealing the true purpose of Lemkin's laws against barbarity and vandalism: they were preparations for attempts by imperialist governments to militarily intervene against revolutions that threatened their interests.³² “In a nutshell,” Weiss-Wendt argues, “Trainin was arguing that revolutionary violence could not be subject to international criminal law” while Lemkin was arguing that it could.

The effort to standardize international law, therefore, according to Vyshinsky, was nothing but an attempt to provide capitalist countries with a humanitarian excuse to militarily intervene in the affairs of other states to, ensure the domestic politics of those states progressed in a way that was advantageous to their own interests. Quoting Pella, Vyshinsky noted that “such intervention . . . denied state sovereignty under the slogan of ‘We must remove the state from its pedestal.’”³³ Humanitarian intervention to save “cultures” and “innocent” civilians, Vyshinsky wrote, was nothing but “an example of hottentot morality,” using humanitarian sentiments to conduct direct interference in the internal affairs of another state in the interests of the bourgeoisie.³⁴

The unifiers at the United Nations

In the late 1930s, Lemkin pursued other academic and legal interests, researching and publishing scholarly works on a wide range of topics—from the regulation of international payments and methods of easing international conflicts through alignments of domestic penal codes, to a short thesis arguing that judges should receive consistent training in the latest developments in the criminological sciences. When Stalin and Hitler's armies converged on Poland in 1939, Lemkin fled to Sweden as a refugee, and took up a visiting position at Stockholm University, where he began his research for what would eventually become his magnum opus published in 1944,

Axis Rule in Occupied Europe—the text in which the word “genocide” first appears in print. This portion of Lemkin’s life, from his flight from occupied Europe to his resettlement in the United States at Duke University, has been covered extensively in scholarship.³⁵ This research includes a growing body of work on Lemkin’s time at the IMT in Nuremberg.³⁶ Though he was largely sidelined from much of the tribunal, Lemkin was deeply disappointed with the IMT not because his concept of genocide was not extensively employed, but because he believed the court was “timid” for limiting the reach of the laws of war only to times of formal war between states. Lemkin, instead, had advocated for a more sweeping vision of international law, to extend the laws of war so that they applied during times of formal peace, in order to bring the conduct of state security forces against their own civilian populations under the rule of international law. During his efforts at the United Nations in 1946, Lemkin was explicit in insisting that the UN should rectify the shortcomings of the Nuremberg precedent, and use a convention against genocide as a way of creating a form of international criminal law that could both apply to times of formal peace, and regulate the actions of state security forces against their own citizens.

Lemkin’s vision of robust body of international law governing the way state security forces treated their own populations was completely at odds with almost every one of the UN member state delegations. The Soviet Union was no exception. But one area of convergence between the Soviet delegation and Lemkin’s position was that they understood international law to be a fundamentally political undertaking—and not a neutral, moral structure that could be separated from the political realities that brought the law into existence. It was for this reason that Lemkin embarked on his famous worldwide campaign to mobilize civil society members from every country represented at the UN to lobby their governments in support of the UN Genocide Convention. This early form of a strategy human rights advocates refer to as “naming and shaming” was more or less effective in countries with democratically elected governments. But, Lemkin found, moving the delegations of UN member states such as China and the Soviet Union required a different kind of political struggle.

In July of 1938, Vyshinsky delivered his *Twelve Theses on International Law*. In his *Theses*, he argued that the Soviet Union could assent to international law and accept some of the principles of international law—even though international law was a bourgeois undertaking being advanced by imperialist states—when it served the interests of the state.³⁷ International law, for Vyshinsky, was therefore not a neutral undertaking or a moral undertaking. Rather, international law was an instrument of policy.³⁸ Under this principle, the Soviets approached the UN Genocide Convention and the Declaration of Human Rights with the utmost importance, as extensions of the Cold War, and a primary battle ground of international politics.³⁹ Lemkin’s strategy for engaging the Soviets during the UN drafting process accepted this reality of the Soviet outlook on politics, and he would attempt to frame the UN Genocide Convention as something that could serve narrow Soviet geopolitical interests.

The Soviet delegation began the debates on the convention by noting that the Genocide Contention was not necessary, and that it would be more desirable to codify the Nuremberg principles. Indeed, at Nuremberg, Lemkin recalled the Soviet delegates arguing then that prosecuting German defendants for genocide was not necessary

either. Lemkin wrote that he had heard rumors that the Soviets were executing German collaborators and sending political prisoners to labor camps in Siberia. “Was this the reason for the Russian delegation’s opposition,” Lemkin wondered, or was it simply their desire to oppose the interests of the United States?⁴⁰ At the United Nations drafting committees, the Soviet delegation followed a strategy of attempting to prevent the passage of the Genocide Convention first and, if this could not be achieved, to work to define genocide as closely to Nazism as possible.

In 1946, at the height of Soviet opposition in the first stage of the drafting processes, Lemkin called on the Czech minister of foreign affairs, Jan Masaryk, to discuss the Soviet opposition, pleading for help in lobbying the Soviets. “I have studied the writings of your father, Professor Tomáš Garrigue Masaryk, who devoted his life to explaining the cultural personality of nations. . . . If your father were alive, he would be fighting for the Genocide Convention. I appeal now to his son,” Lemkin told Masaryk, and asked Masaryk to remind the Soviet minister of foreign affairs that Communists and Soviet prisoners of war died with Jews in the Nazi massacre of 100,000 people at Babi Yar in Kiev.⁴¹ Vyshinsky was now opposing Lemkin’s genocide convention on the same grounds as he had opposed Lemkin’s ideas on barbarity and vandalism—that the goal of outlawing genocide was to provide a humanitarian pretext for allowing the United Nations and powerful states from interfering in the affairs of other states. Lemkin told Masaryk, “why not tell him that penicillin is not an intrigue against the Soviet Union.” Taking out his schedule for the next day, Masaryk wrote “Vyshinsky. Genocide. Penicillin.” The next day the Czech foreign minister called to tell Lemkin that Vyshinsky promised the full cooperation of the Soviet Union. The Soviet delegation, however, never fully supported the genocide convention, and remained committed along with the United States and United Kingdom to ensuring that the eventual text of the convention could not be applied to the atrocities they were committing.⁴²

During the drafting processes, the Soviet delegation sought to define genocide as the killing of individuals on national, racial, and religious grounds, and sought to tie the act as closely as possible to aggressive war. Race was outlawed in the Soviet Union, and racism was punishable as a counterrevolutionary crime, the Soviet delegates argued; thus genocide was impossible in the state. The position allowed the Soviet Union to point to the United States and its history of racial tension as a potentially genocidal society. The decision to eliminate references to genocide as a fascist or Nazi crime or racial hatred was therefore met with protestations by the Soviet delegation, who saw the move as an effort by Western states to attempt to criminalize communism, and secretly encourage the rehabilitation of fascism as a check against communism.⁴³ For Lemkin’s own part, he described much of his lobbying efforts at the UN as a fight to prevent the Soviet and French delegations from defining genocide according to the “Hitler Case,” to instead push the Genocide Convention drafting committees to define genocide in universal terms to prevent genocide in the future, in whatever form it might take. For Lemkin, the German genocide of the last war was one of many genocides that had occurred in history—different in form from those in the past, and from those in the future. To write a Genocide Convention that essentially described the crime according to the German case would outlaw a very specific historical event,

not a crime he argued, thus ensuring that future genocides would not fall under the purview of the law.⁴⁴

Lemkin observed that the Soviet Union, the United Kingdom, and the United States, together with France and a host of other countries, collaborated to try and produce a convention that was “non-enforceable . . . with many loopholes” so that “they can manage life like currency in a bank.”⁴⁵ The delegates at the United Nations who drafted the convention, indeed, were career diplomats whose first priority—above the humanitarian impulse that underscored the treaty against genocide and was used to legitimize the need for such a law—was to advance and protect the interests of their governments and states. It is not just that the Soviet Union's delegates who attempted to weaken the treaty and bend the text of the convention so that the law could be applied to their geopolitical adversaries but not themselves. The US delegates wanted to outlaw atrocities such as those unleashed by Nazi Germany, but they worried that the United States was also guilty of genocide against “red” and “negro” Americans, so they fought to weaken the treaty accordingly. Swedish diplomats were instructed to make sure the convention could not be applied to their country's treatment of the Sami, the Canadian delegation was under orders to ensure the convention would suffer death by committee if it seemed the law might criminalize massacres of native peoples and residential schools. The French government attempted to undermine the ability of the treaty to hold individual officials responsible for genocide and they fought to make the law non-applicable in colonial territories. The South African delegation generally felt that outlawing genocide would hinder their state's ability to deal with their problem of “backwards” peoples. Brazil's delegation believed that genocide against political opponents was part of Latin American culture, and that genocide should be preserved as a right for any government when it needed to deal with threats to the existence of the state. The paradox of this moment, which can seem incongruous at first glance, was that every delegation at the United Nations could agree that the horrors of genocide should be outlawed and atrocities such as the Holocaust should never be repeated—but they also wanted a law that could not be applied to their own grave actions, but still be applied to acts of mass murder that hurt their own national interests. In such a way, Pakistan and India, while accusing each other of genocide and trying to craft a law that could be applied to each other but not themselves, both worked together to support the UN Genocide Convention because they believed it would criminalize the kinds of horrors they suffered under the British.⁴⁶

The starting point for understanding the politics and history of the UN Genocide Convention is a recognition that the Soviet Union was a party to the drafting of the Convention, and that Joseph Stalin personally read and annotated every draft, as Anton Weiss-Wendt has made perfectly clear.⁴⁷ More broadly, Weiss-Wendt has shown that some of the most important authors of the law were the Soviet jurists who orchestrated Stalin's show trials and defended Soviet famine. The final wording of the convention carefully defined genocide so as to avoid criminalizing the kinds of mass violence that had been committed by the powers that won the Second World War—the United States and Canada ensured it could not be applied to native peoples, the United Kingdom and France ensured it could not be applied to the colonies, and the Soviet Union ensured that it could not be applied to political and class conflict and carefully

expunged all allusions to starvation as an act of genocide. For this reason, and others, the Genocide Convention itself was very much a reflection of the emerging Cold War politics of the postwar world, where the United States and the Soviet Union could agree that the new institutions of the UN, such as the Genocide Convention, should be strong enough to constrain the kinds of atrocities that threatened the stability of the international order from which their power derived, but weak enough not to threaten their own sovereignty or jeopardize their national interests. For the Soviet Union, outlawing genocide at the United Nations was a good thing so long as it did not hurt them geopolitically. If the law could be used to hurt the United States, all the better. For the United States, the calculation was exactly the same.

In this sense, Vyshinsky was right about the law. International law was not a moral or neutral undertaking, but rather governments supported it when it served the interests of the state. International law, as the UN Genocide Convention drafting processes demonstrated, was an instrument of policy. Lemkin, for his part, understood this. He described the Paris Assembly in 1948, where the Genocide Convention was passed by the General Assembly, as “the end of the golden age for humanitarian treaties at the U.N.”⁴⁸ When “the lights in Palais de Chaillot went out,” Lemkin wrote, “the delegates shook hands hastily with one another and disappeared into the winter mists of Paris.”⁴⁹ Although an act of government, the signatures of the UN delegates merely signified their state's intention to ratify the treaty in their own parliaments. The UN Genocide Convention was now in the hands of the world's politicians and statesmen—people “who lived in perpetual sin with history” and could hardly be trusted with “the lives of entire nations,” Lemkin wrote.⁵⁰ “The fact is that the rain of my work fell on a fallow plain,” Lemkin wrote describing his efforts to outlaw genocide, “only this rain was a mixture of the blood and tears of eight million innocent people throughout the world. Included also were the tears of my parents and my friends.”⁵¹

The fault lines of the law: Legitimacy, grounding, and politics

Western liberal legal theory has been preoccupied with two intertwined questions: the question of the legitimacy of the law, and the question of how to ground the law. The question of legitimacy, broadly defined, sought to sort out exactly what criteria should be used to justify or sanction the law, and what criteria should be used to justify and sanction the authority that had the right to issue the law and enforce the law in the first place. In Kantian terms (more so with the Kantian tradition rather than Kant's writings) the legitimacy of the law follows from the norms and values of a given society, which are used to both posit and judge the law. For Weber, asserting perhaps the most famous theory of legal legitimacy, the law was a system of rules applied through bureaucratic and judicial institutions according to principles that are known prior to the application of the law, and applied through procedures that are themselves delineated through the law, so that those who applied the law were constrained by the law. In this Weberian view, the legitimacy of modern law is derived from the fact that the law could be rationalized based on general principles, applied equally and fairly, through principles that can be freely known. It is possible to argue these approaches reduce the values

used to judge legitimacy to those same values (a neo-Kantian approach), or reduce the legitimacy of the law to the belief in legitimacy while removing values as a criteria of legitimacy (a Weberian approach).⁵² Both approaches remove power as a criteria for judging the legitimacy of the law, and therefore make it difficult to assess the legitimacy of the law in terms of power.⁵³ This removal of power as a criteria of analysis and judgment occurs despite the fact the question of whether or not a system of laws is legitimate already implies that the law represents an "unequal distribution of power" and an "asymmetric relationship constituted by the command relations between the governors and the governed."⁵⁴

What is striking about both Lemkin and Vyshinsky's views on the law—during the League of Nations years and during the United Nations—is how little they were concerned with any questions of legitimacy, even though they stood on opposing ends of the debates over international criminal law. In fact, the role of politics in the law was something that Lemkin and Vyshinsky understood intimately. For these two thinkers, in fact, politics was the guiding principle in all law—which meant that questions of legitimacy were irrelevant. The law, by its very existence, generated its own legitimacy. That is to say, there was no justification of the law necessary beyond the fact that the law had been brought into existence through political struggle.

How did the two thinkers arrive at such a position?

As Anton Weiss-Wendt has shown, Stalinist Soviet legal theory was based on communist assumptions about the relationship between the law and political power, that the state and the law were institutions that existed to protect, legitimize, and perpetuate class hierarchies.⁵⁵ The law emanated from the state and, as such, the law was never apolitical and therefore always an instrument of state policy.⁵⁶ International law, it followed, was likewise an instrument of policy wielded by the most powerful actors in international politics. Consequently, in the Soviet view, the law was at once a reflection of the political order and a buttress to it. This practical and political notion of international law flew in the face of liberal, or bourgeois, conceptions that saw the law as just only when it was politically neutral. Criminal law that was used as a political tool, in the liberal view, produced show trials—indeed, a term often applied to Soviet tribunals. Likewise, from a liberal perspective, international law that was seen as politically motivated was believed to provoke instability and threaten the foundation for peaceful international relations. That any liberal theory of law would see both criteria as eroding the legitimacy of the law is beyond doubt. Yet, in the Soviet conception, where all law was political, to worry about the legitimacy of law and courts was dangerous. The laws and courts were legitimate because the state existed and had come into existence through political struggle. The law and courts, therefore, were ultimately a product of the political struggle. To pretend otherwise was either delusional or hypocritical.

Lemkin believed this, too. Never in any of his writings did he waste words pondering the philosophical foundation of the law or worrying about how to create fair international trials. For Lemkin, international law was instead a pedagogical tool and a political project, brought into existence through political struggle.⁵⁷ Of course,

Lemkin's thinking on how the law was brought into existence also set him at odds with another core component of liberal legal theory, the question of how the law was grounded. What is striking about Lemkin's legal theory is that, for as much as he is taken as a liberal legal thinker,⁵⁸ he was completely unconcerned with questions of legitimacy and grounding. For Lemkin, the law was not a philosophical undertaking.⁵⁹ The law was a social and moral undertaking, with the potential to constrain human behavior, including political behavior. Remarkably, Lemkin furthermore did not restrict the value of international criminal law, nor the Genocide Convention, to legalism.⁶⁰ Justice and due process were important, he believed, but it was more important for the law to integrate the world in a cosmopolitan order.⁶¹ Here, Lemkin was of like mind with Vyshinsky, his Soviet counterpart and political adversary, in that they both saw the law as a political tool. The task of the Genocide Convention, in Lemkin's mind, was to achieve what the Nuremberg tribunal could not: to serve as a normative and political buttress for efforts to prevent genocide and restructure an international political system accordingly. For Lemkin, like Vyshinsky, this meant there was nothing inherent in the law, or the process of the law, that could guarantee a desired outcome, or justice. The value of international law to the larger effort to prevent state repression and terror against identity-based groups, to prevent genocide, Lemkin believed, was the social, moral, and political struggle the law inspired and supported. In this regard, Vyshinsky might well have agreed with Lemkin that the purpose of the law was to inspire and bolster social and political struggles.

Notes

- 1 Anton Weiss-Wendt, *A Rhetorical Crime: Genocide in the Geopolitical Discourse of the Cold War* (New Brunswick: Rutgers University Press, 2018).
- 2 Whether one sees this violence as part of Soviet nation-, state-, or empire-building depends on one's perspective on the nature of the relationship between Moscow and the rest of the Soviet Union. See, Alexander J. Motyl, *Imperial Ends: The Decay, Collapse, and Revival of Empires* (New York: Columbia University Press, 2013).
- 3 Anton Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention* (Madison: University of Wisconsin Press, 2017).
- 4 Douglas Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide* (Philadelphia: University of Pennsylvania Press, 2017).
- 5 Raphaël Lemkin, "Akte der Barbarei und des Vandalismus als Delicate Juris Gentium." *Internationales Anwaltsblatt* 19 (1933): 117–19.
- 6 Why Lemkin was prevented from going to Madrid is disputed, with some suggesting anti-Semitism and others suggesting it was Poland's fear of provoking Germany or the Soviet Union. It seems both factors played a role. For varying accounts, see William Korey, *An Epitaph for Raphael Lemkin*; Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002); and Ryszard Szawłowski, "Raphael Lemkin's Life Journey: From Creative Legal Scholar and Well-to-Do Lawyer in Warsaw Until 1939 to Pinnacle of International Achievements During the 1940s in the States, Ending Penniless Crusader in New York in the 1950s," in Agnieszka Bienczyk-Missala and Sławomir Debski, eds., *Rafał Lemkin: A Hero of Humankind* (Warsaw: Polish Institute of International Affairs, 2010), 31–58.

- 7 Raphaël Lemkin, *Totally Unofficial: The Autobiography of Raphael Lemkin*, ed. Donna-Lee Frieze (New Haven, CT: Yale University Press, 2013), 22.
- 8 Daniel Marc Segesser and Myriam Gessler, "Raphael Lemkin and the International Debate on the Punishment of War Crimes (1919–1948)," *Journal of Genocide Research*, 7/4 (2005), 453–68.
- 9 Raphaël Lemkin, "Les Actes Constituant un Danger General (Interétatique) Considérés Comme Delits du Droit des Gens," in Jimenez de Asua, Vespasien Pella, and Manuel López-Rey, eds., *Actes de la Vème Conférence Internationale Pour l'Unification du Droit Pénal, Madrid 14–20 Octobre 1933* (Paris: A. Pedone, 1935), 48–56.
- 10 Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford: Oxford University Press, 2014), 188.
- 11 See Jimenez de Asua, Vespasien Pella, and Manuel López-Rey, eds., *Actes de la Vème Conférence Internationale pour l'Unification du Droit Pénal (Madrid 14–20 Octobre 1933)* (Paris: A. Pedone, 1935).
- 12 Claudia Kraft, "Nationalisierende Transnationalisierung: (Inter)nationale Strafrechtswissenschaft in der Zwischenkriegszeit," in Dietmar Müller and Adamantios Skordos, eds., *Leipziger Zuga nge zur Rechtlichen, Politischen und Kulturellen Verflechtungsgeschichte Ostmitteleuropas* (Leipzig: Leipziger Universitätsverlag, 2015), 15–26. And see Dietmar Müller, "Zu den Anfängen des Völkerstrafrechts: Vespasian Pella und Raphael Lemkin," in Dietmar Müller and Adamantios Skordos, eds., *Leipziger Zuga nge zur Rechtlichen, Politischen und Kulturellen Verflechtungsgeschichte Ostmitteleuropas* (Leipzig: Leipziger Universitätsverlag, 2015), 27–40.
- 13 Lemkin, "Les Actes Constituant un Danger General."
- 14 Ibid.
- 15 Ibid.
- 16 Bartolomé Clavero, *Genocide or Ethnocide, 1933–2007: How to Make, Unmake and Remake Law with Words* (Milan: Giuffrè Editore, 2008), 22–25.
- 17 Lemkin, "Les Actes Constituant un Danger General."
- 18 Andrey Y. Vyshinsky, foreword to *Criminal Intervention: The Movement for the Unification of the Criminal Law of the Capitalist Countries*, by Aron Trainin, ed. Andrey Y. Vyshinsky, 3–7 (Moscow: State Publishing House OGIZ, 1935). I thank Gennadi Poberezny for helping me translate this text.
- 19 Raphaël Lemkin, *The Polish Penal Code of Minor Offenses*, trans. Malcolm McDermott (Durham, NC: Duke University Press, 1939).
- 20 Hersch Lauterpacht, "Revolutionary Propaganda by Governments," in Elihu Lauterpacht, ed., *International Law: The Collected Papers of Hersch Lauterpacht*, vol. 3, *The Law of Peace* (Cambridge: Cambridge University Press, 1977), 279–96.
- 21 See Michael Kearney, *The Prohibition of Propaganda for War in International Law* (Oxford: Oxford University Press, 2007).
- 22 Vespasien V. Pella, *L'Esprit de Corps et les Problèmes de la Responsabilité Pénale* (Paris: Ernest Sagot, 1920).
- 23 For an analysis of this argument and its influence, see Lewis, *The Birth of the New Justice*, 103.
- 24 Ibid., 104.
- 25 Vespasian V. Pella, *La Criminalité Collective des États et le Droit Pénal de l'Avenir* (Bucharest: Imprimerie de l'État, 1925).
- 26 Henri Donnedieu de Vabres, *Introduction à l'Étude du Droit Pénal International: Essai d'Histoire et de Critique sur la Compétence Criminelle dans les Rapports avec l'Étranger* (Paris: Recueil Sirey, 1922).

- 27 Pella, *La Criminalité Collective*.
- 28 Rafał Lemkin, "Dzieje I Charakter Reform Karnego we Włoszech," in *Kodeks Karny Faszystowski Włochy* (Warsaw: Nakładem Księgarni F. Hoesicka, 1929), 10.
- 29 Rafał Lemkin, "Ustawodawstwo Karne Rosji Sowieckiej, Kodeks Karny, Procedura Karno," in Waclaw Makowski, ed., *Encyklopedji Podrecznej Prawa Karnego, Volume 25* (Warsaw: War-zawiej, 1938), 7.
- 30 Rafał Lemkin, *Kodeks Karny Faszystowski Włochy* (Warsaw: Nakładem Księgarni F. Hoesicka, 1929).
- 31 Vyshinsky, foreword to *Criminal Intervention*, 4–5. The text in the original reads: Podlinnyj smysl usilij unifikatorov—juridicheski i politicheski obosnovat' pravo kontrrevoljucionnoj burzhuzii na vmeshatel'stvo vo vnutrennie dela vsjakogo gosudarstva, sostojanie kotorogo mozhet vnushat' "bespokojstvo" za sud'by "kul'tury i civilizacii."
- 32 Aron Trainin, *Ugolovnaia interventsia* (Moscow: OGIZ, 1935), 42–48, 89. This reading of Trainin comes from Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*, 13–14.
- 33 Vyshinsky, foreword to *Criminal Intervention*, 5–6. The text reads as: Takoe vmeshatel'stvo prjamo proklamiroval odin iz naibolee vidnyh dejatelej unifikacionnogo dvizhenija prof. Pella, otricavshij bezgranichnost' gosudarstvennogo suvereniteta, brosisvshego otkryto lozung: "Nado snjat' gosudarstvo s pedestal'a."
- 34 Ibid. The text reads as: Eshhjo otkrovennee v jetom smysle vystuplenie prof. Levita (SShA), proektirujushhego v svoem "Mezhdunarodnom ugolovnom kodekse" prjamoje vmeshatel'stvo vo vnutrennie dela drugogo gosudarstva v interesah burzhuzii, kvalificiruemoje prof. Trajninyim kak "dvojnaja buhgalterija." Vprochem, pravil'nee, nam kazhetsja, bylo by jeto vystuplenie kvalificirovat' kak obrazec gottentotskoj morali.
- 35 See Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*. And see John Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (London: Palgrave, 2008). See Mark Klamberg, "Raphaël Lemkin in Stockholm: The Significance of his Work for Axis Rule in Occupied Europe," *Genocide Studies and Prevention: An International Journal*, forthcoming.
- 36 Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, especially chapters 5 and 6.
- 37 Weiss-Wendt, *A Rhetorical Crime*, 14.
- 38 Ibid.
- 39 Ibid.
- 40 Lemkin, *Totally Unofficial*, 126–27.
- 41 Ibid.
- 42 Lewis is correct that Lemkin was wrong in his memoirs, and that Masaryk had no lasting influence on the Soviet position. See Lewis, *The Birth of the New Justice*, 204.
- 43 United Nations Official Records of the Third Session of the General Assembly, Sixth Committee, 63rd Meeting (September 30, 1948). See Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*.
- 44 Pearl Buck to Raphaël Lemkin, Correspondence and Proposed Manifesto, American Jewish Historical Society, New York, New York, Box 1, Folder 17, Dated Sunday (circa 1947).
- 45 Lemkin, *Totally Unofficial*, 217.
- 46 See Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*.
- 47 Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*.

- 48 Lemkin, *Totally Unofficial*, 173.
 49 *Ibid.*, 178.
 50 *Ibid.*, 115.
 51 *Ibid.*, 132.
 52 For a discussion, see Jean-Marc Coicaud, *Legitimacy and Politics: A Contribution to the Study of Political Right and Political Responsibility*, trans. David Ames Curtis (Cambridge: Cambridge University Press, 1997).
 53 *Ibid.*, 155.
 54 *Ibid.*, 25.
 55 Weiss-Wendt, *The Soviet Union and the Gutting of the UN Genocide Convention*.
 56 *Ibid.*
 57 Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, especially chapter 7.
 58 For an important, more nuanced discussion, see Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton: Princeton University Press, 2013), 104–48.
 59 See Irvin-Erickson, *Raphaël Lemkin and the Concept of Genocide*, especially chapter 8.
 60 Raphaël Lemkin, "Reflections on Cure and Treatment," n.d., New York Public Library, New York, New York, Reel 3, Box 2, Folder 3/4.
 61 Raphaël Lemkin, "The Concept of Law in Genocide," in *Introduction to the Study of Genocide*, n.d., New York Public Library, New York, Reel 3, Box 2, Folders 1–4.

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