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The World Revolutionary Origins of the Crime of Aggression: Sovereignty, (Anti-)Imperialism, and the Soviet Union's Contradictory Geopolitics of Global Justice

Eric Loefflad*

Despite the importance of Soviet influences in developing an international legal basis for holding individuals criminally liable for planning and waging aggressive war at Nuremberg, relatively little research has been done on this innovation's place within the broader Soviet agenda. In addressing this gap, this article provides a multifaceted account of how the criminalization of war both complemented and contradicted the Soviet Union's prime objective of furthering world revolution. This entails a narrative that connects pivotal points in Soviet history from early critiques of imperialism to the experience of the Second World War to contentious appeals to the Third World in the decolonization context. While riddled with contradictions, these Soviet lessons have much to teach us in a contemporary global order where the crime of aggression is now within the jurisdiction of the International Criminal Court, yet the underlying geopolitical aspects that have long animated this project demand further theoretical engagement.

Table of Contents

<i>I. Introduction: The Consciousness of International Criminal Justice</i>	2
<i>II. Lineages of War's Outlawry: Context, Contradiction, Critique</i>	15
<i>A. A New World Order Through (Whose) Law?</i>	15

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<i>B. The Conundrum of Imperial Anti-Aggression</i>	20
<i>C. Taking Lenin's Theory of Imperialism Seriously</i>	26
<i>III. Criminalizing Aggression: The Soviet View</i>	29
<i>A. International Law and Formative Soviet Engagement</i>	29
<i>B. Articulating the Material Deviance of Aggressive War</i>	32
<i>C. Envisioning an Anti-Imperial International Order to Come</i>	36
<i>IV. State vs. Revolution: The Fate of Soviet Anti-Aggression</i>	39
<i>A. Hypocrisy, Commitment, and the Bar of Radical Transformation</i>	39
<i>B. Decolonization and the Matter of Third World Sovereignty</i>	44
<i>V. Conclusion: Whither the Geopolitical Dimensions of Global Justice?</i> ²	50

In the final analysis it must be admitted that there is not and cannot be such a code of international law as would be equally acceptable to the cannibal and his victim, to the aggressor and the lover of freedom, to the "master race" and its potential "slaves," to the champions of the sanctity of treaties and to those who would treat pacts as "scraps of paper," to the advocates of humanising and abolishing war and to the proponents of totalitarian war, to those who "value the tear of every child" to quote Dostoyevsky, and to those who try to build a third or any other empire on a foundation of women's corpses and children's skulls.

—Evgeny (Eugene) Korovin, 1946¹

I. Introduction: The Consciousness of International Criminal Justice

On December 15th, 2017, in a long-awaited move, the International Criminal Court ('ICC'), the first permanent judicial forum established to prosecute individuals for the most serious international crimes, announced its jurisdiction over the crime of aggression.² This development represented the culmination of many years of negotiations regarding the scope, definition, and general appropriateness of including aggressive war as a core offense under the ICC's Rome Statute alongside war crimes, genocide and

¹ Eugene Korovin, *The Second World War and International Law*, 40 AM. J. INT'L L. 742, 742-743 (1946) [hereinafter: '*Second World War*'].

² *Assembly Activates Court's Jurisdiction over Crime of Aggression*, International Criminal Court: Press Release, December 15, 2017, (available at: www.icc-cpi.int/Pages/item.aspx?name=pr1350) (last visited February 8, 2018).

crimes against humanity.³ In its progression from “a placeholder bereft of content” in the 1998 Rome Statute⁴ through rigorous rounds of debate and compromise over a definition of ‘aggression’ during the 2010 Kampala Accords, the prospect of imposing criminal liability on the planners and wagers of unjustifiable war through a permanent international forum raised numerous difficulties.⁵ When considering the nature of the post-Cold War resurrection of international criminal law, these challenges related to prosecuting aggression are unsurprising. After all, while individual prosecutions for war crimes, genocide, and crimes against humanity witnessed a resurgence in the post-Cold War era, especially through the *ad hoc* International Criminal Tribunals for the former Yugoslavia and Rwanda in addition to the ICC, there has not been an international prosecution for planning or waging aggressive war since 1947.⁶

For proponents of international criminal justice, the ongoing failure to effectively adjudicate acts of aggression presents a distinct dilemma. On the one hand, this dearth of prosecution can be viewed as the abandonment international criminal law’s foundational legacies forged at the Nuremberg and Tokyo trials that placed primary emphasis on crimes against peace.⁷ On the other hand, actually implementing such prosecutions in the contemporary world entails numerous doctrinal and institutional challenges, some inherited from earlier eras, some entirely new.⁸ Anxiety over meeting these challenges is abundantly clear in the observations of mainstream international lawyers writing on this topic.⁹ For these scholars, perhaps the most prominent issue is the way the crime of aggression intertwines law and politics in a manner that undermines ideally ‘apolitical’ modes of judicial reasoning.¹⁰ Additionally, there is the argument that,

³ Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9, 17 July 1998, 2187 U.N.T.S. 90 (July 17, 1998), *entered into force* July 1, 2002, at Article 5(1).

⁴ Tom Dannenbaum, *Why Have We Criminalized Aggressive War?*, 126 YALE L.J. 1242, 1245 (2017); *see* Rome Statute, *supra* note 4, at Article 5(2).

⁵ Concluded on June 11th 2010, the Kampala Accords definition can be found appended to the Rome Statute: *Id.*, at Art. 8bis (1) (2); For an account of this negotiation process *see generally* Claus Kress & Leonie von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT’L CRIM. JUST. 179 (2010).

⁶ Danilo Zolo, *Who is Afraid of Punishing Aggressors? On the Double-Track Approach to International Criminal Justice*, 5 J. INT’L CRIM. JUST. 799, 799 (2007).

⁷ *Id.*, at 801; This foundational moment acts as a vital legitimizing anchor for the post-Cold War resurgence of international criminal justice. *See* Ruti Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69, 90 (2003).

⁸ This raises the question of how foundational legal justifications conflict with subsequent political evolution. As Judith Shklar has famously argued, while the Nuremberg trial was deeply flawed from a legalistic perspective, its breach of legality is justified by the fact that it served substantive political ends in a specific context (LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 145 (1964)). On this view, given the different substantive politics present in other sites of international criminal justice intervention, the loose approach to legality that justified Nuremberg does not apply in the same way elsewhere. Samuel Moyn, *Judith Shklar versus the International Criminal Court*, 4 HUMANITY 473, 487-488 (2013).

⁹ As a preliminary matter, it is important to highlight these points before engaging in the left critique, both to avoid conflation and to showcase the mainstream consciousness of international criminal law as it currently exists.

¹⁰ This sensibility informed the U.S. position under the Obama Administration where, despite a far more positive approach to the ICC compared to the preceding Bush Administration, the crime

given the need to strictly separate *jus ad bellum* (the justification for resorting to war) from *jus in bello* (the acceptable standards of conduct during war), the ICC is ill-equipped to prosecute the *ad bellum* issue of aggression given that it already prosecutes *in bello* issues.¹¹ Furthermore, since the ICC fashions itself as a ‘court of last resort’ that places primacy on domestic prosecution via the principle of complementarity, how might aggression and its emphasis on violence *between* states as opposed to *within* states threaten to undermine this fundamental jurisdictional dynamic?¹² Moreover, while aggression has its ideal defendant, namely a national leader, what is to be done when prosecuting other types of individuals would better serve the ends of post-conflict justice?¹³ Given this wide-ranging (yet by no means exhaustive) array of compounding issues, the question of whether the crime of aggression in its current form possesses the

of aggression, as agreed to at Kampala, has remained a bridge too far. Harold Koh & Todd Buchwald, *The Crime of Aggression: The United States Perspective*, 109 AMJ. INT’L L. 257, 263 (2015) (“Aggression determinations...fundamentally require a political assessment and political management...assigning that role to ostensibly political Court would inject the ICC into treacherous political waters that would threaten to undermine both the Court’s credibility and that of the greater international criminal justice project.”); For a view representative of Bush Administration hostility see e.g. John Bolton, *The Risks and Weaknesses of the International Criminal Court from America’s Perspective*, 64 LAW & CONTEMP. PROBS. 167 (2001); For a wide-ranging theory of the crime of aggression’s challenges in this capacity see generally Noah Weisbord, *Judging Aggression*, 50 COLUM.J. TRANSNAT’L L. 82 (2011).

¹¹ Andreas Paulus, *Second Thoughts on the Crime of Aggression*, 20 EUR.J. INT’L L. 1117, 1126 (2009); The argument here is that a base constraint on the conduct of hostilities should apply in all conflicts regardless of their reasons. For a detailed defense of strictly separating *jus ad bellum*/*jus in bello* within international law see generally Robert Sloan, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 YALE.J. INT’L L. 47 (2009).

¹² This is especially true considering how “[t]he ICC Statute basically places the aggressor-state in the ‘driver’s seat’ in relation to the adjudication of the crime of aggression” regarding its ability to not prosecute a leader for political reasons or refuse to provide the evidence needed to render a conviction for aggression by claiming vital security interests. Nicolaos Strapstas, *Complementarity and Aggression: A Ticking Time Bomb?*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE, 450, 459 (Carsten Stahn and Larissa van den Herik, eds. 2010).

¹³ See Mark Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains*, 41 CASE W. RES. J. INT’L L. 291, 317 (2009) (“[T]he inability of anyone to below the absolute leader might have broader implications...[for] bestowing collective innocence upon this vast array of individuals might inhibit the ability of truth commissions, public inquiries, reparations, restitution, reintegrative processes and other forms of justice at the national level...”); For a case-study of a historical episode supporting this claim see e.g. Mark Drumbl, *‘Germans are Lords and Poles are the Servants’: The Trial of Arthur Greiser in Poland, 1946*, in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 41 (Gerry Simpson & Kevin Jon Heller, eds. 2013); Moreover, contextualized within the history of liability for aggression, such possibilities are more restricted now than in the formation of this crime given that the Special Working Group on the Crime of Aggression’s culpability standard, whereby a perpetrator must ‘direct or control’ an act of aggression, is far more narrow than the ‘shape or influence’ standard applied by the International Military Tribunal at Nuremberg. Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR.J. INT’L L. 477, 479 (2007); On the codified status of the Special Working Group’s culpability standard see Rome Statute, *supra* note 4, at Article 25 (3 bis.).

requisite degree of legitimacy needed to sustain itself as an enduring feature of the international legal order remains open for debate.¹⁴

This mainstream approach has dominated discourse on the crime of aggression. In the process, it has compartmentalized complicating issues into narrow doctrinal and institutional formulations assuming the liberal premise that, with a sufficient amount of reform, international law is actually capable of achieving its self-proclaimed ideals as a progressive, apolitical, and universally legitimate body of rules and principles.¹⁵ As a result, there has been minimal effort to comprehensively engage these issues from the radical left, even though this approach can provide deep insight into the legitimacy issues that frequently manifest in the practices of international criminal justice.¹⁶ By turning our attention to the material conditions that generate specific social relations (and the ideologies justifying them), a radical engagement forces us to confront how mainstream international criminal law produces a specific mode of consciousness regarding the causes of, and solutions to, mass atrocities. According to Tor Krever, international criminal law's isolated fixation on the conduct of individual defendants systematically diverts our attention away from structural pathologies that produce atrocity-generating conditions.¹⁷ While acknowledging these forces does not foreclose individual responsibility, it does complicate the way we approach the interplay between structure and agency when holistically confronting these issues.¹⁸ Against this backdrop, Krever

¹⁴ See generally Sean Murphy, *Aggression, Legitimacy and the International Criminal Court*, 20 EUR. J. INT'L L. 1147 (2009) (A critique of the Special Working Group on the Crime of Aggression's definition through an application of Tom Franck's theory of international legal legitimacy).

¹⁵ A problem with international criminal justice in this regard is that its discourse on politics has been predominantly focused on the political will needed for institution-building and the exclusion of political bias from adjudication. As such it fails to confront how the very idea of the 'apolitical' international criminal trial raises political issues in and of itself see Tor Krever, *Unveiling (and Veiling) Politics in International Criminal Trials*, in CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 117, 131 (Christine Schwöbel, ed., 2014); On the related need to critically confront international criminal law at the level of its very purpose as a means of avoiding the field-affirming pitfalls of 'pre-fab' critiques see Grietje Baars, *Making ICL History: On the Need to Move Beyond Pre-Fab Critiques of ICL*, in CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 196, 209 (Christine Schwöbel, ed., 2014).

¹⁶ According to Sara Kendall's depiction of the mainstream and its limits: "[s]uch international criminal scholarship has a positivist focus on decisions and judgments while sidestepping critical engagement understood...as the examination of underlying presuppositions and animating forces...[y]et the need for critical engagement is more acute given the developing crisis of legitimacy manifesting at the institutional sites of international criminal law production." *Critical Orientations: A Critique of International Criminal Court Practice*, in CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION 54, 56-57 (Christine Schwöbel, ed., 2014).

¹⁷ An example provided is the Former Yugoslavia where the social deprivation and instability produced by the International Monetary Fund's structural adjustment policies help to provide a platform for ethno-nationalist demagogues and recruit individuals for their campaigns of violence. However, the ability to make these links was categorically excluded from the international criminal adjudications that followed these conflicts. See Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LEIDEN J. INT'L L. 701, 715-718 (2013).

¹⁸ *Id.*, at 719.

“invites us first to consider the conditions under which international crimes occur, the material context of violence and social conflict, if we are to challenge and repoliticize that context.”¹⁹

Mainstream international criminal law’s reductively individualizing mode of consciousness often pays insufficient attention to the contexts surrounding the crime of aggression. As Krever notes, geopolitical rivalries often produce the type of mass violence whose aftermath international criminal law ostensibly addresses; yet, the process itself largely remains outside of its analytical scope.²⁰ However, through explicitly confronting this disconnect, a critical analysis of the crime of aggression presents a unique vantage point for engaging the geopolitical questions and concerns frequently disavowed by international lawyers.²¹ For unlike other international crimes that deal directly with the suffering of individuals contrasted with trans-spatial conceptions of the “universal consciences of humanity,” the crime of aggression’s focus on one state’s violence against another state highlights the vast disparity of sovereign power relations within the international order.²² This constrains the ability of international criminal justice proponents to retreat into the all-too-convenient belief that a cosmopolitan, post-sovereign, borderless world order is progressively being achieved.²³ Given this backdrop,

¹⁹ *Id.*, at 723; On this point, it can be asserted that using existing adjudicatory fora to address ‘banal’ international crimes can provide a unique means of confronting structural injustices. See e.g. Ionannis Kalpouzos & Itamar Mann, *Banal Crimes Against Humanity: The Case of Asylum Seekers in Greece*, 16 MELB. J. INT’L L. 1 (2015).

²⁰ See Tor Krever, *Ending Impunity? Eliding Political Economy in International Criminal Law*, in RESEARCH HANDBOOK ON POLITICAL ECONOMY AND LAW 298, 301-305 (Ugo Mattei & John Haskell, eds., 2015).

²¹ According to one account of this discursive structure of disavowal and depoliticization amongst international lawyers: “Collective powers, especially aggressive nations, are deplorable facts, and the well-intentioned lawyer has simply to protect the individual victims of these scourges. It is then not necessary to engage in any robust understanding of the conflicts occurring among the Powers. The very mention of geopolitics would be an invitation to a ‘devil’s science.’” Anthony Carty, *The Crime of Aggression—The Crime which Cannot Speak its Name*, BRIT. YBK. INT’L L. 1, 24 (2019).

²² This point is illustrated by Zolo’s posing of the question of why the military and political leadership of NATO were not tried before the International Criminal Tribunal for the Former Yugoslavia for planning and executing the 1999 bombing of Kosovo despite its breaching of the UN Charter’s ban of the use of force (absent self-defense or a Security Council-approved collective security measures)? Zolo, *supra* note 7, at 804-805; Given Zolo’s long-standing calls for a realism in the face of messianic international legal projects, it is reasonable to interpret this question as a condemnation of cosmopolitan hypocrisy as opposed to any serious proposal to build the institutions capable of this extraordinary feat of adjudication. See e.g. DANILO ZOLO, *COSMOPOLIS: PROSPECTS FOR WORLD GOVERNMENT* (1995); Danilo Zolo, *A Cosmopolitan Philosophy of International Law? A Realist Approach*, 12 RATIO JURIS 429 (1999).

²³ On the ICC’s fundamental commitment to sovereign borders despite the force of cosmopolitan rhetoric in sustaining the international criminal justice project see Nadia Chazal, *Beyond Borders? The International Criminal Court and the Geopolitics of International Criminal Justice*, 22 GRIFFITH L. REV. 707, 718 (2013); For an example of this type of celebratory account of international criminal justice, see e.g. Stephen Rapp, *The Reach and Grasp of International Criminal Justice—How Do We Lengthen the Arm of the Law?*, 45 CASE WES. RES. J. INT’L L. 651 (2013).

the normative force latent in prosecuting crimes of aggression emanates from its unique embodiment of what I deem the “geopolitical dimension of global justice.”²⁴

While mainstream international criminal legal theory has long sidestepped these normative questions surrounding geopolitics (or used them to critique international criminal justice as a self-defeating enterprise²⁵), I argue that enhanced critical engagement on these issues provides profound opportunities to re-imagine the international criminal justice project as something far more than simply a body of rules and institutions. The undertheorized status of the “geopolitical dimension of global justice” demands that we confront how our imaginations of international criminal justice came to be shaped by a multitude of historical, political, and cultural forces typically minimized, evaded, or ignored by standard doctrinal accounts.²⁶ A historical exploration of the Soviet Union’s multi-faceted, and deeply contradictory, relationship to the crime of aggression, I suggest, offers a specific site for such a re-imagination.

After all, liberal narratives of international criminal justice, even counter-hegemonic ones, typically avoid critically evaluating geopolitics through abstracted invocations of transcendent morality.²⁷ In the process, these narratives fetishize sovereign states as moral persons in a manner that ideologically excludes the ways in which other entities—be they sub-state movements, social classes, or transnational forces—are constitutive of these realities and can assert legitimacy claims on this basis.²⁸ By contrast, the Marxist

²⁴ While the phrase ‘global justice’ has been applied in a diverse array of contexts by a diverse array of actors (see generally Duncan French, *Global Justice and the (Ir)Relevance of Indeterminacy*, 8 CHINESE J. INT’L L. 593 (2009)), by adopting this terminology in relation to the subject matter discussed in this article I seek to further critical analysis of global justice-international criminal justice relationship which, despite much reflexive conflation, remains profoundly under-theorized. See Frédéric Mégret, *What Sort of Global Justice is ‘International Criminal Justice’?*, 13 J. INT’L CRIM. JUST. 77, 79 (2015).

²⁵ This has been especially true of the neoconservative-associated view that U.S. geopolitical supremacy is necessary for a legitimate global order and the ability of cosmopolitan actors to evaluate the U.S.’s means of maintaining this end through a discourse of criminality is ineffectual at best and catastrophically dangerous at worst. See e.g. Bolton, *supra* note 11; Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003) Jeremy Rabkin, *Global Criminal Justice: An Idea Whose Time Has Passed*, 38 CORNELL INT’L L. J. 754 (2005); The latest installment of this saga has been U.S. National Security Advisor John Bolton’s threats to sanction the ICC for its perceived undermining of U.S. interests. *Full Text of John Bolton’s Speech to the Federalist Society*, Al-Jazeera September 10, 2018 (available at: www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html) (last visited January 21, 2019).

²⁶ On the case for radically expanding the scope of our archive in the analysis of international criminal law as a corrective to the contingent distorting effects of nineteenth-century international legal positivism’s fixation on the “modern state conception” as the exclusive source of binding law see Ziv Boher, *International Criminal Law’s Millennium of Forgotten History*, 34 LAW & HIST. REV. 393, 404-407 (2016).

²⁷ For such a counter-hegemonic disavowal of geopolitics in the quest for justice see e.g. Richard Falk, *Severe State Crime and Double Standards*, 4 STATE CRIME J. 4 (2015).

²⁸ For a classical exemplification of this type of this fetishistic centering of the sovereign state in the name of justifying a liberal theory of international morality, see e.g. MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* (5th ed., 2015); On the frustration of sub-national legitimacy claims through state-centric legal and ethical

commitment to radically uplifting humanity through world revolution led the Soviets to situate the material realities of geopolitics (including their multilayered social construction) as vital considerations in relation to normative goals.²⁹ Centering this alternative engagement can expand our present consciousness by exposing the ways in which Soviet contributions to the formation of international criminal law informed by Marxist insights were subordinated to a liberal Western narrative through a series of historical contingencies as opposed to any natural truth.³⁰

Questions of empire and imperialism were central to Soviet geopolitical praxis, and efforts to criminalize aggression were no exception.³¹ With the imperial legacy's emergence as a key discourse for confronting contemporary inequities within the international criminal justice project, particularly in relation to the claim that it

presumptions, see generally Jessica Whyte, *The "Dangerous Concept of Just War": Decolonization, Wars of National Liberation, and the Additional Protocols to the Geneva Conventions*, 9 HUMANITY 313 (2019). Moreover, when considering the disjuncture between class and geopolitics in liberal internationalist thought (especially in the U.S.), we must note how responses to the Vietnam War triggered a transition from moral reasoning centered on the domestic welfare state to moral reasoning centered international affairs. On this shift, see generally Katrina Forrester, *Citizenship, War, and the Origins of International Ethics in American Political Philosophy, 1960-1975*, 57 HISTORICAL J. 773 (2014).

²⁹ See Bernard Semmel, *Introduction*, in MARXISM AND THE SCIENCE OF WAR 1, 3 (Bernard Semmel, ed., 1981); Conversely, geopolitics were inseparable from the greater social totality that dictated their manifestation. See V.D. Sokolovskii, *The Nature of Modern War*, in MARXISM AND THE SCIENCE OF WAR 276, 276 (Bernard Semmel, ed., 1981) ("Historical experience shows that even the greatest world war....represents only one aspect of social development and completely depends upon the course of that development and upon the political interactions between classes and states.").

³⁰ On the role of limited Soviet media success compared to the West in disseminating their popular version of Nuremberg see Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 AM. HIST. REV. 701, 722-723 (2008); Additionally, in a manner further alienating Soviet ideological ownership over Nuremberg, the Western Allies used this event to disseminate a particular understanding of capitalism whereby peaceful commercial relations were set as opposing a war-based international order. Here the Soviets' continued non-integration within this regime stood out as a deviation in relation to the capitalist ethos for which Nuremberg, at least partially, was positioned to stand. See Kim Christian Priemal, *"A Story of Betrayal": Conceptualizing Variants of Capitalism in the Nuremberg War Crimes Trials*, 85 J. MOD. HIST. 69, 69 (2013); On the ways in which this sensibility was apparent in the non-conviction of Nazi industrial actors see *Id.*, at 100-104; See also Grietje Baars, *Capitalism's Victor's Justice: The Hidden Story the Prosecution of Industrialists Post-World War II*, in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 163 (Gerry Simpson & Kevin Jon Heller, eds., 2014).

³¹ As a general note on terminology, unless specified elsewhere, 'Colonialism' refers to subjection to alien rule; 'Postcolonialism' refers to the condition whereby formalized alien rule has ended but its legacies remain deeply entrenched; 'Decolonizing' refers to the broadly construed efforts to undo the legacies of colonialism; 'Imperialism' refers to the specific mode of global relations defined by capitalist competition coined by Lenin (see infra Part II.C.); and 'Third World' refers to the array of postwar/Cold War political projects centered in Asia, Africa, and Latin America that emphasized the unique position of these nations as irreducible to either the Western or Eastern blocs.

pathologizes certain acts of violence while normalizing others,³² engagement with the Soviet saga has much to offer.³³ After all, while the Soviet project centered on identifying and confronting the dynamics of imperialism in pursuit of world revolution, in the process there emerged deep contradictions fueled by the extraordinary pressures the Soviet Union faced both internally and externally. Given that the Soviet approach to criminalizing aggression functioned as a variable repository for these entangled contradictions, analytically deconstructing them possesses great potential to expose many of the “underlying presuppositions and animating forces” Sara Kendall has identified as

³² On the continuity of these legacies through disparate portrayals of victimhood see John Reynolds and Sujith Xavier, *The Dark Corners of the World: TWAIL and International Criminal Justice*, 14 J. INT’L CRIM. J. 959 (2016) (A comparative study of international criminal justice narratives showing how situations in Darfur and Sierra Leone were cast in the language of universal morality that was absent when applied to ICC engagements by Palestinians and Sri Lankan Tamils); Furthermore, it must be noted that responses to colonialism-invoking critiques by prominent individuals have demonstrated a disturbing lack of meaningful dialogue. This was exemplified by the former ICC Chief Prosecutor Luis Moreno-Ocampo’s comparison of such ICC critics to Holocaust deniers. See Itamar Mann & Ntina Tzouvala, *Letter to the Editor: Response to Luis Moreno Ocampo on Comparisons to Holocaust Denial*, Just Security, (November 1, 2017) (available at: <https://www.justsecurity.org/34016/letter-editor-conflating-icc-african-bias-holocaust-denial-polarizing-dangerous-irresponsible/>) (last visited July 7, 2018).

³³ In this capacity, I engage the international legal dimensions of how the Soviets as Marxist actors navigated both the prospects and challenges presented by appealing to the colonial/postcolonial worlds (On the Soviets’ original primary focus on exporting their revolution to the industrial West as opposed to the Global South see FRIEDMAN, *infra* note 242, at 7-8). As such, this study falls at the intersection of the contemporary projects of Third World Approaches to International Law (TWAIL) seeking to account for international law’s historic and ongoing inequities from the perspectives of colonized/postcolonial peoples, and Marxist international legal theories seeking to show international law’s material and ideological complicity in the reproduction of capitalist political economy to the exclusion of alternative social relations (For key texts in the former movement see e.g. BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); SUNDHYA PAHUJA *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011); For key texts in the later movement see e.g. SUSAN MARKS, *THE RIDDLE OF ALL CONSTITUTIONS: INTERNATIONAL LAW, DEMOCRACY AND THE CRITIQUE OF IDEOLOGY* (2000); CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (2005); BILL BOWRING, *THE DEGRADATION OF THE INTERNATIONAL LEGAL ORDER? THE REHABILITATION OF LAW AND THE POSSIBILITY OF POLITICS* (2008)); While these two projects are profoundly similar in their explicit radical advocacy for a more equitable and inclusive global order, their developmental trajectories have largely run parallel to one another and serious theoretical focus on their interaction is only now gaining attention. See e.g. Robert Knox, *A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law* (2014) (unpublished Ph.D. Dissertation, London School of Economics) (paper on file with author); Robert Knox, *Valuing Race? Stretched Marxism and the Logic of Imperialism*, 4 LONDON REV. INT’L L. 81 (2016); B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (2nd edn., 2017).

being methodically excluded from international criminal justice's standard techniques of knowledge production.³⁴

Relatedly, this article confronts the problematic trope where, in the words of Boris Mamlyuk, "dominant general histories of international law tend to treat the Soviet approaches to international law as anomalous—as aberrant deviations from the ceaseless teleological development of liberal international law doctrines and institutions."³⁵ This presumption is deeply influenced by the liberal premise that Marxism's all-encompassing politicization renders it incompatible with the 'rule of law' where incontestable ethical standards legitimately constrain the exercise of political discretion.³⁶ Thus, influential figures who measure progress in international law by this liberal 'rule of law' standard have long condemned the Soviet Union as insufficiently committed to this project and thus comparable to Nazi Germany under the broad rubric of 'totalitarianism.'³⁷ Through this framing, the Soviet project is reducible to the Stalinist violence and repression that is presented not as a result of historical contingency, but as confirmation of the first principle that liberal conceptions of 'human rights,' 'democracy,' and the 'rule of law' are pillars of any decent social order.³⁸

However, a great advantage of international law's critical 'turn to history' is that such liberal triumphalist narratives are far more difficult to sustain. After all, this turn has exposed the ways in which liberal notions of humanitarianism and legal order not only failed to prevent but indispensably enabled acts of colonial violence on a far grander

³⁴ Kendall, *supra* note 17, at 57.

³⁵ Boris Mamlyuk, *Decolonization as a Cold War Imperative: Bandung and the Soviets*, in *BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES* 196, 198 (Luis Eslava, Michael Fakhri, & Vasuki Nesiah, eds., 2017) [Hereinafter: '*Decolonization*'].]

³⁶ See e.g. Martin Krygier, *Marxism and the Rule of Law: Reflections After the Collapse of Communism*, 15 *LAW & SOC. INQUIRY* 633 (1990).

³⁷ See e.g. John Herz & Joseph Florin, *Bolshevist and National Socialist Doctrines of International Law: A Case Study of the Functions of Social Science in the Totalitarian Dictatorships*, 7 *SOC. RES.* 1, 17-18 (1940); Quincy Wright, *International Law and Totalitarian States*, 35 *AM. POLI. SCI. REV.* 738 (1941); GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AND TOTALITARIAN LAWLESSNESS* (1943); For a critique of blanket assertion of the term 'totalitarianism' see generally SLAVOJ ZIZEK, *DID SOMEBODY SAY TOTALITARIANISM?* (2001); In this context 'ideology' was frequently a label affixed to interpretations of international law, regardless of their substantive content, that deviated from the liberal baseline, see e.g. Kurt Wilk, *International Law and Global Ideological Conflict: Reflections on the Universality of Law*, 45 *AM. J. INT'L L.* 648 (1951); Quincy Wright, *International Law and Ideologies*, 48 *AM. J. INT'L L.* 616 (1954); For an analysis of international law and ideology as it has developed in the Marxist tradition, see generally MARKS, *supra* note 34.

³⁸ For proponents of this view, the end of the Cold War in 1989 was perceived as a massive victory for liberal humanitarianism over those, namely the Soviets and their allies, who were content to justify untold suffering in the name of sovereignty see e.g. Anne-Marie Slaughter, *Revolution of the Spirit*, 3 *HARV. HUM. RTS. J.* 1 (1990); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 *AM. J. INT'L L.* 866 (1990); Given the Soviet Union's collapse just a few years later, it is unsurprising that contemporaneous Soviet theories of human rights formulated against this backdrop received barely any attention. See e.g. Rein Müllerson, *Human Rights and the Individual as a Subject of International Law: A Soviet View*, 1 *EUR. J. INT'L L.* 33 (1990).

scale than anything attributable to the Soviets.³⁹ That said, if we consider international law as a world-historical phenomenon, as opposed to a narrow body of rules and principles, invoking an uncritical measure of ‘violence’ to exclude the Soviets from the narrative of international legal development is incoherent. On this basis, taking the Soviet Union seriously in the history of international law goes hand-in-hand with the need to go beyond abstract ideologies and consider the material conditions that generate mass violence across multiple contexts.⁴⁰

In light of this assertion, this article speaks to numerous trends in contemporary international legal theory that have opened themselves to such an approach by adopting a critical view of this field’s recurring tropes.⁴¹ Here, in addition to contributing to Marxist international legal theory and Third World Approaches to International Law (TWAAIL),⁴² by viewing the Soviet’s perception of international law on their own terms, this study also invokes the increasingly prominent discourse of ‘Comparative International Law,’ an approach that decenters international law’s generally assumed universality by taking seriously the differences in the substance and application of international law as it is engaged by differently situated actors.⁴³ Moreover still, through its deliberate focus on contributions from the Soviet and colonial/postcolonial worlds, this study furthers the emerging ‘Global History of International Law’ that seeks to transcend the limits of Western perception of what international law is and what it can be.⁴⁴

³⁹ Of the multitude of examples available, the Belgian Congo offers one particularly jarring illustration where the assumption of personalized rule by King Leopold II over a vast swath of central African territory resulted in the death of millions. *See generally* ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA (1998); On the coordinated deployments of international legal, free trade, and humanitarian discourses in bringing about this result *see e.g.* Andrew Fitzmaurice, *The Justification of King Leopold’s Congo Enterprise by Sir Travers Twiss*, in LAW AND POLITICS IN BRITISH COLONIAL THOUGHT: TRANSPOSITIONS OF EMPIRE (Shaunnagh Dorset & Ian Hunter, eds., 2010); Matthew Craven, *Between Law and History: The Berlin Conference of 1884-85 and the Logic of Free Trade*, 3 LONDON REV. INT’L L. 31 (2015).

⁴⁰ *See* John Comaroff, *Re-Marx on Repression and the Rule of Law*, 15 LAW & SOC. INQUIRY 671, 674 (1990).

⁴¹ On the example of ‘progress’ narratives as one of the most foundational tropes in this capacity *see generally* THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE (2010).

⁴² *See supra* note 27.

⁴³ *See e.g.* Martti Koskenniemi, *The Case for Comparative International Law*, 20 FINN. YBK. INT’L L. 1 (2009); Ugo Mattei & Boris Mamlyuk, *Comparative International Law*, 35 BROOK. J. INT’L L. 385, 405 (2011); LAURI MÄLKSOO, RUSSIAN APPROACHES TO INTERNATIONAL LAW (2015); ONUMA YASUAKI, INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD (2017); COMPARATIVE INTERNATIONAL LAW (Anthea Roberts, Paul B. Stephens, Pierre-Hugues Verdier, & Mila Versteeg eds., 2018)

⁴⁴ This project has been long stunted by over-reliance on canonical sources (namely the works of classical doctrinal publicists including Francisco de Vitoria, Hugo Grotius, & Emer de Vattel) that have methodologically reproduced default Western perspectives in a manner contradicting international law’s claims to legitimacy on the basis of its self-styled universality. Rose Sydney Parfitt, *The Spectre of Sources*, 25 EUR. J. INT’L L. 297, 298, 306 (2014); For recent explorations contributing to this ‘Global History of International Law’ *see e.g.* ARNULF BECKER LORCA,

By speaking to so many different discourses, this article touches upon numerous debates surrounding methodology in the production of international legal history.⁴⁵ In short, what can no longer be ignored is an enhanced focus on the way scholars justify their choices of sources and subject matter when writing histories of international law, especially as they purport to explain political events and their consequences.⁴⁶ Thus,

MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY, 1842-1933 (2015); C.H. ALEXANDROWICZ, THE LAW OF NATIONS IN GLOBAL HISTORY (David Armitage & Jennifer Pitts, eds., 2017); BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava, Michael Fakhri, & Vasuki Nesiiah, eds. 2018); ROSE SYDNEY PARFITT, THE PROCESS OF INTERNATIONAL LEGAL REPRODUCTION: INEQUALITY, HISTORIOGRAPHY, RESISTANCE (2019).

⁴⁵ While historically engaged, this article is more concerned with demonstrating international law's construction of meaning through the genealogical linkage of events than it is with the conventional historian's task of rigorously determining the multi-faceted contextual setting of historical actors above all else (see e.g. J.G.A. Pocock, *On the Unglobality of Contexts: Cambridge Methods and the History of Political Thought*, 4 GLOBAL INTELLECTUAL HISTORY 1 (2019)). On this methodological distinction between the work of critical international lawyers and context-focused historians when approaching the past see Anne Orford, *On International Legal Method*, 1 LONDON REV. INT'L L. 166, 171-174 (2013) (Interestingly, Orford's usage of genealogy does not extensively draw upon Michel Foucault's iconic formulation of this method (see *Nietzsche, Genealogy, History*, in THE FOUCAULT READER (Paul Rainbow, ed., 1984)). For a conjunctive reading of both Orford and Foucault's usage of genealogy as they relate to the practice of critical international legal history, see PARFITT, *supra* note 45, at 21-27). This approach is justified given that my aim in this article is to expand our imaginative confrontation of the very idea of international criminal justice and the political questions it has consistently raised since its inception. After all, a rigid emphasis on historical context can contradict this stated purpose given that the conventional historian's task of distinguishing the past from the present can easily lead to the presumption that, due to their unique contexts, historically-situated ideas are irrelevant to political engagements in the here and now. Orford, *supra* note 51, at 174 ("To refuse to think about the ways in which a concept or text from the remote past might be recovered to do new work in the present is to refuse an overt engagement with contemporary politics."); On this issue within international criminal justice specifically see generally Frédéric Mégret, *International Criminal Justice History Writing as Anachronism: The Past that did not Lead to the Present*, in THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS 72 (Immi Tallgren & Thomas Skouteris, eds., 2019) (However, an important caveat here is that these lawyer-historian methodological controversies have largely concerned the mainstream 'Cambridge School' of history and have yet to rigorously extend to alternative conceptualizations developed within the field of history see Martin Clark, *Ambivalence, anxieties/Adaptations, advances: Conceptual History and International Law*, 31 LEIDEN J. INT'L L. 747, 755-757 (2018)). This can easily become problematic when confronting arguments, including many that emerged in the context of the Soviet experiment, that were both raised with the explicit purpose of being universally transformative and speak to issues that have yet to be resolved in the present. On the case for revisiting the animating purpose of the Soviet experiment in light of the failures of post-Cold War utopian promises to succeed on their own terms see PHILIP CUNLIFFE, LENIN LIVES! REIMAGINING THE RUSSIAN REVOLUTION 1917-2017 1-23 (2017).

⁴⁶ On the long-standing absence of this type of justification, see Martti Koskeniemi, *A History of International Law Histories*, in OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 943, 961 (Anne Peters & Bardo Fassbender, eds., 2012); My main usage of primary sources consists of translations/publications in Western venues that had the purpose of persuasively

while there are multiple angles for exploring the Soviet place within the crime of aggression (and international law more generally), in the interest of broadly engaging contemporary discourses, one work I deem particularly deserving of a response is Oona Hathaway and Scott Shapiro's *The Internationalists*.¹⁷ A rare merger of highly accessible prose and complex interdisciplinary analysis, this work presents a concise, yet elaborately justified, account of the twentieth-century emergence of the ban on inter-state war under international law and why it must be rigorously defended today.

However, while Hathaway and Shapiro emphasize the central role of 'radical ideas' in this development, their narrative is one triumphalist liberal internationalism that does not engage Marxist actors or ideas on any significant level.¹⁸ Addressing this absence

promoting Soviet visions of criminalizing aggression on an international scale as part of the export of communist world revolution that was the *modus operandi* of the Soviet Union. In constructing an account on this basis, I center key texts by the Soviet jurists Aron Trainin and Eugene Korovin due to the reality they offered broadly-relevant theoretical insights on international law despite a parochialism-generating pressure on Stalinist-era academics to 'toe the party line' or face the harshest of consequences. See Herz & Florin, *supra* note 38, at 17-18 (1940)); This was especially true of Andrei Vyshinsky, the Soviets' representative at Nuremberg who had earlier attained infamy as the architect of Stalin's show trials. See Hirsch, *supra* note 31, at 705; see also ARKADY VAKSBERG, *STALIN'S PROSECUTOR: THE LIFE OF ANDREI VYSHINSKY* (Jan Butler, trans., 1991). All of that said, an acknowledged casualty of this focus is a generalized lack of engagement with the original-language materials and more detailed contextual considerations that would be necessary for any truly comprehensive account of the Soviet view of the crime of aggression. Thus, by positioning a limited number of texts as attention-directing artifacts within the broader landscapes of international legal argument, ideological struggle, and geopolitical contestation my purpose is to generate further debate on the topic rather than offer a conclusive understanding of it. For important English-language contextualization of Soviet law, see e.g. SCOTT NEWTON, *LAW AND THE MAKING OF THE SOVIET WORLD: THE RED DEMIURGE* (2015); Franziska Exeler, *The Ambivalent State: Determining Guilt in the Post-World War II Soviet Union*, 75 *SLAVIC REV.* 606 (2016); Michelle Jean Penn, *The Extermination of Peaceful Soviet Citizens: Aron Trainin and International Criminal Law* (2017) (unpublished Ph.D. Dissertation, University of Colorado, Boulder) (on file with author); Franziska Exeler, *Nazi Atrocities, International Criminal Law, and War Crimes Trials: The Soviet Union and the Global Moment of Post-World War II Justice*, in *THE NEW HISTORIES OF INTERNATIONAL CRIMINAL LAW: RETRIALS* 189 (Immi Tallgren & Thomas Skouteris, eds., 2019); Boyd van Dijk, "The Great Humanitarian": *The Soviet Union, the International Committee of the Red Cross, and the Geneva Conventions of 1949*, 37 *LAW & HIST. REV.* 209 (2019).

¹⁷ OONA HATHAWAY & SCOTT SHAPIRO, *THE INTERNATIONALISTS: AND THEIR PLAN TO OUTLAW WAR* (2017).

¹⁸ According to one prominent reviewer: "Like much other recent work, it highlights the symbiosis of central European Jewish and Anglo-American legal traditions in the making of this order. The Bolshevik role, which was not insignificant, especially in the 1930s, remains unsung, perhaps because it would complicate what can all too easily read like a story of virtue triumphant." Mark Mazower, *The Internationalists by Oona Hathaway and Scott Shapiro Review - The Plan to Outlaw War*, *The Guardian* (December 16, 2017) (available at https://www.theguardian.com/books/2017/dec/16/the-internationalists-review-plan-outlaw-war?CMP=share_btn_tw) (last accessed March 31, 2019). However, it should be noted that the central European Jewish experience, which is only just beginning to be comprehensively accounted for in international legal scholarship (see e.g., REUT YAEL PAZ, *A GATEWAY BETWEEN A DISTANT GOD AND A CRUEL WORLD: THE CONTRIBUTIONS OF JEWISH GERMAN-*

provides a profound opportunity to analytically incorporate the many critical insights highlighted by responses to *The Internationalists*. Given this work's prominent authors, extensive promotion, high degree of contemporary relevance, and bold claims across a number of disciplines, it has elicited a vast array of reviews in both popular and academic publications.⁴⁹ While many are premised on the view that law is impotent in the face of raw power,⁵⁰ others have subjected this work to critique from the left by highlighting how Hathaway and Shapiro's narrow conception of war and peace leads them to venerate institutions of free trade, economic sanctions, and U.S. hegemony that are complicit in

SPEAKING SCHOLARS TO INTERNATIONAL LAW (2012); JAMES LOEFFLER, *ROOTED COSMOPOLITANS: JEWS AND HUMAN RIGHTS IN THE TWENTIETH CENTURY* (2018); *THE LAW OF STRANGERS: JEWISH LAWYERS AND INTERNATIONAL LAW IN THE TWENTIETH CENTURY* (James Loeffler & Moria Paz, eds., forthcoming), was not mutually exclusive with the Soviet project. This is especially true when considering how the Soviet jurist and leading theorist of the crime of aggression (see *infra* Part III.B.) was very much a product of Eurasian borderlands Jewish background. See Penn, *supra* note 52, at 37-53; Through its inclusion of Trainin (articulator of 'Crimes Against Peace'), alongside fellow central European Jewish jurists Hersch Lauterpacht (articulator of 'Crimes Against Humanity') and Raphael Lemkin (articulator of 'Genocide'), Penn's analysis provides an indispensable expansion of Philippe Sands's recent influential account of the origins of international criminal law that only deals with the latter two theorists and crimes. See generally, PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF GENOCIDE AND CRIMES AGAINST HUMANITY* (2016).

⁴⁹ While not an exhaustive compilation, see e.g. Mazower, *supra* note 53; Margaret MacMillan, *The Internationalists by Oona Hathaway and Scott Shapiro - Law and Peace*, Financial Times (September 1, 2017) (available at <https://www.ft.com/content/9e4191c6-8db5-11e7-9580-c651950d3672>) (last accessed March 31, 2019); Louis Menand, *What Happens When War is Outlawed?*, The New Yorker, (September 18, 2017) (<https://www.newyorker.com/magazine/2017/09/18/what-happens-when-war-is-outlawed>) (last accessed March 31, 2019); Richard Aldous, *Gentlemen, Let's Not Fight*, Wall Street Journal (September 25, 2017) (<https://www.wsj.com/articles/gentlemen-lets-not-fight-1506382095>) (last accessed March 31, 2019); Michael Glennon, *How Not to End War*, Lawfare (October 18, 2017) (<https://www.lawfareblog.com/how-not-end-war>) (last accessed March 31, 2019); James Juhnke, *Book Review: 'The Internationalists'*, Mennonite World Review (December 18, 2017) (available at <http://mennoworld.org/2017/12/18/columns/book-review-the-internationalists/>) (last accessed March 31, 2019); Isabel Hull, *Anything Can Be Rescinded: When can you start a war?* 40 LONDON REV. BOOKS 25 (2018); Mary Ellen O'Connell, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* by Oona A. Hathaway and Scott J. Shapiro, 32 ETHICS & INT'L AFF. 255 (2018); Arthur Ripstein, *Review of Oona A. Hathaway and Scott Shapiro, The Internationalists: How a Radical Plan to Outlaw War Remade the World*, 13 CRIM. L. & PHIL. 205 (2018); Peter Yearwood, *Review of The Internationalists: And Their Plan to Outlaw War*, Reviews in History (June, 2018) (available at <https://www.history.ac.uk/reviews/review/2257>) (last accessed March 31, 2019); *Agora: The Internationalists: How a Radical Plan to Outlaw War Remade the World*, 7 GLOBAL CONSTITUTIONALISM 295 (2018) (special issue featuring reviews from Oliver Diggelman, Tarak Barkawi, Andreas Follesdal, Anna Geis, Paolo Palchetti, and Geir Ulfstein as well as responses from Hathaway and Shapiro).

⁵⁰ On author's response to these criticisms, see Oona Hathaway & Scott Shapiro, *The Internationalists vs. the Realists and Neocons*, Lawfare, (September 25, 2017) (available at: <https://www.lawfareblog.com/internationalists-vs-realists-and-neocons>) (last visited March 31, 2019).

the very violence the authors purport to oppose.⁵¹ Thus, engaging *The Internationalists* and its reviews as a meta-phenomenon bridges the gap between this article's historical point that the Soviet Union is key to understanding the crime of aggression and its normative political point that contemporary international criminal justice must be understood through a Marxist lens.

Moving forward from these premises, Part II contextualizes the Soviet approach to aggression by exploring the promises and contradictions presented by the interwar campaign to outlaw war. Through critical engagement with *The Internationalists*, I center the largely absent consideration of the imperial backdrop that shaped the project to outlaw war. This opens a space for exploring Vladimir Lenin's critical and strategic analyses of empire/inter-imperial rivalry in relation to the proclaimed ends of the outlawry campaign. Following this, Part III examines Soviet contributions to the development of the crime of aggression contextualized through Soviet encounters with the international legal order. These ranged from early recognition controversies to its experience of cataclysmic violence during the Second World War to its emergence as a triumphant would-be architect of a new world order. Here, through a reading of key texts by Trainin and Korovin, I depict the Soviet vision of criminalizing aggressive war as actively requiring an emancipatory re-imagination of the global system where the success of juridical innovations could not be separated from achieving their material conditions of possibility.

Finally, Part IV examines the contradictions revealed within the Soviets' project of criminalizing aggression as the Cold War and decolonization took center stage in world politics. Here, I analyze these contradictions in relation to the Soviets' frustrated attempt to, on the one hand, further a world revolution aimed at transcending the state by achieving communism and, on the other hand, employing draconian measures to ensure the survival of the Soviet state as a necessary means of bringing forth its world revolutionary ends. By navigating this chasm through the contradictory principles relating to its commitment to criminalizing aggressive war, the Soviets opened themselves to numerous challenges from a wide variety of actors with very different agendas and ideologies. In concluding, I touch upon contemporary developments aimed at fundamentally re-imagining the crime of aggression as a means of showing why lessons derived from the Soviets' formative visions are still important today.

II. Lineages of War's Outlawry: Context, Contradiction, Critique

A. A New World Order Through (Whose) Law?

⁵¹ See Nicholas Mulder, *The Rise and Fall of Euro-American Inter-State War*, 10 HUMANITY 133 (2019); Charlotte Peevers, *Liberal Internationalism, Radical Transformation and the Making of World Orders*, 29 EUR. J. INT'L L. 303 (2018); Tarak Barkawi, *From Law to History: The Politics of War and Empire*, 7 GLOBAL CONSTITUTIONALISM 315 (2018); Stephen Wertheim, *The War Against War*, The Nation (November 8, 2018) (available at <https://www.thenation.com/article/liberal-internationalism-paris-peace-pact/>) (last accessed March 31, 2019).

The crime of aggression is unique among international crimes. After all, prior to Nuremberg, while trying individuals for breaching the rules of conduct during war was a recognized practice, a sovereign's justification for waging war against an outsider was traditionally assumed to be beyond the scope of legal accountability.⁵² Yet as a matter of historical context, a larger campaign to outlaw war existed in the interwar period that witnessed not only vast transformations of international law⁵³ but the rise of the modern idea of 'international society' as we know it.⁵⁴ The enduring legal impact of this war outlawry movement attained a high degree of prominence when Nazi defendants at Nuremberg sought to challenge the legitimacy of the proceedings against them on the grounds that they were being retroactively charged for acts that were not criminal offenses at the time of their commission.⁵⁵ The prosecution responded to this challenge, in part, by invoking the 1928 Paris Peace Pact (as commonly referred to as the Kellogg-Briand Pact) as evidence that the illegality of the Nazis' behavior was well-established when it occurred.⁵⁶ As they argued, once this initial peace agreement between the U.S. and France was opened to all states as a multilateral renunciation of aggression and conquest as national policy options, it eventually acquired sixty-three signatures (including Germany's), thus revealing an international consensus on the unlawful character of war.⁵⁷

When considering the Allies' overall legal strategy at Nuremberg, finding a basis for proclaiming aggressive war as a crime that the Germans were uniquely guilty of was a crucial task.⁵⁸ By condemning the Nazis for starting the war, and subsequently declaring them liable for their hostilities conduct violations as foreseeable consequences of war, the Allies could exonerate themselves for their own wartime breaches.⁵⁹ The pressure to resolve this conundrum provides context for the Nuremberg Judgment's iconic pronouncement that: "[t]o initiate a war of aggression...is not only an international crime; it is the supreme international crime differing from the other war crimes in that it contains within itself the accumulated evil of the whole."⁶⁰ However, this raised the question of

⁵² GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 141 (2007); For a compilation of pre-Nuremberg practice regarding war crimes trials see generally Willard Cowles, *Trials of War Criminals (Non-Nuremberg)*, 42 AM. J. INT'L L. 299 (1948).

⁵³ On the transformation of existing global sensibilities through the unprecedented merger of international law with international institutionalism see David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 842-844 (1987).

⁵⁴ See DANIEL GORMAN, THE EMERGENCE OF INTERNATIONAL SOCIETY IN THE 1920s 3-8 (2012).

⁵⁵ On these issues of retroactivity from perspective of a Nuremberg defense lawyer, see Otto Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DEPAUL L. REV. 333, 336-340 (1965).

⁵⁶ On the Tribunal's reliance on these arguments in its finding of guilt, see *International Military Tribunal (Nuremberg), Judgment and Sentences* (October 1, 1946), 41 AM. J. INT'L L. 172, 216-218 (1947).

⁵⁷ *Id.*, at 217.

⁵⁸ Franz Schick, *Crimes Against Peace*, 38 J. CRIM. L. & CRIMINOLOGY 445, 448-449 (1948).

⁵⁹ Bernard Meltzer, *A Note on Some Aspects of the Nuremberg Debate*, 14 U. CHI. L. REV. 455, 469 (1947); For a theory of how the International Military Tribunal may have realistically addressed the issue of alleged crimes committed by the Allies see David Luban, *The Legacies of Nuremberg*, 54 SOC. RES. 779, 810-812 (1987).

⁶⁰ *International Military Tribunal*, *supra* note 62, at 186.

whether the Paris Peace Pact was a sufficient basis for justifying the radical move to criminally prosecute individual state actors for behavior they would have otherwise been exempt from under the traditional logic of sovereign immunity. In responding to this, a longstanding view of the Pact is that it represented an idealistic, but utterly ineffectual, attempt to subvert power politics to law and this was made abundantly evident by its failure to prevent the Second World War.⁶¹ That said, presenting a case that placed such great emphasis on a deeply questionable source of legal authority to justify a massive rupture of existing sensibilities certainly provides ammunition for those who would dismiss Nuremberg as ‘Victor’s Justice.’⁶²

However, Oona Hathaway and Scott Shapiro comprehensively challenge these widespread perceptions of the Paris Peace Pact in their recent book, *The Internationalists*. For Hathaway and Shapiro, despite much instinctive cynicism, the Pact was nothing short of a turning point between the ‘Old World Order’ where war and conquest were essential to guaranteeing order in international relations and our current ‘New World Order,’ where the legitimate use of military force is deeply circumscribed, conquest is anathema, and innovative regimes of sanctions exist to enforce standards and obligations as an alternative to war.⁶³ This catalyzed a cascade of juridical innovations using the Pact as a novel basis for condemning deployments of military force and seizures of territory that were once routinely accepted practices in international relations.⁶⁴ The interwar U.S. Stimpson Doctrine marked this shift by invoking the Pact’s delegitimation of aggression as grounds for refusing to recognize the legitimacy of the 1931 Japanese conquest of Manchuria and 1935 Italian invasion of the Abyssinian Empire (Ethiopia), despite the fact that third-party condemnation and sanctions traditionally meant jeopardizing neutrality status.⁶⁵ Once the Second World War was underway, this organizing framework of anti-aggression formed the Anglo-American commitment to ideological pluralism and the disavowal of any plans for postwar territorial aggrandizement via the 1941 Atlantic Charter.⁶⁶ These understandings were later codified

⁶¹ Here Hans Morgenthau, widely acknowledged as the founding father of the Realist school of International Relations, presented a negative view of the Pact emblematic of an emerging critique of legal formalism that remains a highly influential source of contemporary skepticism regarding law’s ability to prevent war, see OLIVER JÜTERSONKE, MORGENTHAU, LAW AND REALISM 177 (2010); On the nature of criminal liability for aggression as a defining point of contention between diverging Realist and legalist conceptions of the international order that became prominent during the postwar era see generally Jochen von Bernstorff, *Peace and Global Justice through Prosecuting the Crime of Aggression? Kelsen and Morgenthau on the Nuremberg Trials and International Judicial Function*, in HANS KELSEN IN AMERICA – SELECTIVE AFFINITIES AND THE AFFINITIES OF ACADEMIC INFLUENCE 85 (Jacob Talmon, ed., 2016).

⁶² See DANILO ZOLO, VICTOR’S JUSTICE: FROM NUREMBERG TO THE HAGUE 140-142 (M.W. Weir, trans. 2009).

⁶³ In framing this argument in anticipation of reflexive dismissals, they claim that “[o]utlawing war only seems ridiculous to us because ours is a world in which war has already been outlawed.” HATHAWAY & SHAPIRO, *supra* note 53, at xiv.

⁶⁴ Accordingly, the Pact should not be dismissed for failing to immediately transform world order upon its signature given that “[l]egal revolutions do not end with the passing of a law. They begin with them.” *Id.*, at 331.

⁶⁵ See *Id.*, at 238-240.

⁶⁶ *Id.*, at 189-191.

in the Principles and Purposes section of the Charter of United Nations, thus forming the very basis for the postwar world order.⁶⁷

It is in this context that Hathaway and Shapiro provide an elaborate behind-the-scenes exploration of Nuremberg's unprecedented imposition of criminal liability on state actors for planning and waging aggressive war. In doing so, they show how the Nuremberg Judgment itself did not do justice to the monumental theoretical efforts involving some of the world's greatest legal intellects who sought to articulate a doctrinally sound basis for the crime of aggression.⁶⁸ This included the observation by Bohuslav Ecer and William Chandler that, rather than aggression constituting a new criminal offense *per se*, the outlawry of war merely stripped aggressors of their sovereign immunity thus rendering acts of killing in furtherance of an unjustifiable war legally indistinguishable from murder.⁶⁹ However, as Hans Kelsen pointed out, given international law's imposition of collective as opposed to individual responsibility, the logical conclusion of this approach was that it made every German a potential defendant; thus, an essential move for ensuring the legitimacy of this new undertaking was to restrict the scope of liability to high-ranking Nazi figures.⁷⁰ Yet, perhaps the most profound moment came during the proceedings against General Alfred Jodl where the prosecution, in the form of Sir Hartley Shawcross, and the defense, in the form of Hermann Jahrreiss, engaged in an act of 'courtroom ventriloquism' whereby both lawyers served as direct argumentative proxies for two of the most influential international legal theorists of all time, Sir Hersch Lauterpacht and Carl Schmitt, respectively.⁷¹ According to this account, argument over the status of the Paris Peace Pact was nothing short of an epic showdown between a Jewish proponent of building a world where the judgment of war is legally actionable (Lauterpacht) and a Nazi defender of accepting war as inherently beyond judicial scrutiny (Schmitt), with the former emerging victorious.⁷²

However, while Hathaway and Shapiro's account enriches our understanding of the crime of aggression as it was situated within the larger movement to outlaw war, their study omits the generative role of the Soviet Union in this context.⁷³ This can largely be viewed as a consequence of the Hathaway and Shapiro's fetishization of the Pact (and the isolated agency of its architects).⁷⁴ On this basis, their study fails to account for the influence of broader movements that viewed the outlawry of war not simply as a narrow matter of legality, but as inseparable from the need to dismantle the entire 'war system' that linked fanatical nationalism, militaristic imperialism, and armaments manufacture-

⁶⁷ *Id.*, at 330-331.

⁶⁸ *Id.*, at 290-291.

⁶⁹ *Id.*, at 252-254, 259-260; For the text of and commentary on Chandler's contribution see Jonathan Bush, *The Supreme...Crime and Its Origins: The Lost Legislative History of the Crime of Aggressive War*, 102 COLUM. L. REV. 2324 (2002).

⁷⁰ HATHAWAY & SHAPIRO, *supra* note 53, at 269-271.

⁷¹ *Id.*, at 288.

⁷² *Id.*, at 288-290.

⁷³ The Soviet Union is by no means the only exclusion made by this work. On neglected role of the Third World in shaping the 'New World Order' Hathaway and Shapiro ascribe to the Pact, see generally Barkawi, *supra* note 57.

⁷⁴ *Id.*, at 316.

based capitalism.⁷⁵ That said, to what extent did Soviet efforts, guided by this impetus of exporting revolutionary transformation on a global scale, substantively contribute to the profound innovation of imposing individual liability for aggression in a manner unrepresented by the text of the Nuremberg judgment? Although Hathaway and Shapiro briefly mention the Soviet jurist Aron Trainin who developed a basis for individually criminalizing aggression, Soviet insights are excluded, absent a condemnatory dismissal of Stalin for employing show trials and generally using law as a legitimizing veneer for political ends.⁷⁶ In doing so, they seemingly depict all Soviet jurists as pure extensions of Stalin's will, thereby affirming a simplistic binary between law and politics occluding how Soviet engagement with the law-politics relationship stemmed from elaborate projects of materialist jurisprudence that could be creatively deployed even in the shadow of Stalin. If there is even a small degree of truth to this assertion, then fears of Stalinist repression makes Soviet jurists all the more worthy of attention given their ability to produce impressive legal innovations under extreme pressure.

Unfortunately, this characterization is indicative of Hathaway and Shapiro's general depiction of the Soviet Union as a cold, calculating actor, as opposed to a producer of any theoretical innovations regarding the status of aggression under international law. As such, it ignores the Soviets' active role in seeking to explicitly fulfill the Pact by advancing a definition of aggression that directly confronted numerous concerns among states that feared to be on the receiving end of military force during the interwar period. In a manner anticipating international legal debates that would become prominent in the postwar context, this definition affixed the label of aggression to potential actions taken

⁷⁵ Peevers, *supra* note 57, at 309 (2018); On additional historical details relevant to the decline of interstate war excluded by *The Internationalists*, see e.g. Mulder, *supra* note 57; Hull, *supra* note 55; However, despite these contextual historicist critiques, *The Internationalists* nonetheless forms a quintessential case study in the method of 'juridical thinking' whereby contextual rigidity is a second-order consideration in relation to the primary task of weaving together diverse strands of meaning for the purpose of declaring the existence of a transcendent principle. Orford, *supra* note 51, at 172 ("[A]s lawyers, particularly those of us with common law backgrounds, we are trained in the art of making meaning move across time."). Thus for Hathaway and Shapiro, the *strands* that were the Pact, the Simpson Doctrine, the Atlantic Charter, the UN Charter, the Nuremberg Judgment, and the subsequent state practice determined via the Correlates of War project (see Oona Hathaway & Scott Shapiro, "Conquest and State Size Database," (available at <http://theinternationalistsbook.com/data.html#data-extended>) (last accessed July 10, 2018)) are woven together construct the *principle* that is the ban on war. However, given that there exists no universally-accepted template for what to include or exclude from such a narrative, expounding upon the development of a juridical principle can always be contested or further expanded. See Koskeniemi, *supra* note 52, at 970 ("What we study as history of international law depends on what we think international law is the first place."); see also John Haskell, *The Choice of Subject in Writing Histories of International Law*, in INTERNATIONAL LAW AS A PROFESSION (Jean d'Aspremont, Tarcisio Gazzini, Andre Nolkaemper, & Wouter Werner, eds. 2017).

⁷⁶ Here Stalin is depicted as not caring "whether crimes against peace were actual crimes under international law." HATHAWAY & SHAPIRO, *supra* note 53, at 257.

against a state's "internal position"⁷⁷ as well as a state's "international conduct."⁷⁸ Such a deficiency is at odds with Hathaway and Shapiro's general argument that radical ideas, and not simply crude Realpolitik, are essential when explaining how war came to be outlawed.⁷⁹ However, a more nuanced characterization has been presented by Kirsten Sellars, who shows that crimes against peace developed "not as any single national monologue, but as an intermittent *international* dialogue involving jurists in the Soviet Union, Britain and the United States, as well as those attached to the European governments-in-exile."⁸⁰ Yet, before actually detailing the substantive Soviet theories on this point, an alternative interpretation of the world order transformation that Hathaway and Shapiro ascribe to the Paris Peace Pact reveals why understanding the Soviet perspective on the crime of aggression matters.⁸¹

B. The Conundrum of Imperial Anti-Aggression

In explaining the successful outlawry of war, *The Internationalists* advances the view that law should be understood as realigning state behavior in a manner that deeply resonates with Constructivist theories of International Relations ('IR') emphasizing actors' imaginative agency when building international norms.⁸² Considering Hathaway

⁷⁷That is, "its political, economic, or social structure; alleged shortcomings of its administration; disorder following upon strikes revolutionary, or counter-revolutionary movements, and civil wars..." *Convention Defining Aggression (Between Afghanistan, Estonia, Latvia, Persia, Poland, Rumania, Turkey and the U.S.S.R.)*, 27 AM. J. INT'L L. SUPP. 192, 194 (1933)

⁷⁸ I.e.: "infringement or a threat of infringing the material or moral rights or interests of a foreign state or its citizens; rupture of diplomatic or economic relations; measures of economic or financial boycott; conflicts in the sphere of economic, financial or other obligations in connection with foreign governments..." *Id.* (For a watershed commitment to many of these ideals nearly forty years later see G.A. Res. 2625 *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, U.N. GAOR, 25th sess., U.N. Doc. A/8082 (1970)); For a compilation of interwar era Soviet anti-aggression efforts, see MAXIM LITVINOV, AGAINST AGGRESSION: SPEECHES BY MAXIM LITVINOV, TOGETHER WITH TEXTS OF TREATIES AND OF THE COVENANT OF THE LEAGUE OF NATIONS (1939.)

⁷⁹ However, *The Internationalists* is not unique in making this exclusion on the basis of perceived Soviet-Western difference when it comes to explain the imposition of criminal liability for waging war. See KIRSTEN SELLARS, 'CRIMES AGAINST PEACE' AND INTERNATIONAL LAW 50 (2013) (Footnote 13 details previous studies of the origins of the 'crimes against peace' that depict it as a Western liberal project fundamentally opposed to what the Soviets' stood for, thus, entrenching a deep skepticism over the possibility of Soviet influence).

⁸⁰ *Id.* (emphasis in original).

⁸¹ It should be noted that offering this alternative is to not categorically dismiss the Pact and its impact. Rather, while Hathaway and Shapiro view the Pact as a *cause* in and of itself, my claim is that it is better understood as an *effect* of larger global forces.

⁸² I credit Tristan Webb with this observation of *The Internationalists* as a Constructivist work; For a broader analysis of this interplay see generally Jutta Brunnee and Stephen Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 COLUM. J. TRANSNAT'L L. 19 (2000); On their subsequent confrontation of the Constructivism paradigm in relation to their work see Oona Hathaway & Scott Shapiro,

and Shapiro's U.S. context, the embrace of this orientation is highly understandable. After all, in the wake of the post-9/11 'War on Terror,' arguments based on structuralist rational choice/game theory models that justify international legal breaches on this basis have become vastly influential within the U.S. academy, judiciary, and general legal culture.⁸³ However, like most theories of international law and IR, Hathaway and Shapiro, along with the vast majority of their critics, base their analysis on the presumption of a horizontal world of sovereign states.⁸⁴ As a result, only secondary emphasis is placed on the vertical hierarchies of empires and their colonies that have existed for most of history and have defined the modern world as we know it.⁸⁵ However, questions surrounding empire following the First World War were central to structuring the debates on the outlawry of war.

For Hathaway and Shapiro, once the Peace Pact provided a condemnation of aggression, there remained the question of what constituted legitimate self-defense. While they show how Salmon Levinson, the American lawyer occupying a leading position in the outlawry movement, opposed including any reference to self-defense due to its supposedly obvious status as an inherent right, the scope of self-defense in the imperial context was anything but obvious.⁸⁶ For instance, Austen Chamberlain, the UK's Secretary of State for Foreign Affairs, asserted a right of self-defense covering not only Britain's "own territory and her Empire, but also over unnamed 'certain regions' outside it."⁸⁷ Moreover, under this view, "defensive actions could be triggered not just by war but also by actions *short of war*," and "[b]y this reasoning, defensive actions could be mounted not just against all-out armed attack but also against rather less forceful actions such as 'questioning' and 'interference.'"⁸⁸ For the American commentator and Pact opponent Edwin Borchard, this British view exceeded even the Monroe Doctrine where at least the geographic scope of the U.S.'s asserted sphere of influence was well

International Law and Its Transformation through the Outlawry of War, 95 INT'L AFFAIRS 45, 46 (2019).

⁸³ For studies of this multifaceted project of American conservative opposition to international legal constraints see e.g. Alejandro Lorite-Escorihuela, *Cultural Relativism the American Way: The Nationalist School of International Law in the United States*, 5 GLOBAL JURIST FRONTIERS 1 (2005); Emily Haslam & Wade Mansell, *John Bolton and the US Retreat from International Law*, 14 SOC. & LEGAL STUD. 459 (2005); JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* (2015).

⁸⁴ For a display of this common presumption through a response to their critics, see Hathaway & Shapiro, *supra* note 55.

⁸⁵ On Emer de Vattel's 1758 treatise *The Law of Nations* as the original framework for state-centrism in modern theories of both international law and International Relations see Jennifer Pitts, *International Relations and the Critical History of International Law*, 31 INT'L RELATIONS 282, 285-89 (2017); On Vattel's theories of sovereign equality as a natural law counterfactual based on individual self-defense abstracted from the hierarchical realities of his actual historical context, see Peter Stirk, *The Westphalian Model and Sovereign Equality*, 38 REV. INT'L STUD. 641, 648 (2011); For an in-depth study of Vattel's context see JENNIFER PITTS, *BOUNDARIES OF THE INTERNATIONAL: LAW AND EMPIRE* 68-91 (2018).

⁸⁶ On Levinson's evasion of self-defense, see HATHAWAY & SHAPIRO, *supra* note 53, at 123.

⁸⁷ SELLARS, *supra* note 85, at 29.

⁸⁸ *Id.*, at 30 (emphasis in original).

established.⁸⁹ Such a critique reveals contention over the kinds of unequal power relations exposed through international legal projects seeking to regulate the use of force. The early-twentieth-century U.S. construction of a legalistic foreign policy prone to rhetorically invoking the principle of sovereign equality as an axiomatic presumption meant to declare moral superiority relative to the European empires emblemizes such a project.⁹⁰ However, in actual practice, these egalitarian aspirations (whether sincere or otherwise) were subordinated to hierarchical justifications when the protection of key economic interests justified coercive interventions in the affairs of weaker states.⁹¹

Additionally, these challenges occurred alongside major changes within the colonial order via the League of Nations Mandate system whereby former German and Ottoman possessions were placed under the internationally-supervised trusteeship of victorious powers tasked with raising these areas to the requisite level of ‘civilization’ in preparation

⁸⁹ *Id.*; see Edwin Borchard, *The Multilateral Treaty for the Renunciation of War*, 23 AM. J. INT’L L. 116, 118 (1929).

⁹⁰ For the leading historical study see generally BENJAMIN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* (2016); Additionally, it is worth noting that while the U.S. did possess a formal empire, it was justified as a peaceful, humanitarian enterprise where instances of acquiring territory through force (namely the Mexican-American and Spanish-American Wars) were rare exceptions. See Pitman Potter, *The Nature of American Territorial Expansion*, 15 AM. J. INT’L L. 189, 192-194 (1921); However, this narrative of imperial virtue/exceptionalism has all too frequently been taken at face value and it is only now that studies of American expansion in its broader world-historical contexts are being produced. See e.g. A.G. HOPKINS, *THE AMERICAN EMPIRE: A GLOBAL HISTORY* (2018); see also DANIEL IMMERWAHR, *HOW TO HIDE AN EMPIRE: A HISTORY OF THE GREATER UNITED STATES* (2019).

⁹¹ The great case in point here was the Monroe Doctrine which frequently raised questions as to how the interventions it justified might be preserved if sovereign equality was truly embraced. See Stephen Wertheim, *The League of Nations: A Retreat from International Law?*, 7 J. GLOBAL HIST., 210, 217, 229 (2012); Such frustrations were tied to an American view that the Monroe Doctrine was a non-legal foreign policy instrument and this was actively contested by Latin American actors who asserted that it formed the basis of obligation within a distinctly Pan-American juridical order. See generally Juan Pablo Scarfi, *In the Name of the Americas: The Pan-American Redefinition of the Monroe Doctrine and the Emerging Language of American International Law in the Western Hemisphere, 1898-1933*, 40 DIPLOMATIC HIST. 189 (2016); This structure of presumed formal equality coupled with exceptional de facto hierarchy continually reproduced itself throughout the twentieth-/twenty-first century American foreign relations from post-First World War Wilsonian ‘self-determination’ (see e.g. ADOM GETACHEW, *WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION* 37-70 (2019)) to Cold War ‘modernization’ (see e.g. NILS GILMAN, *MANDARINS OF THE FUTURE: MODERNIZATION THEORY IN COLD WAR AMERICA* (2007)) to the ongoing ‘War on Terror’ (see e.g. MICHAEL MANN, *INCOHERENT EMPIRE* (2005)). For a theory of a uniquely American view of superiority that allows these justifications to be constructed time and time again, see generally Taesuh Cha, *The Formation of American Exceptional Identities: A Three-Tier Model of the ‘Standard of Civilization’ in US Foreign Policy*, 21 EUR. J. INT’L REL. 743 (2015); For a broader theory of how sovereign equality is itself a problem in that legitimizes a system where formally equal interactions and exchange are foundationally premised on inherently coercive structures, see MIEVILLE, *supra* note 34, at 117-151.

for independence.⁹² Although the technical scope of this system covered only a limited range of cases compared to the world's aggregate mass of colonized spaces, it nonetheless "made a crucial change to the structure of international political and legal order by introducing a new form of global regulation to govern the practice of colonialism, essentially making the promotion of civilization a concern of international society as a whole, rather than exclusively the responsibility of the relevant imperial power."⁹³ While this turn to trusteeship has long been viewed as a compromise between traditional great power *realpolitik* and the type of moralistic internationalist idealism promoted by the likes of Woodrow Wilson, this view obscures the deep systemic logic that intertwined these two approaches.⁹⁴ As Alexander Anievas has shown, the Wilsonian strategy influencing projects such as the Mandate system was rooted in the attempt to transcend the constraints of formal empire while simultaneously preserving racial hierarchies and opportunities for capital accumulation while justifying the interventions needed to preserve these practices.⁹⁵ Thus, while the Mandate system is often understood by critical international legal scholars as a paternalistic order distinct from the League's ambition of outlawing aggression among European states, the projects both of trusteeship and anti-aggression were intertwined within a larger comprehensive system of inter-imperial geopolitics.⁹⁶

Thus, when evaluating the attempt to outlaw aggression and conquest, the 1928 Paris Peace Pact was arguably prompted by preserving the territorial status quo just as much, if not more, than any attempt to eliminate the human suffering that results from war. In identifying this motivation, Nicholas Mulder incisively has observed that the finalization of the Pact occurred at a moment of global economic crisis and a striking historical parallel can be located in 1873 when a roughly analogous economic downturn produced a massive spike in states' drives to accumulate new territories.⁹⁷ Hathaway and Shapiro, however, do acknowledge these material constraints on legal idealism, noting the

⁹² *The Covenant of the League of Nations*, at Art. 22, (available at: www.avalon.law.yale.edu/20th_century/leagcov.asp#art22 (last accessed 9 February 2018)); For a comprehensive history of this system see generally SUSAN PEDERSEN, *THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE* (2015).

⁹³ EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* 126 (2002).

⁹⁴ ALEXANDER ANIEVAS, *CAPITAL, THE STATE, AND WAR: CLASS CONFLICT AND GEOPOLITICS IN THE THIRTY YEARS' CRISIS, 1914-1945* 114-115 (2014).

⁹⁵ *Id.*, at 121-126; On Wilson's influence in the formation of the Mandate system see PEDERSEN, *supra* note 85, at 23-28; see also Sushil Chandra Sinha, *Role of President Woodrow Wilson in the Evolution of the Mandate System*, 3 *INDIAN J. POL. SCI.* 424 (1942).

⁹⁶ For a highly influential formulation of this 'dual order' during the interwar period, see Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 *N.Y.U. J. INT'L L. & POL.* 513, 580 (2002); On the need to account for larger geopolitical structures in order to avoid reductionist explanations based on racial/cultural difference within international legal discourse see Robert Knox, *Civilising Interventions? Race, War, and International Law*, 26 *CAMBRIDGE REV. INT'L AFFAIRS* 111, 126 (2013) (An account of the contemporary manifestations of this racialized dynamic of inter-imperial rivalry in international law); Knox, *Valuing Race?*, *supra* note 34 (Placing this claim in its broader historical and theoretical context).

⁹⁷ Mulder, *supra* note 57, at 143-144.

hypocrisy charges asserted against outlawry proponents by geopolitical latecomers, including the future Axis powers, who missed out on the biggest colonial land grabs.⁹⁸ They also document similar charges concerning the danger of limitless brutality in messianic ‘discriminatory’ wars against ‘unjust’ adversaries asserted by individuals such as Carl Schmitt who viewed absolute sovereign prerogative as a natural limitation on war’s violence, at least as it applied among ‘civilized’ European nations.⁹⁹ Yet, their uncritical fixation on these points of discontent draws too stark of a binary.¹⁰⁰ After all, dividing opinion between those who championed the Pact in the name of building a world without war and those who opposed the Pact out of a desire to preserve the prerogative to wage war excludes the counterintuitive realities that manifested during this era.

While it is easy in retrospect to view the Axis powers as unambiguous aggressors, this should not conceal how, in the lead up to the Second World War, these states strategically lodged arguments invoking ‘anti-aggression.’ Such rhetoric exposed the tensions of an international legal order where progressive commitments remained marred by capitalist imperialism. In other words, far from delivering linear progress, the discourse surrounding the outlawry of war was itself complicit in plunging the world into war for a second time.¹⁰¹ For instance, the commonplace assumption that the 1935 Italian invasion of Ethiopia resulted from the League’s institutional failure conceals the reality that Italy explicitly lodged arguments that its intervention was warranted under international law due to Ethiopia’s violation of the conditional terms of its inclusion as a

⁹⁸ HATHAWAY & SHAPIRO, *supra* note 53, at 159-160; This was articulated by Carl Schmitt where, according to Tony Carty’s reading, by lacking a vast overseas empire, “Prussia was the only Great Power which was only a state and could only expand at the expense of other states which already belonged to the European international community. Hence it was easy for Prussia to acquire the reputation as a disturber of the peace and as a brutal power-oriented state...” Anthony Carty, *Carl Schmitt’s Critique of Liberal International Legal Order Between 1933 and 1945*, 14 LEIDEN J. INT’L L. 25, 45 (2001).

⁹⁹ See HATHAWAY & SHAPIRO, *supra* note 53, at 219-223; On Schmitt’s framing of this evolution of limited war with the decline of the classical doctrine of just war theory see CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* 155-158 (G.L. Ulmen, trans., 2003).

¹⁰⁰ However, it should be noted that differing material positions within the global order did produce different juridical rationales for war. For an excellent account of how ‘order-based’ as opposed to ‘ontology-based’ use of force justifications emerged in contexts of imperial race-hierarchy and great power rivalry, see generally Jochem Von Bernstorff, *The Use of Force in International Law before World War I: On Imperial Ordering and the Ontology of the Nation-State*, 29 EUR. J. INT’L L. 233 (2018) (On the differentiation between these two modes of justification, see *Id.*, at 241).

¹⁰¹ One figure from this era who recognized the paradoxical function of anti-aggression rhetoric within the geopolitical rivalries of great powers was the feminist peace activist Helena Swanwick, who noted:

It is a curious fact that Powers which glorify war, honour soldiers above all, boast in their histories of past conquests - and which great Power does not? - are yet sensitive to the accusation of being the aggressor and devise always some excuse by which it would appear that they were not really aggressors. Whether by phrases such as ‘Girls in the gold-reef city’, or ‘the Russian steam-roller’, or ‘We don’t want to fight’, they put their heads in the pacifist bag for which they profess so much contempt.

HELENA SWANWICK, *COLLECTIVE INSECURITY* 111 (1937).

League member.¹⁰² This reveals the way in which such conditions were uniquely imposed on Ethiopia, despite its status as a sovereign equal, in a deeply racialized manner reflecting the exclusionist conceptions of ‘civilization’ that still justified colonial rule under international law.¹⁰³

Thus, the fact that racial hierarchies overcame formal sovereignty compromised attempts to condemn Italy while exposing how international law remained fundamentally committed to imperial domination despite its newfound embrace of progressive discourse.¹⁰⁴ This cast doubt on the universality of the outlawry campaign’s animating rhetoric.¹⁰⁵ Moreover, these attitudes of racial/civilizational hierarchy provide context for Hathaway and Shapiro’s observation that the Japanese conquest of Manchuria was more thoroughly condemned than the Italian invasion of Ethiopia.¹⁰⁶ This disparity highlights Japan’s precarious international status where, despite rapidly becoming an imperial great power, the race-based limits of its inclusion were starkly exposed.¹⁰⁷ On this basis, the Japanese had little incentive to adhere to a progressive conception of international institutionalism that they would never be fully equal partners in shaping. Furthermore, there was the way in which the Nazis themselves utilized the new interwar international legal order to legitimize territorial aggrandizement while nonetheless invoking the language of non-aggression. This came in the form of invoking League commitments to minority rights to justify ‘peaceful’ territorial transfers to protect ethnic Germans in Austria, Czechoslovakia, and finally Danzig, where refusal to passively accede to this

¹⁰² Rose Sydney Parfitt, *Empire des Negras Blancs: The Hybridity of International Legal Personality and the Abyssinia Crisis 1935-36*, 24 LEIDEN J. INT’L L. 849, 859-860 (2011).

¹⁰³ *Id.*, at 858-859; see also Musab Younis, *Race, the World and Time: Haiti, Liberia and Ethiopia (1914-1945)*, 46 MILLENNIUM 352, 362-365 (2018) (A study of how the only League member states governed by African/African-descended peoples, Ethiopia along with Liberia and Haiti, demonstrated the persistence of racial hierarchy despite formal juridical equality); On the ways in which solidarity with Ethiopia amongst African diaspora communities throughout the world demonstrated an ‘internationalism from below’ in this context see Robbie Shilliam, *Intervention and Colonial Modernity: Decolonising the Italy/Ethiopia Conflict through Psalms 68:31*, 39 REV. INT’L STUD. 1131 (2013).

¹⁰⁴ It is difficult to overstate how profoundly this undermined the progressive ethos of interwar international law given the ways in which the colonies placed under the League’s Mandate were legitimized by the narrative that these territories would be granted meaningful sovereign autonomy. See e.g. Quincy Wright, *Sovereignty of the Mandates*, 17 AM. J. INT’L L. 691 (1923).

¹⁰⁵ This brings attention to the issue that the mainstream outlawry campaign was overly fixated on a narrow and highly Eurocentric conceptions of peace and violence. See Barkawi, *supra* note 57, at 327; For a theory of how a battle/repression binary, as opposed to the standard war/peace binary, allows for a non-Eurocentric approach to conceptualizing the deployment of military force see Tarak Barkawi, *Decolonising War*, 1 EUR. J. INT’L SEC. 199, 200 (2016).

¹⁰⁶ HATHAWAY & SHAPIRO, *supra* note 53, at 319.

¹⁰⁷ This included Japan’s inability to have an anti-race discrimination provision included in the League’s Charter, see Arnulf Becker Lorca, *Sovereignty Beyond the West: The End of Classical International Law*, 13 J. HIST. INT’L L. 7, 42-46 (2011); On Japan’s adaptation of formatively European concepts of international legal subjectivity on its own terms see Mohammad Shahabuddin, *The ‘Standard of Civilisation’ in International Law: Intellectual Perspectives from Pre-War Japan*, LEIDEN J. INT’L L. 13, 22-31 (2018).

pattern of territorial accumulation triggered the invasion of Poland—thus setting off the Second World War.¹⁰⁸

C. Taking Lenin's Theory of Imperialism Seriously

In contrast, what made the Soviets unique in this context was their ability to offer sophisticated explanations of the contradictory interplay between aggression, imperialist ideology, and great power rivalries as they existed within a larger structure of political economy.¹⁰⁹ Largely formulated before and during the First World War, this mode of identifying the inter-relationships that constituted the global system was highly relevant to the interwar period where the cessation of hostilities did not extinguish the war's root causes. Vladimir Lenin's 1916 work, *Imperialism: The Highest Stage of Capitalism*, for instance, asserted that the universalization of monopoly capitalism is structurally destined to result in endless wars of accumulation amongst rival empire-maintaining sovereign states who have no choice but to violently turn on one another once all the world's territorial space is claimed.¹¹⁰ In synthesizing the insights of various Marxist and radical liberal thinkers, Lenin combined "economic analysis with a political analysis of class struggle within the various capitalist countries and their colonies, and on top of that display[ed] a grasp of the international military rivalry . . . thus integrating developments across a multiplicity of systems."¹¹¹ However, despite this centralizing focus on interconnection, Lenin's theory of imperialism did not lead to a *telos* of global unification.¹¹² Rather, he viewed the foundational multiplicity of sovereign states as the driver of this reality of global imperialism where economics and politics functioned as separate, yet intertwined, constitutive elements.¹¹³ From this perspective, attempts to end

¹⁰⁸ See Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 13 YALE J. L. & HUMAN. 351, 370-372 (1992); Natasha Wheatley, *Making Nations into Legal Persons between Imperial and International Law: Scenes from a Central European History of Group Rights*, 28 DUKE J. COMP. & INT'L L. 481, 493-494 (2018); On the points of continuity between Nazi invocations of 'self-determination' and Nazi visions of conquest and domination see JORG FISCH, *THE RIGHT OF SELF-DETERMINATION OF PEOPLES: THE DOMESTICATION OF AN ILLUSION* 175-178 (Anita Mage, trans., 2015).

¹⁰⁹ On Hathaway and Shapiro's lack of critical engagement with questions of political economy and consequent veneration of free trade in a manner that severs any analytical linkage between war and capitalism (not to mention the international legal construction of this relationship) see Barkawi, *supra* note 57, at 327.

¹¹⁰ VLADIMIR LENIN, *IMPERIALISM: THE HIGHEST STAGE OF CAPITALISM* 83-88 (1996 [1915]).

¹¹¹ Jeremy Friedman & Peter Rutland, *Anti-Imperialism: The Leninist Legacy and the Fate of World Revolution*, 76 SLAVIC REV. 591, 594 (2017).

¹¹² In this capacity Lenin's theory of inter-imperial rivalry was consequentially different from theories, such as those of Karl Kautsky, that viewed capitalism's imperial character as creating a universal global order transcending the system of multiple sovereign states, see Spyros Sakellariopoulos & Panagiotis Sotiris, *From Territorial to Nonterritorial Capitalist Imperialism: Lenin and the Possibility of a Marxist Theory of Imperialism*, 27 RETHINKING MARXISM 85, 90 (2015).

¹¹³ "This emphasis on the relative autonomy of the political protects Lenin's argument from economic reductionism and keeps capital accumulation and capitalist class interests as the necessary material ground of the whole process." *Id.*, at 91.

war through the same order of international law that remained fundamentally committed to upholding state sovereignty, colonialism, and capital accumulation could hardly succeed on their own terms. After all, while the discourse surrounding the legitimate ends of conquest and imperialism may have changed, the underlying material conditions that rendered war an effective solution for certain issues arising within this system of social relations remained fundamentally intact.

Following Lenin's pre-war theory, one need only consider how the previously-discussed interwar contradictions of imperial self-defense, internationalized paternalism, and reactionary appropriation provided endless pretexts for waging these inevitable wars of accumulation. Thus, in an effort to avoid these pitfalls, what Lenin provided was an alternative inter-systemic approach applicable to the questions of sovereignty and national independence that defined the interwar era. According to Lenin, the building of political forms capable of furthering the world revolution meant emulating the most modern nation-states that already existed in the West, making national independence a pressing priority.¹¹⁴ However, unlike the West's hierarchical view whereby internationally-supervised independence was appropriate for new nations in Central and Eastern Europe, yet potentially endless trusteeship was required outside Europe,¹¹⁵ the Soviet view actively called for the liberation of colonized peoples in Asia and Africa thus radically rejecting 'civilization' as a basis for sovereign independence.¹¹⁶ This move was fundamentally linked to the cause of emancipating the industrial labor force of the imperial metropole, for ending empire would cut off the ability of the metropolitan elite to continuously exploit surplus profits from their colonies and force them to directly face the demands of their unified domestic working classes.¹¹⁷ Moreover, this strategy was linked to the need to build class alliances between the workers of oppressed and oppressor nations; without this solidarity, alliances between the domestic workers and

¹¹⁴ Bill Bowring, *Positivism versus Self-Determination: The Contradictions of Soviet International Law*, in INTERNATIONAL LAW ON THE LEFT: RE-EXAMINING MARXIST LEGACIES 133, 139-142 (Susan Marks, ed., 2008).

¹¹⁵ For an overview of these diverging Western interwar projects, see Antony Anghie, *Nationalism, Development, and the Postcolonial State: The Legacies of the League of Nations*, 41 TEXAS INT'L L. J. 447, 452-453 (2006); However, it must also be noted that the rhetoric of self-determination largely intended for new European states nonetheless proved a persistent source of inspiration for independence movements in the non-European world. See EREZ MANELA THE WILSONIAN MOMENT: SELF-DETERMINATION AND THE INTERNATIONAL ORIGINS OF ANTICOLONIAL NATIONALISM (2007).

¹¹⁶ Bowring, *supra* note 120, at 143-144.

¹¹⁷ For Lenin, the revolution-frustrating lack of working class unity was a direct result of the way imperial "superprofits" extracted by the Great Powers were used to "...economically bribe the upper strata of 'its' workers..." Vladimir Lenin, *Imperialism and the Split in Socialism*, in V.I. LENIN COLLECTED WORKS, VOL. XXIII 105, 115 (1964) (emphasis in original); It is for this reason that Lenin was opposed to any settlement of the First World War that would allow the Great Powers to accumulate more colonial possessions. See Vladimir Lenin, *To the Workers who Support the Struggle Against the War and Against the Socialists who Sided with their Governments*, in V.I. LENIN COLLECTED WORKS, VOL. XXIII 229, 229 (1964); Thus, for Lenin, the imperative was to "transform the imperialist war into a civil war for socialism." Vladimir Lenin, *The Turn in World Politics*, in V.I. LENIN COLLECTED WORKS, VOL. XXIII 262, 269 (1964).

their bourgeoisie within oppressor nations would continue the process of imperial exploitation unimpeded.¹¹⁸

Thus, for Lenin, national independence was not an end in and of itself, as he understood that formal sovereignty could still coexist alongside capitalist exploitation.¹¹⁹ By linking these various factors in an inter-systemic capacity, Lenin's radical strategy undermined arguments that characterized aggression and empire in a narrow fashion centered on discrete legal provisions aimed at achieving incremental progress. After all, according to this theoretical standpoint, empire was irreducible to any simple legal status for the actually-existing array of legal designations were themselves constructed through a world historic process of consolidating specific material relations of production whose cumulative effect could be deemed 'imperialism' (i.e. the highest stage of capitalism).¹²⁰ This deeply entrenched state of affairs could only be transcended through world revolution.¹²¹

In applying this thinking to debates about interwar use of force, any delineation of aggression that invoked self-defense in the imperial context would be illegitimate because maintaining imperialism was illegitimate. Relatedly, any argument that rested on building a more humanitarian international order that adjusted legal provisions, but still presumed capitalist social relations, could be rejected as self-defeating in that superficial commitments would ultimately be rendered impotent by deeper systemic pathologies.¹²² This provides context as to why jurists in the early Soviet Union were largely unconvinced that the internationalization of civilizational ethos via the formation of the League's Mandate system represented any substantive transformation of an old imperial order based on domination, exploitation, and endless war.¹²³

¹¹⁸ Vladimir Lenin, *The Revolutionary Proletariat and the Right of Nations to Self-Determination*, in V.I. LENIN COLLECTED WORKS, VOL. XXI 407, 409 (1964).

¹¹⁹ Towards this end he provides an example of this inadequacy in the form of Norway's 1905 independence from Sweden. Vladimir Lenin, *The Socialist Revolution and the Right of Nations to Self-Determination*, in V.I. LENIN COLLECTED WORKS, VOL. XXII 143, 145 (1964).

¹²⁰ LENIN, *supra* note 116, at 127.

¹²¹ *See Id.*

¹²² In this capacity, Lenin provided the example of 'anti-imperial' denunciations of the 'criminal' 1898 Spanish-American War as amounting to nothing more than a 'pious wish' given their lack of systemic consciousness or critique. *Id.*, at 115; This disjuncture between efforts towards humanitarian improvement and contradictory material conditions continues to be a persistent issue within international legal implementation. One important example is the way in which the ends of international human rights are systematically undermined by neoliberal economic policies, *see generally* Paul O'Connell, *On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights*, 7 HUM. RTS. L. REV. 483 (2007). For various accounts of the relationship between human rights and neoliberalism as they simultaneously emerged in the 1970s, *see e.g.* SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018); Umut Ozsu, *Neoliberalism and Human Rights: The Brandt Commission and the Struggle to Make a New World*, 81 LAW & CONTEMP. PROBS. 139 (2018); Jessica Whyte, *Powerless Companions or Fellow Travelers? Human Rights and the Neoliberal Assault on Post-Colonial Economic Justice*, 2.02 RADICAL PHIL. 13 (2018); Joseph Slaughter, *Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World*, 40 HUM. RTS. Q. 735 (2018).

¹²³ *See Mamlyuk, Decolonization, supra* note 36, at 201-206.

III. Criminalizing Aggression: The Soviet View

A. International Law and Formative Soviet Engagement

At first glance, the link between the Soviet critique of imperialism and Soviet efforts to criminalize war seems obvious. After all, if the wars waged by capitalist powers were illegitimate, then they should be banned, albeit in a capacity that eliminated the gaps, gray areas, and loopholes liberal condemnations of aggression strategically left open. However, this straightforward link is complicated if we consider just how radical the Soviets' initial engagement with the question of 'law' actually was. According to leading Soviet jurist Evgeny Pashukanis, the 'legal form' was not a transhistorical reality but a feature of capitalist social relations, whereby materially-grounded actors were converted into abstract 'legal persons'—a process that was necessary for legitimized formally-equal exchange within substantively unequal conditions.¹²⁴ Thus, with the advent of the world revolution, the purpose was not to build new legal regimes, but to establish the material conditions that would cause law itself to 'wither away.'¹²⁵ Under this theory, condemning imperialist war in the name of law would have the contradictory effect of affirming the very juridical ordering that enabled capitalism and, by extension, imperialism. These formative premises, however, raise a question: why did the Soviets ultimately incorporate the criminalization of war into their anti-imperialist agenda if doing so contradicted their earlier commitments?

The answer lies in the Soviet experience with the political contingency of international law, which can be indexed by the infinitely plastic concept of 'lawfare' invoked to evaluate the usage of law in the context of war.¹²⁶ While designations of 'lawfare' as a recent

¹²⁴ "Historically...it was precisely the exchange transaction which generated the idea of the subject as the bearer of every imaginable legal claim. Only in commodity production does the abstract legal form see the light; in other words, only there does the general capacity to possess a right become distinguished from concrete legal claims. Only the continual reshuffling of values in the market creates the idea of a fixed bearer of such rights." EVGENY PASHUKANIS, *LAW AND MARXISM: A GENERAL THEORY* 118 (Barbara Einhorn, trans., Chris Arthur ed., 1978); In this capacity, Pashukanis represented a systematic effort to build a theory of law aligned with Marx's view that the abstraction formal equality is fundamentally limited as a tool of emancipation if material contradictions persist. For Marx's classic exposition of this point, see generally Karl Marx, *On the Jewish Question*, in *THE MARX-ENGELS READER* 26 (2nd edn, Richard Tucker, ed., 1978).

¹²⁵ See PASHUKANIS, *supra* note 130, at 64 ("the overthrow of the legal form is dependent, not only on transcending the framework of bourgeois society, but also on a radical emancipation from all its remnants."); On Soviet efforts to consolidate a post-Revolutionary order premised upon this rejection of law, see NEWTON, *supra* note 52, at 30-54.

¹²⁶ See Wouter Werner, *The Curious Career of Lawfare*, 43 *CASE W. RES. J. INT'L L.* 61 (2010) (A typology of different applications of lawfare—ranging from descriptive discourse analysis to pejorative condemnations of claims asserted by purportedly illegitimate actors—and their evolutionary trajectories.); see also Freya Irani, *'Lawfare', US Military Discourse, and Colonial Production of Law and War*, 3 *EUR. J. INT'L SEC.* 113 (2018) (Examination of how 'lawfare' discourse serves to exclude the possibility of non-Western engagements with international law in the context of armed conflict.).

discourse abound in the ongoing ‘War on Terror’ as well as current animosities between Russia and the West,¹²⁷ according to Christi Bartman, a major historical illustration can be found in the discourse of ‘aggression’ as it was applied by the Soviet Union in ways that continued into Russia’s Putin era.¹²⁸ For Bartman, Soviet history reveals a clear and systematic pattern of ‘non-aggression pacts’ preceding coercive force beginning in Finland, Poland, and the Baltic States during the interwar period/onset of the Second World War, continuing in the Cold War through interventions in Warsaw Pact member states and Afghanistan, and surviving the Soviet collapse as shown by the Russian Federation’s approach to the Rome Statute.¹²⁹

In the words of Bartman, “the key to lawfare is its use in a *manipulative* or *exploitative* fashion” and, as such, does not extend to “[s]imply utilizing the international legal system to enforce *valid* laws.”¹³⁰ However, determining what constitutes *valid* international law has long been critiqued as a deeply indeterminate and inherently political process.¹³¹ Furthermore, given its construction at the intersection of highly contested issues of both the use of force and international criminal law, this issue of indeterminacy is especially true of attempts to criminalize aggression.¹³² Moreover, contextualizing how the Soviets approached the legality of aggression as a matter of strategic interest requires attention to how they theorized international law and, consequently, how their deepest pessimisms were confirmed by their formative engagements with the actually-existing international legal order.

For the influential Soviet jurist Evgeny Pashukanis, international law is generated through competition between powerful capitalist states seeking to legitimize the pursuit of their interests through universal invocations that change in accordance with shifting patterns of accumulation.¹³³ In observing how this general theory manifested at the level

¹²⁷ On the former situation see Melissa Waters, “Lawfare” in the War on Terrorism: A Reclamation Project, 43 CASE W. RES. J. INT’L L. 327 (2010) (An attempt to create a more systemic discourse of ‘War on terror’ lawfare beyond crude invocations); On the later situation see Mamlyuk, *The Ukraine Crisis, Cold War II, and International Law*, 16 GERMAN L. J. 479, 493-499 (2015).

¹²⁸ Christi Bartman, *Lawfare and the Definition of Aggression: What the Soviet Union and Russian Federation Can Teach Us*, 43 CASE W. RES. J. INT’L L. 423 (2010).

¹²⁹ *Id.*, at 431, 435, 440-441, 444.

¹³⁰ *Id.*, at 428 (emphasis mine).

¹³¹ For the leading account towards this end see generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2nd edn. 2005); On an applicable of this view on political-directed indeterminacy to international criminal law trials see Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK YBK. UN L. 1, 35 (2002).

¹³² For example, it has been argued that applying the crime of aggression to novel use of force controversies (especially those emerging in the context of asymmetric warfare) that may or may not be illegal threatens to undermine the fundamental criminal law principle of non-retroactivity whereby liability can only be imposed for acts that were crimes at the time of their commission, see generally Sascha Bachmann & Gerhard Kemp, *Aggression as “Organized Hypocrisy?”—How the War on Terrorism and Hybrid Threats Challenge the Nuremberg Legacy*, 30 WINDSOR YBK. ACCESS TO JUST. 1 (2012).

¹³³ Evgeny Pashukanis, *International Law*, in APPENDIX: MIEVILLE, *supra* note 34, at 321, 325 (2005).

of national experience, one need only consider the circumstances surrounding the international recognition of the Soviet Union. Here, the new Soviet regime that emerged in 1917 was subject to numerous recognition denials, with the US only explicitly expressing recognition in 1933.¹³⁴ For many prominent Western scholars, this prolonged nonrecognition blatantly disregarded the longstanding principle that the international legal standing of a domestic government, even one that emerged through revolution, must be evaluated on the basis of objective, *de facto* territorial authority independent of the recognizers' normative/ideological inclinations.¹³⁵ While defenders of nonrecognition raised the issue of Soviet nonfulfillment of pre-existing international legal obligations, as leading international lawyer Hersh Lauterpacht later reflected, this stance rested on a problematic conflation of the *willingness* to fulfill obligations with the *ability* to fulfill them, and the Soviets were certainly 'able.'¹³⁶ Thus, while the inability may have warranted nonrecognition, unwillingness presented much more difficulty in defending such a course of action.¹³⁷

These manipulations revealed how Western proclamations of international law as an 'ideologically neutral' body of rules were deeply political acts made all the more powerful by their very denial of political motives. Yet the Soviets hardly harbored a blind belief in international law's ability to deliver fair, apolitical, and sufficiently determinate results. After all, they were well aware of the distinction between international legal recognition's declarative theories (recognition as the acknowledgment of actually-existing international legal standing) and constitutive theories (international legal standing requires recognition).¹³⁸ According to Pashukanis, declarative theories are "the reflection of the epoch, when the bourgeoisie struggled for national liberty and the formation of national states."¹³⁹ In Evgeny Korovin's addendum to Pashukanis's observation, "[o]n the other hand, the theories of constitutional [constitutive] recognition reflect the practice of the imperialistic policy of the greater powers."¹⁴⁰ Thus, the fact that the Western powers went out of their way to apply the imperialist constitutive theory is quite telling from a Soviet

¹³⁴ Eugene Korovin, *The Problems of the International Recognition of the Union of Soviet Socialist Republics in Practice*, 19 IOWA L. REV. 259, 266 (1934).

¹³⁵ See e.g. Edwin Dickinson, *The Recognition of Russia*, 30 MICH. L. REV. 181, 184-85, 193 (1931); Joseph Kelly, *John Bassett Moore's Concept of Recognition*, 2 J. JOHN BASSETT MOORE SOC. INT'L L. 19, 25-26 (1961).

¹³⁶ Hersch Lauterpacht, *The Recognition of Governments: I*, 45 COLUM. L. REV. 815, 839 (1945).

¹³⁷ See *Id.*, at 839-40.

¹³⁸ On the interplay between these two theories of recognition and their exemplification of the tension between natural law and legal positivism in the theoretical justification of international law see BRAD ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 124-129 (1999).

¹³⁹ Quoted in Korovin, *supra* note 140, at 259.

¹⁴⁰ *Id.*, at 259-260; On this front, Soviet jurists raised an important point whereby the indeterminacy presented by diverging understandings of recognition is itself enabling of larger (and determinate) structures of marginalization and domination. Rose Parfitt, *Theorising Recognition and International Legal Personality*, in *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* 583, 599 (Anne Orford & Florian Hoffman, eds., 2016) (When determining who is entitled to recognition and why: "[i]t is...arguable that the problem lies not only with the doctrine of recognition and (international) personality, but also the theoretical underpinnings of more fundamental, ostensibly 'factual' or 'objective' concepts like individuality, humanity and, in the international legal context, statehood.").

perspective that was well aware of international law's imperial affordances. This being the case, the great lesson for the Soviets in light of their early recognition controversies was that successful struggle against the capitalist world order could neither be waged through consistently rigid adherence to international legal formalism nor outright rejection of international law. Rather, a third option was to use the gaps and indeterminacies inherent within the international legal order to transmit their own alternative conceptions of law, sovereignty and the state that were ultimately bound to the higher purpose of furthering world revolution.¹⁴¹

B. Articulating the Material Deviance of Aggressive War

To understand the Soviet conceptualization of the crime of aggression in this context, one must consider the relationship between international law and the Soviet experience of the Second World War. This is especially important considering how it was the unprecedented degree of violence unleashed by the Nazi invasion of the Soviet Union that solidified the previously controversial decision to subject this violence to postwar adjudication as expressed through the 1943 Moscow Declarations.¹⁴² Yet this is inseparably linked to the question of why this violence reached such an extraordinary level. The Nazi position insisted that legal constraints on the conduct of hostilities were entirely inapplicable to the war on the Eastern Front.¹⁴³ This, considered in conjunction with the Soviet Union's complex relationship with the politics of international legal legitimacy, provides context for their extensive and meticulous documenting of Nazi breaches of laws of war.¹⁴⁴ In this capacity, the Soviets affirmed traditional rules while also introducing many of their own innovations, particularly principles relating to the

¹⁴¹ The 'right to self-determination' was a paradigmatic case study in this regard. See Mamlyuk *Decolonization*, *supra* note 36, at 206-207. An additional example of this coexistence between opportunistic invocation and radical theory can be found through the pragmatic application of international law via a Soviet-German peace treaty by Pashukanis despite his theoretical articulations of the need for law to 'wither away' at the level of form as capitalist social relations are overcome. For an analysis of Pashukanis's role in this context set against the broader trajectory of his theoretical endeavors see Bill Bowring, *Yevgeniy Pashukanis, His Law and Marxism: A General Theory, and the 1922 Treaty of Rapallo between Soviet Russia and Germany*, 19 J. HIST. INT'L L. 274 (2017); While Bowring may view Pashukanis's most radical assertions as a unrepresentative of his ultimate position (*Id.*, at 275), at a more general level beyond Pashukanis as an individual, the simultaneity of his endeavors nonetheless reveals the possibility of 'principled opportunism' vis-a-vie Marxist engagement with international law. See Robert Knox, *Marxism, International Law, and Political Strategy*, 22 LEIDEN J. INT'L L. 413, 433-434 (2009); Robert Knox, *Strategy and Tactics*, 21 FINN. YBK. INT'L L. 193, 222-227 (2010).

¹⁴² Priemal, *supra* note 31, at 89.

¹⁴³ Detlev Vagts, *International Law in the Third Reich*, 84 AM. J. INT'L L. 661, 696 (1990); For a detailed study of how this lack of restraint manifested throughout the entire German command structure see OMER BARTOV, *THE EASTERN FRONT, 1941-45: GERMAN TROOPS AND THE BARBARISATION OF WARFARE* (2001).

¹⁴⁴ In this context Soviet documentation was primarily concerned with Nazi crimes not as specific breaches, however grave, but as revealing of systemic patterns of pathological violence. George Ginsburgs, *Laws of War and War Crimes on the Russian Front During World War II: The Soviet View*, 11 SOVIET STUD. 253, 257 (1960).

legitimacy and international legal status of guerrilla/partisan warfare.¹⁴⁵ Thus, when the war ended and the question of what do about the Third Reich's military and political leadership became unavoidable, the Soviet approach compensated for many of the Western Allies' gaps in legal sensibilities when it came to implementing the novelties that made the Nuremberg trial possible.

On one level, there were issues concerning group criminality and the retroactive application of criminal law that the Soviets had comparatively fewer anxieties about creatively redefining.¹⁴⁶ After all, many in the Soviet Union viewed Nuremberg as a continuation of Stalin's infamous show trials.¹⁴⁷ However, while these contributions certainly affirm the Western 'individualist' versus Soviet 'collectivist' binary that defined much Cold War discourse, other important factors significantly complicated this overarching image. While the British and Americans were initially content to have the individual powers responsible for trying Nazi defendants, it was the Soviet position that these proceedings be a distinctly internationalized endeavor.¹⁴⁸ Additionally, it was the Soviet jurist Aron Trainin who was among the strongest proponents of the position that in the name of promoting peace, responsibility for the war must belong to individual Nazi leaders and not the German people collectively.¹⁴⁹ Thus, while international cooperation and the separation of individual guilt from collective responsibility are defining hallmarks of the contemporary international criminal justice project's liberal cosmopolitan credentials, their modern origins were ironically Soviet. As such, considering these patterns of Soviet legal innovation provides a new perspective on how the crime of aggression attained its unprecedented conditions of possibility.

In his influential book *Hitlerite Responsibility Under Criminal Law*, Trainin argued that planning and conducting an aggressive war furnished individual criminal liability under international law, directly influencing the positions of the Western Allies, particularly the U.S.¹⁵⁰ According to Trainin's distinctly historical materialist approach to connecting war, international law, and individual culpability, the very nature of modern interstate interaction generates the potential for international criminal deviance on

¹⁴⁵ *Id.*, at 278; see also I.P. Trainin, *Questions of Guerrilla Warfare in the Law of War*, 40 AM. J. INT'L L. 534, 552 (1946) ("Every state tries to introduce into international law those principles which it supports within the country. The foreign policy of the Soviet state has been an extension of its internal policy...naturally, the Soviet Union recognizes the right of every people to defend freedom, honor, and independence by all methods.").

¹⁴⁶ Hirsch, *supra* note 31, at 710; However, blaming any of Nuremberg's juridical shortcomings on Soviet theory is limited given that "[t]he Russian jurists never insisted directly on the adoption of the politico-ideological principles behind their legal reasoning for they realized it would not be possible to introduce such concepts...on the traditional networks of international law." Solon Cleanthes Ivraakis, *Soviet Concepts of International Law, Criminal Law and Criminal Procedure at the International Conference on Military Trials London, 1945*, 2 MERCER L. REV. 331, 334 (1951).

¹⁴⁷ Hirsch, *supra* note 31, at 703.

¹⁴⁸ JOHN QUIGLEY, SOVIET LEGAL INNOVATION AND THE LAW OF THE WESTERN WORLD 152-153 (2007).

¹⁴⁹ *Id.*, at 153.

¹⁵⁰ *Id.*, at 154-156; On the Soviet efforts to transnationally disseminate Trainin's theory see GEORGE GINSBURGS, MOSCOW'S ROAD TO NUREMBERG: THE SOVIET BACKGROUND TO THE TRIAL 92-93 (1996).

varying orders of magnitude and, for this reason, legal liability for breaching the rules of war was distinct from legal liability for planning or waging an unjustifiable war.¹⁵¹ This analytical co-consideration of historically-shaped material conditions and the legitimacy of armed conflict was well known among Soviet jurists and deeply rooted in Lenin's just war theory.¹⁵²

In Trainin's theory, the precise nature of international crimes is derived directly from the necessity of trans-border connections and associations in a world of social relations formed through the expansion of capitalist political economy.¹⁵³ In theorizing the material harm that places these offences within the scope of global condemnation, through a proto-theory of the 'everyday life of international law,' he states that "[t]he perpetrators of such crimes delay the movement of trains, ships, freight, circulating between nations; they try to create obstacles, and to set up one country against another, one people against another."¹⁵⁴ Consequently, it is from these premises that peace emerges as a first principle

¹⁵¹ For a concise categorization of these two modes of conduct see ARON TRAININ, *HITLERITE RESPONSIBILITY UNDER CRIMINAL LAW* 54 (Andrey Vyshinsky, ed., Andrew Rothstein, trans., 1944).

¹⁵² See Johannes Socher, *Lenin, (Just) Wars, and Soviet Doctrine of the Use of Force*, 19 J. Hist. Int'l L. 219 (2017). A prime example is Ilya Pavlovich Trainin's (not to be confused with Aron Trainin [I credit Bill Bowring for clarifying this "Two Trainins' issue]) theory of guerrilla warfare, whereby: "The teachings of Marxism-Leninism about war demand that the approach to every war be historical, that is, that one take into consideration the historical period in which the war broke out, its economic background, in whose interests and for what sake it was fought. Only such an approach provides the opportunity to determine whether a given war is justified — corresponding to the interests of the masses of the people — or whether it is a war of aggrandizement, conducted in the interests of a clique of enslavers and oppressors." Trainin, *supra* note 151, at 553-554.

¹⁵³ *Id.*, at 39-40.

¹⁵⁴ TRAININ, *supra* note 157, at 40; For a contemporary exploration of the 'everyday life of international law' see generally LUIS ESLAVA, *LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT* (2015) (An application of ethnographic methods to expose the lived manifestations international legal regimes through an examination of the site of Bogota, Colombia). Although this depiction seemingly conforms to the liberal view that enhanced commerce leads to global peace, and likely contributed to Western support for this theory, Trainin's historical-materialist orientations should lead us to support a different interpretation. Here, rather than viewing war as the result of wrongdoing wicked individuals diametrically opposed to peaceful capitalism in need of restoration (see Primeal, *supra* note 31, at 104-107), consistent with Lenin's theory of imperialism, Trainin can be read as arguing that the outbreak of war was fundamentally rooted in the contradictions of capitalist accumulation. On this basis, the success of postwar reconstruction should be judged by the extent it successfully moves the existing order away from capitalism and the further development of international criminal law could play an important role in this capacity. In linking these issues, Trainin stated the following:

"The post-war organization of the world will probably introduce new forms of communication between countries, and, in the sphere of economics, the supplying and purveyance of raw materials, fuel, restoration of the destroyed economic life, etc. In conformity with this, the question of new forms of offenses against the basis of international association may arise: offenses against the economic basis of international association."

TRAININ, *supra* note 157, at 54-55.

for international coexistence for Trainin,¹⁵⁵ and this being the case, as Justice Robert Jackson, the U.S. chief counsel at Nuremberg, would later famously echo, “[a]ggression is therefore the most dangerous international crime.”¹⁵⁶

Given Trainin’s materialist approach to finding individual criminal liability for aggressive war under international law, what is especially pertinent is his orientation towards the conditions of possibility required for this novel prosecutorial regime to become a durable feature of the international order. In this capacity, it is highly revealing that according to Trainin’s account of failed attempts to criminalize aggression during the interwar period,

[t]he extremely weak study of the problem of international criminal law was, of course, not accidental. It was due to the general nature of the international legal relations in the imperialistic era. The policy of aggressive imperialistic supremacy, a constant threat to peace, a policy systematically giving ample scope for the use of force in the sphere of international relations, naturally could not contribute to the development and strengthening of international law as a system of rules protecting the liberty, independence and sovereignty of nations.¹⁵⁷

Trainin’s awareness of the contradictions of liberal international law during the interwar era echoed the insights of earlier Soviet jurists working within a broadly Leninist tradition of analyzing imperialism.¹⁵⁸ The Soviet experience showed that, contrary to the all-pervasive visions of progressive renewal that captivated many during the interwar era, international law was subject to atavistic regressions when strategic interests, such as the Nazi attempt to turn Eastern Europe into the type of imperial order that existed in Asia and Africa, warranted this shift.¹⁵⁹ In this sense, the Nazi rejection of the laws of war on the Eastern Front can be viewed as having an antecedent within the Mandate system whereby assertions that compliance with the laws of war evinced ‘civilization’ among subject peoples generated backlashes asserting that these laws were incomprehensible, and thus inapplicable, to those deemed culturally and/or racially inferior.¹⁶⁰ Such

¹⁵⁵ *Id.*, at 47.

¹⁵⁶ *Id.*, at 48.

¹⁵⁷ *Id.*, at 7.

¹⁵⁸ See Mamlyuk, *Decolonization*, *supra* note 36, at 202-204.

¹⁵⁹ Mark Mazower, *An International Civilization? Empire, Internationalism and the Crisis of the Mid-Twentieth Century*, 82 INT’L AFFAIRS 553, 562-563 (2006).

¹⁶⁰ Here Quincy Wright’s progressive assertion on this point (*The Bombardment of Damascus*, 20 AM. J. INT’L L. 263 (1926) (“it does not seem that the different culture or the fact of tutelage would withdraw Syrians from the protection of the law of war if that law were otherwise applicable, and they themselves were prepared to observe it.”)), was met with an infamous rejection of this applicability by Elbridge Colby (*How to Fight Savage Tribes*, 21 AM. J. INT’L L. 279, 279 (1927)); On this debate and its context see Frederic Megret, *From ‘Savages’ to ‘Unlawful Combatants’: A Postcolonial Look at International Humanitarian Law’s Other*, in INTERNATIONAL LAW AND ITS OTHERS 265, 275-278 (Anne Orford, ed., 2006); A possible reason for the obscuring of links between the racialized violence of Mandate system colonialism and its exponential intensification through the Nazi campaign on the Eastern Front concerns the tendency to fetish ‘war’ as a particular legal status that changes the applicability of rules (For an overview of this discourse see generally Iain Scobbie, *War*, in CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT 900 (Jean d’Aspremont & Sahib Singh, eds., 2019)). While the Nazis

occurrences should not be understood as existing outside the law, for even making a determination that the laws of war do not apply in a given situation is itself a highly legalized undertaking.¹⁶¹

Against this backdrop, Trainin can be read as providing a juridical analysis that was far more suited to exposing these contradictory realities than prevailing international legal theories.¹⁶² Here, we can see how Trainin's insights illuminate the necessity of exposing material contradictions connecting capital, empire, and violence when understanding the relationship between international law and the effective condemnation war. In other words, successful juridical outcomes actively required a detailed mapping of their material conditions of possibility. Yet what, if anything, was the basis for Trainin's belief that international law could be effective? A possible explanation centers on the anticipation that Soviets would be vastly empowered in reinventing international law in the postwar era as informed by their wartime experiences.¹⁶³

C. Envisioning an Anti-Imperial International Order to Come

When it came to differentiating the aftermath of the Second World War from the interwar period, a bold vision of the Soviet agenda for an anti-imperial world order was presented by Trainin's colleague Evgeny (Eugene) Korovin in a 1946 article entitled "The Second World War and International Law."¹⁶⁴ For anyone familiar with the recurring liberal triumphalist narratives surrounding international law and institutions, of which international criminal justice is arguably the crown jewel, Korovin's piece reads as if it was written in a parallel universe. However, on a deeper level, many traces of his arguments are visible in the modern international legal discourses commonly associated with the aspirations and anxieties of liberalism. By covering a vast array of issues,

explicitly characterized their actions as war, military operations in the Mandates were far more contested as some claimed these coercive actions to be 'police actions' that did not technically qualify as 'war' properly understood. *Cf.* PRIYA STATIA, *SPIES IN ARABIA: THE GREAT WAR AND THE CULTURAL FOUNDATIONS OF BRITAIN'S COVERT EMPIRE IN THE MIDDLE EAST* (2008); MARK NECOLEOUS, *WAR POWER, POLICE POWER* (2014); PAUL SAINT-AMOUR, *TENSE FUTURE: MODERNISM, TOTAL WAR, ENCYCLOPEDIA FORM* (2015).

¹⁶¹ See Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 *COLUM. J. TRANSNAT'L L.* 1, 5-6 (2004).

¹⁶² On Trainin's challenge to prevailing understandings of both natural law and legal positivism, see Penn, *supra* note 52, at 132-134.

¹⁶³ According to Michelle Penn's detailed study of Trainin: "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." *Id.*, at 134.

¹⁶⁴ Korovin, *Second World War*, *supra* note 2; With regards to this text, I am engaging with it not simply as an expounding of theory, but also as an object of diplomacy aimed at exposing an English-speaking audience to Soviet perspectives. On this point, it must be noted that in a Russian language piece substantially similar to this one, Korovin's general depiction of the prospects for Soviet-Western cooperation within the confines of the assumed international legal order is far more pessimistic. Mintauts Chakste, *Soviet Concepts of the State, International Law and Sovereignty*, 43 *AM. J. INT'L L.* 21, 28-29 (1949).

Korovin's general claim can be read as a resounding statement that imagining a world where international law can end war means reimagining world order as we know it.

For Korovin, the juridical ordering of the postwar world could be viewed in evolutionary terms, in that "[s]ome [international legal concepts] the war overthrew and dispersed as ashes in the wind; others it elevated to an unprecedented height."¹⁶⁵ In this capacity, two core features he substantively reevaluates are sovereign equality and the exclusivity of states as international legal subjects. Both of these positions bore directly on the Soviet view of the crime of aggression. On the question of sovereign equality, for Korovin, this meant drawing an inverse distinction between aggressor states and 'peace-loving' states whereby limiting the sovereignty of the former was required to affirm the sovereignty of the latter.¹⁶⁶ After all, "[i]n the final analysis it must be admitted that there is not and cannot be such a code of international law as would be equally acceptable to the cannibal and his victim."¹⁶⁷ This being the case, he lambasted traditionalist understandings of sovereignty and actively embraced great power privileges via the UN Security Council's guarantor function on the grounds of the extraordinary sacrifices made by these states during the War.¹⁶⁸ As a result, his position was that

[g]enuine democracy and juridical levelling have nothing in common, and the organization of international relations on formal and levelling principles would be a crying violation of the most elementary equality, inasmuch as it would lead to absurd privileges for small states, which would be accorded international rights on a par with the Great Powers but would at the same time be free from the most important international obligations and consequently might easily become blind weapons for the aggressive schemes of others.¹⁶⁹

However, despite this defense of qualified sovereign equality, Korovin was just as contemptuous of (predominantly British) theories of 'world government'/post-sovereign internationalism. Under his view, "[t]he chief fault of these theories lies in their authors' inability or refusal to understand that the roots of aggressive nationalism, which the world parliament is to check, lie in the very nature of imperialism... The nature and essence of imperialism cannot be changed by any amount of parliamentary voting."¹⁷⁰ Thus, Korovin claimed, "to reject the conception of sovereignty...would always help those who are strong and would never benefit those who are weak," a pronouncement made evident by the realities of the British Empire which showed how post-sovereignty ideals in the name of peace were eminently consistent with the violent domination of subject peoples.¹⁷¹ Yet despite this, Korovin held to the notion that emancipatory world leadership by the so-called Great Powers was possible, for "there is another type of state (the Soviet), whose social nature completely precludes even the possibility of such a[n] [imperial] transformation."¹⁷² Furthermore, while Korovin viewed the maintenance of colonialism

¹⁶⁵ Korovin, *Second World War*, *supra* note 2, at 742.

¹⁶⁶ *Id.*, at 744.

¹⁶⁷ *Id.*, at 742-743.

¹⁶⁸ *Id.*, at 746.

¹⁶⁹ *Id.*, at 746.

¹⁷⁰ *Id.*, at 747.

¹⁷¹ *Id.*, at 748.

¹⁷² *Id.*, at 747.

via the UN Trusteeship Council system to be a wrongful denial of self-determination, Soviet membership in this organization could provide rectification, for the Soviet Union had “fully solved the problem of the peaceful collaboration and the fraternal relationship of different people.”¹⁷³

On the related topic of Korovin’s critique of state exclusivity in international law, an intriguing parallel can be drawn between two sets on non-state entities of which he calls for elevated participation and condemnation respectively. On the one hand, Korovin invokes the sacrifice of the working class in the winning of the war, asking why transnational associations of workers, namely the sixty-five-million-member World Trade Union Federation, did not have international legal personality when they were often larger and more active in international affairs than many of the world’s states.¹⁷⁴ He thus implores us to think about the ways in which “the admission of the largest international workers’ organizations into the United Nations with a consultative vote...would considerably promote the progressive development and democratization of international law.”¹⁷⁵ On the other hand, in turning to the subjects of condemnation, he invokes Nuremberg. Rather than simply fixate on the unprecedented trial of state actors under international law, he highlights the novelty of imposing liability on “entire institutions and organizations (the Gestapo, the German high command, the leaders of the Nazi party, the SS and SA) as well as private individuals (German industrialists, landowners, slaveowners and others).”¹⁷⁶

In this way, Korovin’s analysis is consistent with Trainin’s focus on deep material interconnections as the basis for imposing broad findings of individual liability for aggression. For Trainin, fascism’s multi-layered strategies for provoking aggressive militarism both within and between nations demanded that the scope of the crime of aggression be correspondingly broad in its condemnation.¹⁷⁷ For Korovin, such a widespread diffusion of criminal liability raised questions of whether the Third Reich as a “regime of ‘rule by criminals’” practicing “international banditism”¹⁷⁸ was in fact representative of an entirely new international legal subject of which international criminal law was asserted as an early attempt at defining.¹⁷⁹ After all, this was not an effort to uniquely pathologize Germany, for Korovin advanced a position conspicuously similar to Trainin’s denial of the collective German guilt that emphasized the reformability of the German state.¹⁸⁰ Thus, based on the perspective provided by Korovin’s parallel, the Second World War on the Eastern Front as “a scared people’s war against an aggressor

¹⁷³ *Id.*, at 751.

¹⁷⁴ *Id.*, at 745.

¹⁷⁵ *Id.*, at 745-746.

¹⁷⁶ *Id.*, at 748.

¹⁷⁷ In Trainin’s assessment:

“There exists a double connection between fascist terrorism and the policy of military aggression: Organizers of terrorism aim to instigate inner-political (domestic) complications, in another country in order to weaken the strengths of its defense; at the same time the Fascist aggressors aim to bring about international complications by means of assassination of political leaders.”

TRAININ, *supra* note 157, at 49.

¹⁷⁸ Korovin, *Second World War*, *supra* note 1, at 744.

¹⁷⁹ On the acknowledgement of international criminal law’s need for much more theoretical development see TRAININ, *supra* note 157, at 54.

¹⁸⁰ Korovin, *Second World War*, *supra* note 2, at 748.

and enslaver”¹⁸¹ can be viewed as a clash between two distinct non-state entities that could not be adequately accounted for under international law’s prevailing state-centrism: the global working class and the fascist alliance of violent fanatics with industrial capital. The former’s legitimacy had yet to be acknowledged, the latter’s illegitimacy had yet to be understood. Thus, while Trainin formulated a novel justification for holding individuals liable for planning and waging unjustifiable wars, Korovin showed how this innovation was just part of a much grander transformative effort that was ultimately rooted in the Soviet agenda of world revolution.

IV. State vs. Revolution: The Fate of Soviet Anti-Aggression

A. Hypocrisy, Commitment, and the Bar of Radical Transformation

However powerful these immediate postwar visions were, a central contradiction emerged that had far-reaching effects on the way in which the condemnation of aggression shaped the Soviet Union’s anti-imperial agenda. This contradiction centered on whether the Soviet Union, as a matter of both internal and external perception, was best understood as a sovereign state or the foundation of a new form of world order that would ultimately transcend state sovereignty by achieving full-communism.¹⁸² This issue presented a strategic dilemma in the wake of the Bolsheviks’ consolidation of power when it became apparent that internally strengthening the Soviet Union could easily come at the expense of exporting world revolution.¹⁸³ It was in this context that, following the death of Lenin, Trotsky’s attempt to ignite ‘Permanent Revolution’ out of the perceived need to capture the most advanced industrial infrastructure in Germany ultimately lost to Stalin’s strategy of building ‘Socialism in One Country.’¹⁸⁴

In viewing this ‘state versus revolution’ issue through the lens of legally condemning aggression as a strategic tool, emphasizing the Soviet Union’s status as a state was the obvious choice. After all, a core truism of international law is that states, and not revolutions or revolutionaries, are the field’s rights-holders of record.¹⁸⁵ Acknowledging this basic, yet under-analyzed, reality makes all the difference when theorizing the ways in which the Soviet embrace of the crime of aggression furthered the cause of its continued sovereign existence while stunting the revolutionary horizons aimed at moving social relations beyond the nation state-form and its corresponding class-based stratifications. Here, the Soviet drive to prosecute Nazis detailed by Trainin, whereby criminal liability was largely coextensive with an entire ideology, was formulated with the

¹⁸¹ *Id.*, at 753.

¹⁸² I credit Rose Sydney Parfitt for this characterization of the Soviet Union’s international legal personality.

¹⁸³ Friedman & Rutland, *supra* note 117, at 596.

¹⁸⁴ Justin Rosenberg, *Isaac Deutscher and the Lost History of International Relations*, 251 *NEW LEFT REV.* 1, 10 (1996).

¹⁸⁵ On this theoretical neglect of revolution despite its profound consequences for international law, see Vidya Kumar, *Revolutionaries*, in *CONCEPTS FOR INTERNATIONAL LAW: CONTRIBUTIONS TO DISCIPLINARY THOUGHT* 773 (Jean d’Aspremont and Sahib Singh, eds., 2019).

end of ensuring the survival of the Soviet Union against such movements that used portrayals of Soviet illegitimacy as an animating impetus for fanatical violence.¹⁸⁶ The fact that this veneration of state sovereignty contradicted earlier critiques of the capitalist state-system is a testament to the way in which the Second World War fortified Stalin's conception of 'Socialism in One Country' and thus rendered earlier alternative, anti-statist formulations increasingly distant memories.¹⁸⁷ At this nexus of state survival and legal legitimacy in the aftermath of war, criminal prosecutions could achieve what summary executions never could. As Kirsten Sellars describes, "A bullet in the neck destroyed just one 'Hitlerite,' whereas a full trial—which would give a detailed exposition of all the crimes of the Nazi regime—would destroy both the 'Hitlerite' and the ideology he stood for, thereby protecting the Soviet Union from future harm."¹⁸⁸

However, the Soviet experience of guaranteeing the survival of 'Socialism in One Country' through the official elimination of political dissidents—including, among others, the Trotskyites who asserted that exporting world revolution was more important than state consolidation—provided the background of this conclusion.¹⁸⁹ That said, it is not difficult to see how the Soviet approach to analogizing anti-statist radical movements to wartime offenders through criminal law theories of conspiracy and joint enterprise deeply resonated with the Western Allies whose own histories taught them the value of specialized legal argument for suppressing radical movements that contested centralized authority, especially in the domain of organized labor.¹⁹⁰ In many ways, this state of affairs has its origins in Western interventions to suppress the Bolsheviks by supporting rival factions during the Russian Civil War, for this fueled the formation of an all-powerful repressive state-apparatus asserting itself as necessary for eliminating the revolution's internal and external enemies.¹⁹¹ This process of administrative consolidation in the face

¹⁸⁶ SELLARS, *supra* note 85, at 56-58; Much of this fanaticism stemmed from the Anti-Semitic rhetoric of 'Judeo-Bolshevism' where it was claimed that the Russian Revolution and creation of the Soviet Union was orchestrated through a Jewish conspiracy that would ultimately destroy Germany absent a proactive response via militant National Socialism. See ENZO TRAVERSO, *THE ORIGINS OF NAZI VIOLENCE* 119-120 (Janet Lloyd, trans., 2003); TIMOTHY SNYDER, *BLACK EARTH: THE HOLOCAUST AS HISTORY AND WARNING* 19-22 (2015); PAUL HANEBRINK, *A SPECTER HAUNTING EUROPE: THE MYTH OF JUDEO-BOLSHEVISM* (2018).

¹⁸⁷ For an account of how the Second World War impacted the origin Bolshevik Revolution, see generally AMIR WEINER, *MAKING SENSE OF WAR: THE SECOND WORLD WAR AND THE FATE OF THE BOLSHEVIK REVOLUTION* (2002); On the legal theories of the early Soviet Union that were largely banished at this point see e.g. Michael Head, *The Passionate Debates of the Early Years of the Russian Revolution*, 13 CAN. J. L. & JUR. 3 (2001).

¹⁸⁸ SELLARS, *supra* note 85, at 58.

¹⁸⁹ *Id.*, at 56.

¹⁹⁰ On conspiracy as a point of agreement see *Id.*, at 105-107, 115; On the legal characterizations of perceived threats posed by radical labor movements, in particular the Industrial Workers of the World (IWW), in the American and British Imperial contexts see e.g. Ahmed White, *The Crime of Economic Radicalism: Criminal Syndicalism and the Industrial Workers of the World, 1917-1927*, 85 OR. L. REV. 649 (2006); Madelaine Chiam, *Tom Baker's "To Arms" Poster: Internationalism and Resistance in First World War Australia*, 5 LONDON REV. INT'L L. 125 (2017).

¹⁹¹ CUNLIFFE, *supra* note 51, at 61; On Western intervention in the Russian Civil War see e.g. Michael Carley, *The Origin of the French Intervention in the Russian Civil War, January - May 1918: A Reappraisal*, 48 J. MOD. HIST. 413 (1976); DAVID FOGLESONG, *AMERICA'S SECRET*

of hostile interventionism had a major stunting effect on the mobilization of legal theory as a vessel for furthering radical consciousness. After all, the 1937 execution of the Soviet Union's one-time leading jurist Evgeny Pashukanis resulted from the fact that his theory of law 'withering away' undermined the Stalinist project building of an all-pervasive legal architecture.¹⁹² Yet, despite these developments whereby the Soviet Union became dedicated to exceedingly punitive understandings of law, sovereignty, and the state, it nonetheless maintained that these were necessary measures in furtherance of the world revolution.¹⁹³

However, using the crime of aggression towards this end presented yet another dilemma, in that invoking international law as a vessel for asserting state autonomy also committed an actor to the general premise of sovereign equality.¹⁹⁴ This presented significant problems for the Soviet Union given its status as a great power with a distinct mission that was nonetheless deeply fearful of its own extinction (an outcome the criminalization of aggression sought to prevent). Such anxiety was apparent in Korovin's above-discussed skepticism concerning the relationship between a transformed world order and strict juridical equality between states that led him to celebrate the legalized hegemony that elevated the Soviet Union within the new UN Security Council system.¹⁹⁵ After all, the discourse of aggression as a means of upholding sovereign equality provides common cause among small and weak states despite the significant differences they may otherwise possess, including diverging commitments to a capitalist versus a socialist global order.¹⁹⁶ How, then, were the Soviets to approach small states pursuing interests and ideologies that undermined world revolutionary aims while also seeking to preserve their independence by invoking the anti-aggression rhetoric the Soviets had ostensibly

WAR AGAINST BOLSHEVISM: US INTERVENTION IN THE RUSSIAN CIVIL WAR, 1917-1920 (2014); JOHN SWETTENHAM, ALLIED INTERVENTION IN RUSSIA 1918-1919: AND THE PART PLAYED BY CANADA (2017 [1967]).

¹⁹² MIEVILLE, *supra* note 34, at 98-99.

¹⁹³ See Julius Stone, L'Etat, C'Est Moi! L'Etat Est Mort! *A Retrospect on Soviet Marxist Theorizing on State and Law*, (1963) 10 UCLA L. REV. 754, 767-768; Thus it was argued in the West that, despite the Soviets' attempt to revolutionary transcend these institutions '[t]he despised bourgeois virtues turn out, in the end, not to be mere copy book maxims, but indispensable ways of getting things done.' Lon Fuller, *Pashukanis and Vyshinsky: A Study in the Development of Marxian Legal Theory*, 47 MICH. L. REV. 1157, 1165 (1949).

¹⁹⁴ This directly impinged upon the ultimate denial of sovereign equality between socialist and non-socialist states within much Soviet international legal thought, where according to Soviet ultra-loyalist Mintauts Chakste: "...we can sum up the Soviet concept of sovereignty as follows: In its legal aspect it establishes the right of the Soviet state to independence including the right to reject outside interference. In relations with the West, this concept, however, lacks reciprocity, as it does not grant these states the protection of sovereignty." Chakste, *supra* note 175, at 34.

¹⁹⁵ Korovin, *Second World War*, *supra* note 2, at 746.

¹⁹⁶ This was especially important with the advent of decolonization where new states in Asia and Africa hosted a variety of conflicting interests and ideologies yet nonetheless sought to build unity on the basis of shared experiences and challenges. On tension between the toleration of ideological diversity and materially transformative solidarity efforts this context, see Umut Ozsu, "Let Us First Have unity among Us": Bandung, International Law, and the Empty Politics of Solidarity, in BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 293 (Luis Eslava, Michael Fakhri, and Vasuki Nesiah, eds., 2017).

committed themselves to?¹⁹⁷ By condemning such states, the Soviet Union risked undermining alliances with similarly situated weak actors who may have had some sympathies for Soviet agenda despite recognizing the imperative of preserving their sovereignty.¹⁹⁸ As such, this dynamic complicated the foundational Leninist view that the unconditional independence and liberation of all nations was necessary for the emancipation of the global proletariat and, as such, was a world revolutionary imperative.

In accounting for this contradiction, and its role as a lightning rod of contestation haunting future attempts to address aggression through international law, one need only consider how early Soviet practices to achieve self-determination were later undone by Stalin. The early Soviet recognition of the right of self-determination regarding Finland (whose independence was opposed by the Bolsheviks' opponents), the Baltic states, and, less successfully, Ukraine and Armenia materially echoed Lenin's proclamation of national liberation as a revolutionary necessity.¹⁹⁹ Yet, despite these early commitments, their ultimate durability proved exceedingly difficult to reconcile with subsequent Soviet actions, such as the 1939 Soviet invasion of Finland in order to acquire territories perceived as vital to the defense against the expansion of Germany that led to the Soviet Union's expulsion from the League of Nations.²⁰⁰ Then, there was the declaration of non-aggression between Hitler and Stalin via the Molotov-Ribbentrop Pact where the German invasion of Poland was accompanied by a separate Soviet invasion from the East.²⁰¹ This same Pact led to the Soviet occupation of Lithuania, Latvia, and Estonia in 1940 which, following Nazi domination from 1941-44 after the Pact's breakdown, remained

¹⁹⁷ An antecedent international legal construction of 'good small state', '-bad small state' problem occurred during the War regarding the category of 'non-belligerency' whereby those who were not formally at war maintained discretion in supporting belligerents. The invocation of this status was praised or condemned by the Soviet Union in direct proportion to its respective frustration or enabling of those the Soviets deemed aggressors. George Ginsburgs, *The Soviet Union, the Neutrals and International Law in World War II*, 11 INT'L & COMP. L. Q. 171, 229 (1962).

¹⁹⁸ For an account of formative declarations of autonomy in the face of potentially intrusive Soviet influence, see RINNA KULLA, NON-ALIGNMENT AND ITS ORIGINS IN COLD WAR EUROPE: YUGOSLAVIA, FINLAND AND THE SOVIET CHALLENGE (2011).

¹⁹⁹ Bowring, *supra* note 120, at 145.

²⁰⁰ GINSBURGS, *supra* note 156, at 128; Interesting enough, one of the conditions for Soviet withdrawal in their armistice with Finland was that the Fins surrender all those accused of war crimes to Allied custody, *Finland Soviet Union: Armistice, September 17, 1944*, 39 AM. J. INT'L L. SUPP. 85, 87 (1945).

²⁰¹ This was justified through the doctrine of *debellatio* where it was claimed that the earlier Nazi invasion resulted in a complete state death. That said despite the existence of the 1921 Soviet-Polish peace treaty "[t]he extinction of the Polish state would...legally terminate all the treaties, agreements and conventions signed between the U.S.S.R. and Poland." George Ginsburgs, *A Case Study in the Soviet Use of International Law: Eastern Poland in 1939*, 52 AM. J. INT'L L. 69, 70 (1958); It must be noted that there was nothing inherently Soviet about this argument. Such an outcome was perfectly consistent with Hans Kelsen's theory that a state stripped of its fundamental features (i.e. an effective government), lacked standing to compel another state to recognize it. Hans Kelsen, *Recognition in International Law: Theoretical Observations*, 35 AM. J. INT'L L. 605, 611 (1941); Kelsen would later apply this reasoning to Allied-occupied Germany following the War. See e.g. Hans Kelsen, *The Legal Status of Germany according to the Declaration of Berlin*, 39 AM. J. INT'L L. 518 (1945); Hans Kelsen, *Is a Peace Treaty with Germany Legally Possible and Politically Desirable?*, 41 AM. POL. SCI. REV. 1188 (1947).

unlawfully occupied by the Soviets until 1990.²⁰² Given these events and the fact that the Soviets were themselves arguably liable for aggression as a result, how can the Soviet position regarding the criminality of aggression as part of a postwar anti-imperial world order to come be understood?²⁰³

In answering this question, one must focus on the Soviet Union's enduring self-perception as the fulcrum of the world revolution that continued despite the critical mass of contradictions generated by its attempt to harness international law and the nation state-form with the ultimate purpose of transcending these institutions. Thus, if survival above all else was the only way to keep the kernel of world revolution alive, then anything was warranted to achieve this end. After all, the Molotov-Ribbentrop Pact was underlined by a parallel mode of justification stemming from Hitler's idea that the inherent weakness of liberal democracy would extinguish these 'transitory' forms of government leaving only authoritarian fascist and socialist regimes.²⁰⁴ A great tragedy of Soviet ascent to this type of logic, and its implicit minimization of the Nazi's role within global capitalism, was that it dispensed with the warnings articulated by Lenin's theory of inter-imperial rivalry and cast the Soviets as participants in the type of tragic state-centric geopolitics the original world revolution sought to transcend.²⁰⁵ This is readily observable in the way Finland, Poland, and the Baltic states, in varying degrees, suffered the fate of overrun 'buffer states' between great powers which, as an empirical matter, are those most likely to face extinction within the international system.²⁰⁶ In this context, and in light of Hitler's devastating betrayal of the Soviet Union, Korovin's optimistic articulation of a new world where aggressors are punished and small states would no-longer "become blind weapons for the aggressive schemes of others" can be understood in an almost redemptive sense whereby Soviet mistakes would inform visions of the future.²⁰⁷ However, given the fate that befell Soviet theorists like Pashukanis whose insights contradicted Stalin's actions

²⁰² For a comprehensive study of this situation see LAURI MÄLKSOO, *ILLEGAL ANNEXATION AND STATE CONTINUITY: THE CASE OF THE INCORPORATION OF THE BALTIC STATES BY THE USSR* (2003).

²⁰³ On the issue of Soviet complicity with Nazi aggression, see SIMPSON, *supra* note 63, at 149; For a record of international responses to Soviet territorial impositions in this context, see ROBERT LANGER, *SEIZURE OF TERRITORY: THE STIMPSON DOCTRINE AND RELATED PRINCIPLES IN LEGAL THEORY AND DIPLOMATIC PRACTICE* 234-284 (1947).

²⁰⁴ Peter Stirk, *John H. Herz and the International Law of the Third Reich*, 22 *INT'L RELATIONS* 427, 430 (2008).

²⁰⁵ See generally Geoffrey Roberts, *The Soviet Decision for a Pact With Nazi Germany*, 65 *SOVIET STUD.* 421 (1996); On the Nazi's fundamental position within the structures of global capitalism see ANIEVAS, *supra* note 100, at 144-184.

²⁰⁶ See Tanisha Fazal, *State Death in the International System*, 58 *INT'L ORG.* 311, 313-315 (2004).

²⁰⁷ Korovin, *Second World War*, *supra* note 1, at 746; A similar view was expressed by Chakste, according to whom, treaties between the Soviet Union and non-socialist states, namely the Hitler-Stalin Pact, resulted from a mistaken assumption that self-interest alone could be a source of juridical obligation and stability. Thus, for Chakste, the catastrophic, yet structurally determined, breakdown of the relations envisioned through these treaties was "...the actual result of the concept of interest as the only basis for law. The victims of this concept were the states along the Soviet Western Frontier: Finland, Estonia, Latvia, Lithuania, Poland to mention only the first in a long list of victims." Chakste, *supra* note 175, at 30.

and agendas, Korovin's lack of further critical scrutiny on this point is entirely unsurprising.

Moreover, the prospect of further cooperation between the victorious powers dwindled as the immediate postwar consensus broke down, the Cold War ensued, and a new bipolar geopolitical order pitting the U.S. and the Soviet Union as rival, ideologically-opposed superpowers became apparent. The Soviets had little incentive for self-critique when it came to debating aggression within the new UN System. Despite the UN's early affirmation of the Nuremberg Principles as a foundational pillar of the emergent new world order in need of further development,²⁰⁸ progress on this front was limited as the question of aggression proved a recurring flashpoint of recrimination as the agendas of the Second World War's victors drifted further and further apart. In the ensuing debates, while the West had the Molotov-Ribbentrop Pact as leverage on the Soviets, the Soviets had leverage on the West regarding their pre-war appeasement policies towards the Nazis whereby Czechoslovakia's Sudetenland region was handed over to Germany via the 1938 Munich Agreement.²⁰⁹ Thus, while both blocs sought to derive legitimacy from their particular interpretations of the Nuremberg legacy, the historical reality was that "Nazism had tarnished them all."²¹⁰

B. Decolonization and the Matter of Third World Sovereignty

In addition to growing contentions between the two superpower blocs, another source of both opportunity and frustration for the Soviet rhetoric of aggression came with increasingly robust movements for decolonization in Asia and Africa and the many international legal issues they presented.²¹¹ With this growing momentum in the postwar era, the Soviets were well positioned to mobilize their contradictory tradition of asserting the right to self-determination in the name of international law.²¹² In doing so, they had the advantage of a sympathetic audience, given that many who rallied under the banner of Third World opposition to Western imperialism viewed the Russian Revolution as a source of inspiration and transferrable strategy in relation to their own struggles.²¹³ However, while self-determination and individual liability for aggression may have been mutually reinforcing when it came to furthering the Soviets' particular method of furthering world revolution, this connection would be contested by certain voices within the broader anti-colonial liberation movement. The Soviet theorists who viewed the postwar international criminal trials as profound opportunities to reinvent the

²⁰⁸ 25 G.A. Res. 95 (I), *Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal*, 188 U.N. Doc. A/64/Add.1 (1946).

²⁰⁹ SELLARS, *supra* note 85, at 267-268; Here one prominent critic of the Western Allies acceding to Nazi demands for territorial concessions was none other than the iconic American Nuremberg prosecutor Telford Taylor, *see generally* TELFORD TAYLOR, *MUNICH: THE PRICE OF PEACE* (1980).

²¹⁰ SELLARS, *supra* note 85, at 268.

²¹¹ For an overview of these issues *see generally* Georges Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOW. L.J. 95 (1962).

²¹² *See* Bowring, *supra* note 120, at 156-163.

²¹³ *See e.g.* WALTER RODNEY, *THE RUSSIAN REVOLUTION: A VIEW FROM THE THIRD WORLD* (Jesse Benjamin & Robin D.G. Kelly, eds., 2018).

international legal order had to contend with an alternative critical engagement with international criminal justice pioneered at the Tokyo Tribunal through the dissenting opinion of Justice Radhabinod Pal of India.²¹⁴ For Pal, any imposition of retroactive criminal liability would have legitimized imperialism because Japanese actions were no different from what European Empires were continuing to do while the ‘universal’ principles justifying the convictions were formulated without any input from the colonized peoples who were systematically degraded.²¹⁵ In formulating this view, Pal was influenced by earlier British imperial invocations of ‘crimes against peace’ that justified ruthlessly suppressing local rebellions in colonial India.²¹⁶ This informed a deep skepticism of whether invoking criminal liability for triggering unjustifiable conflicts could ever be effectively wielded by a weaker party against a stronger one.²¹⁷

Pal’s treatment of Trainin’s theory and the reliance on it by his fellow Justices at the Tokyo Tribunal subjected the Soviets’ commitment to anti-imperialism to critique.²¹⁸ While admiring Trainin for making “a very valuable contribution to deep juridical thinking,” Pal declared that his insights on these points simply did not reflect what the law actually was, which had everything to do with the problem of victor’s justice.²¹⁹ In linking these issues, according to Pal, “At most, Mr. Trainin has only established a demand of the changing international life. But, I doubt whether this [ban on war] can be

²¹⁴ At its most basic level of his dissent, Justice Pal could not accept that the Allies had the juridical authority to produce treaties that result in ex post facto criminalization for “...to say that the victor can define a crime would be to revert back to those days when he was allowed to devastate the occupied country with fire and sword, appropriate all public and private property therein, and kill the inhabitants and take them into captivity.” *Judgment of the Hon’ble Mr. Justice Pal, Member from India, in DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS* 809, 829 (Neil Boister & Robert Cryer, eds., 2008) [hereinafter: ‘*Pal’s Judgment*’].

²¹⁵ For Pal, if the Japanese were guilty then, by taking this premise to its logical conclusion as mandated by universal international law, “the entire international community would be a community of criminal races.” *Id.*, at 904; See also SIMPSON, *supra* note 47, at 147-148; Latha Varadarajan, *The Trials of Imperialism: Radhabinod Pal’s Dissent at the Tokyo Tribunal*, 21 EUR. J. INT’L REL. 793 (2015).

²¹⁶ Kirsten Sellars, *Meanings of Treason in a Colonial Context: Indian Challenges to the Charges of ‘Waging War against the King’ and ‘Crimes against Peace’*, 30 LEIDEN J. INT’L L. 825, 840-844 (2017).

²¹⁷ In synthesizing ‘treason’-based British delegitimizations of anti-colonialism with Justice Robert Jackson’s proclamation that war was an unacceptable resolution mechanism regardless of how grave a dispute may be, Pal can be viewed as concluding that the intended outcome of Tokyo Tribunal was one where “aggressive wars were treasonable acts against the international order. This...was effectively a call for the paralysis of international affairs, and by implication the criminalization of the struggle against colonialism” *Id.*, at 843-844.

²¹⁸ Here Pal seemed to be acutely aware of the Soviets’ motivation to criminalize aggression due to their experience of unfathomable suffering during the War, but was deeply concerned of the effects that this may have on the development of international law. *Pal’s Judgment, supra* note 225, at 897 (“Mr. Trainin speaks of some “honourable obligation” of the Soviet jurists to give legal expression to the demand of retribution for the crimes committed by the Hitlerites. I hope this sense of obligation to satisfy any demand of retribution did not weigh too much with him. A judge and a juridical thinker cannot function properly under the weight of such a feeling.”).

²¹⁹ *Id.*

a genuine demand of that life and whether it can be effectively met by the introduction of such a criminal responsibility which would under the present organization only succeed in fixing such responsibility upon the parties to a lost War.”²²⁰ In advancing from this premise through his critique of Trainin for ignoring “the fact that even now national sovereignty continues to be the basic fact of international life and that the acts in question affect the very essence of this sovereignty,” Pal exposed the Soviet jurists’ above-discussed contradictions regarding the concept of sovereignty.²²¹ In this way, he implicitly anticipated divisiveness of this issue that would inform Soviet-Third World relations to come. In an intimately related capacity, Pal directly confronted Trainin’s focus on the materially-grounded desirability for criminalizing aggression, but could not muster a similar level of enthusiasm for the immediate doctrinal and institutional reinvention of international law.²²² This was due in great part to his position that the state practice Trainin asserted as demonstrating universal respect for the autonomy of all nations against the ambitions of aggressors was plainly contradicted by the actually-existing realities of colonialism.²²³ Yet, perhaps even more importantly, Pal worried how establishing an international legal basis for criminalizing aggressive war could be invoked against those seeking independence in a world where “[t]here are still dominated and enslaved nations, and there is no provision anywhere in the system for peaceful readjustment without struggle. It is left to the nations themselves to see to the readjustment.”²²⁴

This fear of the crime aggression being invoked to distort (and possibly undermine) anti-colonial struggles came to inform the larger position of the Non-Aligned Movement.²²⁵ In addition to contrasting Western concerns regarding the difficulty of developing a ‘legitimate’ regime of prosecuting aggression in a politically polarized climate, such fears helped shift focus from individual criminalization being the locus of aggression’s illegality.²²⁶ Questions returned to the interwar approach whereby aggression

²²⁰ *Id.*, at 898.

²²¹ *Id.*; For an expansion of Pal’s discussion of the contradictions presented by the interplay between sovereignty, international law, and communist world revolution as presented by the Soviet Union’s case against Japan see *Id.*, at 916-918 (For Trainin’s theoretical grounding of the way *Hitlerite* crimes extended liability to the Japanese see Sellars, *supra* note 227, at 839).

²²² Here despite engagement with Trainin’s assertion that the disruption of international interactions provides a grounding for international criminal deviance, for Pal, this did not result in actual culpability for “the character of the so-called international community...was simply a co-ordinated body of several independent sovereign units and...not a body of which the order of security could be said to have been provided by law.” *Pal’s Judgment*, *supra* note 225, at 902.

²²³ “Mr. Trainin’s hopes are based on the Moscow Declaration of 1943. Thereby, according to him, the nations have now agreed that they “respect the right of all nations to choose their own form of government”. His hopes, however are not yet realized in actual life certainly before the Second World War, during the period we are here concerned with, the tendency reflecting the policy of the powerful nations did not even offer any scope for such a hope.” *Id.*, at 904.

²²⁴ *Id.*, at 903.

²²⁵ See SELLARS, *supra* note 85, at 269-272.

²²⁶ *Id.*, at 280-82; Here a view articulated in the West in the immediate aftermath of Nuremberg was that developing a regime for prosecuting aggressors was ‘too much, too soon’ and more incremental efforts, such as an international court for narcotics trafficking, would be more appropriate as an immediate goal. Philip Jessup, *The Crime of Aggression and the Future of International Law*, 62 POL. SCI. Q. 1, 9 (1947).

was condemned as an act for which a state is collectively liable. Here, the central debate was between a West seeking to place the supreme discretion for determining acts of aggression in the Security Council and a Third World seeking to develop a universal definition of aggression that no institutionalized concentration of power could subvert.²²⁷ In this context, the Soviet Union “was in a unique position of being both a Security Council member and the self-appointed leader of the General Assembly’s campaigns for disarmament and national liberation.”²²⁸ According to Carl Schmitt’s general appraisal of this unorthodox and contradictory geopolitical logic, “with an equally striking and symptomatic modification: the world’s greatest land power, the Soviet Union, which was the strongest potential occupier, stood now on the side of small states.”²²⁹

As the state-centric controversy over aggression became the common medium for characterizing legitimate versus illegitimate uses of force against the tumultuous backdrop of the Cold War and decolonization, Soviet commitments were stretched in multiple directions. Here a major shift occurred as the Soviets began to abandon the Leninist theoretical precept that the forces of global capitalism and the forces of world revolution would inevitably clash.²³⁰ In 1956, Soviet Premier Nikita Khrushchev drew on a doctrine largely theorized by Korovin to put forth the concept of ‘Peaceful Coexistence,’ a meant to affirm the UN Charter system’s general ban on the use of force while seeking to move Soviet-Western competition from the realm of armed confrontation to the realm of competing socio-economic models.²³¹ However, ‘Peaceful Coexistence,’ which in many ways was a response to the development of nuclear weapons,²³² was interpreted as a revisionist betrayal by many engaged in anti-colonial struggle who viewed Soviet rapprochement with the West as the abandonment of world revolution.²³³ This created space for the UN-excluded People’s Republic of China to assert itself as the world revolution’s true leader, as the Soviets were simply another manifestation of ‘white

²²⁷ SELLARS, *supra* note 85, at 261; With this schism, the great victory for the Third World bloc occurred through the 1974 General Assembly resolution offering a definition of aggression. G.A. Res 3314, *Definition of Aggression*, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974).

²²⁸ SELLARS, *supra* note 85, at 268-269.

²²⁹ CARL SCHMITT, *THEORY OF THE PARTISAN* 31 (G.L. Ulmen, trans., 2007).

²³⁰ V.I. Lenin, *The Military Program of the Proletarian Revolution*, in *MARXISM AND THE SCIENCE OF WAR* 169, 171 (Bernard Semmel, ed., 1981) (“Only after we have finally overthrown, finally vanquished and expropriated the bourgeoisie of the whole world, and not merely in one country, will wars become impossible.”).

²³¹ JEREMY FRIEDMAN, *SHADOW COLD WAR: THE SINO-SOVIET COMPETITION FOR THE THIRD WORLD* 25-26, 39 (2015); On Korovin’s foundational role in developing ‘Peaceful Coexistence’ see Mattei & Mamlyuk, *supra* note 44, at 405; For Western studies of ‘Peaceful Coexistence’ and its implications for the international legal order see e.g. Edward McWhinney, “*Peaceful Co-Existence*” and *Soviet-Western International Law*, 56 *AM. J. INT’L L.* 951 (1962); Leon Lipson, *Peaceful Coexistence*, 29 *LAW & CONTEMP. PROBS.* 871 (1964); BERNARD RAMUNDO, *PEACEFUL COEXISTENCE: INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM* (1967).

²³² See generally Campbell Craig, *When the Whip Came Down: Marxism, the Soviet Experience, and the Nuclear Revolution*, 2 *EUR. J. INT’L SEC.* 223 (2017).

²³³ See FRIEDMAN, *supra* note 242, at 44-46.

colonizers' seeking to exploit the decolonizing and postcolonial world for its own ends.²³⁴ Against the pressures of this competition, the Soviets "began increasingly to emphasize that peaceful coexistence did not exclude armed struggle in the developing world."²³⁵ This move involved articulating understandings of national liberation struggles where any use of force by the West to maintain its colonies constituted aggression, and any anti-colonial resistance was self-defense against the aggression that occurred through the original act of colonization.²³⁶

However, this massively broad Soviet stance towards aggression opened the Soviets to condemnations of hypocrisy for interventions within their proclaimed 'sphere of influence,' namely the invasions of Hungary in 1956 and Czechoslovakia in 1968.²³⁷ While the West condemned the Soviet justification of aiding socialism via its Brezhnev Doctrine as a pretext for aggression, the Soviets countered that West could not speak of such issues given that their 'pro-democratic' interventions via the Johnson/Reagan Doctrines demonstrated their own lack of ideological neutrality.²³⁸ However, criticism of

²³⁴ See *Id.*, at 55-56; For an analysis of the international law's structural shaping of the contentions of the Sino-Soviet split see generally Eric Loefflad, *Two Revolutions, One International Legal Order*, HIST. MATERIALISM (forthcoming) (Paper on file with author).

²³⁵ FRIEDMAN, *supra* note 242, at 109; This was coupled with Soviet arguments that the international treaties regulating hostilities conduct were fully applicable to anticolonial liberation struggles despite Western protests that such extensions would undermine the progressive development of the laws of war. Whyte, *supra* note 29, at 321.

²³⁶ George Ginsburgs, "War of National Liberation" and the Modern Law of Nations – *The Soviet Thesis*, 29 LAW & CONTEMP. PROBS. 910, 921 (1964); On this view, situations such as India's 1961 annexation of Portugal's enclave of Goa could be legally defensible despite otherwise being an unambiguous use of force violation under the UN Charter. *Id.* at 921-922; Here India acted in a manner deeply analogous to the Soviet position in that one of its arguments was based on a "...right to defend Goa when it was attacked in 1510 continued even though the exercise of this right had been abandoned for over four centuries." Quincy Wright, *The Goa Incident*, 56 AM. J. INT'L L. 617, 622 (1962) (Here it must be noted that Goa, then still under Portuguese rule, had a right to self-determination as non-self-governing territory. *Id.*, at 626-627; However, arguments have been made that 'colonial enclaves' are not automatically granted independent statehood on this basis. See JAMIE TRINIDAD, SELF-DETERMINATION IN DISPUTED COLONIAL TERRITORIES 157-238 (2018)); As such, the Soviet position provided legal justification for an act that arguably located its legitimacy not through a specific interpretation of an ambiguous international legal provision, but through a deliberate breach of international law. See Nathaniel Berman, *Legitimacy through Defiance: From Goa to Iraq*, 23 WIS. INT'L L. J. 93, 97-101 (2005); Such reasoning exposed the international legal project of anti-aggression to Western charges of hypocrisy. See e.g. Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 AM. J. INT'L L. 224 (1977).

²³⁷ *Id.*, at 235; see also Leon Romaniacki, *Sources of the Brezhnev Doctrine of Limited Sovereignty and Intervention*, 5 ISRAEL L. REV. 527 (1970).

²³⁸ See ROTH, *supra* note 149, at 146-149; For comparative analyses of the reasoning behind the Brezhnev and Johnson/Reagan Doctrines see e.g. Thomas Franck & Edward Weisband, *The Johnson and Brezhnev Doctrines: The Law You Make May Be Your Own*, 22 STAN. L. REV. 979 (1970); William Rogers, Michael Reisman, Lloyd Cutler, & Thomas Franck, *The Brezhnev Doctrine and the Reagan Doctrine: Apples and Oranges?*, 81 PROCEED. AM. SOC. INT'L L. 561 (1987); Michael Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171 (1988).

the Soviet position was in no way restricted to the West, with one prominent line of Marxist-Third Worldist argument coming through Non-Aligned Yugoslav pronouncements that, contra Korovin, it was entirely possible for powerful socialist states to repress weaker ones.²³⁹ In light of this context, on the question of aggression and state sovereignty, the Non-Aligned argument can ultimately be deemed the great victor, for in condemning the excesses of both the Eastern and Western blocs, it upheld contemporary international law's foundational premise of a world of states bound by a duty to mutually respect one another's sovereignty.²⁴⁰

Paradoxically, this robust affirmation of sovereignty as something to be protected from aggression ended up limiting the possibility of criminally prosecuting individuals for aggression in the name of international law.²⁴¹ After all, developing a regime capable of efficiently adjudicating the crime of aggression would require a massive reconfiguration of sovereignty and this could prove especially detrimental to weak and marginalized states in the Global South.²⁴² This interplay of aggression, sovereignty, and individual liability produced a dilemma for proponents of Third World sovereignty. On the one hand, advocating for aggression's inclusion in contemporary international criminal justice allows for perhaps the best institutionally-cognizable continuation of the original cause of condemning aggression in the name of affirming peripheral sovereignty.²⁴³ On the other hand, the very act of affirming international criminal justice strengthens a project that contains much in-built opposition to sovereignty-affirming collectivist endeavors by virtue of its foundational focus on individual narratives of victimhood and perpetration.²⁴⁴

Thus, when trapped between a binary that pits sovereignty against individualization, it is difficult to radically exceed the limitations of both these constraints in the name of

²³⁹ Zoran Oklopčić, *Beyond Empty, Conservative and Ethereal: Pluralist Self-Determination and the Peripheral Political Imaginary*, 26 LEIDEN J. INT'L L. 509, 516 (2013); see also Otom Ambroz, *The Sino-Soviet Dispute Through Yugoslav Eyes*, 10 CHINA Q. 144, 146-147 (1962).

²⁴⁰ "Whether or not either the Brezhnev or Reagan Doctrine could be characterized as a proposed principle of international law, it is clear beyond cavil that the international community resoundingly rejected both." ROTH, *supra* note 144, at 148; On the discourse of newly independent states viewing themselves as more responsible international legal subjects who were best equipped to preserve the sanctity of sovereignty in the shadows of recklessness superpower rivalry see Rose Parfitt, *Newer is Truer: Time, Space, and Subjectivity at the Bandung Conference*, in BANDUNG, GLOBAL HISTORY, AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES 49, 58-61 (Luis Eslava, Michael Fakhri, & Vasuki Nesiha, eds., 2017).

²⁴¹ Such a double-bind is indicative of the much larger difficulty facing anticolonial movements whereby embracing the nation-state form as the vessel for decolonisation meant internalising Eurocentric standards and thus derailed the pursuit of more creative decolonial possibilities. See Pahuja, *supra* note, at 54-59.

²⁴² This results from the reality that, much like every other aspect of the international criminal justice project, any attempts at actual implementation would likely be highly uneven in terms of who would be subject to condemnation and who would be immune see Gerry Simpson, *'Stop Calling it Aggression': War as Crime*, 61 CURRENT LEGAL PROBS. 191, 222 (2008) ("During the negotiations in Rome, there were those who feared the inclusion of aggression might be bought only of the high price of giving the Security Council primary jurisdiction over the crime.").

²⁴³ Charles De Bock, *The Crime of Aggression: Prospects and Perils for the Third World*, 13 CHINESE J. INT'L L. 91, 106 (2014).

²⁴⁴ *Id.*, at 127-30.

achieving emancipation on a higher level.²⁴⁵ Ironically, this present impasse is in many ways rooted in a Soviet vision of the world that sought to transcend both individualism and the nation-state through world revolution while simultaneously preserving the power and privileges of state sovereignty to accomplish this goal. In this sense, Soviet efforts to impose individual criminal liability for aggressive war as a means of hedging their state's survival with the aim of achieving world revolution resulted from the compounded contradictions of attempting to reconfigure existing institutional logics in the name of fundamentally transformative ends. That said, mapping the material dimensions that produced this outcome forms a quintessential case study in Barry Buzan and George Lawson's observation that "there is a great paradox at the heart of the relationship between revolutionary states and international society — revolutionary states must establish relations with other states and coexist with the system's rules, laws and institutions even while professing to reject these practices."²⁴⁶ However, while transformative attempts to declare aggression criminal may have imposed numerous constraints on revolutionary actors, the same logic did not apply to liberal actors. Thus, despite the widespread appeal of condemning aggression in the name of anti-imperialism, it was the ideological inheritors of the Western Allies at Nuremberg who were given the opportunity to reinvent international criminal justice according to their own ideals. In the face of this shift, the radical lineage that harkens back to once extensive Soviet visions of criminalizing aggressive war in the name of world revolution was reduced to a progressively diminishing shield against the excesses of liberal interventionism.

*V. Conclusion: Whither the Geopolitical Dimensions of Global Justice?*²

Given the very real contradictions within the international order, it is in many ways unsurprising that the project of using the crime of aggression as a strategy of transformative change has long remained trapped by the reality that it is both a source of captivation and virtually unimaginable with respect to implementation in light of existing institutional realities. Moreover, this stagnation was coupled with diverging progressive developments where, in a turn from 'aggression to atrocity,' Western liberals began articulating the foundations of an alternative approach to international criminal justice critical of the notion that waging an illegal war was truly the 'supreme international crime' giving rise to all of the others.²⁴⁷ While numerous interconnected historical developments

²⁴⁵ After all, this issue of 'individualism' versus 'cultural autonomy' as a false quandary when both presume the continued existence of larger structures of coercion has been one of the most influential pillars of the radical Marxist tradition *see generally* Marx, *supra* note 130.

²⁴⁶ BARRY BUZAN AND GEORGE LAWSON, *THE GLOBAL TRANSFORMATION: HISTORY, MODERNITY AND THE MAKING OF INTERNATIONAL RELATIONS* 146 (2015).

²⁴⁷ *See generally* Heidi Matthews, *From Aggression to Atrocity: Interrogating the Jus in Bello Turn in International Criminal Law* (2014) (unpublished SJD Thesis, Harvard Law School) (On file in Harvard Law School Library); Ironically, a proto-articular of this sensibility was none other than the Nazi jurist Carl Schmitt. While the entire crux of his theorization denied the legitimacy of criminalizing the resort to war (*see* Carl Schmitt, *The International Crime of the War of*

and ideological innovations brought about this reality, perhaps the most important was the 1970s emergence of ‘universal human rights’ as a utopian project that coincided with a general decline of faith in postcolonial statehood given the recurring instances of internal violence that continued into the age of formal independence.²⁴⁸ With this shift in consciousness came the 1975 Helsinki Final Act whereby a liberal vocabulary of international human rights was mobilized as a discourse of resistance against the Soviets’ maintenance of their sphere of influence in the Eastern Bloc.²⁴⁹ Additionally, within this larger human rights campaign, Soviet dissidents became prominent figures through accounts of their experiences of deprivation at the hands of a ‘totalitarian’ regime.²⁵⁰ On the question of violence, too, the work of scholars such as Judith Shklar established a theoretical position proclaiming that acts of physical cruelty are truly the greatest evil and rectifying them is justified, even when doing so would be hypocritical.²⁵¹ Thus, taken as a whole, these developments brought with them the specter of enhanced legitimacy for undermining sovereignty and extending the use of force in ways that, despite being frequently invoked as ‘novel’ developments, have a long history of being deployed at the expense of states and peoples in the Global South.²⁵²

The crime of aggression as a discourse available to weak and marginalized states, however, illuminates the potential inherent within international criminal justice for affirming sovereignty in addition to its dangers of undermining said sovereignty, thereby forcing zealous opponents to confront their hypocrisy.²⁵³ However, given recent theoretical developments within this ongoing turn ‘from aggression to atrocity,’ the crime of aggression’s ability to continue serving in this role may soon come under a great deal

Aggression and the Principle of “nullum crimen, nulla poena sine lege” (1945), in WRITINGS ON WAR 125 (Timothy Nunan, ed., 2011), this denial did not extend to the violence inflicted during the war, and towards this end, “Schmitt was adamant that the Holocaust, as well as the war crimes perpetrated by the Gestapo and the SS, had to be punished.” HATHAWAY & SHAPIRO, supra note 53, at 274.

²⁴⁸ SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 198-199* (2010).

²⁴⁹ See generally DANIEL THOMAS, *THE HELSINKI EFFECT: INTERNATIONAL NORMS, HUMAN RIGHTS, AND THE DEMISE OF COMMUNISM* (2001).

²⁵⁰ See Benjamin Nathans, *The Disenchantment of Socialism: Soviet Dissidents, Human Rights, and the New Global Morality*, in *THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970S* 33 (Jan Eckel & Samuel Moyn, eds. 2013).

²⁵¹ ROBERT MEISTER, *AFTER EVIL: A POLITICS OF HUMAN RIGHTS* 37-39 (2011); However, international criminal law has introduced significant tensions when institutionalizing this moral precept given its difficult balance of an international human rights sensibility focused on seeking justice for victims, against a criminal law sensibility focused providing fairness to the accused. Darryl Robinson, *The Two Liberalisms of International Criminal Law*, in *FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE* 115, 117-118 (Carsten Stahn & Larissa van den Herik, eds., 2010) (“Is ICL simply an enforcement arm of human rights and humanitarian law, adopting incarceration of violators as a new remedy available to victims? Or, is it a system of criminal justice that respects the philosophical preconditions for the punishment and stigmatization of the individual?”).

²⁵² See Obiora Okafor, *Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective*, 43 *OSGOODE HALL L.J.* 171, 187 (2005).

²⁵³ Christopher Gevers, *International Criminal Law and Individualism: An African Perspective*, in *CRITICAL APPROACHES TO INTERNATIONAL CRIMINAL LAW: AN INTRODUCTION* 221, 230-231 (Christine Schwöbel, ed., 2014).

of pressure. A view is instead emerging that, despite commonly held assumptions on all sides of the debate, it is individuals, and not sovereign states, who are the true victims of the crime of aggression. According to Tom Dannenbaum, the leading theorist of this new interpretation, “[t]he crime of aggression fills a normative gap, capturing a rare category of unjustified large-scale killing that is not criminally prohibited by any other provision of domestic or international law—namely the killing of combatants and collateral civilians in an illegal war.”²⁵⁴

This attempt to disarm the crime of aggression’s ability to uphold sovereignty, particularly of weak states, and reinvent it as the culmination of an all-encompassing scheme of cosmopolitan justice cannot be read in isolation. Here, one need only consider the way an entire body of a ‘customary international law of non-international armed conflict’ was refined through the jurisprudence of international criminal tribunals in a move prompted by the reality that postcolonial states largely refused to subject the comprehensive regulation of internal disorders to a multilateral treaty out of fears it would be invoked to undermine their sovereignty.²⁵⁵ While this development concerned the conduct of hostilities in the context of *jus in bello*, there recently has been a corresponding discourse of ‘internal *jus ad bellum*’ whereby the traditional justifications for condemning violence *between* states are being applied to violence *within* states with the effect of further limiting sovereignty.²⁵⁶ The importance of such developments and their impact on aggression discourse’s present political utility cannot be overstated given the way they raise the possibility of a crime of aggression that is consistent with expanding practices of ‘humanitarian intervention.’²⁵⁷ This has the power to directly mobilize the very interventionist justifications that motivated so much peripheral, postcolonial, and counter-hegemonic advocacy for the crime of aggression as a tool for curbing the expansion of exceptions to the general ban on the use of force.²⁵⁸

²⁵⁴ Tom Dannenbaum, *Politics, the Rule of Law, and the Role of the Crime of Aggression: A Response to Koh and Buchwald*, 109 AM. J. INT’L L. UNBOUND 235, 238-239 (2016); For an examination of this ‘human core of aggression’ see Dannenbaum, *supra* note 5, at 1270-1278.

²⁵⁵ See Tamas Hoffman, *The Gentle Humanizer of Humanitarian Law – Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflict*, in FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 58, 61-62 (Carsten Stahn & Larissa van den Herik, eds., 2010).

²⁵⁶ For assessment of this idea see generally Eliav Lieblich, *Internal Jus ad Bellum*, 67 HASTINGS L. J. 687 (2016).

²⁵⁷ See Dannenbaum, *supra* note 5, at 1295-1301; While excluding humanitarian intervention from the crime of aggression would not necessarily render humanitarian intervention legal (see Jennifer Trahan, *Defining the ‘Grey Area’ where Humanitarian Intervention may not be Fully Legal, but is not the Crime of Aggression*, 2 J. USE OF FORCE & INT’L L. 42 (2015)), there remains the possibility that allowing humanitarian intervention to justify otherwise illegal actions would enable it to operate as a *de facto* policy unimpeded. For a case study of an exception swallowing the rule regarding the practice of torture see Itamar Mann & Omer Shatz, *The Necessity Procedure: Laws of Torture in Israel and Beyond, 1987-2009*, 6 UNBOUND: HARV. J. LEGAL LEFT 59 (2010).

²⁵⁸ De Bock, *supra* note 260, at 106; Here it must be noted that humanitarian intervention’s sister doctrine, ‘the Responsibility to Protect’, shares key features with highly controversial justifications for self-defense whereby an external party can use force against non-state actors when the host state proves ‘unwilling’ or ‘unable’ suppress them. Sara Kendall, *Cartographies of the Present:*

In light of these recent developments, the relevance of multifaceted Soviet historical entanglements with the crime of aggression becomes apparent. After all, regardless of the good intentions of those promoting this transcendent cosmopolitan theory of aggression, this project represents a concerted abstraction of international legality from the materiality of its primary subject matter.²⁵⁹ This is highly problematic given that these material conditions will ultimately determine the success or failure of any such project.²⁶⁰ In stark contrast to this retreat into the ideal, scrutiny of Soviet visions of criminalizing aggressive war in light of actually-existing conditions provides us with a rich tapestry showcasing the ways in which critique, implementation practices, and structural contradictions operated in a manner that exposed the highest ideals as being fundamentally constrained by actually-existing realities. The Soviets were actively aware of these material dimensions but nonetheless proved incapable of overcoming them. Does this cast serious doubt on the ability of any analogous project that does not even consider materiality to ever succeed on its own terms?²⁶¹ That said, so long as there remains an impulse to articulate universal justice in a deeply uneven world, understanding the multifaceted material life of Soviet world visions that placed faith in the transformative force of criminalizing aggressive war continues to offer valuable lessons.

'Contingent Sovereignty' and Territorial Integrity, 47 NETHERLANDS YBK INT'L L. 83, 99 (2017); Thus, it is not unreasonable to conclude that the increased acceptability of 'humanitarian exceptions' as outside the scope of the Crime of Aggression could correspondingly increase the acceptability of this 'Unwilling or Unable Doctrine' through a mutually-reinforcing two-front erosion of the nonintervention norm (On the intertwined relationship between humanitarianism and security in justifying breaches of the sovereignty of peripheral states in the post-Cold War era see Anne-Charlotte Martineau, *Concerning Violence: A Postcolonial Reading of the Debate on the Use of Force*, 29 LEIDEN J. INT'L L. 95, 110-112 (2016); Moreover, it must be noted that, at a structural level, the 'Unwilling or Unable Doctrine' essentially reproduces the racial/culturally exclusionist 'Standard of Civilization' that justified the legality of nineteenth century colonialism. Ntina Tsouvala, *TWAIL and the "Unwilling or Unable" Doctrine: Continuities and Ruptures*, 109 AM. J. INT'L L. UNBOUND 266, 268 (2016)). This possibility of unintended consequences furthers Hathaway and Shapiro's point that use of force exceptions, even those intended to rectify the violence of the non-interventionist order, threaten to completely undermine the foundational ban on war. HATHAWAY & SHAPIRO, *supra* note 53, at 368-369; On this ban as a development worth defending (and improving) despite the dubious circumstances of its formation see Oona Hathaway & Scott Shapiro, *Response to Critics*, 7 GLOBAL CONSTITUTIONALISM 374, 380-381 (2018).

²⁵⁹ On the way in which such philosophical abstractions often ideologically separate theorists from the political consequences of their endeavors see Anne Orford, *Moral Internationalism and the Responsibility to Protect*, 24 EUR. J. INT'L L. 83, 107-108 (2013).

²⁶⁰ On the persistent ability of even critical theories of law to miss this point, see Susan Marks, *False Contingency*, 62 CURRENT LEGAL PROBS. 1, 3-4 (2009).

²⁶¹ On the generalized absence of materially-grounded considerations in contemporary normative interpretations of rights and responsibility at the international level (including international criminal justice) see generally Andrew Davenport, *The Marxist Critique of International Political Theory*, in THE OXFORD HANDBOOK OF INTERNATIONAL POLITICAL THEORY 652 (Chris Brown & Robyn Eckersley, eds., 2018).

