

1-1-2017

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Recommended Citation

Jonathan Bush, *Nuremberg and Beyond: Jacob Robinson, International Lawyer*, 39 Loy. L.A. Int'l & Comp. L. Rev. 259 (2017).
Available at: <http://digitalcommons.lmu.edu/ilr/vol39/iss1/12>

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Nuremberg and Beyond: Jacob Robinson, International Lawyer

JONATHAN A. BUSH*

Jacob Robinson (1889–1977) was one of the half dozen leading legal intellectuals associated with the Nuremberg trials. He was also arguably the only scholar-activist who was involved in almost every international criminal law and human rights battle in the two decades before and after 1945. So there is good reason for a Nuremberg symposium to include a look at his remarkable career in international law and human rights. This essay will attempt to offer that, after a prefatory word about the recent and curious turn in Nuremberg scholarship to biography, including of Robinson.

I. THE TURN TO NUREMBERG BIOGRAPHY

A 70th anniversary—what jewelers and caterers call a platinum anniversary—is a worthy event, but on my bookshelves, there are published volumes commemorating Nuremberg on its 20th, 25th, 40th, 45th, and 50th anniversaries, and many hundreds of other volumes not tied to a milestone year. Let me begin this sketch of Robinson on the 70th anniversary of Nuremberg by asking what these various books and articles have addressed over the decades and whether their emphases have changed, and if so, why.¹

It is often said of Nuremberg, as it is of the Holocaust, that partici-

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1. In the following paragraphs, I use a broad brush to survey the scholarship, and in the interests of concision give only a few footnotes, chiefly where a particular source has been cited or is likely to be unfamiliar to legal readers.

pants and scholars were slow to write its history, but for both topics the claim is mistaken. In the case of Nuremberg, there were within a few years of the trial multiple official publications in at least four languages, with the English-language series published in Nuremberg under the imprint of the United Nations running to fully forty-two volumes. There were also unofficial compilations of trial evidence commercially published, in some instances by Nuremberg prosecutors.² Participants wrote both memoirs and more formal narratives and legal studies.³ The authors ranged from journalists to chaplains, jailers, guards, psychiatrists and psychologists, researchers and translators, and judges. Defense counsel and even defendants wrote, including one who finished his account on death row.⁴ The more eminent participants, the chief prosecutors and judges (and defendants), had the opportunity of speaking to professional groups and landing book contracts, and most of them seemed to take up those opportunities and published. By the early 1950s it would have seemed fair to say that everything about Nuremberg had been said and that the next steps would be for nations, individually or through the UN, to draft instruments and initiate cases. Telford Taylor, chief prosecutor at twelve of the thirteen Nuremberg trials, seemed to suggest this satiety when he asked in 1952 “[s]hould it be done as a play, a novel, a history? I don’t want just another book on the legal side, for Nuremberg was far more than that. It became a sort of institution, set in the environment of a changing Germany.”⁵

Nevertheless the legal and historical studies of Nuremberg continued to flow. Some accounts focused not on the trials themselves, their procedure or rulings, but rather on the oral or written evidence, because the vast evidence collected for the trials constituted a unique documentation of a fallen government—Nuremberg as trove for historians and

2. NAZI GERMANY’S WAR AGAINST THE JEWS (Seymour Krieger ed., Henry Monsky foreword, American Jewish Conference 1947); LA PERSÉCUTION DES JUIFS EN FRANCE ET DANS LES AUTRES PAYS DE L’OUEST PRÉSENTÉE PAR LA FRANCE À NUREMBERG (Henri Monneray ed., René Cassin pref., Edgar Faure intro., Centre de Documentation Juive Contemporaine, doc. ser. 2, Éditions du Centre 1947); LA PERSÉCUTION DES JUIFS DANS LES PAYS DE L’EST PRÉSENTÉE À NUREMBERG (Henri Monneray ed., René Cassin intro., Telford Taylor pref., Centre de Documentation Juive Contemporaine, doc. ser. 5, Éditions du Centre 1949). The French research context is described in Georges Bensoussan, *The Jewish Contemporary Documentation Center (CDJC) and Holocaust Research in France, 1945–1970*, in HOLOCAUST HISTORIOGRAPHY, *infra* note 38, at 245, 246–47.

3. The best of which is probably PETER CALVOCORESSI, NUREMBERG: THE FACTS, THE LAW AND THE CONSEQUENCES (Chatto and Windus 1947).

4. WILHELM KEITEL, THE MEMOIRS OF FIELD-MARSHAL KEITEL 234–38 (Walter Görllitz ed., David Irving trans., William Kimber 1965).

5. Lewis Nichols, *Talk With Telford Taylor*, NEW YORK TIMES BOOK REV., Dec. 14, 1952, at VII: 14.

the first human rights Truth Commission.⁶ Other accounts were more conventional legal studies that used Nuremberg to examine doctrines like reprisal, command responsibility, POW status, or proportionality. Still other studies were hortatory or politically engaged, applying Nuremberg to the Cold War rivalry and nuclear war, or to Suez, Algeria, the Vietnam War, Biafra, Cambodia, and other conflicts, or to the military draft. So numerous were these “Never Again” or “Nuremberg And . . .” studies that when a new conventional narrative of the trials came out, the “blurbs” often hailed it as the first of its kind.⁷ All told, one list in 1979 estimated 3352 books and articles on Nuremberg and related matters, and another in 1986 gave 4500 items, many of them different, and both lists were surely on the low side.⁸ Soon the best book on the topic was published, Telford Taylor’s 1992 account of the first trial, at which he was a senior associate prosecutor and heir apparent.⁹

Best book, yes, but hardly the last word. Indeed, Taylor’s book came out at what proved for wholly unrelated reasons to be the start of a new torrent of Nuremberg-related scholarship. One source of the new interest was the demand for a more complete, candid history of the Nazi era. With the allegations in the mid-1990s of Swiss Bank complicity in the Holocaust, researchers investigated the banks and almost immediately, other institutions—German industrial companies, French railroads, Italian insurance firms, the German Foreign Office, the Wehrmacht—to see which entities had used slave labor or helped the SS, and they began by reexamining Nuremberg evidence. A second source of interest stemmed from the celebratory impulse: by the 1990s, the last of the Nuremberg lawyers (prosecution but also a few defense counsel) were alive and still able to fly, speak, be interviewed, and write. With their unique authenticity in linking Nuremberg accountability to the horrors in Bosnia or Rwanda, they found a ready audience for their speeches and publications. A third source of interest were the new tribunals created with the end of the Cold War and the return in the Balkans of genocide to the European heartland. Proponents of the tribunals sought

6. Robert M.W. Kempner, *Nuremberg Trials as Sources of Recent German Political and Historical Materials*, 44 AM. POL. SCI. REV. 447 (1950); Telford Taylor, *An Outline of the Research and Publication Possibilities of the War Crimes Trials*, LOUISIANA L. REV. 496 (1949).

7. See, e.g., the back cover of ROBERT E. CONOT, *JUSTICE AT NUREMBERG* (Carroll and Graf Pubs. 1983).

8. UNCERTAIN JUDGMENT: A BIBLIOGRAPHY OF WAR CRIMES TRIALS (John R. Lewis ed., ABC-CLIO 1979); WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS: AN ANNOTATED BIBLIOGRAPHY AND SOURCE BOOK (Norman E. Tuturow ed., Greenwood Press 1986).

9. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (Alfred A. Knopf 1992).

legitimation and litigants on both sides needed precedent, and Nuremberg was a principal resource. The results of these new streams of interest were not only books and articles, but also specialized journals, law school degree programs, TV documentaries, and jobs.

Yet after a decade or so of Nuremberg ubiquity, the limits to these genres started to be clear. The historians looking at German companies or the Holocaust incorporated Nuremberg evidence, but they turned to other sources as well and had little interest in the trials as such. The Nuremberg alumni had authenticity and sometimes astonishing anecdotes, but their writings had a gee-whiz quality, with an author expressing amazement at the bombed-out condition of the Grand Hotel, or at his feelings as he stared into the face of evil when he interrogated Goering, or at being alongside Justice Jackson shoulder-to-shoulder at the birth of international criminal law. And the few memoirs by top people were overly discreet.¹⁰ In the end, there was little of interest in any of the new memoirs save Taylor's.

As for the legal studies of Nuremberg, they too seemed unsatisfying. Too often the work had a "law-office history" flavor, announcing that "Nuremberg stands for the proposition that . . ." and proving it by reciting holdings from various of the thirteen trials woven together with clauses from a Geneva Convention or ICRC handbook seemingly aimed at Hague judges. If the fault of the historians was that they typically showed little awareness of the law, asserting that "prosecutors failed to do X" without realizing that rules of evidence or procedure might have compelled what to a layman seemed like failure, the lawyers typically missed critical historical context. And even the best legal studies tended to reprise easy rulings while ignoring the harder problems at Nuremberg. The legal studies were also replete with a smug confidence that "Nuremberg was an important first step but flawed and we will do better unless retrograde political forces block us."

Of course, the preceding sketch is a caricature, and the reader is free to argue with both its generalizations and chronology. There were well researched, self-critical books that took legal argument seriously and wove law and anecdote in historical context. But such accounts were few, and even ardent supporters of the new international tribunals may cringe privately at yet another article splitting hairs with or celebrating one of the few rulings by the Hague tribunals or arguing that Nuremberg requires we pursue accountability for atrocities in (choose a country). To many readers, it has been a case of too many lawyers with

10. See, e.g., HARTLEY SHAWCROSS, *LIFE SENTENCE: THE MEMOIRS OF HARTLEY SHAWCROSS* 85–137 (Constable and Co. 1995).

the time to write, burning with moral urgency about their topics and with many venues for publication but few fresh questions to talk about.¹¹

Maybe for these reasons, many of those writing in the field have sought other ways to address war crimes law. For some, this meant looking at unfamiliar trials, and an entire cottage industry has grown where modern international law experts examined “forgotten” trials, many from mid twentieth-century Asia, the nineteenth-century age of imperialism, or even medieval warfare. Other scholars addressed specific war crimes trials, something that had been done in the past for the Nuremberg Medical and Industrialist cases but not for the others. A few authors actually did write plays or novels as Taylor foresaw fifty years earlier. But for many in the field, the alternative to writing yet another book about Nuremberg-As-Modern-Law was a turn to biography.

This has not, however, led to new studies of the leading personalities at Nuremberg or other trials—there is no new major work on figures like Maxwell Fyfe, Telford Taylor, or Airey Neave, nor of any of the judges. Rather, the focus of recent biography has been the legal thinkers. Even here, it is only some of them. There is no new work on Quincy Wright or Herbert Wechsler, leading advisors to the American judges, or Sheldon Glueck, the Harvard criminologist who had Justice Jackson’s ear, or Lord Wright, and only a little on Franz Neumann, whose many involvements with Nuremberg merit fuller study. Instead, the biographical focus has been on René Cassin and Hans Kelsen, who were not at Nuremberg but whose work was related, and on three who were: Raphael Lemkin, the father of the notion of “genocide” and peripheral staff member at and advisor to the U.S. prosecution team, Hersch Lauterpacht, the international law scholar and advisor to the British team, and Jacob Robinson. Each of the latter three has been the subject of multiple studies and of joint and compare-and-contrast accounts as well.

While there is nothing wrong with this turn to biography, especially of a select group of legal theorists, there are risks. Some of the new biographers fall prey to the occupational disease of exaggerating the significance of their subject. Their work can read more like hagiography or a legal brief than like critical scholarship. Their attributions often confuse chronology for causation and they often credit their subjects while failing to examine strong arguments for the role of other participants.¹² By focusing on this small handful of legal thinkers, such studies

11. Already a dozen years ago one Hague judge privately told this author that he longed for a five-year moratorium on articles about Joint Criminal Enterprise.

12. Consider a simple example: Lauterpacht is widely acclaimed today as the father of

tend to minimize the role of other legal scholars, and of non-scholars whose theoretical contributions to Nuremberg were in many instances at least as important as those of the theorists: thus, Murray Bernays, William Chanler, Bohuslav Ečer, and others. That said, the biographical approach allows us to disentangle an enormously complex multinational project involving hundreds of participants and hundreds of thousands of pages of evidence without lapsing into hortatory generalizations. It can allow us to say something fresh about Nuremberg. In that spirit, let us turn to Jacob Robinson before, at, and after Nuremberg.

II. JACOB ROBINSON: ACHIEVEMENTS AND HISTORIOGRAPHY

Jacob Robinson was arguably the most important and prolific legal scholar-activist in the Jewish world in the middle decades of the twentieth century. Often working closely with his younger brother, Nehemiah (1898–1964), Robinson addressed enormous problems, from the rise of

“crimes against humanity” as charged at Nuremberg. ELIHU LAUTERPACHT, *THE LIFE OF SIR HERSCH LAUTERPACHT*, QC, FBA, LLD, at 272 (Cambridge Univ. Press 2010); Michael R. Marcus, *Three Roads From Nuremberg: Seventy Years to the Day after the Start of the Epoch-defining Trials, Three Jewish Advocates Stand Above the Rest: Jacob Robinson, Sir Hersch Lauterpacht, and Raphael Lemkin*, TABLET, Nov. 20, 2015, <http://www.tabletmag.com/jewish-arts-and-culture/books/195230/three-roads-from-nuremberg>; PHILIPPE SANDS, *EAST WEST STREET: ON THE ORIGINS OF “GENOCIDE” AND “CRIMES AGAINST HUMANITY”* 3 (Alfred A. Knopf 2016); Martti Koskeniemi, *Hersch Lauterpacht (1897–1960)*, in *JURISTS UPROOTED: GERMAN-SPEAKING ÉMIGRÉ LAWYERS IN TWENTIETH-CENTURY BRITAIN* 601, 639–40 (Jack Beaton and Reinhard Zimmermann eds., Oxford Univ. Press 2004). The basis is that Jackson suggested it in his published transcript (1949) of the London negotiations and that a dozen years later, his son William, who had been a young assistant to his father, confirmed Lauterpacht’s role in a note to Jacob Robinson who was then writing a memorial essay about Lauterpacht (1961). Robinson’s friend Shabtai Rosenne added to the consensus by crediting Robinson with helping the American team apply “crimes against humanity” specifically to the Holocaust. Shabtai Rosenne, *Jacob Robinson: In Memoriam*, 13 ISRAEL L. REV. 287, 291 (1978) [hereinafter Rosenne], reprinted in *SHABTAI ROSENNE, AN INTERNATIONAL LAW MISCELLANY* 831 (Martinus Nijhoff Publishers 1993), and *THE LIFE, TIMES AND WORK OF JOKŪBAS ROBINZONAS-JACOB ROBINSON* 69 (Eglé Bendikaitė and Dirk Roland Haupt eds., Academia Verlag 2015) [hereinafter “Bendikaitė and Haupt”]. Yet hard evidence is lacking. Lauterpacht talked of crimes against humanity and met with Jackson at the right time, as did Robinson (as we shall see), and the relevant language did appear soon after in the Charter. But other participants also wrote about crimes against humanity and met with Justice Jackson and, crucially, with his aides and the other delegates who negotiated the language of the Charter. At the time, nobody credited Lauterpacht (or Robinson) with the notion or its inclusion in the Charter: not the two British chief prosecutors for whom Lauterpacht worked, not the Americans Telford Taylor, who consulted with him, or Sidney Alderman, a lead drafter of the Charter who also conferred with him. Alderman attributed Nuremberg’s “crimes against humanity” to one of his French counterparts, while Professor Kochavi credits Polish, Czech, and Australian delegates to the UN War Crimes Commission. ARIEH J. KOCHAVI, *PRELUDE TO NUREMBERG: ALLIED WAR CRIMES POLICY AND THE QUESTION OF PUNISHMENT* 145 (Univ. of North Carolina Press 1998). At best, the case for Lauterpacht is speculative and unproven.

anti-Semitism in Eastern Europe and the destruction of minority rights in the 1920s, to Nazi expansionism and domestic atrocities in the 1930s and, then, the Shoah. After the war, he worked to bring war criminals to justice, arrange restitution and reparations for survivors, revive Jewish communal life, and gather Holocaust documentation. Robinson participated in the early struggles of the State of Israel at the United Nations and fought for human rights for Diaspora communities in Eastern and Western Europe, and North Africa. Working through the Institute of Jewish Affairs (“IJA”) of the World Jewish Congress, which he, and then Nehemiah, led for twenty-five years, and later with other groups and the Foreign Ministry of Israel, Robinson, “the first truly Jewish international jurist of front rank of modern times,”¹³ was at the center of the legal action.¹⁴ He was truly “the Formidable Dr. Robinson,” even though the label was given sarcastically by a bitter foe.¹⁵

Yet by 1970, Robinson was—outside of the circle of his aging colleagues—largely forgotten. In later decades, with the explosion of interest in the Holocaust and the turn in Nuremberg scholarship to biography, his work came to be remembered, and he was the subject of a dozen posthumous essays¹⁶—all but two since the turn of the current

13. Rosenne, *supra* note 12, at 296.

14. Jacob Robinson’s papers, including many of his brother Nehemiah’s papers, are located in the U.S. Holocaust Memorial Museum Archives, Washington, D.C., Accession No. 2013.506.1, http://collections.ushmm.org/findingaids/2013.506.1_01_fnd_en.pdf [hereinafter JACOB ROBINSON PAPERS]; the published records of the Institute of Jewish Affairs (“IJA”) can be found in a number of places, including the American Jewish Historical Society, Center for Jewish History, New York, <http://digifindingaids.cjh.org/?pID=365637> [hereinafter INSTITUTE OF JEWISH AFFAIRS COLLECTION]; and the papers of the relevant offices of the World Jewish Congress, are in the Jacob Rader Marcus Center of the American Jewish Archives, in Cincinnati, OH, <http://catalog.americanjewisharchives.org/cgi-bin/ajagw/chameleon> [hereinafter WORLD JEWISH CONGRESS PAPERS]. I gratefully acknowledge the assistance of archivists at all three institutions.

15. Hannah Arendt, “*The Formidable Dr. Robinson*”: A Reply, N.Y. REV. OF BOOKS, Jan. 20, 1966, at 26–30, <http://www.nybooks.com/articles/1966/01/20/the-formidable-dr-robinson-a-reply/>, reprinted in THE JEW AS PARIAS 260–76 (Ron H. Feldman ed., Grove Press, Inc. 1978), and HANNAH ARENDT, THE JEWISH WRITINGS 496–511 (Jerome Kohn and Ron H. Feldman eds., Schocken Books 2007).

16. For works with significant discussions of Jacob Robinson at Nuremberg, see, e.g., Shlomo Aronson, *Preparations for the Nuremberg Trial: The O.S.S., Charles Dwork, and the Holocaust*, 12 HOLOCAUST & GENOCIDE STUD. 257, 264–65 (1998); Boaz Cohen, *Dr. Jacob Robinson, the Institute of Jewish Affairs, and the Elusive Jewish Voice in Nuremberg*, in HOLOCAUST AND JUSTICE: REPRESENTATION AND HISTORIOGRAPHY OF THE HOLOCAUST IN POST-WAR TRIALS 81–100 (David Bankier & Dan Michman eds., 2010); Laura Jockusch, *Justice at Nuremberg?: Jewish Responses to Nazi War-Crime Trials in Allied Occupied Germany*, 19 JEWISH SOC. STUD., Fall 2012, at 107, 111–17; Omry Kaplan-Feuereisen, *Im Dienste der jüdischen Nation: Jacob Robinson und das Völkerrecht*, in OSTEUROPA 2008, IMPULSES FOR EUROPE 8–10, 279–94 (2008) (translated as Omry Kaplan-Feuereisen, *At the Service of the Jewish Nation: Jacob Robinson and International Law*, in OSTEUROPA 2008, IMPULSES FOR EUROPE 157–70 (2008); *Geschichtserfahrung und Völkerrecht: Jacob Robinson und die Gründung des*

century—as well as of a conference with published proceedings devoted to his life.¹⁷ Although he is discussed here and more briefly in dozens of other essays and monographs, it is chiefly for the same two activities: (1) as an advisor to American prosecutors at the first four-power Nuremberg trial (1945–1946); and (2) for his work with Israeli prosecutors in the Eichmann trial (1961), the integrity of which he vigorously defended. His contributions to both trials were important, but the emphasis says more about the recent revival of international criminal law than it does about Robinson's extraordinary and diverse career of scholarly Jewish advocacy.

III. JACOB ROBINSON'S CAREER BEFORE NUREMBERG

Robinson was born in Seirijai, a small town in southern Lithuania, on November 26, 1889; one of seven sons born to David and Bluma Robinson. It was an observant family, descended from rabbis going back to Yom Tov Lipmann Heller in the seventeenth century. But as Robinson's biographer Omry Kaplan-Feuereisen concludes, it was also progressive and engaged in the secular world. Robinson's father was an early Zionist who is said to have represented his community before both the kaiser and the tsar, and his uncle was one of the first Jewish researchers in Russia, a pathologist who led the Institute for Experi-

Institute of Jewish Affairs, in 2 LEIPZIGER BEITRÄGE ZUR JÜDISCHEN GESCHICHTE UND KULTUR 307–27 (Dan Diner ed., 2004); Omry Kaplan-Feuereisen, *Jacob Robinson*, in 1 YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE 1567–68 (Yale Univ. Press 2008); Mark A. Lewis, *The World Jewish Congress and the Institute of Jewish Affairs at Nuremberg: Ideas, Strategies, and Political Goals, 1942–1946*, 36 YAD VASHEM STUD. 181 (2008), adapted in *THE BIRTH OF THE NEW JUSTICE: THE INTERNATIONALIZATION OF CRIME AND PUNISHMENT, 1919–1950*, at 150–80 (Oxford Univ. Press 2014); Michael R. Marrus, *Three Jewish Émigrés at Nuremberg: Hersch Lauterpacht, Jacob Robinson, and Raphael Lemkin*, in *AGAINST THE GRAIN: JEWISH INTELLECTUALS IN HARD TIMES* 240–54 (Ezra Mendelsohn, Steffani Hoffman & Richard Cohen eds., Berghahn Books 2014) (a shortened version can be found in *Three Roads to Nuremberg*, *supra* note 12); Michael R. Marrus, *A Jewish Lobby at Nuremberg: Jacob Robinson and the Institute of Jewish Affairs, 1945–46*, 27 CARDOZO L. REV. 1651, 1651–65 (2006) (a shorter version can be found in *THE NUREMBERG TRIALS INTERNATIONAL CRIMINAL LAW SINCE 1945: 60TH ANNIVERSARY CONFERENCE/DIE NÜRNBERGER PROZESSE* 63–72 (Herbert R. Reginbogin & Christoph J.M. Safferling eds., K.G. Saur 2006)), reprinted *sub nom.* *Jacob Robinson and the Holocaust at the Nuremberg Trials* in Bendikaitė and Haupt, *supra* note 12, at 87–110 [hereinafter *Jacob Robinson and the Holocaust*]; Michael R. Marrus, *The Holocaust at Nuremberg*, 28 YAD VASHEM STUDIES 5 (1998), http://www.yadvashem.org/odot_pdf/Microsoft%20Word%20-%20203220.pdf; Maurice Perlzweig, s.v., *Robinson, Jacob*, in 14 ENCYCLOPEDIA JUDAICA col. 207 (2d ed. 1971); Rosenne, *supra* note 12, at 291; Gil Rubin, *The End of Minority Rights: Jacob Robinson and the 'Jewish Question' in World War II*, in 11 SIMON DUBNOW INST. Y.B. 55–71 (2012).

17. The proceedings of the 2007 conference were published as Bendikaitė and Haupt, *supra* note 12.

mental Medicine and was a guest of the last tsar.¹⁸ Robinson received a traditional Jewish education from a tutor in Vishtinets, and went to secondary school in the larger town of Suvalki. Conscripted into the Russian army in 1914 after earning the equivalent of a doctorate in law at the University of Warsaw, Robinson was captured and spent three years as a German prisoner of war. Upon his release, he and his wife Clara settled in the Lithuanian city of Virbalis, where he founded and ran a Hebrew *gymnasium*. He was admitted to the Bar; moved to Kaunas (Kovno); began a legal practice that Nehemiah later joined in 1927; co-edited a Yiddish newspaper; and in 1923, was elected to the second Lithuanian parliament (Seimas) as one of seven Jewish members. He was the leader of both the Jewish faction and the minorities caucus for the parliament, posts he held until its dissolution in a December 1926 coup.¹⁹

The dissolution of the Seimas marked the start of the next phase of Robinson's communal activism. On the international Jewish stage, he was active with the Paris-based Committee for Jewish Delegations, established in 1919 to represent Jewish interests at the Peace Conference, and participated in the early efforts to organize the World Jewish Congress (1927–1936). He is even credited with the idea for the Bernheim Petition (1933), a novel legal proceeding in which an exiled German Jew used a treaty to win a League of Nations ruling against Germany.²⁰

18. See *Im Dienste der jüdischen Nation: Jacob Robinson und das Völkerrecht*, *supra* note 16; Bendikaitė and Haupt, *supra* note 12, at 3–16 (Introduction). This and the following paragraph are drawn from various sketches by Kaplan-Feuereisen, *Jacob Robinson*, *supra* note 16. David Robinson's representations are cited in Rosenne, *supra* note 12, at 287.

19. See Saulius Kaubrys, *Jokūbas Robinzonas – A Member of the Second and Third Seimas: Anatomy of Action and Experience*, in Bendikaitė and Haupt, *supra* note 12, at 19–38. For the political context, see JOSEPH ROTHSCHILD, EAST CENTRAL EUROPE BETWEEN THE TWO WORLD WARS 378–79 (Peter F. Sugar and Donald W. Treadgold eds., Univ. of Washington Press 1974).

20. See Philipp Graf, *The Bernheim Petition 1933: Jacob Robinson's Contribution to Jewish Minority Diplomacy in the Interwar Years*, in Bendikaitė and Haupt, *supra* note 12, at 179–94; and the study by Jacob Robinson's colleague in Lithuanian Government and on the Committee, NATHAN FEINBERG, THE JEWISH CAMPAIGN AGAINST HITLER AT THE LEAGUE OF NATIONS (THE BERNHEIM PETITION) (Yad Vashem 1957) [Heb.]. The case is reported at Harry Schneiderman, *Review of the Year* [Jul. 1, 1932–Jun. 30, 1933], in 35 AMERICAN JEWISH Y.B. 5694, at 21, app. at 74–101 (Harry Scheiderman ed., American Jewish Committee 1933–1934). Robinson and various Jewish organizations helped Bernheim bring an individual petition arguing that as an Upper Silesian, he was protected by the German-Polish Agreement on Upper Silesia (1922). Embarrassed by this legal scrutiny so soon after coming to power, the Nazis suspended certain racist laws in that territory until 1937. See A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE 142–45 (Oxford Univ. Press 2001); CAROLE FINK, DEFENDING THE RIGHTS OF OTHERS: THE GREAT POWERS, THE JEWS, AND INTERNATIONAL MINORITY PROTECTION, 1878–1938, at 331–32 (Harv. Univ. Press 2004); Rubin, *supra* note 16, at 57; Johann Wolfgang Brugel, *The Bernheim Petition: A Challenge to Nazi Germany in 1933*, 17 PATTERNS OF PREJUDICE 17–25 (1983); Greg Burgess, *The Human Rights Dilemma in Anti-Nazi Protest: The Bernheim*

At home, Robinson organized an informal group to promote Jewish rights and was loosely involved in Zionist activities.²¹ At the same time, he served as legal advisor to the Lithuanian Foreign Ministry (1931–1933); was his country's representative on the German-Lithuanian Permanent Conciliation Committee (1931); and helped present the country's successful claim at the Permanent Court of International Justice ("PCIJ") in the important Memel case (1932).²²

The German invasion of Poland did not immediately bring Lithuania into the war,²³ but Robinson knew that his country was unlikely to be safe for long.²⁴ Around May 1940, he, his wife, and their two daughters were granted visas to the United States, but because they gave their tickets to two young students, their arrival was delayed until December. Within a few months, the World Jewish Congress ("WJC") and the American Jewish Congress announced, through Rabbi Stephen S. Wise, the establishment of the IJA, based in New York and led by Robinson. The IJA was the first Jewish think tank addressing Nazism and war.²⁵ It faced a huge agenda with a tiny staff of refugee intellectuals, including Jacob's brother Nehemiah, who started working at the WJC/IJA soon

Petition, Minorities Protection, and the 1933 Sessions of the League of Nations (Contemporary Europe Research Centre, CERC Working Papers Series No. 2/2002).

21. Eglé Bendikaitė, *Politician Without Political Party: A Zionist Appraisal of Jacob Robinson's Activities in the Public Life of Lithuania*, in Bendikaitė and Haupt, *supra* note 12, at 39–66.

22. Formerly a part of the Russian Empire and with an ethnic German majority, Memel was coveted by Poland and Germany but assigned to Lithuania under the five-power Allied oversight (1922). When German local officials made surreptitious visits to Germany, Lithuania removed them, prompting the five guarantors to seek a ruling about Memel's autonomy. The PCIJ rejected Robinson's reasoning but largely accepted his conclusion that Lithuania, as sovereign, had a right to supervise its restive enclave, which it did until Hitler demanded and was ceded the territory in March 1939. *Interpretation of the Statute of the Memel Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 47 (Aug. 11, 1932); *Interpretation of the Statute of the Memel Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 49 (Aug. 11, 1932). The case was Robinson's first appearance at the international court and became the occasion of his massive two-volume book on the Memel problem (1934). For Robinson's appearances at other international cases in this period, see Rosenne, *supra* note 12, at 289 n.1.

23. Robinson and his lobbying group pressed Lithuania to receive Jewish refugees from Poland, as noted in Kaplan-Feuereisen, *Jacob Robinson*, *supra* note 16, at 1567–68.

24. While in the town of Vichy, France, in autumn 1939, Robinson unsuccessfully used his contacts with diplomats and a U.S. senator to try to obtain refugee status in the United States, France, Denmark, and probably elsewhere. See JACOB ROBINSON PAPERS, at box 1, folder 11 (Documents Related to Immigration (1911–1955)). When these efforts failed, he returned to Lithuania, where a few months later he received his U.S. visa.

25. Sources vary on its inception—February 1941, Spring 1940, and in one place Robinson even says that he and Wise planned it in April 1939 to be based in Geneva—and it was reconfigured in early 1942. But regardless, the IJA seems to have pre-dated other research and advocacy groups such as the American Jewish Committee's Institute on Peace and Postwar Problems and the Jewish Labor Committee's Research Institute for Jewish Postwar Problems.

after.²⁶ From its modest beginning, the IJA began a substantial program of research and publications that would continue throughout the war and long after.

The IJA's best-known book from the war years is probably *Hitler's Ten-Year War on the Jews* (1943), a useful book akin to Franz Neumann's *Behemoth* or Raphael Lemkin's *Axis Rule in Occupied Europe*, albeit with more solid research and less theoretical flash. An even more significant book may be the IJA's little-remembered first work, *Jews in Nazi Europe, February 1933 to November 1941*, prepared for the Inter-American Jewish Conference in Baltimore in November 1941, at which Wise and U.S. Undersecretary of State Sumner Welles were the principal speakers. Circulated in mimeo for speedier dissemination, the book compiled Jewish human and material losses on a country-by-country basis and seems to have been the first study to show the scale of the Holocaust as it was about to enter its most murderous phase. And although it was mistaken about some details, cautiously offering figures that erred on the low side, and relied in its methodology on published scraps of information, official estimates and leaks, and escapee accounts, the book was a clarion call not only for outrage among the delegates, but also for further research.

Robinson wrote a book on the legal issues of the British Mandate, opposing the closure of immigration to Palestine. In another one of his books, *Were the Minority Treaties a Failure?* (1943), he drew on his positions in the Memel case to argue for the efficacy of better-designed minorities treaties. His brother Nehemiah, who had studied law at Berlin and Jena and practiced law with Jacob in Kaunas in the 1920s, soon wrote one of its earliest and finest books, *Indemnification and Reparations: Jewish Aspects* (1944), which deals with legal issues relating to Jewish losses. Together with their half-dozen colleagues and outside allies, the two Robinsons also wrote about refugees and migration, restitution, cultural revival, Zionism, federalism, the organization of a proposed United Nations, assimilation, human rights, treaty protections, German demilitarization and rehabilitation, and Soviet Jewry. They shared data with and lobbied labor unions, Christian groups, and university experts, and worked with the WJC's Political Section and British Section despite having different emphases.²⁷ Jacob frequently wrote in

26. The staff roster is given in IJA, Report of the Institute of Jewish Affairs for the Period February 1, 1941 – April 30, 1947, Appendix II: Former Members of the Professional Staff, 1941–1946. One young staff member—we would call him an intern—was high school student Alexander Bickel, later the eminent Yale constitutional scholar.

27. See, e.g., Lewis, *supra* note 16, at 162–63 (disagreement whether to press for a Jewish

Congress Weekly and other Jewish publications, gave courses on nationalism and minority protections to students and officer candidates at Columbia University, and played a prominent role at the WJC's War Emergency Conference in Atlantic City, New Jersey, in November 1944, which adopted an eleven-point program for war crimes accountability and another on reparations.²⁸

Looking at Jacob's prominent writings and speeches from the period, one scholar has identified a shift in his wartime views from advocating reconstruction of Jewish life with treaty protections in a postwar Europe, to robust Zionism. Another argues that the IJA shifted from policy advocacy to Holocaust documentation as the extent of the "Final Solution" became known.²⁹ But a different case can also be made from the writings by the Robinson brothers and their colleagues at the IJA. They were part of an entire generation of émigré lawyers and intellectuals, most but not all German or Austrian and living in the U.S., most fearful that their extended families were dead, all too old for active military service but eager to contribute, and some with full- or part-time wartime jobs with government. All were searching for answers to "the Problem of Germany" and "What Next?" Only a handful of these dozens of individuals—René Cassin, Franz Neumann, Hersch Lauterpacht, Hans Morgenthau, Hans Kelsen, and Raphael Lemkin—are familiar today. Some started with policy preferences, as Jacob Robinson did with minority rights treaties, and some became entrepreneurs for particular theories or approaches, most famously Lemkin with his notion of genocide or Vishniak with his proposal for an international convention against anti-Semitism,³⁰ but those of a pragmatic bent, including the Robinsons, soon promoted more than one policy prescription. With authors such as the Robinsons, who wrote so much and so often with each other and other co-authors, it is particularly difficult to see a trend in their policy commitments or methodologies. Still, it is not unlikely that with each new set of death estimates making the idea of renewed Jewish life in Eastern Europe less plausible, their commitment to Zionism, as

official prosecutor of war crimes).

28. The reparation clauses also were drafted by Jacob Robinson. See NANA SAGI, GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS 24–26 (Dafna Alon trans., Magnes Press, Hebrew University 1980). These and many other of Robinson's wartime publications are collected in JACOB ROBINSON PAPERS, at box 4, folder 10.

29. Some of these agendas within the IJA are discussed in Rubin, *supra* note 16, at 55–61, 68–70; MARK MAZOWER, NO ENCHANTED PALACE: THE END OF EMPIRE AND THE IDEOLOGICAL ORIGINS OF THE UNITED NATIONS 121–22 (Princeton Univ. Press 2009).

30. Later published as MARK VISHNIAK, AN INTERNATIONAL CONVENTION AGAINST ANTISEMITISM (Research Institute of the Jewish Labor Committee 1946).

well as to Diaspora life in a liberal North America and to legal accountability for the Holocaust, grew.

IV. JACOB ROBINSON AND THE NUREMBERG TRIALS

In May 1945, Supreme Court Justice Robert H. Jackson was announced as head of U.S. planning for war crimes policy. Later, when a trial plan for prominent Nazi war criminals was agreed upon with the major Allies, Jackson became the chief U.S. prosecutor at the International Military Tribunal (“IMT”) at Nuremberg (November 1945–October 1946). Jacob Robinson was an advisor to Jackson and, for the rest of his life, was proud to identify himself as such. In many ways, he was an ideal choice for Nuremberg: his work at the IJA meant he had sources about the Holocaust that complemented what the Allied governments knew, and his writings on, and practice in, prewar international tribunals were unrivaled by the U.S. staff.

A trail of memos illustrates Robinson’s role. In June 1945, newly returned from San Francisco, where he was a WJC observer at the conference that founded the United Nations, Robinson met with Jackson and, soon after, was introduced to Charles Irving Dwork and Abraham Duker. Dwork and Duker were two Jewish staff members who worked at the “Jewish Desk” for the Office of Special Services (“O.S.S.”), the wartime intelligence agency whose chief, General William O. Donovan, was now U.S. Deputy Chief Prosecutor and was sharing his agency’s resources with the Nuremberg effort.³¹ It was most likely Robinson and his IJA colleagues who prepared the comprehensive plan that Dwork proposed for viewing the Holocaust as a criminal conspiracy.

In June, Robinson also took on the task of assembling reliable Holocaust estimates for presentation at trial for Jackson. He urged Jackson to consider including a Jewish chief prosecutor or official representative; giving the court an official Jewish submission *amicus curiae*; and above all, seeing the atrocities against Jews as a planned crime against a collectivity, a people, rather than a vast number of individual atrocities—all three points were agreed upon at the Atlantic City conference.³² Upon hearing rumors of the names of possible defendants,

31. Aronson, *supra* note 16, at 257; Cohen, *supra* note 16, at 90–91.

32. Minutes, Meeting of World Jewish Congress with Justice Robert H. Jackson in New York City, June 12, 1945, WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-06-12&documentid=C106-16-5&pagenumber=1. The IJA had, by then, accepted the British Section’s proposal for a Jewish prosecutor though that Section previously had no luck in lobbying the UN War Crimes Commission in London to accept the view. *See* Lewis,

Robinson wrote Jackson in late July to urge that Adolf Eichmann be included alongside the Grand Mufti of Jerusalem, who was already under consideration. Emphasizing that, “it has to date not been made public what has happened to Eichmann,” he summarized Eichmann’s enormous role in the Holocaust.³³

Throughout the summer of 1945, Robinson, Cambridge Professor Hersch Lauterpacht, and a few others continued maneuvering to have a co-equal Jewish chief prosecutor, or a Jewish official witness who would testify—perhaps Chaim Weizmann—or both,³⁴ and Robinson took the occasion of meeting Weizmann to discuss issues of restitution and reparations. In October 1945, Robinson lectured members of the U.S. team who were still in London,³⁵ and in mid to late November, he was in Nuremberg working with the small team under Major William Walsh to prepare the American presentation of what euphemistically was called “the Persecution of the Jews.” In December 1945, he went home and later reported to the WJC on his time at and impressions of Nuremberg, and returned briefly to Nuremberg in the summer of 1946.³⁶

supra note 16, at 162–66.

33. Letter from Jacob Robinson to Robert H. Jackson, July 27, 1945, WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives),

http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-07-27&documentid=C106-16-2&pagenumber=1. WJC staffers continued for a few weeks to press for the inclusion of the Grand Mufti in the trial. *See* Internal Memorandum from Dr. Jacoby and Dr. Sinder to Jacob Robinson, August 3, 1945, WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-08-03&documentid=C106-18-5&pagenumber=1.

34. The issues are discussed in an unsigned report entitled: “Some Basic Ideas with Regard to the Appearance of a Jewish Witness at the International Military Tribunal”, September 5, 1945. WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-09-05&documentid=C107-8-1&pagenumber=1.

35. As late as October 19 the WJC was still asking for permission for Robinson and Easterman to go to Nuremberg. *See* Letter from Stephen S. Wise to Robert P. Patterson, October 17, 1945, WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-10-17&documentid=C107-8-2&pagenumber=1.

36. *See* Organizational Literature, INSTITUTE OF JEWISH AFFAIRS COLLECTION, at box 1, folder 3 (documenting Robinson’s travels to London and Nuremberg); Report from Jacob Robinson to the World Jewish Congress, December 6, 1945, WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-12-06&documentid=C14-16-1&pagenumber=1; and Minutes of Office Committee Meeting, World Jewish Congress, December 10, 1945, WORLD JEWISH CONGRESS

That is the measure of Robinson's direct involvement at Nuremberg, and unfortunately, while there is proof of his presence and numerous memoranda, there is little evidence of his significance, that is, whether his and his colleagues' advice was heeded.³⁷ Because of this, some scholars have emphasized Robinson's role at Nuremberg, extrapolating from his memos and meetings with more enthusiasm than evidence. Others have concluded that Robinson and other Jewish advocates made little imprint. They argue, however, this stemmed not from lack of effort, but rather from Nuremberg's blindness to the centrality of what would become known as the Holocaust, and from the absence of a Jewish voice and evidence at Nuremberg—a characterization that became conventional wisdom by the time of the Eichmann trial fifteen years later and is still widely accepted.³⁸ In this view, the charge against Nuremberg is twofold: that there were few Jewish participants and not enough focus on the Holocaust.

PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-12-10&documentid=C14-16-2&pagenumber=1.

37. There are approximately two dozen memos between Robinson and other Jewish organizational leaders and the Nuremberg prosecutors and another few dozen between WJC and IJA staff members that can be viewed at: http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/index.php?action=docs. But there is scant evidence whether these Jewish organizational efforts were adopted by the four prosecution teams. Even if we go beyond the Robinson memos and O.S.S. research to examine items such as (i) favorable references to Robinson in the diary of Seymour Krieger, a prosecutor working for Walsh on the Holocaust case, or (ii) to British WJC leader A.L. Easterman's participation, or (iii) the various thank-you notes from Jackson, Lauterpacht, and Glueck, JACOB ROBINSON PAPERS, box 5, folders 5 & 6, the case for Jewish organizational significance is unclear. On the contrary, there is evidence that from the start Jewish groups felt frustrated by the way Nuremberg staffers were not following their advice. See Letter from Jacob Robinson to Irving Dwork, June 23, 1945, WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/index.php. Only occasionally is there direct evidence that IJA material reached top prosecutors, either directly or indirectly, through O.S.S. staffers. See, e.g., Telford Taylor, "Progress Report No. 5" [minutes of planning Committee 2 and 3], 2, no. 12 (Sept. 4, 1945), TELFORD TAYLOR PAPERS, 1918–1998, at box 298 (on file with Columbia University Library) [hereinafter TELFORD TAYLOR PAPERS].

38. See, e.g., Aronson, *supra* note 16; Cohen, *supra* note 16; Jockusch, *supra* note 16; *Three Jewish Émigrés at Nuremberg*, *supra* note 16; *A Jewish Lobby at Nuremberg*, *supra* note 16; Donald Bloxham, *Jewish Witnesses in War Crimes Trials of the Postwar Era*, in HOLOCAUST HISTORIOGRAPHY IN CONTEXT: EMERGENCE, CHALLENGES, POLEMICS AND ACHIEVEMENTS 540 (David Bankier & Dan Michman eds., Yad Vashem and Berghahn Books 2008) [hereinafter HOLOCAUST HISTORIOGRAPHY]; DONALD BLOXHAM, GENOCIDE ON TRIAL: WAR CRIMES TRIALS AND THE FORMATION OF HOLOCAUST HISTORY AND MEMORY 64–68, 101–115, 124 (Oxford Univ. Press 2001) [hereinafter GENOCIDE ON TRIAL]; LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 60, 66, 72, 78–80 (Yale Univ. Press 2005).

The truth about Jewish voices and influence at Nuremberg lies somewhere in between. Robinson and Jewish groups were right to feel that the Holocaust was not the focus of the trial. The largely American notion of deeming the war itself the supreme crime and encompassing everything related to it, including the Holocaust, into a criminal conspiracy model, had been developed in autumn 1944; adopted by two successive presidents and Jackson; imposed on skeptical or surprised allies at the UN meeting in San Francisco; and adopted at the London planning meetings.³⁹ Even where theories advocated by Jewish groups were adopted, such as the demand, since 1942, of the British Section of the WJC that postwar accountability include wrongs done (1) prior to the war, (2) to enemy nationals (German and Austrian Jews), and (3) with the aim of exterminating whole peoples—in short, even where Jewish groups anticipated “crimes against humanity” and “genocide”—it was a case of *post hoc, ergo propter hoc*: Nuremberg planners arrived at the same place independently and without evidence that they heeded Jewish proposals.⁴⁰

Despite this familiar story, Robinson’s gloomy view that Jewish perspectives and voices were being ignored—the view widely accepted today—was also wrong in many ways. Allied prosecutors did seek out émigrés—mainly German Jewish lawyers, political scientists, and historians—who could verify facts rather than legal theory, which is why Robinson himself was prized for his ability to document the hard figures of Holocaust deaths. The British staff does not appear to have consulted any scholars or émigrés aside from Lauterpacht, but the far larger American legal team from the start sought help from refugee scholars and

39. See Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1137–38, 1140–43 (2009) [hereinafter *Corporations and Conspiracy*]; Jonathan A. Bush, “*The Supreme . . . Crime*” and Its Origins: *The Lost Legislative History of the Crime of Aggressive War*, 8 COLUM. L. REV. 2324, 2353–70 (2002) [hereinafter *The Supreme . . . Crime*].

40. For wartime advocacy of these theories, see Kochavi, *supra* note 12, at 163 (Easterman pressing UN War Crimes Commission on the centrality of crimes against Jews), and Lewis, *supra* note 16, at 162–64. Even when he was back in New York briefing his colleagues on Nuremberg, Robinson could not have known that he had it upside down in attributing Jackson’s theories to UN War Crimes Commission delegates, Marcel de Baer and Bohuslav Ečer, rather than War Department planners in Secretary Stimson’s office. Compare Report, Jacob Robinson, Minutes of the Office Committee Meeting, World Jewish Congress, December 10, 1945, WORLD JEWISH CONGRESS PAPERS (on file with The Jacob Rader Marcus Center of the American Jewish Archives), http://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-12-10&documentid=C14-16-2&pagenumber=1 [hereinafter Minutes of the Office Committee Meeting], with *The Supreme . . . Crime*, *supra* note 39, at 2342–43, 2346–66.

others.⁴¹ The most important refugee to whom they turned was not an academic or someone connected to Jewish think tanks, but Robert M.W. Kempner, who had been ousted from the Prussian civil service and became a ranking prosecutor in both the IMT and the later Nuremberg trials; he showed his worth by discovering both papers connecting field marshals on the Eastern Front to the *Einsatzgruppen* and what is still the only extant copy of the Wannsee Protocol.⁴² Aside from Kempner, prosecutors seemed to feel, as litigators temperamentally do, that they did not need outside help, either from new co-equal prosecutors or official witnesses, as Robinson had hoped,⁴³ or from outside advisors. Robinson, Lauterpacht, Lemkin, Glueck, Kelsen, and other eminences were consulted a few times, met chief or deputy prosecutors, and left—and were heartily thanked—with the theories that had preceded them largely unchanged.

None of which is to say that Jewish voices or concerns were not heeded. There were dozens of American Jewish staff prosecutors, investigators, and researchers on the large U.S. team.⁴⁴ Their backgrounds

41. Associate prosecutor Sidney Alderman recalled the early search for these experts in Sidney S. Alderman, *Reminiscences of Sidney Sherrill Alderman: Oral History 854–70* (1953) (on file with Columbia University Library). Of the scholars involved, the most important was probably Harvard criminologist Sheldon Glueck, described in *The Supreme . . . Crime*, *supra* note 39, at 2343–45, 2350, 2360–61, 2368. Kelsen’s work is cited in *id.* at 2368 n.132.

42. See generally ANATOMY OF THE NUREMBERG TRIALS, *supra* note 9, at 520; Letter from Benjamin Ferencz to Robert Kempner, Dec. 13, 1989, TELFORD TAYLOR PAPERS, at box 270, 20-1-3-34.

43. Proposals for a Jewish co-chief prosecutor were spurned, as were similar requests by Czech, Polish, and Yugoslav leaders. Bloxham concludes that the refusals were based on different reasons in the case of the Jews, and that the Robinson–Lauterpacht idea was rejected because of the Allies’ inability to see Jewish identity as anything but a religious faith whose adherents had been singled out by the Nazis, see GENOCIDE ON TRIAL, *supra* note 38, at 67; *Jewish Witnesses, in HOLOCAUST AND HISTORIOGRAPHY*, *supra* note 38, at 548–49, and there is something to that. Compare the two different sets of notes kept for the same high-level meeting at which Allied delegates rejected the notion of an official Jewish prosecutor: the American team raised questions of policy, while the British team treated the idea with contempt and more than a whiff of anti-Semitism. Progress Report No. 4 Subcommittee 2 & 3, Sept. 4, 1945, TELFORD TAYLOR PAPERS, at box 298, unnumbered folder “International Indictment-drafting Committees—minutes”. As for an official Jewish witness, whether Weizmann or Joseph Proskauer, president of the American Jewish Committee, the idea could easily have backfired at the hands of a defense counsel skillful at cross-examination.

44. Later research has shown that both Jackson and a senior associate, Executive Counsel Thomas Dodd, preferred to avoid having too many Jews on staff, especially on the Holocaust portion of the case. Jockusch, *supra* note 16, at 116–18; *Jewish Witnesses, in HOLOCAUST AND HISTORIOGRAPHY*, *supra* note 38, at 549. That notwithstanding, there were many Jewish lawyers on the U.S. team, both on the Jewish portion of the case (Seymour Krieger, Isaac Stone, Joseph Dainow), and throughout the higher echelons where strategy was developed (Murray Bernays, Benjamin and Sidney Kaplan, and Murray Gurfein, who had been on the IJA board in 1941). Attempts to count Jews on staff, as some scholars do, are misleading because they exaggerate Jewish

ranged from assimilated but professional New Deal lawyers, to more strongly observant Jews who were deeply committed to the specifically Holocaust dimensions of the case. Jewish and other survivors were not needed to testify in open court in a trial of German leaders, many of whom had never been to a ghetto or extermination camp. What was needed was testimony from knowledgeable senior Germans who could incriminate their colleagues, and this was gradually found in witnesses such as S.S. officers Erich von dem Bach-Zelewski and Otto Ohlendorf and diplomat Hans Gisevius.⁴⁵ Documentary proof was needed even more and was found by scores of investigators. A sequence of American prosecutors assembled hard documentary evidence specifically about the Holocaust.⁴⁶ Other delegations, especially the Soviets, did so as well. In the end, the Holocaust featured prominently at Nuremberg. It was inescapable in the trial record. The extent to which an explicit Jewish voice was not featured or a story not told was due to the trial's legal premises about aggression and lawyers' self-confidence, and to a larger setback handed to Robinson and allies by the judges. Erring on the side of caution, the judges ruled that with a few exceptions they lacked jurisdiction over conspiracy to commit war crimes or crimes against humanity and over prewar atrocities.⁴⁷ Both were bitter blows to the prosecution, and even more so to Robinson, for whom a conspiracy or central plan against Jews was the heart of the case. But even the Tribunal could

significance by counting junior and support staff or persons in titular authority only, or they omit staffers who had Jewish family (Elwyn Jones) or were otherwise wholeheartedly sympathetic to the Holocaust case. Those who count also assume that a Jewish background signifies an agenda or single perspective. What matters is not the layered Jewish identities of the senior staff, but rather the support many shared for the Jewish dimensions of the case.

45. This is not to deny that prosecutors seem to have avoided using Jewish survivor witnesses for various reasons, few of them defensible, ranging from real or perceived courtroom advantage to anti-Semitism. *Jewish Witnesses*, in HOLOCAUST AND HISTORIOGRAPHY, *supra* note 38, at 540, 548–49. This is especially true of the French team, whose portion of the case included atrocities and who almost exclusively used non-Jewish survivor witnesses, but also the British lawyers, who had an aversion to the WJC. Nevertheless, survivors were not generally needed for the case that the Allies, for better or worse, had ambitiously chosen to bring.

46. Telford Taylor was the first American liaison to the Polish and Soviet teams, and he brought Lemkin and Seymour Krieger to meet Polish historian Philip Friedman (with whom Robinson later published Holocaust documentation). See Memorandum from Telford Taylor, German Atrocities in Poland, September 1, 1945, K. LINCOLN PAPERS, War Crimes File, Evidence—Major War Criminals [Folder 3] (on file with Harry S. Truman Presidential Museum & Library), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-09-01&documentid=19-4&pagenumber=1. Other lawyers who later focused on the Holocaust included Brady Bryson and William Walsh and his team.

47. See *Corporations and Conspiracy*, *supra* note 39, at 1160–73 (describing narrow IMT rulings and contemporary reactions). More than most contemporary observers, Robinson immediately saw and criticized these devastating jurisdictional rulings.

not and did not want to minimize the Holocaust.

All this is to skip ahead somewhat. Back in the early months of the trial, when Robinson had only just returned from Nuremberg, he briefed his WJC and IJA colleagues about the trial and offered his critical view that while in principle the trial was important and even historic, insufficient attention was given to the Holocaust, and there was a second-rate quality to the American prosecutors presenting that case. In his confidential report, Robinson told colleagues that Jackson was “tremendous” and an ally,⁴⁸ but that the trial premises he espoused derived from the UN War Crimes Commission; the U.S. team was estranged from the others; the resignation of Deputy U.S. Chief Donovan had significance; the French team might be the most supportive of the Holocaust case because of the Jewish background of alternate judge Robert Falco; the broad expertise of the British prosecutors meant they would also be effective allies; the Americans would be of little help because many of the staff were junior and second-rate and because no Jew had been assigned a speaking role in the case in chief; and, lastly, the composition of the prosecution demonstrates that, overall, “[w]e are witnessing the ebb of Jewish influence in the world.”⁴⁹ As it happens, he was almost completely wrong in these conclusions. Nevertheless, Robinson, as well as the WJC, followed the trials closely and kept this overall view for the next few years. In the winter of 1945 and spring of 1946, Robinson could not have known that Nuremberg would address the Holocaust with condemnation and stiff sentences, albeit with complicated and mixed legal rulings; nor could he have known that a number of the prosecutors and consultants on the Holocaust portion of the case would make important contributions to later trials or to the first wave of Holocaust scholarship.⁵⁰

Robinson also could not have known that, early in the second round of Nuremberg trials (1946–1949), chief prosecutor Telford Taylor

48. Thus echoing a view that their president Rabbi Wise had already reached. *See, e.g.*, THE PERSONAL LETTERS OF STEPHEN WISE 268 (Justine Wise Polier and James Waterman Wise eds., John Haynes Holmes intro., Beacon Press 1956).

49. Minutes of the Office Committee Meeting, *supra* note 40. For a broadly similar view of how Robinson viewed the IMT during and after the trial, *see* Marrus, *Jacob Robinson and the Holocaust*, *supra* note 16, at 103–08.

50. One of the prosecutors Robinson implicitly criticized on Walsh’s team, Krieger, used Nuremberg evidence to publish the earliest Holocaust documentation in English (1947), and French prosecutor Henri Monneray published the first documentation in French (1947), both cited *supra* note 2. Meanwhile, prosecution consultant Raphael Lemkin used his new post in the Pentagon to assist in the later Nuremberg trials and to urge prosecutors focus on the Holocaust and his genocide theory, especially in the Medical and Flick cases, the latter a case on which Robinson himself assisted.

would send a memo to his deputies in February 1947, praising them for the current cases but urging them to view the Holocaust as the defining feature of the Nazi regime and to prepare prosecutions that would reflect this centrality. One result was the *Einsatzgruppen* case; another was the focus in the *Ministries* and *High Command* cases on crimes against humanity. But if Robinson could not have known those things, he and WJC President Wise should have shown better judgment than to send a November 19, 1947, letter to Taylor, with copies leaked elsewhere, complaining about the paucity of cases and citing six uncharged S.S. leaders. One problem with this letter was that they were complaining about one of their best allies, for Taylor had actually sought to charge many more Nazis but had been reined in. Another problem was that the list was factually wrong; most of the men either had been charged or were confirmed dead.⁵¹

While they stumbled by criticizing their allies in 1947, Robinson and the WJC were right about the larger fact that the Americans, at Nuremberg and elsewhere—and even more so the British, the French, and the liberated nations—were bringing few new cases and were cutting back on resources, manpower, and enthusiasm for war crimes trials and punishment. This was due in part to war weariness and Nazi fatigue, and in part to unscrupulous Cold War politics. Whatever the balance, the WJC was accurate, at its second plenary assembly in Montreux in July 1948, in identifying and denouncing the trend toward clemency and amnesty for Nazi war criminals. From then on, the WJC was on the same side as the (former) prosecutors. Both Robinson brothers corresponded with Taylor to help lobby for publication of the Nuremberg record.⁵² They and their colleagues wrote Taylor to campaign for new trials and to oppose the pell-mell rush that began around 1951 to grant

51. See *Corporations and Conspiracy*, *supra* note 39, at 1181 nn. 313–15, 1262 (Taylor to senior staff (Feb. 1947)); *id.* at 1187–88 nn. 341–48 (letters between Wise and Taylor, Kenneth Royall, Secretary of the Army, General Daniel Noce, and Colonel Edward Young (Nov.–Dec. 1947)); GENOCIDE ON TRIAL, *supra* note 38, at 73–75; [WJC] Statement, Extension of the ‘Ministries’ Case to Include Some Additional High Nazis Responsible for the Extirpation of Jews, November 20, 1947, WORLD JEWISH CONGRESS PAPERS (on file in The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1947-11-20&documentid=C194-3-6&pagenumber=1; Draft Letter from World Jewish Congress to Telford Taylor, ca. 1947, WORLD JEWISH CONGRESS PAPERS (on file in The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1947-00-00&documentid=C194-3-7&pagenumber=1.

52. The English language record of the first trial was published, but the record of the later twelve trials was severely cut and published in only limited print runs. Meanwhile the German-language text was never released.

clemency to convicted major Nazi defendants. Nehemiah and his colleagues at the IJA also published articles similarly urging trials and opposing clemencies.⁵³

V. JACOB ROBINSON AFTER NUREMBERG

Back in late 1945, when he first returned from Nuremberg, Robinson rejoined his Institute. The IJA continued to produce scholarly and policy studies, some two dozen in one series alone, over the next few years, with a small but noticeable turn to domestic issues, such as civil rights in employment and schooling and veterans' rights. Robinson wrote two of them, one on Jews in the Soviet Union, the other on the unfinished business of victory.⁵⁴ But he was drawn to international law and increasingly the international arena. Six months earlier, in May 1945, the WJC and American Jewish Conference, two of the nearly fifty NGOs that were attached to the American negotiating team, and their counterparts from the Board of Deputies of British Jews had submitted a memo to negotiators in San Francisco who were planning the United Nations—surely the first instance of an NGO petitioning the new organization, and surely a document drafted by Robinson, perhaps with his fellow delegate Alex Easterman—to urge a stronger basis for the UN protection of minorities; it was rejected.⁵⁵ Now, in May 1946, Robinson returned to the point with his prescient IJA study, “Human Rights and Fundamental Freedoms in the Charter of the United Nations,” with a focus on national and international jurisdictions and humanitarian inter-

53. See, e.g., Nehemiah Robinson's letters to Taylor throughout the 1950s, TELFORD TAYLOR PAPERS, at box 188, folders 50 and 60; and box 190, folders 96–97. Jacob Robinson's letters to Taylor are all from the early 1950s and then the period of the Eichmann trial, are scattered in a dozen boxes. Nehemiah Robinson's articles on prosecution and clemency over a ten-year span from the late 1940s are on file in the INSTITUTE OF JEWISH AFFAIRS COLLECTION, at box 1, folders 1, 2, and 4; and box 2, folder 6. A number of these letters, memos, and pamphlets by both brothers, Anatole Goldstein, Robert Marcus, and others are uploaded on the Truman Library website for the years 1948 and then 1950 and after. https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/

54. See Jacob Robinson, *Jews in the USSR*, 1 JEWISH AFFAIRS, March 1, 1946, INSTITUTE OF JEWISH AFFAIRS COLLECTION, at box 2; Jacob Robinson, *Unfinished Victory*, 1 JEWISH AFFAIRS, Sept. 15, 1946, INSTITUTE OF JEWISH AFFAIRS COLLECTION, at box 2.

55. Though broad human rights language was adopted and Arab League efforts to withdraw existing guarantees to Jews in Palestine were rebuffed. For the role of Robinson and allied groups at the San Francisco conference, see the various surveys in American Jewish Conference, *Bulletin of Activities and Digest of the Press* (May 18, 1945), at 1–6; Sydney H. Zebel, *International Events, Review of Year 5705-International Events*, in 47 AM. JEWISH Y.B. 483, 489–96 (1945); JOSEPH M. PROSKAUER, A SEGMENT OF MY TIMES 216–28 (Farrar, Straus and Co. 1950). One insider observed that Robinson aided all three Jewish groups (American Jewish Conference, World Jewish Conference, and Jewish Agency) represented in San Francisco. Rosenne, *supra* note 12, at 290.

vention. Near the end of 1946, the UN Secretariat hired Robinson as a consultant to plan the first meeting of the UN Human Rights Commission, which was held in early 1947.

There was little surprise that, in April 1947, Robinson resigned from the IJA, which was safely in Nehemiah's hands, to become legal advisor to the Jewish Agency at the United Nations and, after Israel's independence, first legal advisor to Israel's UN Mission. Within a few months of assuming his new role, Robinson marked his presence at the United Nations with another book, *Palestine and the United Nations* (1947), documenting the legalities of the worsening situation in Mandatory Palestine and urging an even-handed constructive role for the United Nations.⁵⁶ Some of his work was legal, some political,⁵⁷ and some diplomatic. Abba Eban, Israel's first ambassador to the United Nations, later said that, "Robinson did more than anyone else to educate us all to the potentialities and limitations of multilateral diplomacy."⁵⁸

For the next ten years, the Robinson brothers were a Jewish-issues counterpart to West Point's famed football backfield of the mid-1940s that featured "Mr. Inside" and "Mr. Outside." Jacob was the insider at Israel's UN Mission, working in the corridors of power, and Nehemiah was the outsider at the scholarly IJA, urging new programs, warning of new dangers, and advising the public. The brothers lived and worked together, and were surely coordinating their tactics and strengths. Thus, on international criminal law and development of the Nuremberg principles, Jacob was a leading voice in UN meetings for many years, while Nehemiah publicized UN developments and used the WJC's official consultative status to petition the UN and its constituent organs.⁵⁹ On

56. Robinson's friend and colleague Lauterpacht also gave legal help to the Jewish Agency, in his case after a period of seeming ambivalence. See Eliav Lieblich and Yoram Shachar, *Cosmopolitanism at a Crossroads: Hersch Lauterpacht and the Israeli Declaration of Independence*, 84 BRIT. Y.B. OF INT'L L. 1–51 (2014); REUT YAEL PAZ, A GATEWAY BETWEEN A DISTANT GOD AND A CRUEL WORLD: THE CONTRIBUTION OF JEWISH GERMAN-SPEAKING SCHOLARS TO INTERNATIONAL LAW 284–92 (Martinus Nijhoff Publishers 2013).

57. It was likely Robinson who helped rally support for the nascent state from prominent figures like Murray Gurfein, a New York lawyer (and later the judge in the Pentagon Papers case) who had been on the IJA board in 1941 and a senior Nuremberg prosecutor in 1945. See ABBA EBAN, AN AUTOBIOGRAPHY 74 (Random House 1977).

58. See EBAN, *supra* note 57, at 133; Rosenne, *supra* note 12, at 291–92.

59. Robinson's many statements in and submissions to the UN regarding international criminal law are in JACOB ROBINSON PAPERS, at box 5, folders 10-11, and box 6, folder 2, and briefly surveyed in Rosenne, *supra* note 12, at 292. Nehemiah's outside lobbying is illustrated, e.g., by Letter from Robert S. Marcus to Trygve Lie accompanied by a Memorandum from the World Jewish Congress, June 2, 1950, WORLD JEWISH CONGRESS PAPERS (on file in The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?d

Holocaust compensation, Nehemiah continued to publish and update books and articles on West German and Austrian legislation for the IJA and work with Easterman and other experts from the WJC Political and British Sections. Jacob worked as an insider with Nahum Goldmann and others in the difficult Wassenaar negotiations, and is credited with being one of the principal drafters of the *Luxembourg Agreements* (1952), which provided for historic reparations by West Germany to both Israel and individual Holocaust survivors. His typed commentary on the agreement, with marginalia, may be the closest thing to an ur-text for that landmark document.⁶⁰

The brothers did the same with the emerging crime of genocide. Today, some say that genocide is the crime of crimes or the supreme crime, and that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide was an obvious outgrowth of the Holocaust. If so, it was not obvious at the time. Few nations initially ratified the Convention, and many had concerns about the definition of the crime and the incursions the Convention seemed to permit on state sovereignty. Nehemiah's 1949 commentary is the first and, arguably, still the most important, gloss on the Convention, and he and other scholars at the IJA continued to track developments on genocide law in their publications. For his part, Jacob was almost certainly the strategist for the Israeli Mission as it successfully petitioned the United Nations, along with the British and French, to permit them to ask the ICJ for an advisory opinion on the question of reservations to the Genocide Convention. The question may sound academic, but for Israel, the issue was that Arab bloc nations might ratify the Convention with variants of a reservation that created doubt whether they renounced genocide against Israelis. Using Robinson's arguments, Shabtai Rosenne, then-legal advisor at the Mission, and his two European counterparts persuaded the ICJ that uni-

ocumentdate=1950-06-02&documentid=B141-25-1&pagenumber=1; Memorandum Concerning the Formulation of the Nuremberg Principles, World Jewish Congress to the Second Session of the United Nations International Law Commission, June 2, 1950, WORLD JEWISH CONGRESS PAPERS (on file in The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1950-06-02&documentid=C194-3-4&pagenumber=1; and Letter from Robert S. Marcus and Nehemiah Robinson to the United Nations General Assembly accompanied by a Memorandum from the World Jewish Congress, October 18, 1950, WORLD JEWISH CONGRESS PAPERS (on file in The Jacob Rader Marcus Center of the American Jewish Archives), https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1950-10-18&documentid=B141-31-1&pagenumber=1.

60. See JACOB ROBINSON PAPERS, at box 6, folder 1; NICHOLAS BALABKINS, WEST GERMAN REPARATIONS TO ISRAEL 136 (Rutgers Univ. Press 1971); SAGI, *supra* note 16, at 94–95, 189, 206 (about Nehemiah); *id.* at 90 (about Jacob Robinson).

lateral reservations that undercut the heart of a treaty were void (1951).⁶¹

After this victory, Jacob continued to make learned presentations on Israel's behalf to the UN Sixth Committee and other organs on the Genocide Convention, aggression, crimes against humanity, an international criminal court, slavery, and the Nuremberg principles. Other matters on which he was active were the Convention on the Declaration of Death of Missing Persons (1950) and the Convention Relating to the Status of Refugees (1951). Both were intended as temporary, retrospective agreements, and both might seem technical, but they were of deep concern to a nation such as Israel, with hundreds of thousands of refugees and missing kinsmen. Joining Robinson at the negotiations was Gerhart Riegner, an old hand from the WJC and author of the crucial 1942 Riegner telegram that first alerted the world about the Holocaust. And, reliable as clockwork, the UN Convention Relating to the Status of Refugees and the Convention on the Declaration of Death of Missing Persons on which Jacob worked as an insider, were then discussed in scholarly commentaries by Nehemiah at the IJA (1952).⁶²

Robinson's most important moment at the United Nations came in the tense weeks before, during, and after the Suez incursion (October–November 1956). Meeting constantly with Ambassador Eban and occasionally with Foreign Minister Golda Meir, Robinson served as legal advisor to Israel as it sought to fend off diplomatic pressure while negotiating withdrawal from the Sinai. Soon after, in summer 1957, despite widespread praise and respect, a disillusioned Robinson left the United

61. See generally Part II: Public Sitings held at the Peace Palace, The Hague, from April 10th to 14th, and on May 28th, 1951, Oral Statements, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. (ser. C) 328–57 (May 28, 1951). For the British perspective, see A.W.B. Simpson, *Britain and the Genocide Convention*, 73 BRIT. Y.B. INT'L L. 5, 39–43 (2002). For continuing difficulties with the law of treaty reservations in the Genocide Convention and generally, see William A. Schabas, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 615–19 (2d ed., Cambridge Univ. Press 2009).

62. The text of many of Jacob Robinson's later presentations to UN committees are found in JACOB ROBINSON PAPERS, at box 5, folders 10 and 11; and box 6, folder 2, while others can be found in the negotiations that have been put online for some of these conventions. See, e.g., 1951 Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter 1951 Convention], <http://www.unhcr.org/en-us/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>; see Rosenne, *supra* note 12, at 292 (regarding Robinson's central role in the Declaration of Death Convention); Gilad Ben-Nun, *The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention*, 27 J. OF REFUGEE STUD. 101 (2013); Gilad Ben-Nun, *The British-Jewish Roots of Non-Refoulement and its True Meaning for the Drafters of the 1951 Refugee Convention*, 28 J. OF REFUGEE STUD. 93 (2015) (regarding Robinson's role in the Convention Relating to the Status of Refugees).

Nations and returned to his life of research.⁶³ With Nehemiah still leading the IJA and publishing furiously about Jewish issues around the world—*European Jewry Ten Years After the War* (1956), and surveys of Jewish life and anti-Semitic pressures in dozens of countries from Latin America to Iran—Jacob gathered bibliographic material on the Holocaust and international law, though he occasionally advised Israel on high-stakes litigation before international tribunals.⁶⁴ In 1959, Robinson was honored by scholars and communal leaders around the world on his seventieth birthday, and he continued to write.

His quiet routines as a scholar and institutional leader were interrupted by the arrival of Adolf Eichmann in Israel, after being abducted from Argentina on May 11, 1960. Israeli Attorney General Gideon Hausner, who would lead the prosecution, had only just taken office and had not previously been involved in the legal planning surrounding Eichmann's indictment.⁶⁵ With the trial now imminent, Hausner recruited Robinson, who had pressed the Allies to charge Eichmann as long ago as Nuremberg, as his international law specialist. Naturally, Nehemiah at the IJA was also involved, writing an essay in December 1960 about the controversial sale of Eichmann's memoir to *Life* magazine by Eichmann's wife and another essay as the trial began about the same legal issues on which his brother was the chief advisor.⁶⁶ Unlike others on the small prosecution team, Jacob did not argue in court or examine witnesses, but he was indispensable and can be seen in trial photos sitting next to Hausner. He had declined an invitation to testify as the lead expert witness—a role that fell to famed historian Salo Baron, to mixed reviews—but he helped investigators sort through hundreds of survivor accounts to find witnesses, he defended the trial in scholarly and other publications, and he is credited with preparing the international law arguments used in court.⁶⁷ After a four-month trial, Eichmann was con-

63. EBAN, *supra* note 57, at 221–22.

64. Rosenne, *supra* note 12, at 289 n.1 (on international litigation); Boaz Cohen, *Setting the Agenda of Holocaust Research: Discord at Yad Vashem in the 1950s*, in HOLOCAUST HISTORIOGRAPHY, *supra* note 38, at 255–92 (on politicized research context).

65. The evidence suggests that while officials had been engaged in diplomatic and intelligence efforts to obtain Eichmann since at least late 1957, they had given scant attention to the legal questions a trial might bring.

66. See, e.g., *Are Eichmann's Memoirs Published in Life Magazine Authentic?* (Dec. 5, 1960), INSTITUTE OF JEWISH AFFAIRS COLLECTION, at box 1, folder 3; *Eichmann's Confederates and the Third Reich Hierarchy* (May 1961), INSTITUTE OF JEWISH AFFAIRS COLLECTION, at box 1, folder 2. Jacob also wrote one article and sparred with historian Oscar Handlin afterward. Jacob Robinson, *Eichmann and the Question of Jurisdiction*, 30 COMMENTARY 1–5 (1960); Oscar Handlin and Jacob Robinson, *Ethics and Eichmann*, 30 COMMENTARY 161–63 (1960).

67. See GIDEON HAUSNER, *JUSTICE IN JERUSALEM* 303, 313 (Harper and Row 1966); HANNA YABLONKA, *THE STATE OF ISRAEL VS. EICHMANN* 98, 100–06, 147 (Ora Cummings &

victed and the conviction affirmed, and he was hanged in late May 1962.

Today, the trial is widely seen as fair and the process praised for being the first trial of a high-level war criminal since the Nuremberg era. It was the first case to feature the legal theories of universal jurisdiction and genocide, and the first to rely so centrally on survivor testimony. Yet, it is often forgotten that at the time, the legal questions—seizure, jurisdiction, the Israeli statute, retroactivity, fair trial, venue, and execution—and behind them the political and moral issues, were enormously controversial. There were hundreds of newspaper editorials and essays by what a later generation would call public intellectuals. Every international lawyer seemed to write about it, as did three senior Nuremberg participants, one in favor (Kempner) and two more skeptically (Taylor and Wechsler). Argentina brought a formal complaint to the UN, and foreign governments mostly condemned Israel.⁶⁸

Without question, the harshest and most influential criticism came from the noted German Jewish émigré philosopher, Hannah Arendt, in her 1963 book, *Eichmann in Jerusalem: A Report on the Banality of Evil*, which was based on a series of articles she had written for *The New Yorker*. Arendt presented the defendant as guilty but ordinary, honest, free of anti-Semitism, mechanistic, and interesting rather than evil. She portrayed the prosecution as rigid and error-prone; the survivor witnesses as overly emotional; the Israeli government as staging a show trial; the charges as based on sectarian rather than universalistic grounds; and the Holocaust as so huge that it required, out of necessity, the significant complicity of Jewish communal leaders.

Many reacted to these shocking characterizations, but in certain quarters it was feared that Arendt had mastered the voluminous evidence and that only someone with similar mastery could rebut her effectively. Enter Robinson, who wrote a short essay for the Anti-Defamation League (1963) and then a 1965 book⁶⁹ in which he rebutted Arendt's points, sometimes line by line. It is accurate on almost all

David Herman trans., Schocken Books 2004). The best evidence of his work is his manuscript *Israel vs. Eichmann: A Study in International, Comparative, and Domestic Law* (revised ed., Jan. 1961), in JACOB ROBINSON PAPERS, at box 7, folder 4.

68. In time their objections receded, either because Argentina had dropped its UN complaint after a face-saving compromise, or their own nations sought to avoid the spotlight of trying or failing to try Nazis, or the Israeli trial turned out to be fair.

69. AND THE CROOKED SHALL BE MADE STRAIGHT: THE EICHMANN TRIAL, THE JEWISH CATASTROPHE, AND HANNAH ARENDT'S NARRATIVE (Macmillan Co. 1965); *A Report on the Evil of Benality: The Arendt Book*, 15 FACTS 263–70 [published by the Anti-Defamation League] (1963). Robinson's other related publications are in JACOB ROBINSON PAPERS, at box 7, folder 11.

points, and new research continues to endorse its findings, but is poorly written and organized—more a dense list than the polished appraisal that would be needed against a polemicist as skilled as Arendt. She answered with a contemptuous reply that to her many admirers left her the victor.⁷⁰ But if most—not all—general readers felt that way,⁷¹ Holocaust specialists saw it differently.⁷² They saw, increasingly so, that Robinson was right on all of his historical points and most of his legal points, and right to reject, as all serious students of the Holocaust do, Arendt's views on Jewish passivity and complicity. Whatever Arendt's contributions elsewhere or the value of her book for sociology, political theory, or mass atrocities, it is wrong, even mendacious, about the Holocaust, Eichmann, and his trial. Yet the unfortunate fate of Robinson's best-known, but least-successful book, was that, despite the consensus of specialists, most readers still regard Arendt's book as brilliant if flawed, and Robinson's, when remembered at all, as an angry, nit-picking, even if accurate, book.⁷³

Robinson continued to wear multiple hats in the world of communal Jewry.⁷⁴ From 1957, he had been legal advisor to the Claims Conference and helped establish the research branch of Yad Vashem—although he typically introduced himself as merely “research coordinator of the four Holocaust institutes”—from which he encouraged joint scholarly projects to be undertaken and tried to assemble proposed lists of survivors who could be witnesses in war crimes trials. He worked

70. “*The Formidable Dr Robinson*”, *supra* note 15.

71. The drift away from Arendt's views in at least one non-specialist is illustrated by Isaiah Berlin. He began with a measure of skepticism about the trial and a noncommittal sympathy for Arendt, *see* ISAIAH BERLIN, *BUILDING: LETTERS 1960–1975*, at 3–4, 93–94, 192, 195–96 (Henry Hardy and Mark Pottle eds., Chatto and Windus 2013). A decade later, however, he was baffled at the spell she seemed to have over their many mutual friends and repeatedly denounced her as he did almost nobody else of his vast circle, writing that she and her views were “dreadful,” “contemptible,” and “terrible on this (as on many things).” ISAIAH BERLIN, *AFFIRMING: LETTERS 1975–1997*, 41, 252, 277, 297–300, 314–15, 362, 389, 462–64, 503 (Henry Hardy and Mark Pottle eds., Chatto and Windus 2015) (quotations respectively at 314, 389, 277).

72. This includes Raul Hilberg, who defended some of her claims but whose own controversial views were far more nuanced. He also loathed the way Arendt distorted his views to support hers, and later moved away from even those views that were sympathetic to hers. *See* Jonathan A. Bush, *Raul Hilberg (1926–2007) In Memoriam*, 100 *JEWISH Q. REV.* 661, 673–76, 679–80 (Fall 2010) 673–76, 679–80.

73. *See generally* Richard I. Cohen, *A Generation's Response to 'Eichmann in Jerusalem'*, in HANNAH ARENDT IN JERUSALEM 253, 266–67 (Steven E. Aschheim ed., 2001). Contrary to popular belief, Robinson was not an automatic defender of all aspects of the trial; for instance, he questioned the death sentence, albeit on practical rather than legal grounds. YABLONKA, *supra* note 67, at 147.

74. This and the next paragraphs are largely based on Robinson's correspondence in JACOB ROBINSON PAPERS, at box 1, 8, and 9.

with his brother's IJA, the national affiliates of the World Jewish Congress, and other groups. He corresponded with officials, rabbis, survivors, and old allies in Eastern Europe, Latin America, and, of course, Israel, Germany, and throughout the United States, and was seen as an indispensable counselor. He steered funds to a steady stream of survivors who came in penury to him and his brother, and to scholars and memorial projects; but he lived modestly, residing as he had since 1941, on Riverside Drive with his wife and two daughters, his brother, and sister-in-law—all of whom helped in his work.

But his immediate world grew darker. His intimate co-author, Nehemiah, died young in January 1964, as had another beloved co-author, his daughter Vita, of leukemia in 1955. The rise of other, more specialized research and advocacy groups meant that the IJA was less central, and—perhaps because it no longer had Nehemiah's energy anchoring it in New York—it relocated to London in 1965. Jacob was left with more time for his research, which he pursued unabated. Continuing the bibliographic series of unpublished Holocaust evidence that he had begun with the late Philip Friedman in 1960,⁷⁵ Robinson, together with scholars at Hebrew University, published new volumes starting in 1965. His 1967 bibliography of international law and legal sources is sadly forgotten today, but it itemizes and assesses over two thousand sources in dozens of languages, including older manuals and periodicals by Slavic and Asian authors that cannot be found in any major American library. It was a return to the basic research that had marked his first major publication, a two-volume 1928 bibliographic compilation of the legal protections for minorities under the League of Nations. His last major bibliographic work was, fittingly, a 1976 digest of the Nuremberg evidence, co-edited with Henry Sachs. At a time when the Nuremberg trials are breezily cited everywhere, but the body of evidence is too vast and unwieldy for all but a few specialists to access, Robinson's calendar is the gold standard for serious researchers. In 1977, soon after the digest was completed, Robinson died.

75. See generally Roni Stauber, *Philip Friedman and the Beginning of Holocaust Studies*, in HOLOCAUST HISTORIOGRAPHY, *supra* note 38, at 83–102. A dozen years earlier Robinson had helped bring Friedman to New York. *Id.* at 91.