

RAPHAEL LEMKIN AND ‘GENOCIDE’ AT NUREMBERG, 1945–1946

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Dr. Raphael Lemkin fathered the concept of genocide as a defined international crime.¹ His efforts to get the nations of the world to comprehend and then to outlaw this crime occurred in five phases:

- his own living, thinking and writing, culminating in his 1944 book, *Axis Rule in Occupied Europe*,² which coined the new word ‘genocide’ to communicate the systematic evil of acts committed with intent to destroy national, ethnic, racial or religious groups;
- his 1945-46 work relating to the prosecution in Nuremberg of the principal surviving Nazi leaders for crimes including genocide;
- his work at the United Nations in late 1946, culminating in the General Assembly’s December 11, 1946, adoption of a resolution condemning genocide as a crime under international law;
- his continuing work at the UN during the next two years, culminating in the General Assembly’s December 9, 1948, Resolution urging states to agree to a Genocide Convention by which they would commit to prosecute any perpetrator of the crime; and
- his subsequent efforts to persuade states to ratify the Convention on the Prevention and Punishment of the Crime of Genocide, which a sufficient number did to bring it into force in 1951.

Of these phases, Raphael Lemkin’s work relating to the 1945-46 Nuremberg recognition and prosecution of Nazi genocidal conduct is the least studied and understood. Some accounts of this period, including Lemkin’s own, are brief and imprecise.

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¹ See generally J. Cooper, *Raphael Lemkin & the Struggle for the Genocide Convention* (Houndsmills, Palgrave Macmillan 2008); Tanya Elder, ‘What you see before your eyes: documenting Raphael Lemkin’s life by exploring his archival Papers, 1900-1959’, 7 *Journal of Genocide Research* (2005), p. 469; S. Power, *‘A Problem from Hell’: America & the Age of Genocide* (New York, Basic Books 2002); W. Korey, *An Epitaph for Raphael Lemkin* (New York, Jacob Blaustein Institute 2001, as reissued 2009).

² R. Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace 1944).

Some accounts are inaccurate. This chapter, based in contemporaneous documents, chronicles where Lemkin actually was, what he did, and how his concept and word ‘genocide’ advanced, fitfully and not by Lemkin’s efforts alone, during the Nuremberg trial year.

I. LEMKIN IN WASHINGTON, SPRING 1945

In the late afternoon on Wednesday, May 2, 1945, President Harry S. Truman announced at a press conference that he had appointed Robert H. Jackson, an Associate Justice serving on the Supreme Court of the United States, to serve as US representative and chief of counsel to prepare and prosecute before an international military tribunal the European Axis powers and their agents on charges of atrocities and war crimes. Radio, newspapers and newsreels reported Jackson’s appointment prominently.

Raphael Lemkin, a Pole, a Jew, a lawyer and a refugee from Nazism who then was working as a War Department consultant, heard the news and acted upon it. On May 4, he typed a letter to Justice Jackson and sent it, along with a magazine issue containing Lemkin’s most recent article, to Jackson at the Supreme Court.³

Lemkin’s short letter to Jackson, which apparently was their first contact, contained three distinct messages. First, it pointed out that the enclosed April 1945 issue of *Free World* magazine, a pro-Allies, internationalist magazine published in New York City, contained Lemkin’s article, ‘Genocide – A Modern Crime.’⁴ Second, the letter highlighted that the article contained a chilling statement that recently captured German Army Generalfeldmarschall Gerd von Rundstedt had made in 1943 and urged that this statement, ‘in connection with other specific acts, points to the particular responsibility of this man as a major war criminal’ who, presumably, Jackson should prosecute.⁵ Third, Lemkin’s letter alerted Jackson to the Carnegie Endowment for International Peace’s publication ‘three months ago’ – in fact it had been twice that long – of Lemkin’s book *Axis Rule in Occupied Europe*, ‘which contains also some legal evidence as to war crimes.’ Lemkin added that he would be delighted to give a copy of the book to Jackson but for Lemkin’s discov-

³ See Dr. Raphael Lemkin letter to Honorable Robert Jackson, 4 May 1945, in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington DC, Box 98, Folder 9. On this letter, Jackson’s secretary jotted his instruction to ‘ackn[owledge]’ it to Lemkin. *Idem*.

⁴ See R. Lemkin, ‘Genocide – A Modern Crime’, 9 *Free World* (1945), p. 39. The article contained much of chapter nine from Lemkin’s then recently published book.

⁵ *Idem*. In Jackson’s hard copy of the magazine, which survives today as he or an assistant filed it, someone – probably Jackson – marked this quotation in pencil with lines and a large ‘X.’ Two pages later, the same person marked with pencil lines in the margin Lemkin’s statement that ‘the Jews in the overcrowded ghettos were forbidden the use of public parks’ and the start of the next sentence, which refers to ‘[t]he authoritative report of the War Refugee Board published in November 1944, and the overwhelming new evidence that appears daily ...’ *Ibid.*, at pp. 39, 42. I conclude that the pencil wielding reader was Justice Jackson, both because he regularly made pencil marks in printed items as he read them, and because the issue of *Free World* that Lemkin sent to him contains, at the first page of the Lemkin article, a blue paper Library of the US Supreme Court bookmark.

ery 'only today' that the book's first printing 'is exhausted' and that the Carnegie Endowment was undertaking a second printing. 'I am sure however,' Lemkin closed, 'that the Library of the Supreme Court has a copy.'⁶ Justice Jackson, thanks to his habit of reading daily newspapers and other materials, might well have known already of Raphael Lemkin and his book. Jackson might have noted, for example, that the *Washington Post* had, in November 1944, published a prominent editorial, headlined 'Genocide,' which discussed a report that the Roosevelt Administration's War Refugee Board (WRB) had issued publicly that month. The WRB had reported then, months prior to Allied liberation of Nazi concentration camps, that Germany had used poison gas to kill approximately 1.7 million Jews at the Auschwitz and Birkenau extermination camps. The *Post* editorial also explained that 'a noted Polish scholar and attorney, Prof. Raphael Lemkin,' had recently coined the word 'genocide' to describe such conduct. The editorial, applying Lemkin's definition of the term, stated flatly that 'the Germans have committed genocide in virtually all of the countries of Europe which they occupied' and endorsed his call for 'international agreement now on the outlawing of genocide.'⁷ Jackson also might have noticed another *Washington Post* editorial, published in early May 1945. It actually was published just one day after Jackson had received Lemkin's letter introducing himself and supplying the complimentary copy of *Free World* magazine containing his article. The *Post* editorial thus might have reinforced the significance of Lemkin's direct communication with Jackson. Titled 'Retribution,' this editorial described the war-ruined condition of Germany and argued that the Nazis had caused this devastation and their soon-to-become-official military defeat by unleashing 'terror and systematic destruction ... in a world where men still place value on human life and freedom ...' This editorial also cited Lemkin's *Free World* article and printed from it the quote from von Rundstedt's 1943 speech to the Reich War Academy in Berlin, which Lemkin had flagged in his letter to Jackson:

'One of [Germany's] great mistakes of 1918 was to spare the civil life of the enemy countries, for it is necessary for us Germans to be always at least double the numbers of the peoples of the contiguous countries. We are therefore obliged to destroy at least a third of their inhabitants. The only means is organized underfeeding which in this case is better than machine guns.'⁸

(It seems reasonable to suspect that Lemkin, who courted the press energetically, played an important role in calling first his 1944 book and, later, his spring 1945 magazine article to the newspaper's attention, and in persuading it to publish these editorial stances. Years later, Lemkin wrote in a summary of his proposed autobiography that he had in the late 1944-early 1945 time period won the support of *Washington Post* publisher Eugene Meyer.)⁹

⁶ Lemkin to Jackson, 4 May 1945, *supra* n. 3.

⁷ 'Genocide', *Washington Post*, 3 December 1944, p. B4 (editorial).

⁸ 'Retribution', *Washington Post*, 6 May 1945, p. B4 (editorial).

⁹ See 'Chap 8 summary', n.d., in Raphael Lemkin Papers, New York Public Library, Manuscripts & Archives Division, New York, NY, Reel 2.

Lemkin was, in his written surmise to Jackson, correct – the US Supreme Court Library, supplied by the Library of Congress, did have a copy of Lemkin's book *Axis Rule in Occupied Europe*. Jackson borrowed it from the Court's Library, took it to London that summer, kept it in his office there, took it to Nuremberg for the ensuing trial year, and finally returned it more than a year later, after he had completed his chief of counsel assignment.¹⁰

Within about ten days of receiving Lemkin's letter and the enclosed magazine, Jackson's secretary followed his instruction to prepare a letter of response, which Jackson signed and sent. Jackson wrote that he had read both the 'Genocide' article and the book and he thanked Lemkin for calling them to Jackson's attention.¹¹ (Jackson's ultimate and lasting familiarity with Lemkin's book is demonstrable: years after Nuremberg, Jackson recalled Lemkin accurately as 'one who had followed closely the Axis rule in occupied countries and had got out a book showing their decrees and rules.')¹²

From the April 1945 start of Justice Jackson's assignment as US Chief of Counsel, his work followed, perhaps more closely than even he realised, Lemkin's conceptual lead. In his book *Axis Rule*, Lemkin described and analysed the SS, Gestapo and various other Nazi Party entities as criminal organisations. Inside the War Department during the second half of 1944 (i.e., months before Jackson's chief of counsel appointment), an advance copy of Lemkin's book and in particular his description of Nazism as organised criminality became a basis for the plan, developed by Colonel Murray C. Bernays (US Army, General Staff Corps Executive), a War Department attorney, to try Nazi leaders and their organizations before an international tribunal for the crime of conspiracy. Bernays's plan was approved, first by Secretary of War Henry L. Stimson and later by Secretary of State Cordell Hull and Attorney General Francis Biddle.¹³ This plan became the basis for President Truman's appointment of Jackson and a central part of the position description and job guidance that he received. Bernays's conspiracy concept of Nazi criminality then became Jackson's blueprint for what came to be the August 1945 London Agreement and, in time, the Nuremberg trial itself.

¹⁰ See 'Books Requested for Use Overseas By Members of Justice Jackson's Staff to Prosecute the Major Axis Criminals', n.d. (est. July 1945) (listing Lemkin's book as one of the 'Books Now On Loan to Justice Jackson Via Supreme Court Library'); Memorandum from Mary Burns to Lt. Col. [Leonard] Wheeler, 'Subject: Books and Publications in Justice Jackson's [London] Office', 27 August 1945, p. 2 (listing Lemkin's book), & 'Library of Congress', 15 October 1946 (listing Lemkin's book, with Jackson secretary Elsie Douglas noting that it had been 'Ret'd'), all in Jackson Papers, *supra* n. 3, Box 104, Folder 1; see also 'O.C.C. [Office of Chief of Counsel] Information Bulletin No. 155, Nurnberg, Germany, 30 July 1946' ('urgently request[ing] that all books borrowed during the preparation of the case from Justice Jackson's office, some of which were missing and came 'from the Supreme Court Library and the Library of Congress, be returned to his secretary'), in Jackson Papers, *supra* n. 3, Box 105, Folder 8.

¹¹ Robert H. Jackson letter to Dr. Raphael Lemkin, 16 May 1945, in Jackson Papers, *supra* n. 3, Box 98, Folder 9.

¹² H.B. Phillips (ed.), *The Reminiscences of Robert H. Jackson* (New York, Columbia University Oral History Research Office 1955), p. 1211.

¹³ See R.E. Conot, *Justice at Nuremberg* (New York, Carroll & Graf Publishers, Inc. 1984), pp. 11-12; J. Cooper, *supra* n. 1, pp. 62-63.

In May 1945, Justice Jackson assembled the core legal staff that would assist him as international tribunal negotiator and war crimes prosecutor. Jackson's lawyers, who came for the most part from existing government offices and/or military service, included a number of men who had been working already on war and war crimes-related matters. Jackson's first underling and executive officer was, from the War Department, Col. Bernays. They quickly became affiliated with leadership personnel from the Army's Judge Advocate General (JAG) Corps Department and from the Office of Strategic Services (OSS). Lieutenant James B. Donovan (US Navy Reserve), OSS's general counsel, became a principal participant. With President Truman's permission, Jackson recruited the head of the OSS, Major General William J. Donovan (US Army), to be Jackson's deputy. With the permission and support of Attorney General Biddle, Jackson recruited his close friend and former Department of Justice colleague, Assistant Attorney General (Claims Division) Francis M. Shea. Jackson also recruited Sidney S. Alderman, the general counsel of the Southern Railway System, who Jackson admired as an advocate before the Supreme Court. Col. Telford Taylor (General Staff Corps), Commander Sidney J. Kaplan (US Coast Guard) and other lawyers were detailed to the staff. One of these was Jackson's son, Ensign William E. Jackson (USNR), who became the Justice's executive assistant.

From the start, Raphael Lemkin's intellectual work was known to and influenced Jackson and his staff. During the week of May 7, 1945, Sidney Alderman obtained, from Jackson or elsewhere, a copy of Lemkin's book *Axis Rule* and read much of it over the May 12-13 weekend.¹⁴ Col. Bernays, who knew his War Department colleague Lemkin's book and had conceptualised prosecuting Nazi criminal conspirators along the organisational lines it documented, drafted during this same period two memoranda for discussion with Jackson and his legal team. In one, an 11-page draft entitled 'Planning Memorandum,' Bernays wrote that the Allies' trial proof of the atrocities and other crimes that Nazi war criminals committed before and during their illegal wars of aggression would include evidence of '[d]ecimation of racial minorities and subjugated populations' by methods including '(1) underfeeding; (2) depriving them of clothing, shelter, fuel, sanitation, medical care; (3) deporting them for forced labor; [and] (4) working them in inhuman conditions.'¹⁵ At a May 16 meeting at the Supreme Court, Jackson and most of his senior lawyers, going over this document paragraph by paragraph,¹⁶ changed Bernays's draft to include – Jackson added in his own hand – Lemkin's word 'genocide.' The trial proof of these crimes, Jackson wrote, would include evidence of

¹⁴ See H.B. Phillips (ed.), *The Reminiscences of Sidney S. Alderman* (New York, Columbia University Oral History Research Office 1955), p. 817 ('I had procured a copy of this book the previous week [i.e., 7-11 May 1945] and had read the first half of it, Part I, over the [12-13 May] weekend.'). Alderman's oral history is a recitation of entries from a diary that apparently no longer exists.

¹⁵ See 'Draft, 14 May 1945, Planning Memorandum', at p. 9, in Jackson Papers, *supra* n. 3, Box 107, Folder 5.

¹⁶ Robert H. Jackson diary entry, 16 May 1945, in Jackson Papers, *supra* n. 3, Box 95, Folder 5.

'genocide, sterilization, castration, or destruction of racial minorities and subjugated populations by such means and methods as (1) underfeeding; (2) depriving them of clothing, shelter, fuel, sanitation, medical care; (3) deporting them for forced labor; [and] (4) working them in inhuman conditions.'¹⁷

Jackson approved this Planning Memorandum as amended.¹⁸ (A month later, when Jackson and most of his staff relocated to London to continue trial preparations there while negotiating with British, Soviet and French allies, Jackson distributed a later, but still 'genocide'-mentioning, version of this Planning Memorandum to the foreign delegations 'as an aid to their understanding of the proposed agreement.')19

On Friday, May 18, 1945, Sidney Alderman met Raphael Lemkin in person. Brigadier General John M. Weir, Judge Advocate General of the US Army, who had attended the May 16 meeting, brought Lemkin to meet Alderman, who at that time was working in the JAG Corps War Crimes office in the Munitions Building on the Washington Mall. Alderman and Lemkin spoke, probably at length. Alderman was pleased to learn that Lemkin had for a time been a law professor at Duke University, Alderman's *alma mater*. That evening, Alderman wrote in his diary about this meeting. He noted (erring on some particulars) that 'Raphael Lemkin was a German [*sic*], a Jew, who had to flee from Germany [*sic*].' Alderman described Lemkin's *Axis Rule in Occupied Europe* as 'a very comprehensive and interesting book, one of the basic texts along with Dr. [Franz] Neumann's *Behemoth*.'²⁰ Alderman also wrote about Lemkin's new word, 'genocide':

'I might say at this point that Prof. Lemkin, I believe in this book, coined the word "genocide" as a term to refer to the deliberate attempt to extinguish whole races of people – obviously referring to the German attempt to extinguish the Jews of Eastern Europe. I immediately saw that he was very proud of this word.'²¹

During the ensuing weeks, Jackson's staff continued to have contacts with Lemkin. Late on the afternoon of Saturday, May 26, he was invited to attend a contentious meeting, hosted by Francis Shea at the Department of Justice, that concerned the ignorance and resulting anxiety of non-OSS lawyers on Jackson's staff about how and what OSS was doing with the evidence assembling and other trial preparations that it had been assigned.²² (Bill Jackson, who was present at the meeting, wrote

¹⁷ See 'Draft, 14 May 1945, Planning Memorandum', *supra* n. 15.

¹⁸ See *ibid.*, at p. 1 (Jackson's handwritten note: 'Conference of May 16th. Approved this with changes').

¹⁹ See 'Planning Memorandum', n.d., in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials* (Washington, US Government Printing Office 1949), p. 64.

²⁰ See F. Neumann, *Behemoth: The Structure & Practice of National Socialism, 1933-1944* (London, V. Gollancz Ltd. 1942). Dr. Neumann served in the OSS during World War II and in Fall 1945 headed Justice Jackson's research section at Nuremberg, which assisted and advised US lawyers.

²¹ See *The Reminiscences of Sidney S. Alderman*, *supra* n. 14, at p. 818 (discussing events of 18 May 1945).

²² See *ibid.*, pp. 837-839.

afterward that Lemkin 'did not appear to have any idea of the type of case we are concentrating on, although he is no doubt a scholar of parts.'²³ Shea and Alderman subsequently chose Lemkin to serve on a 'control squad' that would, by commissioning from OSS a micro-trial brief or some other sample of its work, take 'test borings' on what it was doing.²⁴ On Monday, May 28, Lemkin began to work officially under Gen. Weir in the JAG Corps War Crimes office.²⁵ Col. Taylor and Cmdr. Kaplan soon gave Lemkin what Alderman regarded as 'a complete water-haul out' but they failed to get any information on how this proposed OSS-over-sight committee would work. The US lawyers then decided to strike Lemkin from the committee roster, 'leaving him for encyclopedic purposes in the War Crimes office.'²⁶

Lemkin thus remained in the War Department, near and in contact with, but not formally a member of, the Jackson project and staff. When Justice Jackson, Alderman and other senior personnel relocated to London in late June 1945, they left a 'rear echelon' group, headed by Col. Taylor, behind at the Pentagon. In a memorandum to Jackson as they were preparing to leave, Alderman suggested activities and possible new projects for Taylor and his staff. 'On genocide,' Alderman suggested, this team could review War Refugee Board materials they had already acquired, plus 'further materials' that Alderman believed 'are contained in Lemkin's book ...'²⁷

II. LEMKIN IN LONDON, LATE SUMMER 1945

Although Raphael Lemkin was not present in London during the four-nation Allied negotiations that ran from late June until early August 1945, his linguistic and conceptual contributions were present. The Americans knew Lemkin, they knew of his book, article and related press, and they knew his word 'genocide.' The British, Soviet and French delegations perhaps also knew Lemkin's word and his legal concept, from his writings and from the Planning Memorandum that Jackson distributed to each delegation as the conference began.²⁸

During the London negotiations, all four powers insisted that their right to prosecute Nazi atrocities derived from the connection between those acts and the central Nazi crime, the waging of aggressive war.²⁹ The resulting London Agreement

²³ William E. Jackson note, 26 May 1945.

²⁴ See *The Reminiscences of Sidney S. Alderman*, *supra* n. 14, at p. 818 (discussing events of 18 May 1945).

²⁵ See William E. Jackson note, *supra* n. 23 (Lemkin 'reports to Weir's division Monday morning').

²⁶ See *The Reminiscences of Sidney S. Alderman*, *supra* n. 14, p. 842.

²⁷ Sidney S. Alderman, *Memorandum for Mr. Justice Jackson, Subject: Suggestion of specific tasks to be assigned to the rear echelon Task Force, to be carried on in Washington, 13 June 1945*, Inclosure One, pp. 1-2, in Jackson Papers, *supra* n. 3, Folder 107, Box 5.

²⁸ See 'Planning Memorandum', *supra* n. 19, p. 64.

²⁹ See W.A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn. (Cambridge, Cambridge University Press 2009), pp. 39-42.

and Charter of the International Military Tribunal (IMT), signed on August 8, 1945, identified Crimes against Peace, War Crimes and Crimes Against Humanity, along with ‘participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes,’ as the offenses within the IMT’s jurisdiction.³⁰ Although these instruments did not use the word ‘genocide,’ they in substance adopted much of Lemkin’s insight, legal definition and argument for the future of international law. In particular, the Allies defined Crimes Against Humanity as

‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’³¹

Indeed Jackson, describing near the end of his life the significance of the London Agreement, used Lemkin’s word to summarise part of this legal achievement: ‘here was a clear-cut declaration by four of the dominant powers of the world, which nineteen others joined, that aggressive war is a crime, and that these crimes against humanity, such as genocide, are crimes.’³²

Lemkin’s work in London occurred after the London Agreement had been signed. He came at the invitation of Col. Bernays, representing the War Department. In late July, Bernays lobbied to have Lemkin detailed to London, bringing with him materials ‘on spoliation and exploitation’ that he had been assembling.³³ When Bernays told OSS general counsel and newly-promoted US Navy Commander James Donovan of his (Bernays’s) idea to bring Lemkin to London, Donovan objected. He told Bernays that OSS had considered employing Lemkin on several occasions, but that each time it had not done so based on a general agreement at OSS that Lemkin’s scholarship, including his book *Axis Rule*, was ‘inadequate,’ that ‘better Polish scholars [were] available,’ and that Lemkin had ‘an emotional approach to problems, personality difficulties, etc.’ Bernays nonetheless decided to go forward, presumably with approval from Shea, Alderman or Justice Jackson, agreeing ‘that if Lemkin came he would be his (Bernays’s) responsibility.’³⁴ As events unfolded that summer, however, Bernays soon left London – he retired from Jackson’s staff in August. As a result, although Lemkin arrived and was nominally affiliated with

³⁰ ‘Charter of the International Military Tribunal’, Art. 6, in *Report of Robert H. Jackson*, *supra* n. 19, p. 423.

³¹ *Ibid.*, as amended by ‘Protocol to Agreement and Charter’, 6 October 1945, in *Report of Robert H. Jackson*, *supra* n. 19, p. 429.

³² *The Reminiscences of Robert H. Jackson*, *supra* n. 12, p. 1641.

³³ M.C. Bernays, ‘Notes for Mr. Shea and Ensign Jackson’, in *Francis M. Shea Journal*, US Holocaust Memorial Museum Archives, Washington DC (25 July 1945), pp. 1-2.

³⁴ Memorandum from Commander [James B.] Donovan to Colonel [Telford] Taylor, cc: Justice Jackson, ‘SUBJECT Dr. Lemkin’, 24 September 1945, p. 2, in Jackson Papers, *supra* n. 3, Folder 106, Box 4.

the Jackson staff – Lemkin's name was added in pencil to the Jackson staff roster, but Lemkin did not have an assigned office or a telephone number³⁵ – he was largely unsupervised.

It seems that Lemkin arrived in London from Washington in late August 1945.³⁶ In Washington, he had been working to complete an extensive report on General Karl Haushofer, a German former geopolitical theorist and teacher who the US then was considering for addition to the list of prospective Nazi war crimes defendants.³⁷ Lemkin's report, which reached Jackson's London office in late August or early September 1945, impressed Shea and Alderman; in the second week of September, they arranged for a copy to be delivered in Washington to Justice Jackson, who was back in the US for consultations with President Truman and others.³⁸ Shea also ordered, from the War Department for Jackson's London office, six more copies of Lemkin's book.³⁹

In London, Lemkin had some involvement in Jackson office discussions of evidentiary matters. By late August, he had told Jackson staff colleagues, who had reported it to the Justice, that he (Lemkin) had 'information that a very large amount of evidence of atrocities in Poland [was] accumulated in Warsaw,⁴⁰ to which the Soviet Union controlled access. Jackson followed up by putting Lemkin in contact with the senior USSR official at the London Conference, General I.T. Nikitchenko,⁴¹ but apparently nothing came of Lemkin's claimed lead to evidence. Lemkin also made contact in London, it seems on his own initiative, with members of the United Nations War Crimes Commission (UNWCC), with World Zionist Organization president Chaim Weizmann and his colleague Moshe Shertok (Sharrett), and with Rabbi Stephen Wise and attorney Jacob Robinson, president and legal adviser, respectively, of the World Jewish Congress.

In September 1945, Lt. Col. Joseph V. Hodgson (JAGD, US Army), the US representative to the UN War Crimes Commission in London and a supportive friend of Justice Jackson and his team, complained to Cmdr. James Donovan about Lemkin.

³⁵ See 'Alphabetical Roster of Personnel, OCC', n.d. (est. late August 1945), in Jackson Papers, *supra* n. 3, Box 106, Folder 7. On this typewritten roster, Lemkin's name is added in pencil and Bernays's is crossed out.

³⁶ See 'Record of Telephone Conference 15 August 1945 at 1803 Hours British Time' (Francis Shea and Telford Taylor in London speaking with Lt. Col. John W. Griggs and Lt. Cmdr. Charles A. Horsky (US Coast Guard) in Washington), p. 4, in Jackson Papers, *supra* n. 3, Box 110, Folder 9.

³⁷ See Dr. E.A. Walsh, 'Report on Professor Karl Haushofer of the University of Munich and the Influence of his Geopolitics', 6 February 1946, p. 1 (describing 'Lemkin's report ... prepared in Washington' as 'a complete survey of the subject, with many exhibits, charts and photostats ... bound in heavy cardboard covers'), in Jackson Papers, *supra* n. 3, Box 104, Folder 10.

³⁸ See 'Record of Telephone Conference 10 September 1945 at 1800 Hours British Time' (Shea and Sidney Kaplan in London speaking with Gen. Weir, Lt. Cmdr. Horsky, Lt. Col. Griggs and Lt. Col. John F. Richter in Washington), pp. 3-4, in Jackson Papers, *supra* n. 3, Box 110, Folder 9.

³⁹ *Ibid.*, at p. 5.

⁴⁰ Lt. Col. Leonard Wheeler, Jr., 'Notes of Staff Meeting, 31 August 1945', p. 2, in Jackson Papers, *supra* n. 3, Box 110, Folder 1 (cited in Michael Salter, *Nazi War Crimes, US Intelligence & Selective Prosecution at Nuremberg* (Abingdon, Routledge-Cavendish 2007), p. 339 & n. 117).

⁴¹ See Jackson diary entry, 31 August 1945, in Jackson Papers, *supra* n. 3, Box 95, Folder 5.

Hodgson reported that Lemkin had been complicating Hodgson's diplomatic responsibilities by meeting with UNWCC members. Worse, Lemkin had been telling them 'of the tremendous amount of work which has been done by him and others' and of the 'excellent evidence' that has been assembled in Gen. Weir's JAG Corps War Crimes office – evidence that the UNWCC members had never seen from Hodgson. He also reported that Lemkin had put Hodgson on the spot at a luncheon with UNWCC members by expressing amazement that he had never given them copies of Lemkin's book, which forced Hodgson to order copies for them through the War Department. Hodgson also reported that Lemkin was discussing war crimes issues with reporters. When Donovan arrived in Washington shortly after receiving these complaints, he sent a reporting memorandum back to Col. Taylor in London. Donovan understood that Taylor was the War Department official who was supervising Lemkin in London following Bernays's departure. In his memorandum, after reporting Hodgson's complaints, Donovan included his account of OSS's unimpressed history with Lemkin. Donovan closed by conveying Hodgson's 'sole suggestion that the sooner Lemkin is out of London, the more Col. Hodgson will be pleased.'⁴²

Although Justice Jackson received a copy of Donovan's memorandum, there is no indication that Jackson read it. Years later, Jackson recalled inaccurately that Lemkin had been one of Gen. William Donovan's OSS experts who had studied the problem of prosecuting Nazi war criminals and assembled and studied relevant evidence.⁴³ Decades after that, Taylor repeated Jackson's error⁴⁴ – Lemkin was not OSS.

III. 'GENOCIDE' IN THE NUREMBERG INDICTMENT, OCTOBER 1945

During September and into October 1945, senior lawyers on Jackson's staff worked in London with British counterparts to draft what would become the Nuremberg Indictment.⁴⁵ The Americans included Lt. Col. Benjamin Kaplan (US Army), Cmdr. Sidney Kaplan, Col. Telford Taylor and Sidney Alderman. The British participants included G.D. ('Khaki') Roberts, K.C., and Wing Cmdr. Peter Calvocressi. Alderman, the ranking official among the Americans, later recalled that Raphael Lemkin was

'constantly coming to see me, trying to be sure that his word genocide was used in the indictment. Finally, over some opposition from other members of our staff, I got the

⁴² Donovan to Taylor, *supra* n. 34. Donovan's biography contains no information about Lemkin in London or this controversy. See P.J. Bigger, *Negotiator: The Life and Career of James B. Donovan* (Bethlehem, PA, Lehigh University Press 2006).

⁴³ *The Reminiscences of Robert H. Jackson*, *supra* n. 12, p. 1211.

⁴⁴ See T. Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York, Alfred A. Knopf 1992), p. 49.

⁴⁵ For a good summary account, see A. Tusa & J. Tusa, *The Nuremberg Trial* (London, BBC Books 1995), pp. 112-114.

word genocide into the last draft of the indictment, and I am quite certain that Prof. Lemkin has always been greatly pleased that it appeared in that document. The British particularly thought it was too fancy a word to put in a legal document, and some of their graduates of Oxford University said that they couldn't understand what the word meant.⁴⁶

Lemkin, drafting in the late 1950s an autobiography that never was published, gave credit to his London contacts from the World Jewish Congress, Stephen Wise and Jacob Robinson, for being 'very helpful in obtaining the support of the British Government for the inclusion of the charge of Genocide in the Nuremberg Trials.'⁴⁷ British participant Calvocoressi, however, in his post-Nuremberg book chapter on the relevant portion of the Indictment, mentioned neither the inclusion of the word 'genocide' nor any Lemkin role in preparing the Indictment.⁴⁸ US participant Taylor, in his Nuremberg book, identified Roberts as the British lawyer who objected to the word 'genocide,' properly credited Lemkin – who Taylor described as 'at that time a member of the American prosecution staff' – with coining the word, and wrote ambiguously that 'we,' which probably meant the Americans, 'used the word' in the Indictment.⁴⁹

The last-minute, improvised nature of the addition of the word 'genocide,' along with (for the unfamiliar) its definition, to the Indictment was and is revealed by its odd location – it was placed not where it would seem most relevant, in Count Four charging Crimes Against Humanity, but in Count Three, charging War Crimes. The specific sentence, as located within that Count, was as follows:

'COUNT THREE – WAR CRIMES

Statement of the Offense

All the defendants committed War Crimes between 1st September, 1939, and 8th May 1945, in Germany and in all those countries and territories occupied by the German armed forces since 1st September, 1939, and in Austria, Czechoslovakia, and Italy, and on the High Seas.

...

(A) Murder and Ill-Treatment of Civilian Populations of or in Occupied Territory and on the High Seas

Throughout the period of their occupation of territories overrun by their armed forces the defendants, for the purpose of systematically terrorizing the inhabitants, murdered and tortured civilians, and ill-treated them, and imprisoned them without legal process.

The murders and ill-treatment were carried out by divers means, including shooting, hanging, gassing, starvation, gross over-crowding, systematic under-nutrition, system-

⁴⁶ *The Reminiscences of Sidney S. Alderman*, *supra* n. 14, p. 818.

⁴⁷ Lemkin draft autobiography, '1st chapter?', n.d., in Lemkin Papers, *supra* n. 9, Reel 2, p. 4.

⁴⁸ See P. Calvocoressi, *Nuremberg: The Facts, the Law and the Consequences* (London, Chatto & Windus 1947), pp. 45-60.

⁴⁹ T. Taylor, *supra* n. 44, p. 103.

atic imposition of labor tasks beyond the strength of those ordered to carry them out, inadequate provision of surgical and medical services, kickings, beatings, brutality and torture of all kinds, including the use of hot irons and pulling out of fingernails and the performance of experiments by means of operations and otherwise on living human subjects. In some occupied territories the defendants interfered in religious matters, persecuted members of the clergy and monastic orders, and expropriated church property. *They conducted deliberate and systematic genocide, viz., the extermination of racial and national groups, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, Gypsies and others.*

...

Such murders and ill-treatment were contrary to international conventions, in particular to Article 46 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and to Article 6(b) of the [London] Charter ...⁵⁰

Lemkin in later years took full credit for this development. In a summary of his planned autobiography, which he proposed to call *Totally Unofficial* and then *The Unofficial Man*, he wrote, 'I was sent after the war by the U.S.A. Government to London and Nuremberg to help prepare the indictment against the Nazi war criminals. I included the charge of Genocide in this indictment.'⁵¹ In a draft of the first chapter, Lemkin wrote, 'In 1945, I went to London and succeeded in having inserted the charge of Genocide against the Nazi war criminals in Nuremberg.'⁵² In a draft summary of his life's activities that he prepared to make the case that he deserved to receive the 1958 Nobel Peace Prize, Lemkin, writing about himself in the third person, stated that '[h]e included the charge of genocide in the indictment against the [Nazi] war criminals.'⁵³

On October 18, 1945, the International Military Tribunal, meeting in Berlin, held its first public session and received the Indictment officially. The British chief prosecutor, Attorney General Hartley Shawcross, announced that the Allied chief prosecutors had agreed on the Indictment. At his request, three senior attorneys, Roman Rudenko of the USSR, Francis Shea of the US and a French lawyer, then read the Indictment to the judges. Each lawyer took a turn reading in his respective native tongue and interpreters then sequentially recited translations of that material in the other two languages. When this slow, lengthy proceeding was over, 'genocide' had appeared for the first time in an 'official document of international

⁵⁰ Indictment, *The United States, et al. v. Hermann Wilhelm Göring, et al.*, in Robert H. Jackson, *The Case Against the Nazi War Criminals* (New York, Alfred A. Knopf 1946), App. II, pp. 111, 137-138 [emphasis added].

⁵¹ Summary, n.d., in Lemkin Papers, *supra* n. 9, at Reel 2, p. 1.

⁵² Lemkin draft autobiography, '1st chapter?', n.d., in Lemkin Papers, *supra* n. 9, at Reel 2, pp. 3-4.

⁵³ Summary of Activities of Raphael Lemkin, n.d., in Lemkin Papers, *supra* n. 9, at Reel 2. Although the prior sentence antecedent of this Lemkin use of 'He' is 'the U.S.A. Chief Prosecutor at the Nuremberg trial' (i.e., Jackson), it is clear from context that this is a reference to Lemkin.

stature ...⁵⁴ Lemkin, who at this time was in London, sent a cable the next day to the Washington Post. He claimed that its December 3, 1944, 'Genocide' editorial, which had more recently been distributed in reprint form, had 'contributed greatly' to the inclusion of 'genocide' in the Indictment's Count Three.⁵⁵

IV. LEMKIN AND 'GENOCIDE' DURING THE NUREMBERG TRIAL, NOVEMBER 1945-SEPTEMBER 1946

When the Nuremberg trial began on November 20, 1945, Lemkin's word 'genocide' was uttered for the first time in a courtroom litigation proceeding. An assistant prosecutor representing France, Pierre Mounier, read Count Three, including 'genocide,' to introduce the charged particulars of Nazi crimes in occupied France.⁵⁶ Soviet assistant prosecutor Lt. Col. J.A. Ozol also read 'genocide' later on that day when he introduced Count Three's charged particulars of Nazi crimes in Soviet Republics.⁵⁷

It is not clear when Lemkin first came to Nuremberg. One memoir, by Jackson's first executive trial counsel Col. Robert G. Storey (US Army), reported that Lemkin was one of the experts who conducted an evening seminar for the staff's education during the fall months before the trial began.⁵⁸ I know of no evidence that Lemkin was in Nuremberg during this pretrial period – he himself later wrote that he 'return[ed] from London] to Washington to help prepare the War Crimes Trials in Tokyo.'⁵⁹ During winter 1946, Lemkin's specific work in Washington included proposing that the US should prosecute Haushofer in Japan because his geopolitical thinking linked intellectually the aggressive war making of Nazi Germany and Imperial Japan.⁶⁰ (Lemkin, a bachelor of apparently some public prominence in Washington, also was interviewed during this period by a Washington society news writer about the attractive qualities of local women.)⁶¹

Lemkin definitely was in Nuremberg, perhaps for the first time, during late Spring 1946, as the trial approached its conclusion. A private note by Bill Jackson indicates that Lemkin and a JAG Corps officer met there with Justice Jackson on

⁵⁴ D.A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account*, Vol. 1 (Lanham, Maryland, University Press of America 1999), p. 101. Sprecher, who was a prosecutor on Jackson's US staff at Nuremberg during 1945-46, does not mention Lemkin in this two-volume book.

⁵⁵ Dr. Raphael Lemkin, 'Genocide', *Washington Post*, 23 October 1945, p. 6 (publishing Lemkin's cable as a letter to the editor).

⁵⁶ II *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1947), pp. 45-46.

⁵⁷ *Ibid.*, p. 60.

⁵⁸ See R.G. Storey, *The Final Judgment?: Pearl Harbor to Nuremberg* (San Antonio, TX, The Naylor Co. 1968), p. 96. Storey wrote erroneously that 'Dr. Lempink [sic]' was 'from Germany' and 'on our [i.e., the US] staff.' *Idem.*

⁵⁹ Raphael Lemkin, 'Outline for "Totally Unofficial"', in Lemkin Papers, *supra* n. 9, at Reel 2.

⁶⁰ See J. Cooper, *supra* n. 1, pp. 67-69.

⁶¹ See G. Reynolds, 'Cosmopolites Clock the American Femme: Nice, But Too Honest to Be Alluring', *Washington Post*, 10 March 1946, p. S4. Lemkin's conclusion: 'I'll settle for one.' *Idem.*

June 2, 1946. They told Jackson that they had been visiting or at least learning about prisoner of war camps. They reported that over 25,000 SS men had already been released. Lemkin and his colleague said they were in Germany to see the effect of that. Jackson was puzzled and surprised that such prisoner releases could be occurring while the IMT case, including against the SS as a criminal organisation, was ongoing. Lemkin and his colleague also reported to Jackson that in most camps, the German prisoners who remained were being guarded by only a handful of US soldiers and a few Poles. Jackson thought this a dangerous, ludicrous situation. Lemkin also said, or at least Jackson took away the (apparently incorrect) impression and soon repeated to his son, that Lemkin had been ‘in Japan.’ He reported that Joseph B. Keenan, Jackson’s former Department of Justice colleague who then was US Chief of Counsel for Japanese War Crimes Prosecutions, was getting more documents than he (Keenan) had been previously, and that defendants in Japan were denying nothing that was stated in a document. Jackson seems to have commented that the IMT defendants on trial in Nuremberg were behaving the same way.⁶²

Almost three weeks later, Lemkin was still in, or he was back in, Nuremberg. According to another note, he reported to Jackson at that time that US military review boards were, based on erroneous determinations of non-dangerousness, releasing 500 former SS men per day without taking their photographs or giving them identification papers. By contrast, Lemkin reported, more ordinary (i.e., non-SS) prisoners were still being held. Lemkin also told Jackson that the US military had released 25,000 German civilians from internment, and that their former camps were being returned to German control. Lemkin stated that Lt. Gen. Lucius D. Clay (US Army), Deputy Military Governor, Office of Military Government for Germany (US), had told him that these releases of former SS men were based on economic grounds – the US could not afford to keep these prisoners indefinitely. Jackson observed that the entirety of the SS, not merely its leadership, was an organisation that still was on trial at Nuremberg.⁶³

If Lemkin also was lobbying Jackson at this time to use the word ‘genocide’ in the trial, he was unsuccessful. Lemkin’s apparent contacts with British prosecutors seem, on this measure, to have been more fruitful. On June 25, 1946, British deputy prosecutor Sir David Maxwell Fyfe, while cross-examining defendant Constantin von Neurath, read a memorandum about the ‘Germanisation’ of Czechoslovakia,

⁶² See William E. Jackson note, 2 June 1946 (‘Lemkin + Col. from War Crimes office of JAG, Washington, call on RHJ – they over here to see effect of release of SS from camps – over 25,000 SS already released (how can they be before this case settled?) – in most camps guarded by only handful of US soldiers, plus a few Poles – dangerous + ludicrous situation[.] Lemkin was in Japan – says Keenan getting more docs. than formerly – and, as here, Japs deny nothing if stated in a doc. –’).

⁶³ See William E. Jackson note, 21 June 1946 (‘Lemkin came in – re release of SS men – 500 a day being released by boards who decide they are not dangerous, tho ordinary non SS P/W’s not released – also 25,000 civilian internees released, + their camps being turned over to Germans to control – this on USFET [US Forces European Theater] orders[.] Clay told Lemkin real reason was economic – can’t keep these people indefinitely – yet confused Leadership Corps of Nazi Party (we indict only top level) with SS (whole under indictment), and hence release all low rankers – a hell of a thing – no photographs or identification papers on them before releasing them – and they are killers – madness’).

reminded the defendant that he and others were charged with 'genocide,' and read from Lemkin's book, by name, his definition of the crime.⁶⁴ On July 27, British chief prosecutor Sir Hartley Shawcross spoke in his closing argument of the defendants' crimes of 'genocide.'⁶⁵ On July 29, French chief prosecutor Auguste Champetier de Ribes argued that

'scientific and systematic extermination of millions of human beings and more especially of certain national or religious groups whose existence hampered the hegemony of the Germanic race ... is a crime so monstrous, so undreamt of in history throughout the Christian era up to the birth of Hitlerism, that the term "genocide" has had to be coined to define it ...'⁶⁶

French deputy prosecutor Charles Dubost also spoke in his closing argument of 'genocide.'⁶⁷

United States newspapers, led by the *New York Times*, took note of Lemkin's word's trial appearances at Nuremberg that summer. On August 26, 1946, the *Times* published, as the fifth of its six editorials that Monday morning, its institutional perspective on the word that it employed as the editorial's eye-catching title: 'Genocide.'⁶⁸ Nineteen months earlier, the *Times* had given a very big boost to Raphael Lemkin's book *Axis Rule in Occupied Europe*, its coinage of the word 'genocide' and that word's application to Nazi conduct by giving the book a full, front-page review in the Sunday Book Review section.⁶⁹ (This review, which led the 28-page section, ran on the high-readership Sunday that was the day following President Franklin Roosevelt's fourth inauguration.) Similarly, the *Times* in October 1945 had published a wire service summary of a longer London Sunday *Times* report, published at a time when Lemkin was in London, that the Nuremberg Indictment contained a charge that each defendant had 'conducted deliberate and systematic

⁶⁴ See XVII *Trial of the Major War Criminals*, *supra* n. 56, at p. 61.

⁶⁵ See XIX *Trial of the Major War Criminals*, *supra* n. 56, at pp. 497, 515.

⁶⁶ *Ibid.*, at p. 531.

⁶⁷ See *ibid.*, at p. 551.

⁶⁸ See 'Genocide', *N.Y. Times*, 26 August 1946, p. 17 (editorial). Dr. William Korey's monograph on Lemkin, published decades later, mistakenly indicates that this editorial was published in 1945 (i.e., before the start of the Nuremberg trial) rather than in 1946 (i.e., near the trial's conclusion, as the IMT was drafting its Judgment). See W. Korey, *supra* n. 1, pp. 20 & 132 n. 40.

⁶⁹ See O.D. Tolischus, 'Twentieth-Century Moloch: The Nazi-Inspired Totalitarian State, Devourer of Progress – and of Itself', *N.Y. Times Book Review*, 21 January 1945, p. 1. Interestingly, although reviewer Tolischus praised the book and explicitly noted Lemkin's coinage of genocide as 'a new term of gruesome significance,' *ibid.*, at p. 24, the reviewer faulted Lemkin for various errors and other failings. These included Lemkin's failure to understand Nazism as an instance of 'that modern monstrosity known as totalitarian government,' and for faulting 'the entire German people' in a way that is 'too likely to feed that nazism-in-reverse which has done so much to prolong th[e] war.' *Ibid.*, at p. 1. Two months earlier, the *Times* had reported on its Friday 'Books' page a one-paragraph notice that Columbia University Press had just published Lemkin's book. See 'Books and Authors', *N.Y. Times*, 17 November 1944, p. 17. That notice, which identified Lemkin as 'a Polish lawyer now in' the US, described the book as '[a]n analysis of the laws and decrees promulgated by the Nazis and their puppet governments in the conquered areas of Europe' but did not use the word genocide. See *idem*.

genocide,' and that this 'new word' had been coined by Lemkin.⁷⁰ On July 30, 1946, the Times also had published a wire service story from Nuremberg. This report quoted French prosecutor de Ribes's closing argument to the IMT and conspicuously added, in brackets, credit to Lemkin for coining the word.⁷¹

The 26 August New York Times editorial continued its practice of prominently supporting Lemkin, his word and his legal objective. Reflecting detailed knowledge of the nearly-completed IMT trial, the editorial reported in its first sentence that British prosecutors Shawcross and Fyfe each had used this 'new word ... to castigate the twenty-one German leaders who are on trial ...' The Times explained that 'Prof. Raphael Lemkin,' whom it identified, in keeping with the earlier press reports and generously, as 'of Duke University' and an 'adviser on foreign affairs to our War Department,' had 'coined' the word and defined it as 'the biological and cultural destruction of national, religious and other entities.' The editorial explained that preexisting words were inadequate to describe Nazi crimes – 'mass murder' failed 'because it says nothing about motives' and '[d]enationalization is no better because it has no connotation of biological destruction.' The editorial then explained Lemkin's coinage of 'genocide,' recited past genocides (by Czarist Russia, Rumania and Turkey) that the US government had protested, explained Lemkin's objective to codify genocide as an international crime punishable in any country, reported that he had 'half accomplished' his goal with the genocide charge against the Nuremberg defendants, and closed by urging use of Lemkin's word in the Nuremberg 'sentence.'⁷² All of this was content that Lemkin and few, if any, others could have provided. Although the editorial might have reflected merely the contents of the Times's clippings files and perhaps input from its Nuremberg trial reporters and visitors,⁷³ it seems likely that Lemkin himself supplied most of the information and convinced someone important at the Times that the paper should take this editorial stance.

Lemkin's successful effort, if it in fact occurred, to persuade the New York Times to lobby the IMT judges to use the word 'genocide' in their imminent Nuremberg Judgment would have been consistent with his other efforts. On 26 August 1946, the same day as the Times's editorial, Lemkin, then back in London, wrote to Sir David Maxwell Fyfe in Nuremberg. Lemkin recounted that he had just given, at the International Association of Criminal Law (IACL) meeting in Cambridge, England, a well-received report on genocide. Indeed, Lemkin wrote that he had already telephoned this information to Fyfe's secretary in Nuremberg and was writing in case that message had not reached him. Lemkin thanked Fyfe for his support and told

⁷⁰ See Associated Press report, 'New Word "Genocide" Used In War Crimes Indictment', *N.Y. Times*, 22 October 1945, p. 5.

⁷¹ United Press report, 'Jackson to Start Home Tomorrow', *N.Y. Times*, 30 July 1946, p. 2.

⁷² 'Genocide', *supra* n. 68.

⁷³ See, e.g., C.L. Sulzberger, *A Long Row of Candles: Memoirs and Diaries [1934-1954]* (New York, Macmillan 1969), pp. 306-307 (publishing the New York Times's Chief Foreign Correspondent's 6 March 1946, diary entry regarding his attendance at Nuremberg trial sessions and his 'long talk' that day with Justice Jackson).

him to communicate to those who might be interested, including in Nuremberg, the news of Lemkin's positive reception at the IACL. Lemkin closed his letter with an implicit request that prosecutor Fyfe, at this post-summation moment in the trial, seek to influence the IMT judges as they were reaching their verdicts and drafting their Judgment:

'I think that the inclusion of Genocide in the judgment would contribute to the creation of a preventive atmosphere against repetition of similar acts of barbarity. Indeed, we cannot keep telling the world in endless sentences: – Don't murder members of national, racial and religious groups; don't sterilize them; don't impose abortions on them; don't steal children from them; don't compel their women to bear children for your country; – and so on. But we must tell the world now, at this unique occasion, – don't practice Genocide.'⁷⁴

On Monday, September 30, 1946, the IMT judges began to read, with each taking a turn at the microphone, their lengthy Judgment. It found that the evidence established that certain defendants had, as charged in Count One, engaged in a conspiracy to commit the crime charged in Count Two, aggressive war.⁷⁵ The tribunal also found that the overwhelming evidence established that defendants had, as charged in Count Three, committed War Crimes,⁷⁶ and that they had, following the start of Germany's aggressive war making in 1939, committed Crimes against Humanity as charged in Count Four.⁷⁷

On other legal issues, the tribunal's rulings were adverse to the prosecutors. The IMT decided to disregard Count One's charges of conspiracy to commit War Crimes and Crimes against Humanity, for instance, because the tribunal concluded that the London Charter, which was binding on the IMT,⁷⁸ defined only aggressive war as a criminal object of conspiracy.⁷⁹ With regard to Count Four, Crimes against Humanity, the IMT, again construing the London Charter as limiting its jurisdiction, held that its power reached only those crimes committed after Germany began its military aggression (September 1939), and that such crimes were encompassed within the scope of Count Three, War Crimes:

'With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression and murder of civilians in Germany

⁷⁴ Raphael Lemkin letter to the Right Honorable David Maxwell Fyfe, 26 August 1946, pp. 1-2, in Raphael Lemkin Collection, P-154, Box 1, Folder 18, American Jewish Historical Society, Newton Centre, MA and New York, NY. Published with permission.

⁷⁵ See Judgment of the International Military Tribunal, *XXII Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg, 1948), pp. 427, 468-469.

⁷⁶ *Ibid.*, p. 469.

⁷⁷ See *ibid.*, pp. 469-498.

⁷⁸ See *ibid.*, p. 461.

⁷⁹ *Ibid.*, pp. 469, 496.

before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crimes within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war and therefore constituted crimes against humanity.⁸⁰

Finally, as to the War Crimes charged in Count Three (and, for that matter, as to the entirety of the Judgment), the IMT, while describing in fact, based on the enormous trial record, the crime of genocide,⁸¹ did not use Lemkin's word.

Lemkin wrote later that he was in Paris when the IMT announced its Judgment:

'When the Nuremberg Judgment was pronounced I was not in Nuremberg. At that time, the Peace Conference with the Satellite Axis Powers was taking place in Paris. I went to Paris and tried to include Genocide in the clauses of the peace treaties. I came at the wrong time because there was a stalemate in the negotiations. The delegates to the Peace Conference listened to me, but their minds were elsewhere. Under the stress of this work, I became ill and was confined to the American military hospital in Paris. It was there that I listened over the radio to the Nuremberg judgment which condemned the Nazis but failed to take into account an international law, the full moral, social, and humanitarian implications of Genocide as international crime.'⁸²

Lemkin 'returned hastily from Paris to New York' in October 1946 and then concentrated his efforts on the United Nations.⁸³ Although US assistant prosecutor Henry King decades later recalled seeing Lemkin at the Grand Hotel in Nuremberg in fall 1946 following the IMT Judgment,⁸⁴ it seems more likely that those were

⁸⁰ *Ibid.*, p. 498.

⁸¹ See W.A. Schabas, *supra* n. 29, p. 44. Indeed, Lemkin himself later wrote that '[t]he evidence produced at the Nuremberg trial gave full support to the concept of genocide.' *Idem*, quoting Lemkin, 'Genocide as a Crime in International Law', 41 *AJIL* (1947), p. 145 at p. 147.

⁸² Lemkin draft autobiography, '1st chapter?', n.d., in Lemkin Papers, *supra* n. 9, at Reel 2, p. 5.

⁸³ *Ibid.*, p. 6.

⁸⁴ See H.T. King, Jr., 'Genocide and Nuremberg', in R. Henham & P. Behrens (eds.), *The Criminal Law of Genocide: International, Comparative and Contextual Aspects* (Aldershot, Ashgate Publishing Ltd. 2007), p. 30; H.T. King, Jr., B.B. Ferencz & W.R. Harris, 'Origins of the Genocide Convention', 40 *Case Western Reserve Journal of International Law* (2007-08), p. 13 at pp. 13-14; J.Q. Barrett, W.R. Harris, H.T. King, Jr., & B.B. Ferencz, 'Nuremberg and Genocide: Historical Perspectives', in E. Andersen & D.M. Crane (eds.), *Proceedings of the Second International Humanitarian Law Dialogs* (Washington, American Society of International Law 2009), pp. 47-48. In our subsequent conversations, King, who lived in the Grand Hotel from his arrival in Nuremberg in May 1946 until he moved

memories of Lemkin in Nuremberg that spring and summer, before the IMT trial had concluded.

In the US that fall, Lemkin was present as the fledgling United Nations met for the first time in Lake Success, New York. Before the year was out, his efforts led delegates to introduce, and then the General Assembly to pass unanimously, a resolution calling genocide a crime under international law. Earlier that same day (11 December 1946), the General Assembly affirmed the legal principles of the August 1945 London Agreement and IMT Charter and the IMT's September 1946 Judgment. From 1947 through the end of his life, Lemkin then concentrated on and accomplished UN passage of the Genocide Convention and then its entry into effect through state ratifications.

In all of that, Nuremberg was for Lemkin an episodic, only somewhat productive, and thus personally transitional undertaking. In August 1947, Justice Jackson's son Bill, his former Nuremberg executive assistant who then was completing his first year in what ultimately would be a fifty-three year career practicing law in the Milbank, Tweed firm in New York City, wrote this in one of his regular letters to his father in Washington:

'Dear Dad:

A strange voice came on the telephone this morning, and it turned out to be Dr. Lemkin, who is now a sort of part-time expert consultant to the UN, chiefly on the draft convention of genocide. I never could quite figure the bugger out when he was in London and then Nuremberg ...'⁸⁵

V. CONCLUSION

There is a disjunction between the general greatness and historical significance of Raphael Lemkin and what his role really was in the process that led up to and included the international trial at Nuremberg of the principal Nazi war criminals. Lemkin conceptualised the crime of genocide and ultimately achieved its recognition in international law. He was only barely, and not centrally, involved, however, in the international diplomatic process and then the Nuremberg trial during 1945 and 1946.

For international law, those seventeen months of Nuremberg involved great events and significant advances toward global understanding of genocide and, ultimately, its criminalisation. The August 1945 London Agreement and Charter of the International Military Tribunal did not use Lemkin's word 'genocide,' but they codified

into a private house there late that fall, clarified that he could not recall whether his Grand Hotel encounters with Lemkin predated or followed the IMT's 30 September 1946, Judgment.

⁸⁵ Bill [William E. Jackson] letter to Dad [Justice Robert H. Jackson], 11 August 1947, in Jackson Papers, *supra* n. 3, Box 2, Folder 8. I thank Jim Fussell for first calling this letter to my attention. This letter is, alas, cited and quoted in David Irving, *Nuremberg: The Last Battle* (London, Focal Point Publications 1996), pp. 335 n. 30 & 351 n. 29.

for the first time Crimes Against Humanity, an overlapping legal concept of great significance. The October 1945 Nuremberg Indictment was the first international legal agreement to use the word 'genocide.' During the Nuremberg trial proceedings in 1946, British, Soviet and French prosecutors used and defined the word in court, thus advancing its visibility and comprehension. The September 1946 IMT Judgment did not use the word, but the Judgment recognised legally the criminality of any individual planning, supervising or committing genocidal conduct as part of waging aggressive war and, related, the new category of Crimes against Humanity during such war making. And all of this gave Lemkin and his concept stature and credibility as he then turned his efforts to the United Nations and, in time, achieved its 1948 adoption of the Genocide Convention.

Yet Lemkin was involved in Nuremberg infrequently, from its periphery, somewhat unofficially, in focused but also egotistical, obsessive, at times annoying personal pursuit of anyone, in any venue, who might make use of the word that he had coined. He was, in the cascade of complex, human actions at Nuremberg during 1945 and 1946 that advanced the criminalisation of genocide, the precipitating agent. But he was not, in these actions, alone or even primary. Lemkin fathered the word 'genocide' and was the leading promoter of its comprehension, but many people, including Murray Bernays, Sidney Alderman, Francis Shea, Robert Jackson and their many other allies and colleagues along the way, contributed much to an essential part of what history properly recalls as Lemkin's achievement.

THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION

edited by

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and

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