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Hitlerian Jurisprudence: American Periodical Media Responses to the Nuremberg War Crimes Trial, 1945-1948

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To the Graduate Council:

I am submitting herewith a thesis written by McMillan Houston Johnson entitled "Hitlerian Jurisprudence: American Periodical Media Responses to the Nuremberg War Crimes Trial, 1945-1948." I have examined the final electronic copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in History.

G. Kurt Piehler, Major Professor

We have read this thesis and recommend its acceptance:

Lynn Sacco, George White, Jr.

Accepted for the Council:

Dixie L. Thompson

Vice Provost and Dean of the Graduate School

(Original signatures are on file with official student records.)

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Anne Mayhew
Vice Chancellor and
Dean of Graduate Studies

(Original Signatures are on file with official student records)

**“Hitlerian Jurisprudence”
American Periodical Media Responses to the Nuremberg War
Crimes Trial, 1945-1948**

**A Thesis
Presented for the
Master of Arts Degree
The University of Tennessee Knoxville**

**McMillan Houston Johnson
May 2006**

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Abstract

Since its conclusion, jurists, legal scholars, and historians have heralded the Nuremberg Trial as a landmark in international jurisprudence. Scholars have highlighted Nuremberg's prosecution of those responsible for the Holocaust, and applauded the trials' conviction of war criminals. These precedents have continued to inform discussions of war crimes and international law for the last sixty years. More recently, commentators have invoked Nuremberg's positive legacy in support of the prosecution of Slobodan Milosevic and attempts to create an international criminal court.

This paper examines popular periodical responses to the Nuremberg War Crimes Trial between 1945 and 1948. It describes the nature and content of those reactions, and explores their significance in relation to contemporary understandings of the proceedings. In contrast to representations of Nuremberg that arose in the 1960's, initial responses to the trial exhibited significant and sustained criticism. Most significantly, articles challenged the legality of the proceedings, and presented arguments that undermined the legitimacy of the trial's core project: the prevention of aggressive war. These reactions stand in opposition to contemporary representations of the trial, and point to a need to reevaluate Nuremberg's legacy.

The research for this project included the examination of 13 periodicals between the years of 1939 and 1995 for articles relating to the Nuremberg trial. A resulting total of more than 250 pieces formed the core primary sources for this project and provided a thorough and representative account of media response. Evidence was also gathered from the writings of Robert H. Jackson, former Supreme

Court Justice and lead Allied prosecutor at the trials, and numerous secondary sources.

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Introduction

The privilege of opening the first trial in history for crimes against the peace of the world impose a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flush with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law is one of the most significant tributes that Power ever has paid to reason.¹

With these words, Justice Robert Jackson opened the Allied case against the Nazi war criminals at Nuremberg on November 21, 1945. Although Jackson's words marked the beginning of the trial itself, they also represented the culmination of several years of effort by the United States and other Allied governments. As early as 1942, the United States made public its desire to bring war criminals to justice after the close of hostilities, and sought support among the other members of the "Big Four" Allied nations.² As it became increasingly clear that the war would end in victory, and as more and more reports of German atrocities reached Washington, culminating in the horrific discoveries of Nazi concentration camps, governmental leaders increasingly began to push for a concrete framework with which to define a course of action.

Before the end of hostilities, President Harry S. Truman appointed Supreme Court Justice Robert Jackson to be the architect of U.S. war crimes prosecutions in Europe. More than any other individual, Jackson helped to shape the American policy toward war criminals. In addition to taking a leading role in the creation of U.S.

¹ Robert H. Jackson, *The Nuremberg Case: As Presented By Robert H. Jackson, Chief Council For The United States* (New York: Alfred A. Knopf, 1947), 30-31.

² The Moscow Declaration of 1943 and Churchill's Speech to the House of Commons on September 8, 1942 represent two concrete examples of this desire amongst the Allies.

policy, Jackson also served as the primary American negotiator at the international summits that formally established the framework for the trial. He played an instrumental role at both the London Conference in June of 1945, which established the guidelines for the Nuremberg trial, and at the signing of the Four Power Agreement in August of that year, which formally created the Charter of the International Military Tribunal, the governing body for the Nuremberg proceedings.

As a direct presidential appointee, Jackson embodied, and in large part created, U.S. policy towards war criminals. He encountered scant opposition to his actions within the U.S. government, and for the most part had total freedom to create a model for what ultimately became the Nuremberg trial. In the international arena, however, Jackson encountered competing interests among the Allied powers, primarily from the Russians who sought a more direct means for dealing with war criminals.³ Despite episodes of disagreement, however, Jackson demonstrated a remarkable ability to bring his ideas to fruition. To a great extent, the Nuremberg's structure, organization, and focus remained closely tied to Jackson's initial vision for the proceedings.⁴

Jackson's role as lead Allied prosecutor granted him an unparalleled opportunity to defend the IMT and articulate his view of what Nuremberg was supposed to accomplish. Jackson's opening address to the court provided him with

³ At the London Conference, the Russians argued strongly for summary military punishment for Nazi war criminals, but were ultimately convinced of the value of a trial.

⁴ Jackson's writings on the trial clearly express both his annoyance at the differing opinions expressed by the other Allied powers regarding the structure and organization of the trial in the spring and summer of 1945, and his ultimate satisfaction with the results of the London Conference and the ensuing structure of the Trial.

the ultimate stage from which to present his case to the court. Over the course of two days, Jackson articulated a vision for the Nuremberg proceedings that extended far beyond the walls of the courtroom. Jackson hoped that in addition to punishing high-ranking Germans for their actions before and during the war, the trial would serve several important functions. Jackson expressed his desire that that Nuremberg would provide a new and powerful precedent in International Law with which the international community could prosecute future war criminals. At the same time, he argued that Nuremberg would serve as an example to potential war criminals that would dissuade them from undertaking such action in the future. Finally, Jackson argued stridently for what he considered the most important purpose of the proceedings: the prevention of aggressive war. Jackson argued that aggressive war represented the single most dangerous possibility in the contemporary international arena, and argued that the punishment of Nazis for that offense would set a precedent that would help carry the world toward a brighter future.

The American media expressed an immediate interest in Jackson's address, demonstrating the impact that his rhetoric had on both the court and the American people. In his book, Judgment On Nuremberg, historian William Bosch demonstrates that virtually every major American newspaper carried coverage of Jackson's speech as front-page news on the day after its delivery.⁵ Additionally, the periodical media showed an immediate and lasting interest in the substance of his words. Both news

⁵ William J. Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials* (Chapel Hill, University of North Carolina Press, 1970), 95.

articles opinion pieces often quoted from Jackson's address at length, and virtually every media outlet utilized his speech as a summary of U.S. hopes for the trial.

The impact of Jackson's words, however, was no mere accident. Jackson's address represented the culmination of several years, and thousands of hours of work by Jackson and other members of the U.S. government. The time and effort expended by the government, and by Jackson, demonstrated the importance of the Nuremberg trial for the United States. From 1942 until the end of the trial, both Jackson and the U.S. government displayed unwavering support for the proceedings, even in the face of initial Allied reluctance and massive logistical troubles. In addition, Jackson demonstrated sustained interest in the legacy of Nuremberg. After the trial, he published his opening address, and continued to argue for the importance of the IMT in the postwar world. Jackson particularly hoped for the widespread acceptance of and support for the goals that he articulated in his address.

In many ways, those desires seem to have been fulfilled. A large majority of the American public supported the creation of the Nuremberg trial. Before the close of the war, a majority of Americans expressed a desire for severe summary punishment for war criminals, in the form of either imprisonment or execution. However, the announcement of the creation of the IMT and the Nuremberg trial met with widespread support. Bosh cites public opinion surveys from 1945 and 1946 demonstrating that approximately 75 percent of the American public approved of the postwar trial of German leaders.⁶ Although perhaps surprising in light of earlier

⁶ Bosch, *Judgment on Nuremberg*, 109.

attitudes about what to do with war criminals, this popular support seems to indicate widespread American acceptance of the Nuremberg trial.

Additionally, the major Allied powers demonstrated consistent and sustained support for the proceedings. Despite some initial reservations, Britain, France and Russia all took an active role in the IMT, providing judges, lawyers and interpreters to the court. These actions involved the utilization of significant resources, and indicate that the other three Allied powers involved in the proceedings continued to back Jackson's vision for the duration of the trial.

The media response to the trial, particularly that of popular periodicals, however, displays a markedly different story. Little has been written about the media response to Nuremberg. In fact, Bosch's book represents the only significant historical work that attempts to describe popular reactions to the trial.⁷ However, Bosch only devotes six pages to a discussion about periodical media. He concludes that periodical coverage generally mirrored popular sentiment, with about 75 percent of articles offering general support for the proceedings.⁸

This cursory look at the periodical response to Nuremberg, however, obscures significant distinctions in magazine coverage. Magazine articles about Nuremberg break down into three distinct types. First, magazines such as *Time* and *Newsweek* provided readers with many brief articles about the trial that related the latest news

⁷ Although much has been written about the Nuremberg trial and the International Military Tribunal, virtually none of that body of scholarship has been devoted to Nuremberg's reception by the American public. Scholarly works either focus on trial history (See: Michael Marrus's, *The Nuremberg War Crimes Trial 1945-1946*, and Robert Connot's, *Justice at Nuremberg*), or on the legal implications of the proceedings (See: Robert Woetzel's *The Nuremberg Trials in International Law*).

⁸ Bosch, *Judgement On Nuremberg*, 109.

from the IMT. These articles offer little in the way of overt opinion, merely relating factual summaries of the ongoing events in Germany. Second, magazines like *The New Yorker* provided longer articles focused on the wider context of events and issues surrounding the trial. Novelists such as Rebecca West and John Dos Passos wrote lyrical articles that described a broader view of the proceedings. Both of these types of articles displayed little in terms of overt opinion about the trial itself. In that sense, they could be considered to give cursory support to the proceedings, but such articles present little in terms of argument.

Opinion pieces, however, provided a different perspective on Allied actions at Nuremberg. The vast majority of opinion pieces presented critical opinions of both the IMT and the Nuremberg trial. They articulated significant and sustained criticism of Nuremberg on a variety of counts. Articles challenged the legal and judicial authority of the IMT and criticized the legality of several Counts of the Indictment. Periodical authors expressed the opinion that the proceedings constituted a political, not a legal act, and argued that the trial was victor's justice. Many pieces also attempted to demonstrate the apparent hypocrisy of the proceedings, and aggressively contested Jackson's goal of ending aggressive war. These articles demonstrate a highly technical understanding of the legal issues involved and presented sophisticated arguments questioning the morality and legitimacy of the proceedings. Most interestingly, many of these articles responded directly to Jackson's rhetoric, often quoting excerpts from his opening address to ground their opposition.

Interestingly, the majority of this criticism arose from liberal sources. Articles in magazines like *The Nation*, and *The New Republic*, traditionally liberal

publications, articulated the most scathing attacks against Jackson. In fact, conservative criticism of the trial remained virtually absent from periodicals during this period. This seems particularly significant in light of the hopeful and idealistic goals that Jackson presented to the court. The fact that the majority of critical pieces appeared in liberal periodicals only further highlights the significance of this media reaction to Nuremberg and the IMT.

These critical reactions, however, have largely been lost to American memory in the years since the close of the Nuremberg proceedings. In the years following the trial, American depictions of Nuremberg have virtually ignored Jackson's focus on the prevention of aggressive war, and have portrayed the trial in a distinctly positive light. Contemporary representations of the Nuremberg trial focus on the IMT's response to the atrocities of the Holocaust and other war crimes.⁹ In addition, many commentators refer to Nuremberg's precedent of denying the defense of superior orders. Indeed, books such as Samantha Power's *The Age of Genocide*, and even movies such as the 1960's classic *Judgment at Nuremberg* ignore the question of aggressive war entirely.¹⁰ Contemporary understandings of Nuremberg portray the trial as a positive good, citing the significance of bringing the architects of the

⁹ For example, see the author's commentary in Michael Marrus's, *The Nuremberg War Crimes Trial 1945-1946.*, Samantha Power, *A Problem from Hell: America in the Age of Genocide.*, Peter Maguire, *Law and War: An American Story.*, and Robert Conot, *Justice at Nuremberg.*

¹⁰ Scholarly works have also displayed a marked lack of discussion of Jackson's central goal. Although histories of the trial mention the importance of Jackson's opening address, they do not delve into the significance that Jackson placed on the prevention of aggressive war. Only legal histories of the trial include discussions of Jackson's focus on the preventing aggressive war, and these works display a primary interest in the legal implications of Jackson's focus, rather than its impact on the wider American population.

Holocaust to justice and its impact on the creation of the International Criminal Court at The Hague.

These contemporary representations, however, ignore the most important elements of the proceedings and overlook the immediate American response to the trial. Jackson's hopes for the prevention of aggressive war ultimately never came to fruition, and in that sense, the trial, at least for Jackson and important elements of the U.S. government, should be seen as a failure. Recent positive representations of the trial also obscure the significant and sustained negative response to Nuremberg in the American media. These criticisms of the trial's central tenants undermine contemporary views of Nuremberg's significance and call for a reexamination of its impact on both America and the wider world.

This criticism embodies a significant and under explored element of the Nuremberg trial. In addition to its lack of congruence with contemporary understandings of the trial's significance, periodical criticism of the trial does not seem consistent with the (apparent) widespread support for the trial in the American public and the importance that Jackson and the U.S. government placed on the trial. If in fact these articles did not mirror public opinion, then we must ask why they were written and published. There appears not to have been any public backlash against such articles, and they appeared in magazines that continued to be successful during and after the trial. Despite these facts, however, these articles present a powerful antithesis to Jackson's rhetoric.

This thesis attempts to describe the nature and content of the periodical criticism of Nuremberg. The first chapter provides an overview of Jackson's opening

address, as it provides the best-articulated and most concise example of the U.S. government's goals for the trial. The issues that Jackson raises are also significant because they form the basis for later media criticism of the proceedings. The second chapter discusses the three major types of periodical coverage of Nuremberg. After a description of the nature of news and literary coverage, the chapter addresses the nature and content of critical opinion pieces. This section is organized thematically rather than chronologically in order to best demonstrate the specific types of criticism levied at Jackson and the U.S. Hopefully, this paper will present a new historical perspective on Nuremberg and help to broaden our understanding of its cultural impact.

In light of the lack of scholarship regarding popular reactions to Nuremberg, the research for this project began with a desire to explore all popular periodical coverage of the Nuremberg trials. The dearth of such secondary sources led to an examination of all popular magazine articles related to Nuremberg written between 1939 and 1995. Examination of the Readers Guide to Periodical Literature under headings of "Nuremberg," "Nuremberg War Crimes Trial" (when it appeared), "War Criminals," "Germany," "War Crimes, 1939-1945," "International Military Tribunal," "International Law," and "World War, 1939-1945" yielded a multitude of relevant articles. Because this paper seeks to determine popular reactions to Nuremberg, sources were limited to magazines generally devoted to a public, non-technical audience, and do not encompass legal publications or publications devoted to governmental policy, such as *Foreign Affairs*. Magazines such as *Time*, *Newsweek*, *Life*, *The Nation*, *The New Republic*, *The Saturday Evening Post*, *Reader's Digest*,

Atlantic, *The New Yorker*, and *The Commonweal* provided numerous articles devoted to coverage of the trial itself and related issues.¹¹

After 1948, however, articles related to the trial virtually ceased. In the latter half of the century, articles about Adolf Eichmann, Nazi hunters, and later trials performed by the German government all saw publication, but contained little or no information that related back to the Nuremberg proceedings.¹² The years 1945 -1948 witnessed the vast majority of periodical coverage related to Nuremberg itself, and provided several hundred relevant articles devoted both to the trial itself and surrounding issues.

These articles formed the core primary sources for this thesis, providing a comprehensive and representative overview of periodical coverage of Nuremberg. This project attempts to provide a thorough articulation of periodical responses to the trial, and offers a window on how a crucial element of the American population viewed Nuremberg. Hopefully, it will help to provide a more comprehensive view of what Nuremberg's legacy has been, and demonstrate how that legacy has changed in the sixty years since the close of the proceedings.

¹¹ A total of more than 250.

¹² There are more than 50 articles focused generally on German war crimes trials and war criminals from this period. For example see: "Case Closed," *Time*, June 18, 1951, <http://www.time.com/archive/priview.0,10987,814963.00.html>., "War Crimes Unforgotten," *Time*, November 9, 1962, <http://www.time.com/archive/preview/0,10987,829321,00.html>., Victor H. Bernstein, "Remembering Nuremberg," *The Nation*, January 23, 1967, 112., Philipp Fehl, "The Ghosts of Nuremberg," *Atlantic*, March, 1972, 70., Michael Walzer, "The Memory of Justice," *The New Republic*, October 9, 1976, 19.

Chapter 1—Stated Goals of the Nuremberg Trial

Background

Following the end of the Second World War, the United States took the lead in the definition and creation of the International Military Tribunal. Utilizing a conceptual framework created by War Department Lawyer Murray Bernays, President Truman appointed Supreme Court Justice Robert Jackson to oversee the creation and organization of the Tribunal. Members from the U.S., Britain, France and the Soviet Union designed a Charter for the IMT based upon four major crimes: conspiracy to commit aggressive war, actively engaging in aggressive war, crimes in war not justified by military necessity, and crimes against humanity. These four counts allowed the Tribunal to formally indict 24 high-ranking Nazi's under the Tribunal's Charter.

As lead Allied prosecutor and the architect of the trial, Justice Robert Jackson had specific ideas about what the trial was designed to accomplish. Truman appointed Jackson to take the lead in the creation of the IMT, and on May 2nd, 1945 formally named Jackson chief prosecutor, ordering him to prepare charges against the Nazi leaders.¹³ Truman granted Jackson unparalleled freedom to construct a model for the trial, and in large part Jackson was immune to bureaucratic pressure and influence. Jackson utilized the framework created by Bernays to draft the charges, and in June of 1945 traveled to London to meet with other Allied representatives. On June 26th, representatives from France, the Soviet Union, and Britain met with Jackson and an American delegation in order to decide the specifics of the trial. On the 8th of August,

¹³ Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46: A Documentary History* (New York: Bedford Books, 1997), 256.

the four major Allied powers signed the Four-Power agreement, which created the Charter of the IMT. On October 6th of that year, the Tribunal formally indicted 24 leading Germans and six German organizations. The Trial formally began on November 20th 1945, and Jackson delivered the prosecution's opening statement the following day.¹⁴

Jackson's address to the court immediately followed the formal reading of the Indictment. In it, he defined the goals for the trial and laid out an overview of the prosecution's case. Because Jackson oversaw the creation of the IMT and acted as the U.S. government's immediate agent at the trial (aside from Francis Biddle, the lead American judge), Jackson exemplifies U.S. policy in relation to Nuremberg. His actions directly led to the creation of the IMT, and his guidance oversaw the shape that the trial eventually took. Although Jackson worked, and in some cases compromised with the other prosecuting nations on specifics, Jackson's vision of the IMT was realized to a great extent through the proceedings at Nuremberg. As an agent appointed by the president, he personifies the American position on what Nuremberg was supposed to accomplish.

Further, Jackson's position as lead Allied prosecutor provided him a platform to express that position to the court, and to the international community.¹⁵ Leading the prosecution not only allowed Jackson to control how the Allies would present their case, it also enabled him a chance to speak on behalf of the ideology behind the Indictment. In an erudite and eloquent opening address, Jackson clearly defined what

¹⁴ Marrus, *The Nuremberg War Crimes Trial*, 257.

¹⁵ The term "international community" is admittedly problematic. In this paper, I mean for it to embody the wider international audience of the trial, specifically nations who would later become members of the United Nations.

he believed to be Nuremberg's purpose. In addition to explaining the nature of the charges brought against the defendants and providing a brief preview of the prosecution's case, Jackson spent considerable time arguing for a conceptual foundation for the trial that had significance far beyond the courtroom. Jackson also described the historical and legal precedents for the charges levied against the defendants and explained the significance of the IMT in an international legal context.

Jackson's opening address provides an excellent overview of the stated goals of the IMT. It demonstrates the centrality of Jackson's focus on the prevention of aggressive war and allowed Jackson to fully articulate his rationale to the court. In addition, his address can be seen as an articulation of the U.S. government's policy about, and hopes for, the Nuremberg Trial. The address is relevant as well because of its significance to the media. Its eloquence and thoroughness resulted in Jackson's address being quoted constantly in newspaper and magazine articles. Journalists used his words to explain the purpose and significance of the trial to their readers. In turn, articles critical of the trial and of U.S. policy often used Jackson's address to provide evidence for perceived shortcomings of the court. The address became the cornerstone for arguments in support of, and critical of Nuremberg, and is therefore vital to understanding the generally negative response of the American popular media to the trial.

Jackson's Thesis

Jackson wanted the Nuremberg Trial to serve as a deterrent to future world leaders bent on waging aggressive war. At the beginning of his address, he declared, “This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of seventeen more, to utilize International Law to meet the greatest menace of our times—aggressive war.”¹⁶ Jackson argued that the IMT’s primary project was a crusade against the violence and destruction wrought by modern warfare. The waging of aggressive war and the decision to embark upon such a course represented, for Jackson, the gravest threat to the international community. This fundamental assumption grounded the prosecution’s case and provided the underlying ideology that contextualized all of the other charges brought against the defendants.

From this powerful initial argument, Jackson further described the duties of the court, and its responsibility to both the defendants and the world. This responsibility is vital, because by definition, the IMT is a case of victor’s justice. However, Jackson insisted that fact should not stand in the way of a just and fair trial. He observed that, “unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes . . . Either the victors must judge the vanquished or we must leave the defeated to judge

¹⁶ Jackson, *The Nuremberg Case*, 31.

themselves.”¹⁷ For Jackson, this meant that the court has an ethical duty to present and judge a fair case. He stated, “to pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.”¹⁸ For Jackson, the importance of the trial necessitated that there be no allegations of impropriety and he continued to argue vehemently for the importance of impartial justice at Nuremberg.

Jackson bolstered his claim of impartiality by telling the court that the prosecution’s case would be built upon documentary evidence. “We will not ask you to convict these men on the testimony of their foes. There is no count of the Indictment that cannot be proven by books and records.”¹⁹ Here Jackson related that the prosecution’s case would be built not upon the testimony of the victors, but rather upon Nazi documents and records. He argued that this type of case limits possible impropriety on the part of the Allied nations, and presented the most reasoned and impartial evidence possible.

From these foundational precepts, Jackson proceeded to describe the significance of the First Count²⁰ to the court, and then went on to articulate a brief history of Nazi action. This history provided the court with contextual information that helped Jackson to ground the remainder of the prosecution’s case.

The next major element of Jackson’s address focused on the law of the case. In this section, Jackson articulated strident arguments against the idea that Nuremberg

¹⁷ Jackson, *The Nuremberg Case*, 33.

¹⁸ Jackson, *The Nuremberg Case*, 34.

¹⁹ Jackson, *The Nuremberg Case*, 35.

²⁰ conspiracy

could be considered victor's justice, or that the law underlying the IMT constitutes ex post facto justice. The latter issue is central to media criticism of the trial, and Jackson was obviously aware that he must make a strong case in favor of the IMT's actions. He did so by defining the nature of International Law, thus distinguishing it from the American and English traditions, and giving a brief history of international legal precepts relevant to the case.

In Jackson's opinion, the progression of international legal precepts outlawing aggressive war "is traceable in many steps."²¹ Jackson pointed to the Kellogg-Briand Pact of 1928, the Geneva Protocol of 1924, the Eighth Assembly by the League of Nations in 1927, and the Sixth Pan-American Conference of 1928 as concrete examples of international legal agreements that moved to outlaw aggressive war. Further, Jackson insisted that Nazi leaders had adequate knowledge of the illegality of their actions in light of German participation in several of these events. As he forcibly stated, "Can there be any doubt that the outlawry of aggressive war was one of the 'generally accepted rules of International Law' in 1939?"²²

Jackson then proceeded to defend the judicial (distinct from the legal) precedent of the IMT.²³ He granted that the IMT and the Nuremberg trial had no judicial precedent in International Law, but argued that International Law, like Common Law, must progress through the creation of new precedent. In his opinion, international legal agreements outlawing aggressive war provided an adequate

²¹ Jackson, *The Nuremberg Case*, 83.

²² Jackson, *The Nuremberg Case*, 84.

²³ This distinction represents the difference between the presence of existing law to cover the case, and the presence of a judicial precedent for actually charging any individual under that law.

foundation for levying charges against defendants who violated those precepts. Jackson's address made it clear that although he understood that the IMT's actions broke new judicial ground, he believed his actions to be consistent with the progression of International Law. By tying the legal precedent of the IMT to events during the 1920's and arguing that new judicial precedents are a part of the evolution of both Common and International Law, he made a powerful case in favor of the IMT.

For Jackson, and the U.S. government as well, the establishment of such a judicial precedent had relevance far beyond the courtroom in Nuremberg. The acceptance of the IMT and its actions represented a necessary precondition for the fulfillment of the larger goals that both parties had for the trial. Jackson earlier described his hope that Nuremberg would establish a precedent that would form a barrier to the waging of aggressive war in the future. For there to be any hope that Nuremberg would provide that shining example, Jackson had to firmly establish the legality of the trial.

Jackson then proceeded to specifically defend the first two Counts of the Indictment.²⁴ Most significant is his focus on the importance of individual responsibility. Jackson denied that superior orders constitutes a defense against the conspiracy charge and argued for the fundamental importance of holding all individuals responsible for their actions. It is important to note, however, that although Jackson argued stridently for the importance individual responsibility, he failed to present an articulation of the legal principles that allow the Court to indict

²⁴ Conspiracy, and the waging of aggressive war.

individuals. Particularly relevant to Count One, this point would later draw significant criticism in the media.

Jackson then moved his discussion of responsibility to the larger issue of conspiracy. The First Count of the Indictment recognized conspiracy to commit crimes against peace as a legally punishable offence in the eyes of the Tribunal; in many ways, Bernays and Jackson built the whole Nuremberg case upon the legal framework of conspiracy. Although Jackson mentioned the importance of this charge earlier in the indictment, his defense of “vicarious liability” and the criminality of Nazi political, police, and military organizations is vital to the overall project of the IMT. Significantly, the conspiracy charge, and its underlying legal framework is also a point highlighted for criticism by many in the media. Jackson’s discussion of these issues is therefore crucially important to his defense of the IMT’s objectives.

In addition to using criminal conspiracy to establish the personal responsibility of the defendants at Nuremberg, Jackson also had a larger objective: to establish the criminality of Nazi organizations.²⁵ This latter element had significance in light of the burden of proof that it placed upon members of any of the organizations that Jackson labeled as criminal. For the IMT to formally recognize Nazi organizations as criminal would mark any member of those organizations as guilty of crimes unless proven innocent.²⁶ As Jackson argued, “These individual defendants did not stand alone in crime and will not stand alone in punishment. Your verdict of

²⁵ Most notably, the SS, Gestapo, SD and military High Command.

²⁶ Jackson’s decision to define the German military High Command as a criminal organization presented a particularly contentious issue. Jackson argued that actions of the German Military moved beyond duty to encompass criminal conspiracy, but many members of the press strongly disagreed.

‘guilty’ against these organizations will render *prima-facie* guilty, as nearly as we can learn, thousands upon thousands of members now in custody of United States forces.”²⁷ A guilty verdict by the IMT would effectively convict thousands of Germans who had membership in any organization labeled as criminal.

Jackson clearly recognized the importance of this potential precedent, and argued forcefully for its importance in the larger scope of German aggression. This precedent, however, is one of the most controversial elements of Jackson’s case. The criminality of Nazi organizations, combined with the law of individual responsibility had the potential to leave little legal recourse for German members of the High Command, SS and SD, who would be considered guilty until proven innocent. Jackson articulated the importance of these legal precedents to the Court, but many members of the media sharply criticized Jackson and the IMT for these charges in particular.

Jackson ended his opening address with a section describing the responsibility of the Tribunal. Jackson utilized powerful rhetoric to argue that the Nuremberg trial represented the ultimate effort by the international community to outlaw aggressive war and establish an international judicial precedent that would continue to serve as a deterrent for future war criminals and those who would wage wars of aggression. In addition, Jackson placed the IMT in the larger scope of international action in the postwar world and tied the goals of the IMT to the creation of the United Nations.

Jackson argued that experience had shown that modern conflict never remained local. For him, World War II exemplified the global nature of modern wars.

²⁷ Jackson, *The Nuremberg Case*, 91.

This trend led him to state that, “All modern wars become world wars eventually. And none of the big nations can stay out.”²⁸ Jackson’s focus on this element led him to a singular conclusion. He told the Court, “if we cannot stay out of wars, our only hope is to prevent them.”²⁹

Although adamant about the importance of preventing aggressive war, Jackson admitted the inherent lack of power of legal action to prevent war, stating, “I am only too well aware of the weaknesses of juridical action alone to contend that in itself your decision under this Charter can prevent future wars.”³⁰ In spite of this admission, Jackson remained firm that Nuremberg would prove a vital step toward eliminating aggressive war in the modern world. In his opinion, the IMT represented a part of the larger international effort to stem the tide of conflict in the modern world. He declared, “the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesman responsible to the law.”³¹ The role of the IMT in this effort is vital for Jackson, who stated that “while this law is first applied against German aggressors . . . if it is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.”³² In this context, Nuremberg “represents mankind’s desperate effort to apply the discipline of the law to statesmen who have used their powers of state to

²⁸ Jackson, *The Nuremberg Case*, 92.

²⁹ Jackson, *The Nuremberg Case*, 92.

³⁰ Jackson, *The Nuremberg Case*, 92.

³¹ Jackson, *The Nuremberg Case*, 93.

³² Jackson, *The Nuremberg Case*, 93.

attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors."³³

Jackson presented a powerful and compelling case regarding the importance of the IMT to the international community and the role of the Nuremberg trial in preventing future wars. In doing so, Jackson clearly tied the IMT's project to hopes for the world's future. This in turn connected the goals of the trial to other international efforts to end war and promote international cooperation. "This trial is part of the great effort to make the peace more secure. One step in this direction is the United Nations Organization, which may take joint political action to prevent war if possible . . . The Charter and this Trial . . . constitute another step in the same direction."³⁴

The creation of the United Nations occurred concomitantly with the Nuremberg trial and, for Jackson, represented another significant move by the international community to form a system to peacefully adjudicate international disputes. In this sense, the UN can be understood to serve the same ends as the Nuremberg proceedings. His opening address, however, made it clear that Jackson privileged Nuremberg's legal precedent, highlighting its importance over that of the UN.

These passages demonstrated that for Jackson and the U.S. government, more was at stake at Nuremberg than the punishment of Nazi war criminals. The trial represented a part of a larger international effort to end aggressive war. This goal mandated the inclusion of Count Two of the indictment, crimes against peace, and

³³ Jackson, *The Nuremberg Case*, 93.

³⁴ Jackson, *The Nuremberg Case*, 93.

explains why Jackson placed so much importance on the establishment of new judicial precedent. Without the realization of those goals, Nuremberg could not fulfill its most important purpose for the international community.

Jackson ended his address with this passage:

Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical actions will put the forces of International Law, its precepts, its prohibitions, and, most of all, its sanctions, on the side of peace, so that men and women of good will in all countries may have 'leave to live by no man's leave, underneath the law.'³⁵

The conclusion of Jackson's opening address once again highlighted the ideals of the IMT, and the role that Jackson hoped Nuremberg will play in the future.

The vital importance of Nuremberg to the postwar world order stands out as the central focus of Jackson's address. His statements to the court allowed him to outline the prosecution's case against the Nazi defendants in the dock, but more importantly, to publicize the larger importance of the trial for the United States and the international community. Compelling, erudite, and well defended, his arguments to the court presented the audience with perhaps the best and most focused defense of the IMT's project at Nuremberg.

Positive Periodical Responses to Nuremberg

The significance and persuasiveness of Jackson's address can clearly be seen in governmental and periodical support for Nuremberg. Indeed, the arguments presented in his opening address formed the foundation of such support for the trial.

³⁵ Jackson, *The Nuremberg Case*, 94.

Although a majority of periodical articles criticized Jackson and the U.S. for the organization and legal basis of Nuremberg, a minority of articles did present a positive view of both Jackson's arguments and the proceedings in general. In addition, governmental rhetoric for the trial also generally followed Jackson's formula.

Periodical articles that expressed support for Jackson and the IMT generally echoed the arguments that Jackson presented in his opening address. First, these articles argued for the fairness and impartiality of the proceedings. Herman Phleger, writing in the April, 1946 edition of *The Atlantic*, applauded the fairness and impartiality of the proceedings, stating "I am confident that when the trial is concluded, thoughtful people everywhere will have reason to believe that the defendants have had a fair hearing and have been fairly judged."³⁶ Another *Atlantic* article from the end of 1946 echoed that sentiment, asserting "The Nuremberg proceedings were a model of forensic fairness."³⁷

Articles that express support for the trial also agreed with Jackson's statements about the nature of International Law. A *New Republic* article echoed Jackson's rhetoric, stating, "The law of nations derives from treaty and custom rather than from the acts of legislatures . . . This rule or custom was evidenced, among other things, by the Briand-Kellogg Pact outlawing war, to which Germany was the first signatory."³⁸ In a similar vein, Phleger argued, "It seems clear that . . . these

³⁶ Herman Phleger, "Nuremberg—A Fair Trial?," *Atlantic*, April, 1946, 61.

³⁷ Charles E. Wyzanski, Jr., "Nuremberg in Retrospect," *Atlantic*, December, 1946, 59. See also: Thomas L. Karsten and James H. Mathias, "The Judgment at Nuremberg," *New Republic*, Oct. 21, 1946, 512.

³⁸ Karsten and Mathias, "The Judgment at Nuremberg," 512.

defendants not only knew that aggressive wars were outlawed and unlawful when they planned them, but they also knew they would be individually punished if they were not successful.”³⁹

Echoing Jackson’s central focus for the Nuremberg trial, articles also expressed support for the outlawing of aggressive war. “A great moral principle has been judicially established—the principle that the planning and waging of aggressive war is the greatest crime known to mankind and that those guilty of perpetrating it will be punished.”⁴⁰ Again, Phleger reiterated this sentiment. He argued that in addition to punishing those guilty of atrocities, Nuremberg also served loftier goals, such as “the furthering of the cause of future peace through the actual enforcement of rules of international law by imposing effective sanctions against those who wage aggressive war.”⁴¹

Articles supporting the trial displayed an almost dogmatic focus on the core of Jackson’s project, and utilized much the same language to make their respective points. Although these articles represented a numerical minority in periodical coverage, it remained significant that Jackson’s address, and the arguments presented therein, influenced certain elements of periodical coverage in powerful ways.

Public Officials Voice Support For Nuremberg

Several federal officials articulated these same core elements of Jackson’s focus in public expression of support for Nuremberg. In a February 1946 article in

³⁹ Phleger, “Nuremberg—A Fair Trial?,” 63. See also: Wyzanski, Nuremberg in Retrospect,” 57.

⁴⁰ Karsten and Mathias, “The Judgment at Nuremberg,” 512.

⁴¹ Phleger, “Nuremberg—A Fair Trial?,” 65.

Readers Digest, Murray Bernays, the individual responsible for the initial framework of the trial, defended the IMT, and Jackson's focus on preventing aggressive war. After explaining the background of the trial and defending its structure, Bernays declared, "Moral responsibility under the law of nations must be supported by the tools of justice."⁴² Bernays, like Jackson, placed Nuremberg in a larger context of world events, and argued that the trial "opens a vista of hope to men of courage and goodwill everywhere."⁴³

Secretary of War Henry Stimson stressed the importance of ending aggressive war and other elements that appeared prominently in Jackson's address. In a January 1947 article in *Foreign Affairs*, Stimson presented a comprehensive defense of the trial, and of the central elements of the IMT's mission. Like Jackson, Stimson argued that "International Law is not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world."⁴⁴ Later in the article Stimson added, "The wickedness of aggression must be punished by a trial and judgment."⁴⁵ He closed his article with a passage that would not have looked out of place in Jackson's address. "In the judgment of Nuremberg there is affirmed the central principle of peace—that the man who makes or plans aggressive war is a criminal. A standard has been raised to which American, at least, must repair; for it is

⁴² Murray C. Bernays, "The Legal Basis of the Nuremberg Trials," *Readers Digest*, February 1946, 64.

⁴³ Bernays, "The Legal Basis of the Nuremberg Trials," 64.

⁴⁴ Henry L. Stimson, "The Nuremberg Trial: Landmark in Law," *Foreign Affairs*, January 1947, 180.

⁴⁵ Stimson, "The Nuremberg Trial," 180.

only as this standard is accepted, supported and enforced that we can move onward to a world of law and peace.”⁴⁶

The support for Nuremberg expressed by these officials again demonstrated the importance of Jackson’s ideology. This is not to say that Jackson was single-handedly responsible for the trial or its charges, but rather that his opening address reflected the strongest and clearest articulation of the key goals for the trial. These aims formed the core elements of both positive and negative responses to the trial, reiterating the power and influence of Jackson’s address.

Despite the power of Jackson’s rhetoric and its influence on a minority of periodical articles, however, the majority of U.S. periodical media lent a critical eye to the proceedings at Nuremberg. Interestingly, many opinion pieces quoted extensively from Jackson’s address in order to define the government’s position, and as a point of origin from which to levy criticism. These criticisms attacked every major point articulated in Jackson’s opening address, and cast significant doubt over the legality, morality, and effectiveness of the Nuremberg proceedings.

These criticisms have been largely lost in modern representations of the trial that view Nuremberg in a positive light. We should not, however, ignore the powerful and sustained criticism levied against Jackson and the IMT by influential elements of American popular media. The lack of a comprehensive understanding of media responses to the trial obscures the full story of those proceedings, and has led to modern positive (mis)perceptions of Nuremberg. Before modern scholars and commentators invoke Nuremberg as a positive influence on law and war in the 20th

⁴⁶ Stimson, “The Nuremberg Trial,” 180.

and 21st century, we must be accurate about the legacy of the trial. The story of Nuremberg cannot be complete without a thorough understanding of U.S. responses to the trial, both positive and negative.

Chapter 2—The Periodical Media’s Response to Nuremberg

Thus far the trial of “war criminals” in France and elsewhere has revealed little respect for pre-war legal principles. Unfortunately, the Indictment of the leading war criminals filed with the International Military Tribunal also exhibits characteristics of Hitlerian jurisprudence . . . It is regrettable that the indictment, which conforms neither to the principles of law in general nor to the principles of international or criminal law in particular, as these are “derived from the criminal law of all civilized nations,” should not be in accordance with the first principle of all Justice—impartiality and disinterestedness.⁴⁷

This quote, from the December 1st 1945 edition of *The Nation*, and written less than two weeks after the opening of the Trial, presented a perspective on Nuremberg and the IMT far different than the rosy ideals articulated by Robert Jackson in his opening address to the court. However, it is symptomatic of a striking trend in popular periodical literature from the period during and shortly after the Trial. As details of the Nuremberg Trial filtered down to the American people, writers in popular magazines showed a remarkable willingness to criticize the legality, judicial authority, morality, and procedures of the International Military Tribunal. While periodical coverage of Nuremberg encompassed other elements as well, including basic news coverage and literary descriptions of the trial’s wider context, these critical analyses of Nuremberg represent a striking contrast to American public opinion. In his book, Judgment On Nuremberg, William Bosch presented polling data that suggests 75% of the American people supported the Nuremberg trial. The presence of these critical articles raises many questions about their significance, and their relation to the opinions of Americans.

⁴⁷ Rustem Vambery, “Law and Legalism,” *The Nation*, Dec. 1, 1945, 573.

On the surface, popular magazine coverage of the background and beginning of the Nuremberg trial does not seem particularly negative. Indeed, a cursory look at the entirety of periodical coverage does not display any striking trends. Bosch argues that periodical coverage of the Trial followed the sentiments of the American public at large. He argues that “the popular press mirrored very accurately the heart and mind of the average man.”⁴⁸ In fact, his figure of 75% for general American support for Nuremberg exactly matches his findings for the coverage of popular magazines.⁴⁹

These figures, however, do not convey the variety of facets found in magazine coverage of the trial. Distinctions between different types of articles yield a very different picture. Bosch correctly points out that the majority of articles about Nuremberg demonstrate general support for the proceedings. Magazines such as *Time* and *Newsweek* provided the American people with a myriad of articles about Nuremberg, the vast majority of which provided news coverage of events surrounding the Trial, with little analysis of the issues at hand. These types of articles, as Bosh argues, generally mirror the coverage found in newspaper articles across the country.

A focus on opinion pieces and editorials, however, and a look at a broader sweep of periodical coverage, tells a remarkably different story. Although these pieces represented a numerical minority of articles,⁵⁰ their depth and breath heighten their significance to audiences. They appeared in major popular magazines with significant national circulation. The vast majority of these opinion pieces displayed an intense level of criticism toward Nuremberg in the years during and immediately after

⁴⁸ Bosch, *Judgment On Nuremberg*, 108-109.

⁴⁹ Bosch, *Judgment On Nuremberg*, 109.

⁵⁰ Including news and literary articles.

the trial. Specifically, this negative coverage focused on the legal basis of the IMT and the validity of the charges presented in the Indictment.⁵¹ As Bosch argued, “periodicals’ treatment of the trials polarized around set questions. First among those was the legal basis of the International Military Tribunal.”⁵² What Bosh does not adequately express is the important criticism levied against the trial centered on those issues. Opinion writers in a variety of magazines raised significant questions about the legal, judicial, and moral background for the Nuremberg Trial, and sharply criticized Justice Jackson for his dismissal and/or misrepresentation of the important issues.

Significantly, periodical authors questioned Jackson’s support of an International Legal precedent that ignored the reality of International Law and created the artificial impression that the IMT rested upon a solid legal foundation. Critics also asserted that Jackson’s distortion of legal issues obscured the fact that the Nuremberg Trial was an example of *ex post facto* justice, antithetical to the most basic legal principles of the United States. Articles criticized the Tribunal for practicing victor’s justice as well. Opinion pieces argued that any case of the victors judging the vanquished is inherently flawed and results in a misappropriation of justice. Further, articles raised *tu quoque* issues regarding Allied actions during the war. Columnists observed that Allied nations performed acts of reprehensible morality and legality during the war, and thus the prosecution of Nazi’s for war crimes represented a

⁵¹ Of the 24 opinion pieces identified in popular magazine between 1945 and 1948, 20 opposed the trials, three expressed general support, and one presented a mixed review.

⁵² Bosch, *Judgment On Nuremberg*, 109.

hypocritical attempt by nations that are themselves criminal to artificially embrace the idea of neutral justice.

Finally, and perhaps most significantly, opinion pieces questioned the ultimate goals of the IMT and the Nuremberg Trial. Jackson clearly argued that the verdict at Nuremberg had importance and relevance to issues far larger than the life or death of the defendants in the dock. His opening address placed the IMT in a larger context of efforts to promote international cooperation and end aggressive war. Jackson wanted Nuremberg to make statesmen adhere to the rule of law. The media clearly hesitated to accept this rhetoric, and indeed sharply criticized Jackson and the U.S. government for bringing politics into the courtroom. Many articles argued that Jackson and the U.S. ignored their legal responsibility by attempting to impose political goals on the judicial process. Writers emphasized that the IMT had the ability and the legal foundation to adequately punish Nazi offenders for war crimes and crimes against humanity within the scope of established International Legal precedent. The attempt to make the waging of aggressive war a crime, and to base the indictment upon a charge of conspiracy undermined the legality, and thus the legitimacy, of the trial, and proved to many journalists that Jackson and the U.S. were merely using Nuremberg as a platform from which to promote political change in the international arena.

Indeed, even before the creation of the International Military Tribunal and the start of the Nuremberg trial, periodical articles displayed a marked skepticism regarding the creation of such a court. In addition, articles also questioned the value and effectiveness of trying Nazi leaders for the planning and waging of aggressive war. As early as 1943, an article in the *New Republic* argued, “The question of the

punishment of war criminals had better not be looked at primarily from the point of view of its effects in preventing or causing another world war.”⁵³ In January of 1944, another piece in the *New Republic* expressed doubt about the creation of “an International Criminal Court.”⁵⁴

In addition, articles questioned whether the law supported charging Nazi offenders with the planning and waging of aggressive war. “Neither is the levying of aggressive war technically a crime, nor even the breach of treaties. An unwritten law there may be, but the powers have never drawn up an international criminal code, nor set up an international criminal tribunal.”⁵⁵

These articles, written before the start of the trial, and before Jackson’s address, nonetheless demonstrated skepticism about the path that the Nuremberg trial would ultimately take. In fact, the majority of articles from this period argued for either summary political judgment or trial in military courts.⁵⁶ While not significant in and of themselves, these articles do provide an interesting prelude to later, and harsher, criticism about Jackson, Nuremberg, and the International Military Tribunal.

⁵³ Sheldon Glueck, “Punishing the War Criminals,” *New Republic*, November 22, 1943, 706.

⁵⁴ “J.K. Miklitzanski, “Punishing the War Criminals,” *New Republic*, January 3, 1944, 23. See also: Maurice Edelman, “Will the War Criminals Escape?,” *New Republic*, February 19, 1945, 259. and Raphael Lemkin, “The Legal Case Against Hitler,” *The Nation*, March 10, 1945, 268.

⁵⁵ H.N. Brailsford, “What to Do With Germany: The Problem of war Criminals,” *New Republic*, July 24, 1944, 100. See also: Allan A. Michie, “How Will We Try the Axis War Criminals?,” *Readers Digest*, December 1943, 57.

⁵⁶ See: Michie, “How Will We Try the Axis War Criminals?,” 57., Lemkin, “The Legal Case Against Hitler, 268., Glueck, “Punishing War Criminals,” 706., and Brailsford, “What to Do With Germany,” 100.

News Articles

Despite significant criticisms levied at the IMT and the Nuremberg Trial by the popular press, it is important to differentiate between different types of periodical coverage of Nuremberg. A majority of articles about the trials merely reported on the relevant events leading up to and during the trial itself. These types of articles in many ways mirrored newspaper coverage of the trial, providing detailed information about the proceedings, but lacking significant opinion or analysis. Indeed, what is perhaps most striking about news coverage of the trial is how routine it is. In many ways, this coverage of Nuremberg differed little from media trial of any major trial, going so far as to become boring after the theatrics of the trial's opening days. After a flurry of stories about the significance and background of Nuremberg, new coverage settled down to simple, almost formulaic stories about the evidence and the progression of the prosecution and defense cases. In fact, several of these articles go so far as to remark upon how boring the trial actually became. Beyond a somewhat morbid fascination with the accused (again not unlike many other trials), the majority of news coverage remained routine for the majority of the trial.

Many articles in weekly magazines, notably *Time* and *Newsweek* displayed a keen interest in how the Allied powers planned to deal with captured Nazi leaders in the months after the war. Even before the end of the war, periodical articles reported on U.S. progress towards war crimes prosecutions. An April 9, 1945 article in the *New Republic* reported on action of the House Foreign Affairs Committee, which had "completed a brief series of hearings on Representative Emanuel Celler's resolution to give real power for dealing with Axis war criminals to the United Nations

Commission on War Crimes.”⁵⁷ On May 21, *Time* reported that “the War Crimes Commission in London was hard at work, checking the latest prisoner lists against its bulky catalogue of charges.”⁵⁸ Later in the month, *Newsweek*, published an article explaining that even when, and if the United Nations War Crimes Commission and the Soviets agreed which Nazis should be tried, “the question then arises how they are to be tried, especially the important ones.”⁵⁹ On August 6, 1945, *Time* reported that “despite all that had been done, Russia, Britain, France and the U.S. had yet to agree on a common procedure [for the trials]. This week a U.S. source in London said that Prosecutor Robert Houghwout Jackson had toughened up, warned the others that the U.S. would start the trials alone unless agreement came soon.”⁶⁰ This coverage extensively reported on the development of American governmental policy, and the Allied efforts to bring war criminals to justice after the close of hostilities.

This coverage demonstrated a particular interest in the legal foundation for prosecutions, although virtually none of these articles expressed any judgment about such legal issues. On August 20, 1945, *Time* reported, “The Big Three, with the addition of France, finally decided what constituted a war crime. Three categories were established, all punishable by death . . . Crimes against peace . . . Violations of the laws and customs of war . . . [and] Crimes against humanity”⁶¹ These charges encompassed, in order, German aggression, war crimes, and the killing of innocents

⁵⁷ “War Crimes,” *New Republic*, April 9, 1945, 543.

⁵⁸ “The Accused,” *Time*, May 21, 1945,

<http://www.time.com/archive/preview/0,10987,852219,00.html>.

⁵⁹ “Trial by Executive,” *Newsweek*, May 28, 1945, 66.

⁶⁰ “The Place of Judgement,” *Time*, August 6, 1945,

<http://www.time.com/archive/preview/0,10987,803667,00.html>.

⁶¹ “Definition,” *Time*, August 20, 1945,

<http://www.time.com/archive/preview/0,10987,797647,00.html>.

in the holocaust. After reporting on the specifics of the three charges, the *Time* article elaborated on the significance of this decision. “For Supreme Court Justice Robert Houghwout Jackson, chief U.S. prosecutor of war crimes, last week’s declaration was a personal victory. He had argues long & loud that a war of aggression must, per se, be considered a crime.”⁶² The same article also articulated the importance of other precedents set with the declaration. “The agreement made other milestones in international law. One was that entire organizations, such as the SS, could be adjudicated guilty collectively. Another was that obedience from above was no excuse.”⁶³ In October of 1945, *Newsweek* reported that “Allied charges rested on treaties, the Hague and Geneva conventions, national codes, basic principles of criminal law, and a new form of law that defined ‘crimes against humanity.’”⁶⁴ Articles such as these display a keen interest in the legal issues facing Allied attempts to create a foundation for charging Nazi war criminals, but do not comment upon the larger issue of legal precedent or question the motivations or actions of the Allied powers.

The media did, however, articulate that such a legal framework would be moving into uncharted legal waters. Reporting on the Indictment, a piece in *Newsweek* related that “the 25,000-word document was unprecedented in scope.”⁶⁵ Similarly, a June 18 1945 article in *Time* stated, “Prosecutor Jackson faced the fact that the victors have very little written law to work with, brusquely proposed to

⁶² “Definition,” <http://www.time.com/archive/preview/0,10987,797647,00.html>.

⁶³ “Definition,” <http://www.time.com/archive/preview/0,10987,797647,00.html>.

⁶⁴ “For These Crimes,” *Newsweek*, October 29, 1945, 45.

⁶⁵ “For These Crimes,” 45.

remedy that deficiency by making law to suit the case.”⁶⁶ Although this statement seems to foreshadow later media criticisms of the trials, the article goes on to quote Jackson at length, taking his defense of the prosecutions efforts at face value. “International law as taught in the 19th and early . . . 20th century generally declared that war-making was not illegal and no crime at all . . . Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law.”⁶⁷ Such a statement from Jackson provided a preview of his opening address to the court. Unlike many later opinion pieces, however, this article did not express any judgment about Jackson’s statement, instead merely reporting on his response to a question.

When such news articles did comment beyond a mere recounting of fact, they generally expressed a hatred of the Nazi regime, and a desire that Allied nations make Nazi leaders answerable for their crimes. An April 23, 1945 article in the *New Republic* stated, “Not only does justice demand their [Nazi leaders] punishment as individuals, but political wisdom requires the complete elimination of the sources of power of those classes of German society which they represent.”⁶⁸ In September, *Newsweek* described the defendants “hunched at their tables for long hours, writing the memoirs designed to save their own skins by blaming everything on their accomplices when they came before the international court of justice.”⁶⁹ This intense

⁶⁶ “To Suit the Case,” *Time*, June 18 1945,

<http://www.time.com/archive/preview/0,10987,775906,00.html>.

⁶⁷ “To Suit the Case,” <http://www.time.com/archive/preview/0,10987,775906,00.html>.

⁶⁸ “Who are the War Criminals?,” *New Republic*, April 23, 1945, 543.

⁶⁹ “Pigs in the Pen,” *Newsweek*, September 17, 1945, 60.

anti-Nazi sentiment is understandable in context, and pervades many articles in the months leading up to the trial.

News articles displayed a keen interest in the individual defendants charged under the IMT indictment. In an October article *Time* related, “The Nazi elite were again gathering in Nurnberg [sic]. But the old Parteitag pomp and mass hysteria were gone. This time the leaders had to make their speeches in prison cells, where they awaited trial by the United Nations War Crimes Commission for being Nazis and starting the war.”⁷⁰ A *Newsweek* article from October 22 reported how “the defendants fretfully devoured Western adventure stories and cheap novels. They occasionally threw fits of jealous pique when one or the other rated special questioning from investigators.”⁷¹ Another *Time* article from October 29th entitled “The Defendants” described each defendant’s reaction to receiving copies of the Indictment.⁷²

On December 3, *Time* provided a summary of the opening of the Trial, providing many colorful comments about the defendants in the dock. The Nazi’s leaders, “had fallen far and hard . . . The only thing they had salvaged from their days of glory was their arrogance, and that was tattered.”⁷³ A December 3 *Newsweek* article provided a brief description of each defendant in order to emphasize their

⁷⁰ “Is Ayone Guilty?,” *Time*, October 15, 1945,
<http://www.time.com/archive/preview/0,10987,792422,00.html>.

⁷¹ “Payment Due,” *Newsweek*, October 22 1945, 48.

⁷² “The Defendants,” *Time*, October 29, 1945,
<http://www.time.com/archive/preview/0,10987,776327,00.html>.

⁷³ “The Fallen eagles,” *Time*, December 3, 1945,
<http://www.time.com/archive/preview/0,10987,852473,00.html>.

appearance “during this trial for their lives”⁷⁴ On December 10, *Time* characterized the defendants reaction to the proceedings, “All were puzzled by their fate. Beyond the unhappy realization of having been on the losing side of a war, they could not quite grasp the meaning of the court’s quiet, determined fairness, or the hard working prosecutor’s meticulous attention to detail. The Nazi’s had never done things that way.”⁷⁵

This type of tenor, at once dismissive of the Nazi defendants and lyrically descriptive of the prosecution’s efforts, formed a constant in periodical news coverage throughout the trial. That same December 10 *Time* article stated, “Whether or not the Germans were impressed, the trials were the only way humanity had found to bring Hitler’s heirs to judgment.”⁷⁶ On the same date, *Newsweek* reported, “From the start the Nuremberg courtroom was an impressive backdrop to a giant drama. But last week, with the preliminaries over, the show really got underway. In three days, it reached peaks of comedy, intrigue, and bombast.”⁷⁷ Another *Time* article, entitled, “The Chalice of Nurnberg [sic],” stated “the charges encompassed every evil act of Nazidom.”⁷⁸

After the opening of the proceedings, many periodical articles described the progression of the prosecution’s case, detailing many specifics relating to evidence

⁷⁴ “Brutes, Schemers, Cynics: The Nazi Hierarchy in Court,” *Newsweek*, December 3, 1945, 49.

⁷⁵ “Day of Judgement,” *Time*, December 10, 1945,
<http://www.time.com/archive/preview/0,10987,852563,00.html>.

⁷⁶ “Day of Judgement,”
<http://www.time.com/archive/preview/0,10987,852563,00.html>.

⁷⁷ “The Nuremberg Show,” *Newsweek*, December 10, 1945, 50.

⁷⁸ “The Chalice of Nuremberg,” *Time*, December 10, 1945,
<http://www.time.com/archive/preview/0,10987,852564,00.html>.

and the actions of Allied lawyers. A December 24th *Time* article entitled “Naiveté & Skill,” characterized the actions of U.S. prosecuting attorney Captain Sam Harris, who “stepped to the microphone in Nuernberg’s [sic] courtroom last week and read seriously from the first page of his brief: ‘The noise you hear is my knees knocking. They haven’t knocked like this since the day I asked my wife to marry me.’”⁷⁹ That same week’s *Newsweek* reported, “Last week the Nazi’s own thoroughness turned on them again in Nuremberg. In evidence seized by the Allies, and from the lips of survivors, fresh details of Nazi crime unfolded before the 21 accused war criminals in the prisoners’ dock.”⁸⁰ On January 14, 1946, *Time* mentioned that “the Allied prosecution continued to pile up evidence, detailing their [the defendant’s] guilt with an endless chain of chilling facts.”⁸¹ A January 21 article described how “U.S. and British prosecutors worked in relays. Ever-new assistants stepped briskly to the stand with ever-new documents. Their task: to prove that the deeds which the indictment had labeled ‘crimes against humanity’ had been committed by individual human beings, just like the murder or the bank-robbery around the corner. Under the hammer of evidence, alibi after alibi cracked open.”⁸² A June 21 article in *Newsweek* reported, “The stacks of documentary evidence climbed toward the ceiling of the Nuremberg courtroom. American prosecutors, outtalking their colleagues, read and reread the

⁷⁹ “Naivete and Skill,” *Time*, December 24th, 1945, <http://www.time.com/archive/preview/0,10987,778522,00.html>.

⁸⁰ “Nazi Crimes: From A to Z,” *Newsweek*, December 24, 1945, 40.

⁸¹ “Prosit Neujahr!,” *Time*, January 14, 1946, <http://www.time.com/archive/preview/0,10987,886826,00.html>.

⁸² “Under the Hammer,” *Time*, January 21, 1946, <http://www.time.com/archive/preview/0,10987,924266,00.html>.

diaries, state papers, and affidavits produced to convict twenty men who led Nazi Germany to its destruction.”⁸³

Articles detailing the defense’s case contained a similar tone. A March 18th *Time* article noted that, “the 22 defense lawyers would fight hard, even though they had to defend the indefensible.”⁸⁴ Periodical coverage documented the progression of the defendant’s cases, with a particular emphasis on Goering’s testimony. Several articles provided a summary of Goering’s actions, while others centered their reporting on the substance of his words. A March 25th article in *Newsweek* observed that Goering’s testimony provided “fascinating details of much Nazi history.”⁸⁵ These articles contained little analysis, but continued to report on the events of the trial in a similar manner.

The media displayed a particular fascination with the sentencing of the defendants and the eventual hangings of those sentenced to death. On September 9th, *Time* described how “The accused made their last pleas to the bar, to the German people and to history. The strong ones spoke as though they were still addressing a Nurnberg [sic] party rally, reaffirming the faith by which they lived and killed. The weak ones merely whimpered professions of their innocence.”⁸⁶ An October 7 article in *Newsweek* provided brief descriptions of each defendant as the court read their respective verdicts. The article described Ribbentrop as “In the worst shape of any man in the dock. Looks as if a noose literally was already around his neck. Even

⁸³ “Nuremberg: Private Guilt,” *Newsweek*, June 21, 1946, 47.

⁸⁴ “Indefensibles’ Defense,” *Time*, March 18, 1946,
<http://www.time.com/archive/preview/0,10987,934452,00.html>.

⁸⁵ “Trials: Hermann’s Version,” *Newsweek*, March 25, 1946, 46.

⁸⁶ “Serene Justice,” *Time*, September 9, 1946,
<http://www.time.com/archive/preview/0,10987,855393,00.html>.

coughs with a shudder.”⁸⁷ On October 21, *Time* described how “last week, as the condemned awaited the judgment’s execution, their composure . . . began to crack.”⁸⁸ The same edition of *Newsweek* stated, “the doomed men showed the strain of their last days.”⁸⁹ Finally, on October 28, 1946, *Time* covered the final moments of those defendants sentenced to hang. “Thus Death, as it must to all men, came to the eleven by whose instrumentality so many thousands died (more horribly and without a chance for historic histrionics).”⁹⁰

At the close of the trial, news articles did convey some disagreement about the verdicts. An October 14th *Time* article articulated that “Opinion on the verdicts ran in two directions. Naturally, most of the Nazi’s surviving victims denounced the verdicts as too lenient . . . The other school of opinion held that the judges had been too stern.”⁹¹ However, such media articles did not side with either opinion, other than expressing the moral superiority of the United States. “On the executions’ eve, many Russians, French, and even Germans believed that the sentences had been too light. It was perhaps typical of the world’s comparative ethics that the heaviest twinges of conscience were experienced in the U.S. and Britain.”⁹² These comments never delved into the legal issues behind the sentences, nor did they indicate qualms about legality or morality of either the trial or the verdicts.

⁸⁷ “Judgment,” *Newsweek*, October 7, 1946, 48.

⁸⁸ “Forgive Us Our Sins...,” *Time*, October 21, 1946,
<http://www.time.com/archive/preview/0,10987,855486,00.html>.

⁸⁹ “Grim Reapers,” *Newsweek*, October 21, 1946, 39.

⁹⁰ “Night Without Dawn,” *Time*, October 28, 1946,
<http://www.time.com/archive/preview/0,10987,803997,00.html>.

⁹¹ “Morning After Judgment Day,” *Time*, October 14, 1946,
<http://www.time.com/archive/preview/0,10987,934036,00.html>.

⁹² “Forgive Us Our Sins...,”
<http://www.time.com/archive/preview/0,10987,855486,00.html>.

The importance of Robert Jackson to the trial represented a final theme in news coverage. For most reporters, Jackson symbolized the epitome of the Allies project. He figured prominently in a majority of news articles, in both his organizational and prosecutorial roles. Articles from the summer and early fall of 1945 mentioned his role in the organization of the IMT and the trial repeatedly, often quoting him at length. A May 21, 1945 *Time* article related that Jackson “was on record with another, fundamental suggestion”⁹³ about the framework of the IMT. On May 28, *Life* explained Jackson’s view of the legal process.⁹⁴ On June 18, *Time* reported on Jackson’s summary of the U.S. position on war crimes prosecution, delivered the previous week.”⁹⁵ In July, *Newsweek* provided a brief biography of the Justice, and reported, “it is quite possible that one of the historic achievements of the war will be a revolution in international law associated with his name.”⁹⁶ On August 6, *Time* indicated that Jackson had “toughened up”⁹⁷ in the four-power negotiation about the IMT in London. A November 26 *Time* article described how Jackson hoped “that Nuremberg was an important beginning, and that around this precedent real international law would crystallize.”⁹⁸

Jackson’s opening address in particular attracted significant attention from journalists. A *Newsweek* article commenting on Jackson’s opening address reported, “As chief architect of the court’s procedure, Jackson had another job almost as

⁹³ “The Accused,” <http://www.time.com/archive/preview/0,10987,852219,00.html>.

⁹⁴ “Allies Round Up War Criminals,” *Life*, May 28, 1945, 29.

⁹⁵ “To Suit the Case,” <http://www.time.com/archive/preview/0,10987,775906,00.html>.

⁹⁶ “Jackson, World’s Attorney,” *Newsweek*, July 2, 1946, 29.

⁹⁷ “The Place of Judgment,”

<http://www.time.com/archive/preview/0,10987,803667,00.html>.

⁹⁸ “West of the Pecos,” *Time*, November 26, 1945.

difficult as criminal prosecution. No single national code governed the Nuremberg trial, and it had no legal precedent”⁹⁹ The article summarized Jackson’s articulation of the trial’s legal foundation and purpose, while quoting extensively from his address. *Time* called the address “a nobly worded, nobly intentioned statement”¹⁰⁰ and quoted from it at length. Further, the rhetoric of the statement continued to occupy a prominent place in the media for the duration of the trial.

As the Trial progressed, Jackson’s role moved to the background as other Allied prosecutors presented evidence to the court, but Jackson’s name continued to be mentioned regularly. At the close of the Trial, however, Jackson once again rose to media prominence. *Time* articles from October 21 and 28 1946 quoted him extensively, again focusing on his role in the trials’ organization and progression.

From the close of the war until after the end of the Trial, the media spotlight focused on Jackson, and the ideals of his opening address. Jackson’s role in the trial further helped to contextualize general news coverage of Nuremberg. Throughout the proceedings, news coverage proved consistent; it seldom raised questions about the proceedings, and generally upheld the moral superiority of the United States while both implicitly and explicitly criticizing the defendants.

Literary Articles

Although news articles such as those described above dominated much of the periodical coverage of the trials, the significance of the event also fostered other,

⁹⁹ “Brutes, Schemers, Cynics: The Nazi hierarchy in Court,” 49.

¹⁰⁰ “Day of Judgment,”

<http://www.time.com/archive/preview/0,10987,852563,00.html>.

more literary articles about the Trial. Novelists such as Rebecca West and novelist John Dos Passos covered Nuremberg for a variety of magazines, and gave readers a strikingly different account of the proceedings. The powerful elements of human interest that flowed through the trial seemed to give rise to longer, almost novelistic articles about both the trial itself, and related events and issues in the vicinity. Like news articles, these lyrical accounts of Nuremberg generally did not pass judgment on the Trial or the IMT, but instead attempted to broaden the public's understanding of the larger context of Nuremberg.

Many of these articles offered overviews of the atmosphere and landscape that surrounded the Trial. In a *Nation* article from December 1, 1945, Peter De Mendelsshon explained that “there are two Nuernbergs [sic] in this town, enshrouded in wintry mists and drizzling rain: one, all but forgotten by the world, is a stark, fearful reality to the citizens, who gaze on it with uncomprehending eyes; the other, now in the world's limelight, means little or nothing to the people.”¹⁰¹ Many authors articulated this trend of immense separation between the poverty and hopelessness of the city of Nuremberg and the prestige and vibrancy of the Trial. *Life* correspondent John Dos Passos writes about German “men, surrounded by towheaded children . . . putting potatoes to boil on a stove made out of a torn sheet of galvanized roofing.”¹⁰² This sharply contrasts Passos's description of Americans “ thronging the corridors . . . with a familiar Washington look about their faces.”¹⁰³ An *Atlantic* article from January 1946 quotes a German woman talking to correspondent Nora Waln as saying,

¹⁰¹ Peter De Mendelsshon, “The Two Nurembergs,” *Nation*, December 1 1945, 569.

¹⁰² John Dos Passos, “ Report From Nuremberg,” *Life*, December 10, 1945, 27.

¹⁰³ Passos, “Report From Nuremberg,” 27.

“‘You cannot understand. You are different from us. We live in two different worlds.’”¹⁰⁴ This theme of constant separation between the Nuremberg of the Trial, and the Nuremberg inhabited by its German citizenry, played an important role in authors attempt to describe the larger context of the trial.

In many articles, authors focused specifically on the personalities of the defendants. Unlike many news articles, literary authors rejected casting these men as monsters, and instead attempted to understand their current situation, and how powerful Nazis coped with imprisonment and trial. In July of 1945, Edgar Snow, correspondent for the *Saturday Evening Post*, visited the Salzburg jail where Allied counterintelligence experts attempted to determine the responsibility of several leading Nazis for war crimes. He wrote “‘Here I thought I might collect some of those ‘last minute revelations’ to answer such questions as columnists haven’t yet settled among themselves. Instead, what I attended was a clinic of the Nazi mind, and a preview of the defense which war criminals will make when they come up for trial.’”¹⁰⁵

After the beginning of the Trial, many journalists offered their assessments of the psychological states of the defendants in the dock. Mendelssohn observed that, “‘looking at them [the defendants] now in the harsh glare of big lamps suspended from the ceiling, one perceives even the dull reflection of his dynamism in the face of these tired, uninspired men.’”¹⁰⁶ In a September 7, 1946 *New Yorker* article, Rebecca West insisted, “‘The people in court who want the tedium to endure eternally are the twenty-

¹⁰⁴ Nora Waln, “Crime and Punishment,” *Atlantic*, January 1946, 43.

¹⁰⁵ Edgar Snow, “They’re Getting Their Alibis Ready,” *Saturday Evening Post*, July 28, 1945, 12.

¹⁰⁶ Mendelssohn, “The Two Nurembergs,” 569.

one defendant in the dock, who disconcert the spectator by presenting the blatant appearance that historical characters, particularly in distress, assume in bad paintings.”¹⁰⁷ These authors seem particularly focused on how the defendants responded to the proceedings in court. John Dos Passos described how the defendants reacted to Jackson’s opening address. “The defendants sit up attentively . . . They listen as if this is all news to them.”¹⁰⁸

In July of 1946, the *New Yorker* published an interview with Dr. David Kelley, chief prison psychiatrist for the defendants. In the article, Kelly provided a psychological profile of each defendant, and commented on their intelligence and morality. The article closed with Kelly’s observation that. “Rosenberg summed up their [the defendants’] feelings when he said to me, ‘We shouldn’t have killed six million Jews. It turned public opinion against us.’”¹⁰⁹ This fascination with the prisoners in the dock echoed an important theme in news coverage of the trial, but these longer, more literary articles expressed little overt hatred for the accused. Instead, they showed interest in men placed in a situation to which they do not have the slightest idea of how to respond.

Other articles focused on the social context of life in Nuremberg for the many Allied soldiers, journalists, and lawyers during the Trial. At times, these descriptions merely encompassed the mundane aspect of the trial not seen in the larger news coverage. In September of 1946, after 10 months of the trial, Rebecca West

¹⁰⁷ Rebecca West, “Extraordinary Exile,” *New Yorker*, September 7, 1945, 34.

¹⁰⁸ Passos, “Report From Nuremberg,” 27.

¹⁰⁹ “No Geniuses,” *New Yorker*, June 1, 1946, 19.

characterized the courtroom as “a citadel of boredom.”¹¹⁰ In the same article, she discussed the tenor of life for the “exiles” forced to stay in Nuremberg until the end of the Trial. “Considering this strain, the atmosphere surrounding these exiles is extraordinarily sweet . . . This sweetness of atmosphere is due chiefly to a kind of easy good nature—the warmer side of indifference—that we Europeans describe as typically American; and doubtless many are kept sane by certain distractions.”¹¹¹

As with news coverage of the trial, Justice Jackson plays an important role in this type of coverage.¹¹² Although many of the articles devote their lines to larger contextual issues, Jackson still appears as an important figure in Nuremberg. John Dos Passos in particular seems enthralled by Jackson’s presence. He described the beginning of Jackson’s opening address: “Robert Jackson steps quietly to the microphone to open the case for the prosecution . . . He talks slowly in an even, explanatory tone without betraying a trace of self-importance in his voice.”¹¹³ After several long quotes from Jackson’s address, Dos Passos related the impact of Jackson’s words.

As the day wears on and Jackson, reasonable, dispassionately, with magnificent clarity, unfolds the case against them . . . a change comes over the prisoner’s box. They stir uneasily in their seats. They give strange starts and shudders when they hear their own words, their own secret diaries quoted against them. When the prosecutor reached the crimes against the Jews they freeze in an agony of attention.¹¹⁴

¹¹⁰ West, “Extraordinary Exile,” 34.

¹¹¹ West, “Extraordinary Exile,” 34.

¹¹² More than half of literary articles displayed at least some focus on Jackson.

¹¹³ Mendelssohn, “The Two Nurembergs,” 569.

¹¹⁴ Mendelssohn, “The Two Nurembergs,” 569.

Literary articles depicted the sense of camaraderie between men and women of different nationalities in Nuremberg. The companionship among men and women from different countries seems driven to a large extent by the details of the trial itself. Nora Waln described a meeting with fellow journalists in the Palace of Justice. “Our British, French, and Russian acquaintances greeted us as if glad to see us. Like ourselves, they were waiting for the trial to begin. Everyone longed to have it over.”¹¹⁵ In another article, Rebecca West wrote about the living conditions for female journalists in Nuremberg. Journalists were housed in a huge mansion, formerly of German nobility, and a source of irony to West. “In the room where I slept, there were nine hospital beds . . . The women for whom this mansion was built lived inside their corsets as inside towers; their coiffures were almost architectural; all their contours had to be preserved by iron poise. They would have refused to believe that these ink-stained gypsies had, in fact, invaded their halls.”¹¹⁶ These articles provided readers a glimpse of the larger context of Nuremberg, the events beyond the courtroom that helped to shape the lives of those affected by the trial.

The trial’s ultimate goal of punishing Nazi leaders, however, always remained central to periodical coverage. With the close of the trial, many of these correspondents traveled home, but not before they wrote about the impact and significance of Nuremberg to themselves and the world. Waln closed her *Atlantic* article with a powerful reference to the rise of the Nazis. “When I was in Germany when the Nazi’s were in power, they were teaching a song which has the line: ‘*Mit uns zieht die neue Zeit* (With us comes the new day).’ For millions that day was

¹¹⁵ Waln, “Crime and Punishment,” 43.

¹¹⁶ Rebecca West, “The Birch Leaves are Falling,” *New Yorker*, October 26, 1946, 93.

night.”¹¹⁷ Although Waln wrote this article during the Trial, it expresses powerful sentiment about the larger context of Nazi action, and the importance of the Nuremberg Trial.

No correspondent presented a more powerful literary account of the significance of Nuremberg than did Rebecca West. Her articles for the *New Yorker* presented readers with literary passages that contextualized her individual experience during the Trial, and the larger significance of that action. Toward the end of her September 1946 article, she wrote, “So it appears that in the Palace of Justice that it is only the Americans and the British who can hold up a mirror to Germany and help her to solve her own perplexing mystery—that mystery which, in Nuremberg and the countryside around it, is set out in flowers, flowers which disconcert by not only being lovely but beloved.”¹¹⁸ In West’s October article, this questioning of German action, and indeed the German psyche, moved to the background as she described her place in the larger portrait. “How much easier would we journalists have found our task at Nuremberg if only the Universe had been less fluid, if anything had been absolute, even so simple a thing as the sight we had gone to see—the end of the trial.”¹¹⁹ Finally, West offered her reaction to the verdicts, and the coming executions for many defendants. “The vague, visceral mournfulness, the sympathy felt for the doomed flash as the frosted flower, settled on the mind steadily during the days that passed after the return from Nuremberg, as the executions grew nearer.”¹²⁰ These

¹¹⁷ Waln, “Crime and Punishment,” 43.

¹¹⁸ West, “Extraordinary Exile,” 34.

¹¹⁹ West, “The Birch Leaves are Falling,” 93.

¹²⁰ West, “The Birch Leaves are Falling,” 93.

passages demonstrated the power of West's writing, sharply contrasting the pointed, taciturn language of many more news oriented articles.

These longer, more literary articles about Nuremberg addressed many of the same issues as do the more direct news articles. The former, however, also delved into larger contextual and human-interest issues absent from basic news coverage. Neither type of article, however, passed judgment upon the Trial or its legal foundation. This is not to say that they should, but only to point out an important distinction in periodical coverage of Nuremberg. Both of the former types of articles about Nuremberg figured prominently in periodical coverage, and appeared in a wide variety of magazines before, during and after the Trial. They did not, however, present readers with strong arguments or opinions about the legality or ethicality of the proceedings.

Critical Articles

The lack of judgment present in news and literary articles makes it all the more interesting that before, during and after the trial numerous articles criticized the foundation of the IMT and the trial. Although critical articles took issue with the proceedings on a number of counts, the majority of critical periodical coverage focused on the legal basis of the IMT and the trial. Although this focus on legal issues was not unique in magazine coverage, the level of analysis and argument sharply distinguished these critical articles from the types of articles previously discussed. In addition, it is significant to note that the majority of opinion pieces written about Nuremberg, particularly those concerning legal issues, sharply criticized the proceedings.

General Criticisms Of Nuremberg Before the Start of the Trial

Even before the start of the proceedings, writers showed a willingness to question and criticize the legality of the IMT. In May of 1945, scarcely two weeks after the close of the war, Rustem Vambery wrote an article in *The Nation* that challenged the Allied right to charge Germans with any war crimes.¹²¹ Indeed, Vambery argues that “war crimes” do not exist in any legal sense.

No textbook of the criminal law of any country contains the term “war crime” or “war criminal” There is, indeed, no such thing as war crime, meaning a special class of crime. In stressing this, I am not indulging in legalistic hairsplitting or attempting to deny the necessity of retribution for crimes committed during the war. In public opinion as reflected in the press war crimes are either just ordinary crimes . . . committed in an extraordinary measure by enemy citizens and punishable under the penal law of every civilized country, or acts, of which we violently disapprove and we call crimes because we want to have them punished.¹²²

Vambery argued that the very idea of “war crimes” is the creation of individuals seeking retribution. For Vambery, the majority of Nazi crimes could have easily been prosecuted by any legal system in the “civilized world.” However, “as for acts which we wish to see punished as crimes, neither aggressive war nor support for the Nazi doctrines . . . is listed as a crime in any criminal code of the world.”¹²³ In his opinion, the IMT’s project attempts to subvert justice both through the creation of new crimes, and the attempt to legally codify a new set of “war crimes” not previously in existence.

¹²¹ Vambery was a criminal lawyer, and a former dean of the Law School at the University of Budapest. His articles for *The Nation* presented readers with some of the most ringing criticisms of the Nuremberg Trial.

¹²² Rustem Vambery, “Criminals and War Criminals,” *Nation*, May 19, 1945, 567.

¹²³ Vambery, “Criminals and war Criminals,” 567.

Other articles questioned the foundation of the trials, though perhaps not in as much detail as offered by Vambery. A piece in the September 15, 1945 edition of *The New Yorker* stated, “we strongly suspect that the long delay in the war trials has been not so much because there was no solid foundation under a certain courtroom, as because there was no foundation under the new level of justice with which the victorious nations are fumbling.”¹²⁴ These examples indicated a striking level of skepticism about the foundations of the IMT, and a remarkable willingness to criticize the legality of the Nuremberg Trial by many journalists and commentators.

Writers also questioned the larger significance of the Trial. Authors readily acknowledged that the Allies project at Nuremberg encompassed much more than mere punishment. A *New Republic* article from November of 1945 argued, “But more is involved in the trial than just punishment of the accused. As both the indictment and the Charter of the International Tribunal suggest, a new departure will be made in international law. If carried through, it will have far-reaching consequences in the conduct of a state’s foreign relations.”¹²⁵ This article further questioned the legitimacy of making individuals responsible for the acts of nations and wondered how this would affect decision making in the international arena.

Many articles relate similar ideas, arguing that the proceedings at Nuremberg had significance far beyond the courtroom, and further, went on to question Jackson’s larger goals. A December 10th, 1945 article in *Life* states, “The Trial is an ambitious attempt to forward human justice, an imaginative but risky innovation in international

¹²⁴ “The Talk of the Town: Notes and Comment,” *New Yorker*, September 15, 1945, 17.

¹²⁵ Heinz Eulau, “The Nuremberg War-Crimes Trial: revolution in International Law,” *New Republic*, November 12, 1945, 625.

law.”¹²⁶ These worries about the ultimate purpose of the trial and its potential effectiveness demonstrated a complex understanding of the larger issues surrounding the IMT and the Nuremberg Trial, and also an immediate willingness to question those larger purposes.

The Start of the Proceedings

After the publication of the Indictment and the beginning of the Trial, a new barrage of legal criticism appeared in periodical coverage of the Trials. Authors criticized both the broad legal foundations of the Indictment, and also the specifics of Counts One and Two (conspiracy and committing aggressive war). Responding directly to Jackson’s opening address, Peter De Mendelssohn wrote in *The Nation* “the chief issue is: Are these defendants charged under a law which did not exist at the time they committed their crimes, and if so, what justification have the Allies for changing them? Reduced to simplest terms, Jackson’s closely knit, hard-hitting and comprehensive answer was that these men are lucky to be given a trial at all.”¹²⁷ De Mendelssohn questioned the legality and ethicality of Jackson’s argument and, more significantly, called into question the legal foundation of the trial itself.

Vambery provided a strongly critical response to the rhetoric of the Indictment. In a December 1 *Nation* article, he again cast doubt about the legal foundation of the entire enterprise. “If an attempt is made to apply the law of a stable society to the atrocities of revolution and war in a world turned topsy-turvy, the

¹²⁶ “Civilization Tries 20 Top Nazis,” *Life*, December 10, 1945, 27.

¹²⁷ Peter De Mendelsohn, “America’s Case at Nuremberg,” *Nation*, December 15, 1945, 652.

narrow frame of law will burst without restoring the desirable order.”¹²⁸ In addition to arguing that the law provided an inadequate tool the IMT’s purpose, Vambery also disputed Jackson’s application of International Law. “Thus far no authoritative attempt has been made, in custom or in general practice, to extend the precepts of international law . . . to cover the condemned and forbidden conduct of individuals.”¹²⁹ Here Vambery pointed out a seemingly glaring error in the legal foundation of the Indictment. Even if the crime of aggressive war could be considered legally legitimate, there is no precedent to apply it to individuals.¹³⁰ As a result, “the jurisdiction of the International Military Tribunal can therefore scarcely be said to rest on a firm basis, since its charter, like all rules of international law, requires their acceptance by the customs of all civilized nations.”¹³¹ These criticisms addressed the heart of Jackson’s arguments in favor of, and hopes for, the Nuremberg trial, and came immediately on the heels of Jackson’s opening address. They provided powerful evidence of the popular media’s immediate willingness to question the core values of the IMT as defined by Jackson.

Criticism About the Politicization of Nuremberg

Many articles questioned the fundamental motivation for the Nuremberg Trial. In the period before and shortly following the start of the Trial, many authors argued that Nuremberg, at its core, represented a political, not a legal project. As early as June 9, 1945, a *Nation* article stated, “We touch on this larger problem [of

¹²⁸ Vambery, “Law and Legalism,” 573.

¹²⁹ Vambery, “Law and Legalism,” 573.

¹³⁰ In effect, Vambery makes the distinction between legal and judicial precedent.

¹³¹ Vambery, “Law and Legalism,” 573.

international intentions] simply because the punishment of war criminals is actually more of a political than a judicial question.”¹³²

The identification of the trial as a political act in turn led to criticism that the Allies, and the U.S. in particular, attempted to mold the law in order to accomplish political ends. “The trial, even in advance, has taken on a curious air of unreality. It is a political act, justified and overdue, wrapped up in an elaboration of judicial procedure that seems to the lay observer somewhat farcical . . . The Nuremberg court is a political court with a political job to perform.”¹³³ Several critics suggested that if the Allies established the IMT and went forward with the Nuremberg Trial in order to accomplish political, rather than legal ends, then the stated goals of the trial appeared manipulative at best. In fact, Nuremberg’s attempt to make legal institutions serve political ends in the international sphere would seem to undermine the moral foundation of the trial so eloquently defended by Jackson in his opening address.

Additionally, Freda Kirchwey argued that the elaborate political “façade” of the Trial in fact obscured its most important purpose.

No honest anti-fascist can regret the punishment of the men responsible for Hitler’s dictatorship and the system of terror and aggression that supported it. But to argue that their punishment was better accomplished by a Nuremberg Trial than by a straightforward political decision misses, I think, the central meaning of the struggle against the fascist drive for power. The trial, in fact, obscured that meaning behind its elaborate façade of legalism.¹³⁴

¹³² “Let’s Finish the War,” *Nation*, June 9, 1945, 635.

¹³³ “War Criminals Facing Trial,” *Nation*, October 27, 1945, 418.

¹³⁴ Freda Kirchwey, “Politics and Justice,” *Nation*, October 12, 1946, 396.

Kirchwey goes on to argue that a straightforward political sentence, like that meted out to Napoleon, would have “avoided the appearance of specious legality”¹³⁵ and vastly simplified the process. In her opinion, however, looking at the trial from a different perspective does much to solve this apparent dilemma. “To one who looks upon the whole trial as essentially an over-elaborate political process, the coincidence of high ideals and questionable law offers fewer difficulties.”¹³⁶

Some articles insisted that the “elaborate façade” of a trial actually granted Nazi perpetrators international legitimacy by allowing them to have a trial. A rather extreme article from the June 9 1945 edition of *The Nation* argued, “We are now in grave risk not only of letting the aggressor go free but of clothing him in white linen and giving him one of the chief seats at the feast.”¹³⁷ The article declared that the Allies had an obligation to kill all of the German General Staff, and that a decision not to do so does much to grant legitimacy to Hitler’s genocidal practices. In other words, the article argued that granting mass murderers the right to sit in a courtroom and defend themselves grants legitimacy to those actions by placing them in an understandable context. The alternative of summary execution would forever identify such action as indefensible, and would thus better serve the world community.

Admittedly, these articles from the *Nation* advocated a rather extreme alternative course of action that circumvented the need a legal trial at all. However, it remained significant that they identified a perceived weakness in the foundation of

¹³⁵ Kirchwey, “Politics and Justice,” 396.

¹³⁶ Kirchwey, “Politics and Justice,” 396.

¹³⁷ “Let’s Finish the War,” 635.

the IMT, and argued that an ultimately political goal for the trial undermined its legal foundation.

Criticism of the Basis For Count Two

Periodical coverage expressed particularly sharply criticism for the first two Counts of the Indictment. Legal scholars and other authors argued that these charges lacked adequate legal foundation, contradicted the democratic legal tradition, and that Jackson failed to adequately define his terms. These powerful objections are particularly significant in light of their relation to the rhetoric of Jackson's opening address.

Jackson clearly articulated that preventing aggressive war represented the ultimate purpose of the Nuremberg trial. That goal, however, remained dependant upon several subsidiary arguments related to the Second Count. First, Jackson argued that there was adequate international legal precedent for establishing the waging of aggressive war as a crime.¹³⁸ Jackson readily conceded, however, that although there was a *legal* precedent for such a charge, the Nuremberg court was breaking new ground by setting a *judicial* precedent that actually indicted individuals for that crime. He supported creating a new precedent by arguing inter-war conventions provided an adequate foundation for Count Two of the Indictment.

Despite Jackson's best rhetorical efforts, however, authors attacked this point mercilessly. Articles argued that Jackson and the IMT relied on specious legal principles when defining aggressive war as a crime. These arguments challenged

¹³⁸ The Kellogg-Brand pact, etc.

Jackson's argument in several ways. First, many pieces denied the existence of adequate judicial tradition for trying individual defendants for the crime of committing aggressive war. A December 1, 1945 article from the *Nation* stated, "We are told that only acts should be punished 'which have been regarded as criminal since the time of Cain.' Many despots tyrants, and dictators have indeed committed atrocities which from time immemorial have been considered crimes. But in no country has the planning or waging of aggressive war ever been tried by a court of law."¹³⁹ This position goes to the core of Jackson's project and attacked the prosecutor's argument by denying the existence of an adequate link between moral and legal tradition, and the creation of Count Two.

This is not to say that Jackson lacked any support, however. The Nuremberg Trial and Aggressive War, a book published by Sheldon Glueck, in 1946, maintained that the perpetrators of wars of aggression could be punished because of their violation of customary international criminal law. Glueck's pioneering work on the prosecution of war criminals, arguing for the inclusion of such a count as early as 1944. However, his 1946 book on that subject received several negative reviews that disagreed with his legal rationale, further demonstrating many journalists' antipathy to Jackson's project.

A review of Glueck's book in the *New Republic* noted that, "But even if the sources gathered by Glueck proved the consensus of civilized opinion as to the criminality of wars of aggression, could this agreement be considered a 'custom'?"¹⁴⁰ In other words, the reviewer argued that even if there were an international consensus

¹³⁹ Vamberg, "Law and Legalism," 573.

¹⁴⁰ Book Reviews, "To the Nuremberg Court," *New Republic*, Aug 26, 1946, 232.

that the waging of aggressive war constituted a crime, such agreement would not necessarily imply the existence of the legal custom upon which to build an indictment. Although directed at Glueck rather than Jackson, this article again demonstrates a critical response to Nuremberg's legal foundation.

Magazine articles focused on Jackson's failure to define "aggressive war" sharply criticized the proceedings. Although Jackson told the court that an attempt at such a definition would "involve the Tribunal in insoluble political difficulties,"¹⁴¹ many commentators viewed this failure as a crucial flaw in Jackson's reasoning. Rustem Vambery articulated scathing criticism in an October 12, 1946 *Nation* article. He wrote, "How aggressive war is to be defined and why it is a crime we are not told in the summary of the judgment prepared 'for the convenience of the press,' which looks more like a textbook of history than a legal document."¹⁴²

Like the book review from the *Nation*, Vambery also addressed his criticism to the arguments of Glueck. Vambery follows his earlier stated arguments with an even more critical statement that criticizes Jackson, Glueck, and the Tribunal in general. "But instead of going to the elementary trouble of formulating a definition of aggressive war, the Nurnberg [sic] court, in the words of Professor Glueck, 'avoided wrangles over definitions and dealt with the challenge—is it a crime to make a war of aggression?' It is strange, considering the possibility of divergent definitions . . . that the Tribunal should have been able to give a correct answer without knowledge of the

¹⁴¹ Jackson, *The Nuremberg Case*, 86.

¹⁴² Rustem Vambery, "The Law of the Tribunal," *Nation*, October 12, 1946, 400.

question.”¹⁴³ Such arguments highlighted what many periodical authors perceive as critical oversights in the prosecution’s effort to support Count Two.

Criticism of the Charges (ex post facto justice)

Many articles articulated criticism of the actual charges against individual defendants. Even granting the legality of Count Two in general, some authors maintained that there was no precedent for applying such a charge to individual defendants. An *Atlantic* article from April of 1946 argued, “The body of growing custom to which reference is made is custom directed at sovereign states, not at individuals. There is no convention upon an individual not to aid in waging an aggressive war.”¹⁴⁴ Even granting Jackson the existence of an international legal custom that permitted the charge of waging aggressive war, this article noted that the IMT must demonstrate a convention that would allow the charging of an individual (rather than a state) with such a crime.

These criticisms of Jackson’s argument in particular, and the actions of the IMT in general, have relevance to another set of critical articles. Establishing the waging of aggressive war as a crime was critical to Jackson’s larger goals for reasons beyond its immediate significance to Count Two. It was additionally critical for Jackson to establish the international legal precedent against aggressive war and fix it during the inter-war period to avoid charges of levying ex post facto justice.¹⁴⁵ In

¹⁴³ Vambéry, “The Law of the Tribunal,” 400.

¹⁴⁴ Charles E. Wyzanski, Jr., “Nuremberg—A fair Trial?: Dangerous Precedent,” *Atlantic*, April 1946, 66.

¹⁴⁵ Charging defendants retroactively with laws created after the acts were committed.

order for the IMT to charge Nazi defendants with both conspiracy to commit aggressive war, and the waging of aggressive war, Jackson had to prove that these acts were crimes in international legal convention before the Nazi rise to power. Otherwise, the levying of such charges against the Nazi defendants would constitute retroactive justice, something prohibited in virtually every law code in the world. In his opening address, Jackson attempted to do just that, but many critics argued strongly that the IMT was, in fact, levying ex post facto justice.

Even before the start of the trial, *The Commonweal* expressed the opinion that Jackson's arguments and the IMT's case rested upon a foundation of specious legality. "Complicated as the matter is, it would seem that if international law is to develop moral weight and binding force the enemy war criminals must be tried for crimes that were crimes at the time they were committed."¹⁴⁶ In December of that year, only weeks after the beginning of the trial, a *Nation* article echoed that sentiment, arguing, "Collective responsibility hinges on the crime against peace, which is 'defined' as planning, preparing, or waging a war of aggression or participating in the planning of such war. We are not told exactly what constitutes an 'aggressive war,' but the facts substantiating this crime are all political and military events that occurred after the foundation of the Nazi party in 1920."¹⁴⁷ This statement encompassed several objections to the charges, taking issue not only with the possibility of ex post facto justice, but also arguing that Jackson did not adequately define aggressive war.

¹⁴⁶ "War Criminal Trials," *The Commonweal*, September 21, 1945, 539.

¹⁴⁷ Vambéry, "Law and Legalism," 573.

In addition, the significance of the ex post facto argument led many in the press to questions about the overall purpose of the trial. A *Commonweal* article from March of 1946 raised doubts about why the Jackson and IMT went to such lengths to establish new law, when already existing laws could have been more than adequate to the task of punishing Nazi offenders. “The twenty men in the dock were legally responsible for crimes punishable by death under the laws of pre-nazi Germany, indeed under the laws of any civilized nation on earth. Why then the elaborate panoply of *ersatz* universality?”¹⁴⁸

Other articles attacked the United States in particular for its apparent hypocrisy. A December 1 article in *The Nation* singles out the ex post facto argument as a point of particular concern. “There are other principles of law and jurisprudence with which the Indictment is at variance, but the violation of nonretroactivity sets the most dangerous example.”¹⁴⁹ That same article also describes the immorality of levying the charge of waging aggressive war against the defendants.

If aggressive war thus far has been no crime, it is certainly desirable that it should be made punishable. Whether the charter has the authority to fill this *lacuna* is doubtful. But such legislation cannot be made retroactive anyway—not only because Article 9 of the Constitution of the United States interdicts ex post facto laws but because all tyrants from Nero to Hitler have used retroactivity . . . But this is exactly what the Indictment is doing.¹⁵⁰

This quote is significant in that it attempted to occupy that moral high ground by arguing in favor of making aggressive war a crime, while at the same time deriding

¹⁴⁸ Percy Winner, “The Atom at Nuremberg: Men’s Safety and man’s Salvation,” *The Commonweal*, March 22, 1946, 566.

¹⁴⁹ Vambery, “Law and Legalism,” 573.

¹⁵⁰ Vambery, “Law and Legalism,” 573.

Jackson and the IMT for their efforts to do so retroactively. In doing so, the author presented the IMT in the same light as Hitler, an ultimate bit of irony.

Criticisms of the IMT surrounding the *ex post facto* issue did not lessen with time. Looking back at the Nuremberg trial in the fall of 1946, a piece from *The Commonweal* again sharply criticized the IMT over that issue. “Nuremberg had style, it was dignified, it looked all right—and also it condemned men for crimes . . . which were not listed in any law books as crimes at the time they were committed, and so it was not all right because we have never thought it all right to condemn anyone on an *ex post facto* law.”¹⁵¹

In fact, periodical criticism of Jackson and the IMT over this issue remained consistent and significant throughout the course of the trial. Despite Jackson’s strident efforts in his opening address to ground the Charges of the Indictment in international legal precedents from the inter-war period, periodical articles strongly and consistently attacked the IMT’s legality, particular criticizing Count Two of the Indictment. These criticisms are even more significant in light of Jackson’s rhetoric. For him, the ultimate purpose of the trial remained closely linked to the acceptance of Count Two. The media, however, refused to accept Jackson’s arguments at face value and remained negative and skeptical throughout the course of the trial.

Charges of Victor’s Justice

Periodical articles levied charged of victor’s justice against the IMT for the duration of the trial. Like criticisms of Count Two, charges of victor’s justice

¹⁵¹ “Our Law War Broken,” *The Commonweal*, October 18, 1946, 5.

responded to several elements of the Nuremberg trial. Journalists argued that any prosecution of war criminals contained flaws because of the inherent immorality of the victor judging the vanquished. Other articles used a *tu quoque* argument to attack the IMT, arguing that the Allies, and particularly the Soviet Union, had no right to prosecute Germans for war crimes in light of their own actions during the war.

Charges of victor's justice again attacked one of the core tenants of Jackson's case, and a point upon which he speaks at length during his opening address. Jackson admitted that the Nuremberg trial must, in some sense, be victor's justice. As he stated, "Either the victors must judge the vanquished or we must leave the defeated to judge themselves."¹⁵² However, Jackson argues that the legal foundation of the trial grounds the principles of the Indictment in impartiality. He related that the Charter represented the wisdom of twenty-one nations, and that the charges of the Indictment form a natural outgrowth of International Law, a body of legal thought greater than any one nation.

Periodical articles, however, demonstrated that the significant elements of the media denied the validity of Jackson's argument, and presented sharp criticism over what they perceived as a major fault of the trial. Vambery provided a passage that quickly goes to the heart of this issue. "Even more contrary to the principles of criminal law and as unprecedented in the non-authoritarian part of the world is the determination of what should be considered a 'crime' by the victors, that is, by the prosecutors, as it appears from the report of Justice Jackson to the President and the

¹⁵² Jackson, *The Case at Nuremberg*, 33.

definition of the ‘crimes’ in the charter.”¹⁵³ Vambery argued that the definition of “crimes” by the victors, who also act as the prosecutors at trial, violates virtually every legal code in the democratic world. His argument encompassed both a legal and a moral element, but unquestionably demonstrated a strong challenge to Jackson’s claim of impartiality and disinterestedness on the part of the U.S. and other prosecuting nations.

Like criticism of Count Two, charges of victor’s justice remained consistent throughout the course of the trial. An April 1946 article in *Atlantic* argued, “Another difficulty is the possible bias of the Tribunal in connection with Count 2. Unlike the crimes in Counts 3 and 4, Count 2 charges a political crime. The crime which is asserted is tried not before a neutral bench, but before the very persons alleged to be victims.”¹⁵⁴ This statement attacked the validity of the proceedings on several counts. Most importantly, it tied the perceived weakness of Count Two to a charge of victor’s justice, at once undermining two distinct elements of the IMT’s project.

Some of the most pointed allegations of victor’s justice came during the latter months of the proceedings. An August 1946 article in the *New Republic* lamented the fact that as long as conflict persists in the world, victor’s justice will haunt the international legal scene.

As long as there is no way of adjudicating international disputes in advance of war, the victor will always judge the vanquished. The weaker party will not only lose the war; he will also be punished for it . . . There will hardly ever be a victor unable or unwilling to describe the vanquished as an aggressor. And, what is worse, there will never be a war leader who will doubt his opponent’s

¹⁵³ Vambery, “Law and Legalism,” 573.

¹⁵⁴ Wyzanski Jr., “Nuremberg—A Fair Trial?,” 66.

readiness to treat him as an aggressor and as a war criminal—*regardless of the way in which he conducted the war.*¹⁵⁵

It is interesting to note that this passage lamented the lack of a way to adjudicate international disputes without resorting to violence, for this is exactly what Jackson argued he is trying to accomplish through the IMT and the Nuremberg trial. Jackson clearly believed that the creation of the IMT and the success of Nuremberg would, combined with the establishment of the United Nations, allow the world community to move into an era exempt from the threat of war. This article echoed other pieces articulating criticisms denying the ability or effectiveness of Nuremberg to serve those ends. Articles that criticized the IMT on the basis of Count Two, or on the basis of victor's justice, undermined the ultimate purpose of the trial.

Charges of Tu Quoque

Articles in the *New Republic* and *The Commonwealth* also attacked Jackson and the IMT through the use of *tu quoque* arguments.¹⁵⁶ Authors utilized charges of *tu quoque* to argue that Allied perpetration of immoral and illegal actions before and during the war deny the legitimacy of Allied prosecutorial action. In other words,

¹⁵⁵ "To the Nuremberg Court," 232.

¹⁵⁶ *Tu quoque* (literally "you too") is a philosophical term that defines a particular line of fallacious argument. A *tu quoque* statement attempts to undermine the weight of a moral argument by accusing the arguer of the same charge that he or she levies against another. At root, a *tu quoque* charge is really a charge of hypocrisy, but the term remains relevant because of its use by periodical authors in their criticisms of Nuremberg.

It should also be noted that in philosophical terms, a *tu quoque* represents an informal logical fallacy, because the immoral actions of one (the accusing) party in no way reduce the moral weight of the actions taken by any other agent.

because the Allied nations also committed war crimes, any attempt by them to try Germans for such crimes represents the pinnacle of hypocrisy.

A the December 24, 1945 edition of *The New Republic*, Waldo Browne asserted, “My own deep doubts and misgivings [about the trial] arise from far more fundamental consideration . . . They are rooted in a conviction that the larger issues of the Nuremberg trial involve not only the guilt of the German people and their leaders but the guilt of the Western democracies as well, and that by its necessary strategy in obscuring this fact, the trial may defeat its own ends.”¹⁵⁷ Although the author did not mention specific acts, it seems clear that this passage was directed at both the political and military actions of the Allied nations before and during the war. Further, it implied that the IMT’s claim of impartiality actually detracts from the legitimacy of the trial by giving the impression that the Allies have covered up their own misdeeds.

Later in that same piece, the author went on to question the entire structure of world civilization. He argued, “The indictment of the German war criminals is also the indictment of a world civilization in which such men could achieve the heights of political power and perpetrate their monstrous deeds undeterred and even unrebuked for so long.”¹⁵⁸ Admittedly, this passage seems extreme, but the sentiment expressed remains legitimate. The author was certainly justified in asserting the apparent hypocrisy present in the Allied nations prosecution of Nazi war criminals.

Tu quoque arguments did not remove the moral or legal impact of Nazi actions, but they did lend a negative context to Jackson’s argument supporting the

¹⁵⁷ Waldo R. Browne, “The Nuremberg Trial,” *New Republic*, December 24, 1945, 871.

¹⁵⁸ Correspondence, “The Nuremberg Trial,” 871.

impartiality of the proceedings. An article in *The Commonweal* from November of 1946 nicely summarized this opinion. “Now the trouble with Mr. Jackson’s attempt to help create such a law [to establish a reign of peace] was from the beginning that it rested upon the assumption that a war-time mirage could be trusted. That is, the court was convened in the belief that the only atrocities were nazi [sic] atrocities, and that the only menace to peace was the nazi [sic] menace.”¹⁵⁹ Passages such as these demonstrated a certain cynicism about the international political structure, but they also provide a powerful criticism of the IMT’s actions, and demonstrate the apparent hypocrisy of Jackson’s rhetoric.

Other articles presented *tu quoque* arguments focused more narrowly on Russian actions during the war. An article in *The Commonweal* expressed dismay about the apparent duplicity of having a Russian sit in judgment of Nazis at Nuremberg. “Against the assets of Nuremberg we must balance the growing suspicion that leaders of one of the judging nations should have been sitting with the nazi [sic] criminals in the prisoners’ dock.”¹⁶⁰ This sentiment is certainly understandable in light of Soviet actions during the Second World War. The eastern front witnessed some of the most brutal fighting of the war, and both the Germans and Russians committed atrocities against soldiers and civilians. These Russian actions served to more severely highlight the apparent hypocrisy of Allied judges sitting in judgment on Nazi defendants. Specifically, the Russian desire to prosecute German defendants for the Katyn massacre in Poland, an act widely thought to have

¹⁵⁹ George N. Shuster, “The Hangings at Nuremberg: The truth was not allowed to emerge,” *Commonweal*, November 15, 1946, 111.

¹⁶⁰ Winner, “The Atom at Nuremberg,” 566.

been perpetrated by the Soviets themselves, lent powerful and credible evidence of Allied duplicity.

The presence of such tu quoque argument in the media, however, did not, and should not have obscured the truth of Nazi responsibility. That same *Commonweal* article stated that “None of this indictment of Soviet Russia’s role [in perpetrating war crimes] serves to change the overwhelming guilt of the nazi [sic] criminals; but it does change the value of the trials themselves.” Although the periodical media sharply criticized the IMT on the basis of tu quoque arguments, those same articles carefully separated the complicity of the Nazi defendants from any Allied hypocrisy. These articles displayed a nuanced understanding of the issues at hand, and carefully separated criticism of the IMT from issues of Nazi responsibility.

Criticism of Count One

Much like Count Two, Count One of the Indictment also drew significant and pointed criticism. Again, this negative coverage attacked a core component of the IMT that had significance to the larger purpose of the Nuremberg trial. Murray Bernays’s idea of holding Nazi organizations (and thus their individual members) responsible for crimes based upon a legal definition of conspiracy provided the initial legal foundation and organizing principle of the IMT. Jackson argued for the importance of “vicarious liability” in his opening address, telling the Court that the principle of individual responsibility formed a key foundational aspect of the prosecution’s case. Jackson went on to tie the legal foundation of the persecution’s case to the law codes of democratic nations. “Every day in the courts of countries

associated with this prosecution, men are convicted of acts that they did not personally commit but for which they were held responsible because of membership in illegal combinations of plans or conspiracies.”¹⁶¹ The IMT’s ability to hold Nazi’s individually responsible for actions committed by “a group plan or conspiracy” represented a central element of Jackson’s case, and although he presented a powerful defense of this legal framework in his opening address, critical responses arose quickly in the popular press.

Articles attacked the Indictment’s utilization of conspiracy on the basis that it assumed members of organizations labeled “criminal” guilty by association. Authors argued stridently that the legal precedent set by Count One violated the most fundamental aspects of justice. A *New Republic* article from November of 1945 stated, “The burden of proof in the case of members of criminal organizations is, it appears not on the prosecution, but on the accused criminal. If accepted, the new concept means a complete reversal of the axiom that a person is assumed innocent until proven guilty.”¹⁶² That same article later referred to the Indictment’s use of conspiracy as “a dangerous doctrine.”¹⁶³

Vambery criticized Count One on a related issue. His December 1, 1945 article argued, “In violation of this fundamental principle [that a society cannot commit crimes] all participants of the conspiracy are being indicted not only for their own acts but for those of other conspirators, no matter whether they know of them or

¹⁶¹ Jackson, *The Case at Nuremberg*, 89.

¹⁶² Eulau, “The Nuremberg War-Crimes Trial,” 625.

¹⁶³ Eulau, “The Nuremberg War-Crimes Trial, 625.

not.¹⁶⁴ Vambery found this charge all the more reprehensible because it embraced all of the other crimes listed in the indictment. By challenging the legitimacy of both the substance of the Count itself, and its extension to all crimes listed in the Indictment, Vambery's article criticized both the nature and the scope of the prosecution's conspiracy charge. In doing so, he presented a serious and well-defined challenge to the legitimacy of the Nuremberg trial.

Later in the same article, Vambery went so far as to imply that Count One smacked of Nazi justice. "To be made responsible for all the war crimes and crimes against humanity specified in Counts III and IV, the knowledge of the aims and the ends of the party, the Gestapo, and the S.A. or S.S. is scarcely sufficient, since to be an accomplice, an accessory, or an abettor to knowledge in each and every case of when, where, and by whom the crime was committed is an irremissible element unless we accept the Hitlerian principle of presuming a future guilt." He argued that a crime is not a crime unless it possesses the combination of a criminal act, and criminal intent. He was particularly concerned here with Count One, and how it related to the responsibility of criminal organizations. He questioned whether "it can be sanely assumed"¹⁶⁵ that members of the Nazi party had knowledge of, and intent for the Holocaust, for example. In other words, the author argued that the IMT's actions ignored a fundamental legal principle in broadly applying a conspiracy charge without adequate proof of the criminal acts, and particularly the criminal intent, of all members.

¹⁶⁴ Vambery, "Law and Legalism," 573.

¹⁶⁵ Vambery, "Law and Legalism," 573.

Criticism of Count One did not diminish with time. An April 1946 article in *Atlantic* presented perhaps the most pointedly critical assessment of Count One, arguing, “To put upon any individual such responsibility for action of the group seems literally to step back in history to a point before the prophet Ezekiel and to reject the more recent religious and democratic teachings that guilt is personal.”¹⁶⁶ As with the *tu quoque* charges and the criticisms of Count Two, periodical articles clearly and consistently attacked a vital aspect of the prosecutions case in spite of Jackson’s best rhetorical efforts to the contrary. These articles present a complex understanding of the legal issues at hand, and do not hesitate to strongly condemn the IMT on a number of counts.

Other Criticisms

Periodical articles challenged the legality of the IMT in other ways as well. *The Nation* published an article shortly after the beginning of the trial that expressed regret about the prosecution’s handling of their case. “It was with pained disappointment . . . that one watched the American prosecutors handle the magnificent documentary evidence in an utterly inadequate, uncomprehending way and throw away unique opportunities to pin certain crimes on certain defendants—mere child’s play—but to teach that great history lesson for which the world was waiting.”¹⁶⁷ This passage did not challenge the core legal principles of the IMT in the way that previously mentioned articles did, but it did express a negative opinion of the trial. The comment about prosecutors’ failure to pin certain crimes on

¹⁶⁶ Wyzanski Jr., “Nuremberg—A Fair Trial?,” 66.

¹⁶⁷ Mendelssohn, “America’s Case at Nuremberg,” 652.

certain defendants was particularly telling, as Jackson hoped that those connections would do much to ameliorate larger concerns about the Indictment.

Other articles expressed cynicism about the entirety of the trial's legal foundation. In the closing remarks of his December 1 1945 article, Vambery argued, "However, no law can be established by violating the elementary principles on which both law and civilization rest. It is not a lawyer's crotchet to insist on these principles. Recklessly to disregard them is to threaten the very foundation of social life."¹⁶⁸ Vambery here challenged Jackson's doctrine that the IMT and the Nuremberg Trial represent a positive revolution in International Law. Jackson argued in his opening address that the IMT broke new judicial ground, but that its principles had precedent and foundation in the legal progressions of the inter-war period. Vambery sharply disagreed with this point, and argued that the reckless creation of new principles violates the very foundational principles of the law, and of society.

These points further highlight the level of criticism levied by the media at the legal foundation of the IMT. Authors consistently attacked both the legal principles underlying the Indictment and the prosecution's case during the trial. This is not to say that the media had nothing positive to say about Nuremberg, but only to point out the intense level of criticism that, in many cases, authors directed at the key points of Jackson's project. As a *Nation* article states, "The lawyers have scored their points. But the world was entitled to expect more from Nuremberg [sic]."¹⁶⁹

¹⁶⁸ Vambery, "Law and Legalism," 573.

¹⁶⁹ Mendelssohn, "America's Case at Nuremberg," 652.

Criticisms Regarding the Legacy of Nuremberg

This last quote foreshadows a final genre of criticism that commentators brought against Nuremberg. In his opening address, Jackson's most powerful rhetoric was reserved for explaining the ultimate purpose of the Nuremberg trial. Jackson expressed hope that the precedent set by Nuremberg would help to prevent aggressive war in the future, and that the legal precedent of the trial would combine with the creation of the United Nations to usher in a new era of international unity and peace. Those hopes for the trial necessitated the inclusion of Count Two in spite of its controversial nature, and Jackson remained focused upon the legacy of Nuremberg throughout the proceedings.

Nuremberg's legacy, however, was the point that seems to have drawn the most sustained and widespread criticism. Articles from numerous publications questioned the legacy of Nuremberg on a variety of counts, and in many cases argued directly in opposition to Jackson's rhetoric. Because the issue of Nuremberg's future impact remained central to Jackson's project, it is telling that this issue drew the most significant, widespread, and long-lasting criticism from the media.

The first of these criticisms once again highlighted the significance of Counts One and Two of the Indictment. Articles from both the *New Republic* and the *Saturday Evening Post* argued that the inclusion of such revolutionary charges in fact undermined the overall effectiveness of the trial. *The New Republic* expressed this concern in the summer of 1946 in an article that stated, "The unwisdom of the new principle that aggressive war is a crime lies exactly in the attitude the principle is

bound to create on the part of the belligerents.” The piece went on to argue that Nuremberg would have been better served had the Indictment been limited to its most convincing charge. Trying Nazi leaders for war crimes and crimes against humanity could have served justice and provided hope for a better future. The inclusion of Counts One and Two, however, detracted from the coherence and legitimacy of the proceedings and had the potential to severely tarnish Nuremberg’s legacy.

Similarly, although separated by more than two years, *A Saturday Evening Post* article argued, “The plain truth is that the prosecution might just as well have relied on existing international law, instead of going all over the place to persuade the peoples of the world that the four judges have manufactured law which wasn’t there.”¹⁷⁰ Simply, both of these articles argued that Jackson in fact undermined Nuremberg’s credibility through the inclusion of charges without a firm basis in international law and jurisprudence. Such arguments missed Jackson’s ultimate point about the purpose of the IMT, but nonetheless represented a powerful critique of the trial.

Other articles argued that Jackson did not clearly distinguish between criminal and legal war. *A Time* article from August of 1946 stated, “The world public would be content to see the Nurnberg [sic] criminals die, but it had not got around to distinguishing between criminal and legal war. Until the world public—or a considerable part of it—did that, Nurnberg [sic] convictions would be a function of

¹⁷⁰ “Will Nuremberg Stop New Aggressors?,” *Saturday Evening Post*, November 2, 1946, 164.

victory rather than law.”¹⁷¹ This article expressed the understandable sentiment that most of the world’s public cared little for legal distinctions in the wake of Nazi aggression and brutality, and instead sought justice through the conviction and execution of war criminals. As the passage indicated, however, in spite of its irrelevance to much of the public, the distinction between legal and illegal war (and a general understanding of that distinction) remained an element vital to Nuremberg’s ultimate success.

In fact, a *Commonweal* article from March of 1946 argued that the failure of the IMT to properly make this distinction resulted in the “failure” of the trial. “The trial failed precisely because it was not a judgment of crime but an attempted public portrayal of guilt.”¹⁷² These passages made it clear that at least certain elements in the media remained skeptical of Jackson’s rhetoric, and expressed significant doubts about possibilities for the trial’s ultimate purpose.

Periodicals also questioned the legal impact of the trial. An April 1946 article from the *Atlantic* argued,

Quite apart from the affect of the Nuremberg trial upon the particular defendants involved, there is the disturbing effect of the trial upon domestic justice here and abroad . . . Our acceptance of *ex post facto* law and group guilt blunt much of our criticism of Nazi law. Indeed our complaisance may mark the beginning of an age of reaction of constitutionalism in particular and of law in general. Have we not forgotten that law is not power, but restraint on power?¹⁷³

¹⁷¹ “Trial By Victory,” *Time*, August 5, 1946, <http://www.time.com/archive/preview/0,10987,777018,00.html>.

¹⁷² Winner, “The Atom at Nuremberg,” 566.

¹⁷³ Wyzanski Jr. “Nuremberg—A Fair Trial?,” 66.

Here the author questioned the impact that Nuremberg will have upon the national and international legal structure. The IMT's creation of new law, and the attempted to use new legal and judicial concepts in order to change the world strikes this author as a dangerous precedent, antithetical to the role of law in civilized society.

Another article suggested that the inherently conservative nature of the law would make it difficult to know if, and when, Nuremberg could have an impact upon the international scene. "It will take, if not centuries, a considerable time to find out whether the Nurnberg [sic] judgment has really set precedent by making the violation of international treaties a crime."¹⁷⁴ In other words, Jackson's hope that Nuremberg will help to prevent aggressive war in the future represented a misinterpretation of the impact of new law. Vambery went on to say, "What really happened at Nurnberg [sic] was a revolution in traditional law and jurisprudence. And since law is essentially conservative, it is hard to foretell whether the 'precedents' will ever really be precedents at all."¹⁷⁵

On a related issue, an October 1946 article in *The New Republic* made the point that Jackson's hopes for the end of aggressive war depend much more upon the creation of the United Nations than upon the success of the IMT and the Nuremberg trial.

The degree of effectiveness of the Nuremberg decision will obviously depend to some extent upon the success of the United Nations. If a court is to punish individuals guilty of aggressive warfare, clearly it is better if a world organization exists to decide who has been guilty of aggression. The hope is, of course, that the success of the United Nations will in the future make the

¹⁷⁴ Vambery, "The Law of the Tribunal," 400.

¹⁷⁵ Vambery, "The Law of the Tribunal," 400.

question academic, by doing away with war in total. But the answer to this is to be found in Paris, In Washington, London, Moscow and at Lake Success—not at Nuremberg.¹⁷⁶

This challenged Jackson’s argument by privileging the importance of the UN over any actions of the IMT. Although the passage did not directly challenge the efficacy of the trial, it did point to skepticism that Nuremberg will accomplish Jackson’s stated goals. In his address, Jackson clearly linked the IMT and the creation of the United Nation, but seemed to privilege the importance of the legal precedent set by the Indictment.

Other articles presented less circumspect opinions about the IMTs potential impact upon the future of the international order. *The Saturday Evening Post* expressed a striking lack of hope that Nuremberg would have any positive impact on the world order “Despite the pious extravagances of some of the commentators, it is difficult to find much ground for hope that the fate of these war criminals will be a lesson to persons having similar ambitions in the future.”¹⁷⁷ Later in that same article, the author stated, “Why talk about what posterity will learn from Nuremberg when we in 1946 have learned so little?”¹⁷⁸.

Other articles expressed similar doubts about the legal ramifications of the trial. In 1946, an *Atlantic* article stated, “The argument that these trials set a firm foundation for a future world legal structure is . . . debatable.”¹⁷⁹ Later that year, an article in *The Commonweal* argued similarly that, “Regardless of the verdict there

¹⁷⁶ “The Results at Nuremberg,” *New Republic*, October 14, 1946, 467.

¹⁷⁷ “Will Nuremberg Stop New Aggressors?,” 164.

¹⁷⁸ “Will Nuremberg Stop New Aggressors?,” 164.

¹⁷⁹ Wyzanski Jr. “Nuremberg—A Fair Trial?,” 66.

will be no regrets for the executed men, but the pretensions of Nuremberg to have pioneered a new era in international law have not been established.”¹⁸⁰

Articles from *The Nation*, *The Commonweal* and *Atlantic* also displayed a striking level of cynicism about Nuremberg’s impact on the postwar European landscape. In a *Nation* article from October of 1946, Vambery argued, “Not that the Tribunal was lacking in wisdom but those statesmen who were so scared by the idea of revolution, which after all is the normal consequence of defeat, that they embarked upon the hopeless task of settling a war and the fascist-Nazi revolution by the application of non-existent legal rules.”¹⁸¹ An *Atlantic* article from April of that year echoed that cynicism about the Allied, and particularly the American, rationale for the IMT. “To regard a trial as a propaganda device is to debase justice.”¹⁸² An article from *The Commonweal* argued that Nuremberg failed in its attempt to reform the European mind. “We cannot escape the consequences. Nuremberg did not leave in the European mind the sort of impression which the spectacle was designed to evoke.”¹⁸³ These articles again highlight the fact that much of the media failed to embrace Jackson’s rhetoric, and remained dubious about the trial’s potential for positive influence in the postwar world.

A final quote from Vambery epitomizes periodical media coverage of the Nuremberg trial. Looking back at the actions of the IMT, Vambery articulated how “the Nurnberg [sic] judgment clearly made an attempt to keep up legal appearances.

¹⁸⁰ Christopher Emmet, “Verdict on Nuremberg,” *The Commonweal*, November 22, 1946, 138.

¹⁸¹ Vambery, “The Law of the Tribunal,” 400.

¹⁸² Wyzanski Jr., “Nuremberg—A Fair Trial?,” 66.

¹⁸³ Shuster, “The Hangings at Nuremberg,” 110.

There was, indeed, nothing wrong with the Nurnberg [sic] trial except its psychological background and its juridical foundation.”¹⁸⁴ This passage provided perhaps the most striking example of the cynicism that a significant portion of the media consistently expressed about the trial. These journalists refused to accept Jackson’s arguments about Nuremberg’s legal foundation, and ultimate purpose of the IMT and the Nuremberg trial. Instead, these authors levied clear and consistent criticism about both the legal foundation, and ultimate effectiveness of the proceedings.

Looking back more than two years after the Nuremberg verdicts, an article in *Time* attempted to describe the larger context of Nuremberg and other war-crime trials in the years following the end of World War II. The article focused on the close of the Tokyo trial, proceedings that received much more international criticism than did Nuremberg, and that ended with three dissenting opinions from the bench. However, the article clearly expressed a strong opinion about the immediate legacy of Nuremberg.

From the outset, the judging nations were not quite sure what rights they had over the accused, or under what laws the conduct of the accused should be judged. The hope was that these questions would become clear as the trials unfolded. Nurnberg [sic], at first, seemed to bear out this hope . . . After three years of war trials, however, the world is no farther along than it was in 1945 to an understanding of whether these proceedings represent justice or victor’s vengeance—of whether or not the chalice is poisoned.¹⁸⁵

This passage displays the full spectrum of feeling about Nuremberg, from the initial high hopes that the trial might indeed change the world, to the ultimately ambiguous

¹⁸⁴ Vambery, “The Law of the Tribunal,” 400.

¹⁸⁵ “For Posterity,” *Time*, December 20, 1948, <http://www.time.com/archive/preview/0,10987,799528,00.html>.

legacy of those proceedings. Unfortunately, this article, like so many others, ultimately leaves the reader with the feeling that, in the end, Nuremberg failed to live up to its ideals, and that the world should have expected more.

Chapter 3—A Contemporary Perspective

Understanding the details and scope of media criticisms of Nuremberg seems especially relevant in light of U.S. goals for the international future. The continuing move toward a “global community” and the increasing prevalence of conflict, particularly in the Third World, makes Nuremberg more relevant now than at any point since the trial itself. UN efforts to create an International Criminal Court, and attempts to try Slobodan Milosevic and Saddam Hussein for their actions during conflicts in Bosnia and Iraq are only the most visible examples of the international community attempting put the legacy of Nuremberg to work.

These contemporary issues only heighten the need for further study of Nuremberg, and in particular, its popular legacy in the U.S. As this paper demonstrates, the popular press contained a range of articles offering a powerful and sustained outcry against the trial, something that has been consistently absent from discussions of the trial in intervening years, and remains virtually nonexistent in historical writings on the subject. In fact, American memory has defined Nuremberg as a positive good, focusing on the trials punishment of those responsible for the Holocaust and invoking the trial as a foundation for the creation of the International Criminal Court. Those perceptions, however, ignore both media criticism of the trial, and the ultimate purpose of the trial for Jackson and the U.S. government. In light of these historical (mis)perceptions and Nuremberg’s contemporary relevance, the subject cries out for further study.

Even more surprising, the ambiguous legacy of Nuremberg in the periodical media did not disappear with lagging public interest in the late 1940s. More than 50

years after the end of the Nuremberg war crimes trial, elements of the periodical media continued to discuss those proceedings. An article in the May 15, 1995 edition of *The Nation*, entitled, “From Nuremberg to Bosnia,” presented an intriguing postscript to similar coverage from 50 years before. Interestingly, like the articles described above, this 1995 article offered the hope generated by the judicial precedent set at Nuremberg, and also criticized the trial on many significant counts. Finally, the article placed Nuremberg’s legacy in context, ironically expressing many of the same sentiments as did articles from the latter half of the 1940s.

The author, Tina Rosenberg, began by praising the Nuremberg trial, stating that its legacy has been “meaningful beyond the borders of nostalgia.”¹⁸⁶ Rosenberg argued that “Nuremberg gave legitimacy to the concept that the world has something to say about how governments treat their own citizens.”¹⁸⁷ ¹⁸⁸ She cited the UN establishment of the seven “Nuremberg principles” and the (then) new international tribunal to judge war crimes in Rwanda and the former Yugoslavia as concrete examples of Nuremberg’s positive impact.

However, Rosenberg remained critical of the legal foundation of the IMT. In reference to Count Two of the Indictment, she argued, “This, of course, was ex post facto justice . . . It was also victor’s justice.”¹⁸⁹ For Rosenberg, these points do detract from the impact of the Nuremberg precedent, but she contextualizes these criticisms, stating, “Yet if the Nuremberg trials stretched the existing ideas of law, it was to

¹⁸⁶ Tina Rosenberg, “From Nuremberg to Bosnia,” *Nation*, May 15, 1995, 689.

¹⁸⁷ Rosenberg, “From Nuremberg to Bosnia,” 689.

¹⁸⁸ Note here the significance that Rosenberg places on Nuremberg’s response to the Holocaust, upholding recent perceptions about the trials central focus.

¹⁸⁹ Rosenberg, “From Nuremberg to Bosnia,” 689.

prosecute men who had stretched existing ideas of state criminality.”¹⁹⁰ She went on to discuss *tu quoque* arguments against the trial, and while she granted their legitimacy, she again describes Allied actions in the context of German brutality during the war.

Rosenberg’s most interesting points, however, concerned the legacy of Nuremberg in the international sphere. Here she displayed less confidence in the impact of the trial, stating that contemporary international law had “as much weight as U.S. [law] would carry if there were no police or courts.”¹⁹¹ She went on to critique the development of international law since Nuremberg as “zigzags between the extremes of impunity and victor’s justice.”¹⁹² These statements mirror the cynicism expressed 50 years earlier by critics of Nuremberg, and point to Nuremberg’s extremely ambiguous legacy.

Although Rosenberg only represents a single viewpoint, it is interesting to note that her article expressed many of the same themes as did articles covering the trial in 1945 and 1946. Rosenberg appeared willing to give the IMT the benefit of the doubt concerning the legal foundation of the trial, her discussion of Nuremberg’s legacy in international law seems to confirm the doubts expressed by many earlier critics. Rosenberg closed her article with the hope that an international criminal court would soon be established, a desire that would not have seemed out of place in December of 1946.

¹⁹⁰ Rosenberg, “From Nuremberg to Bosnia,” 689.

¹⁹¹ Rosenberg, “From Nuremberg to Bosnia,” 689.

¹⁹² Rosenberg, “From Nuremberg to Bosnia,” 689.

Today, the U.S. and the UN appear to be using Nuremberg as the basis for international policy, with hopes of bringing war criminals to justice, and punishing acts of genocide around the globe. Despite opposition from the Bush administration, the international community and powerful elements in the United States continue to point to Nuremberg as the most significant positive development in international law in the last half-century. In her book, *A Problem From Hell: America In the Age of Genocide*, Samantha Power speaks of the powerful and positive influence the memory of Nuremberg had on the decision to create an International Criminal Court at The Hague in the early 90's. She writes that "the memory of Nuremberg helped to sweeten allied and UN officials."¹⁹³ Power holds up the positive memory of Nuremberg in order to demonstrate its power in the contemporary world. Before we invoke Nuremberg, however, we should be certain of its legacy.

¹⁹³ Samantha Power, *"A Problem From Hell": America and the Age of Genocide* (New York: Harper Perennial, 2002), 484.

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