

ROBERT H. JACKSON, "OPENING STATEMENT AT THE INTERNATIONAL MILITARY TRIBUNAL"
NUREMBURG, GERMANY (21 November 1945)

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Abstract: On November 21, 1945, U.S. Justice Robert H. Jackson commenced the International Military Tribunal (IMT) in Nuremberg, Germany with his opening statement. This essay examines the rhetorical strategies Jackson deployed to establish the legitimacy of the IMT. Jackson's opening statement defended the IMT against numerous threats to its legitimacy while simultaneously showcasing the plasticity of the Tribunal's political and legal foundations. Although Jackson minimized the political dimensions of the trial in his opening statement, his speech participates in ongoing debates about the relationship between international courts and international politics.

Key Words: Robert H. Jackson, International Military Tribunal, Nuremberg, Legal Rhetoric, World War II

After nearly six years of combat, involving more than 50 countries, 100 million men, and "one trillion dollars of the planet's wealth,"¹ peace finally came to Europe in May 1945. Although the prospect of peace at the end of World War II brought much jubilation, many countries were decimated. According to the Library of Congress, more than "60 million people had perished, tens of millions were uprooted from their homes, [and] hundreds of millions more were wounded physically and emotionally."² Many sites across Europe were reduced to rubble.³ Though its landscape was not as physically devastated as its Allied counterparts (apart from Pearl Harbor),⁴ the United States still faced a complicated and precarious future because of its leadership role in the recovery efforts.⁵ The United States had captured a number of former Axis leaders.⁶ Even though Adolf Hitler and Joseph Goebbels, two of the highest-ranking Nazi authorities had taken their own lives,⁷ the Allied powers disagreed over how to handle the fate of other Nazi leaders.⁸

Proposals for how to bring the accused to justice coalesced around a general sense of "accountability."⁹ Demands for some form of legal redress began to circulate well before the war's conclusion,¹⁰ and efforts to form an International Military Tribunal (IMT or Tribunal) as a vehicle for determining responsibility and retribution followed quickly at war's end. President Harry S Truman chose Supreme Court Justice Robert H. Jackson to serve "as the U.S. representative" in the deliberations over the IMT and chief counsel in the resulting trial in May of 1945.¹¹ In just over a month, Jackson released a report to Truman that contained the first sketch of the trial's parameters.¹² By late summer, the four nations to compose the IMT—the United States, the United Kingdom, France, and the Soviet Union—became signatories to the Agreement of London. The agreement created the charter that defined the crimes to be prosecuted and established the procedures for the trial.¹³ The Tribunal received the indictment

on October 18, 1945,¹⁴ and on November 21, 1945, Justice Jackson commenced the IMT with his opening statement.

The choice of a trial as the vehicle for determining "accountability" speaks to the legal system's capacity "to make comprehensible the incomprehensible."¹⁵ According to Robert Hariman, a "trial is a well-known social practice which can be relied upon whenever events extend beyond prior community prescriptions."¹⁶ Far from merely answering "who done it" questions, Jonathan Mahler notes that courtrooms function as spaces for rehearsing the boundary lines for (im)permissible acts, offering a "reaffirmation" of communal beliefs about "what is right and . . . wrong."¹⁷ And, as Donald Bloxham suggests, the value of such legal exercises may rest ultimately in their capacity to provide a "reassuring" structure to public life.¹⁸ Put simply, through the IMT and subsequent Nuremberg Trials,¹⁹ the Allied powers—and more specifically, the United States—had an opportunity to recreate order from the disorder of World War II.²⁰

Of course, in attempting to create "order" at Nuremberg, the Allied powers were constructing narratives and favoring some ideologies or belief systems over others. As Marouf Hasian explains, the IMT, like all trials, was "an inherently rhetorical exercise, necessarily selective, partial, and interested."²¹ By showcasing the complex and contentious process through which trial participants and critics voiced their conceptions of post-Holocaust justice, Hasian counters trends to "ossify the Nuremberg legacy" through "totalizing legal commentaries."²² Hasian accordingly calls on "critics [to] pay attention to the rhetorical origins and processes" from which these legal discourses emanated in order to preserve the messiness and uncertainty marking the political and legal situation.²³

This analysis responds to Hasian's call by attending to the rhetorical strategies Robert H. Jackson used to legitimate the trial at Nuremberg in his opening statement at the IMT.²⁴ Because of the high levels of skepticism surrounding the Tribunal,²⁵ Jackson faced a substantive rhetorical challenge in penning the opening statement: Jackson had to establish the authority and impartiality of the IMT *even as* trial participants were acting in "partial, and [politically] interested" ways.²⁶ In what follows, I examine how Jackson responded to this challenge by leveraging the equivocalness of the political and legal situation to legitimate the IMT and vest authority in the Tribunal at the start of the trial.²⁷ Ultimately, I contend that Jackson's opening statement confronted threats to the IMT's legitimacy while simultaneously demonstrating the plasticity of the Tribunal's legal foundation.²⁸ Jackson's statement contained a defense of both the Tribunal's structure and the law itself. His defense of the IMT's structure rested upon three grounds: the trial's global scope, the Axis powers' depravity, and transcendent legal principles. Jackson's defense of the law was predicated on its presumed neutrality and purity. By listing multiple, competing grounds, Jackson's defense of the IMT illuminates the pliability of the Tribunal's legal and political underpinnings even as his opening statement operated to solidify its credibility. Jackson worked to diminish the controversies surrounding the trial's creation and to minimize the political implications of its verdicts. Yet, far from muting the politics of the IMT, Jackson's opening statement offers rich insight into the diverse ways in which legal rhetorics participate in international politics.

Nuremberg as a Rhetorical Process

For a number of reasons, the IMT is unique among popular trials.²⁹ It was a “ joint undertaking of four nations with widely different concepts and traditions of legal procedure.”³⁰ The system of law governing the IMT was a hybrid of Anglo (British and American) and Continental (European) legal practices,³¹ and the trials unfolded simultaneously in four different languages (English, French, German, and Russian).³² The trial also had an element of spectacle: “[n]ever before had so many journalists gathered to report on a single event.”³³ Perhaps because of these anomalies, the IMT attracted enhanced scrutiny.³⁴ Such scrutiny created challenges to the legitimacy of the court, adding to the layers of rhetoricity surrounding the legal proceedings.

A rhetorical analysis of the IMT requires reconfiguring common conceptions of the link between rhetoric and law.³⁵ As Trevor Parry-Giles argues, “[s]ystems of law and legal practice are decidedly rhetorical.”³⁶ Hariman identifies three ways in which trials are rhetorical: The courtroom functions as a space for public speaking, the trial serves as a form of persuasive evidence, and acts of legal adjudication “are composed of powerful persuasive techniques,” making trials “thoroughly rhetorical” in nature and meriting a rhetorical approach to their analysis.³⁷ The fruits of such research, Hariman contends, include the “discover[y] [of] rich materials for understanding the texture of a society's public life.”³⁸

As rhetorical artifacts, trials are byproducts of specific historical and political contexts.³⁹ In turn, trials can be treated as ideological negotiations invariably reflecting existing beliefs.⁴⁰ As Hasian stresses, if laws are “not persuasive or ideologically potent, they lose their salience and resonance and are left in the dustbins of history.”⁴¹ In other words, legal proceedings must harness prevailing ideological currents if they are to have any credibility.

Not only do trials bear the imprints of the historical and political circumstances from which they emanate,⁴² they also function as “form[s] of political action.”⁴³ Regarding international law more specifically, Gerry Simpson perceives international law as a form of “juridified diplomacy” that “conducts politics in a different key.”⁴⁴ According to Simpson, war crimes trials (such as Nuremberg) showcase how legal processes become conduits for international politics.⁴⁵ Despite the preferences of some lawyers and jurists to “pretend that politics is alien to the pursuit of justice,” William Schabas decries the naiveté of treating politics “as a vile taint to be shunned rather than one that is to be mastered and understood.”⁴⁶ If, as Parry-Giles asserts, law is “decidedly rhetorical,” then, as Hasian and others have concluded, it is also “inherently political” and “ideological.”⁴⁷

Controversies over a trial's legitimacy and authority provide a rich site for attending to the ideologies or belief systems that undergird legal practices. As many scholars have emphasized, international courts, including tribunals and the International Criminal Court, often face challenges in establishing their authority and legitimacy.⁴⁸ These struggles arise in part because these courts do not operate within the established conventions of any singular state's government.⁴⁹ In Lawrence Douglas's words, such courts become “burdened with the task of demonstrating the justice of its own process.”⁵⁰ Sofia Stolk notes that opening statements provide trial actors with an ideal venue for enhancing perceptions of legitimacy given Kathryn Holmes Snedaker's assertion that an “opening statement often addresses the broader questions of the nature of society and the social order.”⁵¹ Stolk analyzed Jackson's statement

and other prosecutors' opening statements in international trials to demonstrate how history functions as "a legitimizing move."⁵² Stolk's work contributes to a larger chorus of voices examining the ideologies and politics that inform trials and tribunals, including the IMT.⁵³

Jackson's opening statement reveals his efforts to cast the IMT as a valid use of law rather than an arm of postwar politics.⁵⁴ The opening statement contained a robust defense of the Tribunal,⁵⁵ engaging with obstacles to the IMT's perceived credibility while illustrating the pliable nature of the legal and political situation. Jackson upheld the IMT's structure by emphasizing the trial's global scope, Axis villainy, and transcendent legal principles. He offered an idealistic defense of the law by emphasizing the neutrality and purity of the law practiced at the IMT. By accentuating these facets of the trial, Jackson engaged with the politics surrounding the trial's formation while minimizing the Tribunal's role as a political actor.⁵⁶ To more fully appreciate Jackson's defense of the IMT, this essay first considers "the very political-historical circumstances" surrounding the Tribunal,⁵⁷ extending from Jackson's background to the international negotiations that shaped the face of the trial. I then analyze Jackson's rhetorical strategies in legitimating the IMT. I conclude with an assessment of the statement's lingering rhetorical and political implications for international politics and legal proceedings.

"[A]n American story like few others"⁵⁸: Jackson's Path to Nuremberg

Truman's appointment of Robert Jackson helped lend credibility to the legal proceedings at Nuremberg. Heralded as "America's Advocate" by his biographer,⁵⁹ Jackson was an ideal figure to represent the U.S. government at the trial. Norman Birkett, one of the alternate judges for the Tribunal,⁶⁰ described Jackson as "a most distinguished son of the United States of America."⁶¹ Jackson's contemporaries regarded him highly as a gifted public speaker,⁶² "an idealist,"⁶³ and an emblem of American meritocracy, noting his ascent from "humble origins ... [to] exalted destinations."⁶⁴

Jackson possessed a passion for advocacy that sustained his work from private practice in Jamestown, New York, to the start of the Nuremberg Trials. Born in 1892 to William Eldred Jackson and Angelina Houghwout Jackson,⁶⁵ Robert Jackson developed an interest in law at an early age.⁶⁶ Jackson pursued a legal education through a combination of apprenticeship and coursework at Albany Law School without going to college.⁶⁷ After passing the state bar,⁶⁸ he went into private practice in New York, where he made an auspicious connection with a State Senator from Dutchess County, a man known then as "Frank" Roosevelt.⁶⁹ This early introduction would prove to be the font of what John Barrett calls "an important personal friendship and a momentous political relationship."⁷⁰ In 1934, Jackson left New York for Washington, D.C. to serve as "General Counsel of the Bureau of Internal Revenue."⁷¹ From this position, Jackson quickly rose through the ranks, with stints as both U.S. Solicitor General and the U.S. Attorney General. As Jackson's star rose, his name was floated for a variety of prominent political positions until his appointment to the Supreme Court on July 11, 1941.⁷²

Although Jackson's time on the Court afforded him the opportunity to participate in substantive cases on issues ranging from Japanese internment to segregation,⁷³ some scholars speculate that he sought to use Nuremberg as a vehicle to leave the Court.⁷⁴ Jackson faced fraying relationships with some of the other Justices, most notably Justice Hugo Black.⁷⁵ Jackson believed Black acted in politically motivated ways and that his behavior on the bench

threatened the Court's impartiality.⁷⁶ Far from alleviating any relationship frictions, Jackson's departure for Nuremberg created a host of additional complications for the Court (left to do its work without one Justice),⁷⁷ and Jackson's relationship with Justice Black, in particular, worsened.⁷⁸ Tensions between the two culminated in a public dispute in 1946 with Jackson detailing his grievances with Black in a released statement, an act that damaged Jackson's personal reputation and public perceptions of the Supreme Court.⁷⁹ Despite talk of Jackson resigning from the Court,⁸⁰ he eventually returned and served as a Justice until his death in 1954.⁸¹

Given his illustrious career, prestigious appointments, and position on the Supreme Court, Jackson was an ideal representative for the U.S. government at the trial. The symbolism of assigning a Supreme Court Justice to the trials infused the IMT with a certain gravitas. Barrett argues that Jackson's selection as chief prosecutor inspired the other prosecuting nations "to appoint counterpart chief counsel of capability, high rank and sufficient authority to represent their nations."⁸² In other words, Jackson's professional credibility, rhetorical skill, and public stature signaled the U.S. government's commitment to the trial.

Political and Legal Contexts: Courting Public Opinion and Examining Legal Precedent

Although the selection of Jackson may have bolstered the credibility of the IMT, the prosecution faced other obstacles arising from postwar public opinion and the nebulous legal basis for the trial. Support for the trial was far from universal in the wake of the war, and substantive questions existed regarding legal precedent and the appropriate scope of international law.⁸³ Moreover, a failed attempt to use the law to seek justice after World War I exacerbated public skepticism of the proposed Tribunal after World War II.

For many members of the public, demands for "accountability" mostly translated into a desire for immediate and fairly indiscriminate executions.⁸⁴ In his study of U.S. public opinion on the trials, William Bosch writes, "[n]o judicial frills were desired" as American audiences preferred the finality of executions.⁸⁵ Gordon Dean was a colleague of Jackson's at Nuremberg who was responsible for media and public relations. He noted the appeal of executing the perpetrators, observing that simply killing the Nazi "war criminals" would allow U.S. audiences to "wash our hands and write 'finis' to the whole bloody chapter. We could go back to peaceful pursuits—and forget it all."⁸⁶ However, Dean stressed "this fear that we might 'forget it all'" provided a reason for the trial, motivating "some to urge that the guilt of the German leaders should be carefully documented; indeed, documented so painstakingly and with such clarity that the world could never forget."⁸⁷ Mass executions would not satisfy the appetite for documenting and remembering the atrocities. Thus, other avenues for meting out punishment were given serious consideration.

The idea that individuals could be subject to sanctions beyond their own nation's jurisdiction did not originate with the formation of the IMT.⁸⁸ As Whitney Harris explains, international law emerged from the principles of common law, which presumed the existence of higher principles for right and wrong.⁸⁹ Under common law, "[w]rongs became crimes when the community undertook to try and to punish the offender."⁹⁰ However, complications arose in the process of law-making when that "community" was no longer a single nation-state such as Germany or the United States.⁹¹ Harris emphasizes, "[a] common international law of crimes

has grown up in response to the 'felt necessities' of the world community," although its "progress from ill-defined custom to law" has been far from smooth or straightforward.⁹²

The justification for the Nuremberg Trials rested upon a similar logic, offering a juridical mode for addressing "the 'felt necessities' of the world community."⁹³ Although Nuremberg represented "the first time in history, [when] men who had abused power were held to answer in a court of law for crimes committed in the name of war," this trial "was grounded in the common law of nations."⁹⁴ Previous international agreements had identified norms that governments were obliged to follow (for example, the 1899 Hague Convention established standards for conduct in warfare, the 1864, 1906, and 1929 Geneva conventions created a series of protections, and the 1928 Kellogg-Briand Pact "renounce[d] war as an instrument of national policy"⁹⁵).⁹⁶ These agreements provided legal touchstones for adjudicating the criminality of warfare. From this body of international common law and preceding international agreements, those advocating for the legitimacy of the IMT were able to cite past precedent for their actions while simultaneously establishing future precedent for international criminal prosecution.

Perhaps the most important antecedent for the Nuremberg Trials was the Allied nations' experience with the Leipzig Court after World War I. In the aftermath of World War I, the Allied nations also turned to the legal system to hold the defeated responsible for their crimes.⁹⁷ Brian Feltman explains that "the Allied victors compiled a roster of Germans they believed to be guilty of war crimes," but agreed to let Germany handle the affair within their national legal system.⁹⁸ Turning the trials over to the Germans proved to be a misstep: 888 of the 901 men tried were cleared of charges,⁹⁹ and "[h]igh-ranking officials, the kaiser [sic] included, found shelter in neutral countries and were never forced to accept responsibility for their actions."¹⁰⁰ The Leipzig Court was viewed by many as a "farce,"¹⁰¹ and an embarrassing "mockery"¹⁰² of the legal system's capacity to respond to war. Given the Leipzig Court's failure, efforts to bring "war criminals" to justice after the Second World War proceeded in a dramatically different fashion.¹⁰³

Nuremberg at the Trial's Open

In November 1945, Nuremberg was a devastated city.¹⁰⁴ The location of the trial, the Palace of Justice, needed extensive repairs before the trial due to the damage the building suffered during the war.¹⁰⁵ Jackson's biographer, Eugene Gerhart, describes the scene: Amid "the rubble of bomb-shattered buildings," "the Palace of Justice itself showed where an [A]llied bomb went from roof to cellar, leaving concrete floors two feet thick hanging like wisps of paper on ribbons of twisted steel."¹⁰⁶ The security situation in Nuremberg was also tenuous at best. "Sentries were everywhere,"¹⁰⁷ and "[s]ecurity was the watchword."¹⁰⁸ Upon his arrival, Jackson was provided with a personal security guard to ensure his safety.¹⁰⁹

While the city's scars were evident, vestiges of the prosecution's in-fighting were likely more hidden from public view.¹¹⁰ Within the American contingent, Jackson had provoked the contempt of his colleague, Francis Biddle, by blocking Biddle's ascent to the presidency of the Tribunal and instead placing the British Lord, Geoffrey Lawrence, in the top position to prevent the trial from appearing too dominated by Americans.¹¹¹ The other American judge, John J. Parker, was equally challenging as a colleague; according to Conot, he complained about the "modest" seats for alternative judges and longed to return to the United States.¹¹²

The American team also continually found itself at odds with its European allies. Jackson complained about the "lack of preparation and progress" on the part of the French and Soviet contingents, and he found working with the Soviets particularly vexing.¹¹³ From the Soviets' readiness to toast to the defendants' deaths before the trial even began,¹¹⁴ to Stalin's order to Soviet judges to seek the death penalty for the accused uniformly,¹¹⁵ Soviet conduct was often out of sync with American expectations for comportment at the Tribunal.¹¹⁶ Still, the American team was willing to overlook many Soviet transgressions because the IMT was "understood as a last act of the Allied coalition."¹¹⁷ As Michael Marrus has argued, the Americans "were not blind, but they preferred not to scrutinize their Soviet interlocutors too closely."¹¹⁸

In this atmosphere of internal strife and external suspicion, Justice Jackson delivered the opening statement on November 21, 1945. Jackson's statement, which consisted of roughly 21,000 words and "consumed almost an entire day,"¹¹⁹ painted a picture of Nazi aggression as an epic struggle between the forces of good and evil while presenting and explaining the four counts—"Crimes against Peace," "War Crimes," "Crimes against Humanity," and a "Common Plan or Conspiracy to commit those Crimes"¹²⁰—to be prosecuted during the trial. Although many praised the speech,¹²¹ questions regarding the court's legitimacy lingered.

International Precedent or Embarrassment: Jackson on Legitimacy

The rhetorical challenge in Jackson's opening statement was to portray Nuremberg as a powerful, objective, and valid legal institution while erasing all evidence of politicking, compromise, and legal invention.¹²² Thus, Jackson utilized his opening statement to respond to critiques of the Tribunal, including specific charges regarding the IMT's composition and broader fears about the Tribunal's degradation of the law. Jackson's defense of the Tribunal's structure rested on three distinct grounds: The Tribunal's global scope, the Axis powers' depravity, and the IMT's transcendent legal principles. His defense of the law was rooted in idealistic beliefs about the law's neutrality and purity. By shifting among these various lines of defense, Jackson's opening statement illuminated the pliability of the IMT's political and legal foundations, even as Jackson affirmed the Tribunal's legitimacy.

Defending the Tribunal's Structure

Critics of the IMT provided multiple reasons to support claims that the trial was unfair.¹²³ Michael Bazylar foregrounds three charges: (1) victors' justice, (2) *tu quoque* ("you did it too"¹²⁴), and (3) *ex post facto* ("after the fact"¹²⁵) law.¹²⁶ First, critics claimed the trials were acts of Allied vengeance because the victors headed the prosecution.¹²⁷ Second, both sides had blood on their hands, blurring the lines between "victor" and "vanquished" and leading to charges of *tu quoque*.¹²⁸ Put simply, IMT opponents pointed out the hypocrisy of holding Axis powers accountable for "war crimes" while neglecting the atrocities Allied powers committed during the war.¹²⁹ Third, critics issued charges of *ex post facto* law because the 1945 Agreement of London defined the criminal charges after they were committed.¹³⁰ Despite the precedents described earlier in this essay, suspicion percolated: Could victorious nations simply redraw international law to avenge their foes at the close of each war?¹³¹

Today, these areas of contention serve as fruitful grounds for debating the legacy of Nuremberg; however, in the context of the mid-1940s, critiques like the above posed potentially serious obstacles for Jackson.¹³² If he could not curb public suspicions, the validity

and authority of the trial might be jeopardized. Thus, early in his address, Jackson ceded some credence to anxieties concerning the trial's validity.¹³³ Jackson brought fears of illegitimacy to the fore, acknowledging the "certain difficulties which may leave their mark on this case" (7).¹³⁴ Many of these difficulties derived from a lack of precedent, as "[n]ever before in legal history ha[d] an effort been made to bring within the scope of a single litigation the developments of a decade, covering a whole Continent, involving a score of nations, countless individuals, and innumerable events" (7). Yet Jackson made clear that, "[d]espite the magnitude of the task, the world has demanded immediate action. This demand has had to be met, though perhaps at the cost of finished craftsmanship" (7). This early, frank admission of the grounds for doubt caused by the novelty of the trial created the space for Jackson to openly acknowledge critiques, including victors' justice, *tu quoque*, and *ex post facto* law.

To counter such charges in his opening statement, Jackson provided multiple justifications for the trial based on its global scope, Axis villainy, and legal principles. In response to cries of "victors' justice," Jackson offered a defense premised in the global nature of the Tribunal. Jackson (1) stressed the protections afforded by global surveillance of the IMT, (2) reframed the prosecuting nations to encompass many global actors, and (3) argued that the global character of the crimes left no other options for the Tribunal's structure.¹³⁵ Jackson conceded that charges of "victors' justice" loomed; yet, he transformed those grounds for criticism into assurances of the trial's fairness and validity. Jackson held, for example, that the "dramatic disparity between the circumstances of the accusers and of the accused that might discredit our work if we should falter, in even minor matters," actually functioned to ensure the trial remained "fair and temperate" (8). Jackson used the fact that the world's eye was turned on the trial as an asset, recasting global scrutiny as a safeguard for the defendants.

Jackson also refashioned the prosecution to include more global actors. Though the trial was overseen by "four of the most mighty of nations," Jackson argued that these nations possessed "the support of 15 more" (3).¹³⁶ The support of these "[o]ther nations," Jackson claimed, legitimized the work of the IMT, as they espoused "diverse but highly respected systems of jurisprudence" (148). To reinforce the point, Jackson listed off those nations: "Belgium, The Netherlands, Denmark, Norway, Czechoslovakia, Luxembourg, Poland, Greece, Yugoslavia, Ethiopia, Australia, Haiti, Honduras, Panama, and New Zealand" (148).¹³⁷ Jackson thus concluded that the judgments at Nuremberg really "represent[ed] the wisdom, sense of justice, and the will of 19 governments, representing an overwhelming majority of all civilized people" (148). This rhetorical maneuver enabled Jackson to claim the endorsement and support of countries with no physical presence on the bench.

As a final means of responding to the charge of victors' justice, Jackson grounded his argument in the global nature of the crimes and the failure of past responses.¹³⁸ In doing so, he reminded audiences that the IMT was a legal necessity in light of the inadequacy of the trial following WWI. The Allied powers, Jackson urged, "must be" responsible for "both prosecution and judgment," as the "worldwide scope of the aggressions carried out by these men has left but few real neutrals" (9).¹³⁹ In the absence of a neutral third party, Jackson concluded, "[e]ither the victors must judge the vanquished or we must leave the defeated to judge themselves" (9). In an oblique reference to the Leipzig Court, Jackson remarked: "After the First World War, we learned the futility of the latter course" (9).¹⁴⁰ Jackson reasoned that even without the support of the 15 other nations, the trial still would be fair and necessary because

it prevented a legal mockery like the Leipzig trial. Jackson thus countered victors' justice charges by emphasizing the global nature of the Tribunal.

Jackson used a slightly different approach to defend against charges of *tu quoque* by accentuating the turpitude of the Axis powers.¹⁴¹ Because charges of *tu quoque* are based on a logic of equation, Jackson marked Axis behavior as distinct by stressing differences in moral character.¹⁴² Undeniably, Allied powers had also murdered and ransacked innocents during the war, but Jackson drew stark lines between Allied and Axis actions.¹⁴³ For example, both Allied and Axis powers had launched massive propaganda campaigns to bolster support for their causes in the years preceding and during the Second World War. Yet, Jackson charged that Axis propaganda was "on a scale never before known" (105). Though Americans were no strangers to mass fervor, Jackson held that, unlike the German ability to tolerate "a permanent enthusiasm and abandon...we democratic peoples can work up only for a few days before a general election" (105). Accordingly, Jackson established fine lines between the fascistic character of the German state and nations committed to democracy.

Jackson also emphasized Axis villainy as he addressed looting. He acknowledged: "[w]e do not need to be hypocritical about this business of looting. I recognize that no army moves through occupied territory without some pilfering as it goes" (139). But, again, German looting occurred "on an unprecedented scale" (139). The "looting" by German soldiers "was not due to lack of discipline or to the ordinary weaknesses of human nature;" rather, the "German organized plundering, planned it, disciplined it, and made it official just as he organized everything else" (140). According to Jackson, any looting by the Allies reflected only natural human "weakness." Looting by the Germans, on the other hand, was organized and premeditated. Such claims fixed the German character as insidious, depraved, and altogether contrary to that of the Allies. Jackson stressed Axis turpitude to attenuate the potency of *tu quoque* charges.

Jackson used a different set of grounds to respond to charges of *ex post facto* law by emphasizing legal principles. He first questioned the validity of the *ex post facto* charge and then defended the structure of the court through legal theory and precepts.¹⁴⁴ Jackson attempted to stymie *ex post facto* allegations by citing past legal precedent.¹⁴⁵ Though Jackson ceded that the trial "is novel and experimental," he claimed it "is not the product of abstract speculation" (3). In countering such allegations, Jackson reminded audiences that Germany was "party" to many relevant "international conventions" (127), including conventions concerning "the treatment of belligerents" (127) and "immunities . . . for civilian populations that were unfortunate enough to dwell in lands overrun by hostile armies" (130).¹⁴⁶ He argued that "the defendants had . . . the clearest knowledge" of the "international conventions to which Germany was a party" (152). As a result, "they took pains to conceal their violations" (152), revealing their awareness of their wrongdoing in light of existing treaties.

In addition to citing past precedents, Jackson contended that the trial was valid *even if* the court had developed law "after the fact" because the development of the law requires invention.¹⁴⁷ Acknowledging the possibility that the Tribunal might disadvantage the defendants, Jackson nevertheless sanctioned the Tribunal's experimentation: "I cannot subscribe to the perverted reasoning that society may advance and strengthen the rule of law by the expenditure of morally innocent lives but that progress in the law may never be made at the price of morally guilty lives" (162). Jackson thus acknowledged the costs of developing new

law and suggested that the law must "advance at the expense of those who wrongly guessed the law and learned too late their error . . . [h]ence, we are not disturbed by the lack of a judicial precedent for the inquiry" (163).¹⁴⁸ Therefore, regardless of whether past precedent existed, Jackson resorted to a theoretical argument about the law's growth in order to void the *ex post facto* critique.¹⁴⁹ By accentuating the Tribunal's global scope, Axis villainy, and legal principles, Jackson defended the IMT against criticisms of the Tribunal's structure.

Defending the Law

Jackson also had to restore the broader credibility of the law itself in light of Nazi Germany's use of the law and concerns that the IMT's experimental nature degraded the law's standing. As Bazylar notes, Germany's reliance on law to legitimate Nazi policies was an inconvenient reminder that the law could serve both just and unjust ends.¹⁵⁰ Echoing apprehensions surrounding charges of "victors' justice," critics expressed concern that the IMT retrofitted the law to the politics of the time.¹⁵¹ To downplay the politics of the trial and distinguish Tribunal law from its *illegitimate* usage in Germany during World War II, Jackson stressed the law's neutrality and purity.¹⁵²

First, Jackson relied on seemingly "apolitical" legal ideals even though "apolitical" law is an impossibility.¹⁵³ In his broader examination of Jackson's Nuremberg discourse, Thomas Hall notes Jackson's use of "universal, timeless themes rather than dwelling specifically on the facts of the immediate case."¹⁵⁴ Of course, contra Hall, Hasian underscores that the ideals upon which Jackson relied to legitimate the court were far from "universal," "timeless," or, by extension, "objective." As Hasian and others make clear, to the extent that these themes meant anything at all to their audiences, their meaning was contingent upon the time and context in which they were heard.¹⁵⁵ And, Friedrich Kratochwil elaborates, such "'abstract' universal[s]" work well as legitimating maneuvers because they appear to possess "'political neutrality,'" even though they are not neutral.¹⁵⁶ More pointedly, Damien Rogers explains that the legal principles and claims in Jackson's statement were not "universal;" they were part of a very specific political agenda that promoted certain forms of government and denounced opposing views.¹⁵⁷ By utilizing a language of "apolitical" ideals to defend the Tribunal's use of the law,¹⁵⁸ Jackson ultimately helped to efface the belief systems upon which the IMT was premised.

Jackson began his defense of the law as politically neutral early in the speech. For Jackson, the law fell within the province of objectivity and reason rather than retribution and retaliation. Accordingly, the mere existence of the trials evidenced "one of the most significant tributes that Power has ever paid to Reason," affirming the priority of reason over power in the courtroom (2). The challenge for those involved in the proceedings, Jackson maintained, was to distinguish between "the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war" (9). To Jackson, the law represented the pinnacle of civilization's advancement by creating a space for a fair hearing. Amongst the novelties of the trial, Jackson added: "If these men are the first war leaders of a defeated nation to be prosecuted in the name of the law, they are also the first to be given a chance to plead for their lives in the name of the law" (12). Such an opportunity to defend their actions was embodied in "the Charter of this Tribunal, which gives them a hearing, [and] is also the source of their only hope," providing them "a fair opportunity to defend themselves . . . a favor which, when in power, they rarely extended even to their fellow countrymen" (12).¹⁵⁹ For Jackson, these provisions attested to the neutrality of the Tribunal and the objectivity of the law.

Second, Jackson also needed to account for the role of German law in sanctioning the nation's wartime actions. During the 1930s and 1940s, German courts strengthened Nazi authority by upholding laws that defined who counted as a Jew and facilitated the sterilization of select populations.¹⁶⁰ Bloxham argues that good reasons existed to mistrust the law: How could the system that legitimated the Holocaust be a vehicle for justice?¹⁶¹ Nazi use of the law threatened the credibility of the legal system as a whole, revealing that the courts could serve the interest of the moral as well as the immoral.¹⁶² Jackson's defense of the law necessitated an explanation of how the law could underwrite both the actions of the Nazis and the actions of the Allied powers at the Tribunal.

Just as Jackson had contested *tu quoque* arguments, he distinguished law as practiced by the Nazis from the "real" and "pure" law utilized in the West.¹⁶³ Jackson stressed the "lawlessness" of the Nazi system, suggesting that the German people were subjected to the Nazi's "lawless innovations" (15), resulting in a "world...scourged with...violence and lawlessness" (21).¹⁶⁴ Further, Jackson charged that the Nazi party did not infiltrate the German court system; they replaced it with a façade. The Nazi party, Jackson asserted, "had its own source of law in the fuehrer and the sub-fuehrers . . . It had its own courts and its own police. The conspirators set up a government within the Party to exercise outside of the law every sanction that a legitimate state could exercise and many that it could not" (36). Jackson drew a clear line between "the real and the ostensible," divorcing the courts of law familiar to the rest of the western world from the legal system set up by the Nazis (42). While the Nazi party governed the German state, the "real" law did not disappear; it was just ignored. Jackson argued this point at length:

International Law, natural law, German law, any law at all was to these men simply a propaganda device to be invoked when it helped and to be ignored when it would condemn what they wanted to do. That men may be protected in relying upon the law at the time they act is the reason that we find laws of retrospective operations sometimes unjust. But these men cannot bring themselves within the reason of the rule which in some systems of jurisprudence prohibits *ex post facto* laws. They cannot show that they ever relied upon International Law in any state or paid it the slightest regard (151).¹⁶⁵

By divorcing the Nazi system of law from the legal system of the West, the sanctity of the latter was preserved without being tarnished by the wartime actions of the former.¹⁶⁶ Such logic on Jackson's behalf helped bolster the legitimacy of the court—and the law itself—as a vehicle for restoring order in the wake of World War II.

Jackson's Significance: Law & Politics after Nuremberg

Jackson's multifaceted defense of the Tribunal constructed an image of the trial as an impartial tool for seeking justice even as the IMT was steeped in the politics of the day and trial actors operated in "partial, and [politically] interested" ways.¹⁶⁷ Operating within a context marked by ambiguity and suspicion, Jackson leveraged competing understandings of the politics and legality of the trial to legitimate the IMT,¹⁶⁸ demonstrating the malleability of the political and legal context. Nevertheless, while Jackson and others were espousing apolitical ideals they

were participating in highly political interpretations of the war and postwar order.¹⁶⁹ The implications of these interpretations extend far beyond the verdicts rendered at the trial's close. Jackson's vision of the IMT's credibility manifests within, and is challenged by, the various ways his memory and the memory of the Tribunal inform later discussions of international law, politics, and justice.

The Tribunal enacted an immediate form of postwar order through its judgments on September 30 and October 1, 1946.¹⁷⁰ Twenty-two defendants faced charges. The Tribunal determined the guilt of 19 of these individuals and acquitted three.¹⁷¹ According to William Maley, these acquittals constituted powerful evidence of the fairness of the Tribunal's inquisition, proving that the defendants were not all regarded as guilty in advance.¹⁷² As for those the IMT deemed guilty, 12 were hung; their bodies were cremated, and their ashes dispersed so as to prevent the construction of a site "of neo-Nazi pilgrimage."¹⁷³

In the court of public opinion, assessments of Jackson's opening statement and perceptions of the Tribunal have varied over time. Norbert Ehrenfreund, a reporter covering the trial, stated: "As a lawyer and judge for over forty-five years in the courtroom I have heard close to a thousand opening statements. No one ever spoke with such eloquence."¹⁷⁴ Such positive reactions to Jackson's opening statement were all the more remarkable, according to Feltman, because of the lack of public will for a trial prior to the IMT's commencement. Feltman attributes shifting perceptions of the IMT to the influence of Jackson's framing of the Tribunal and the repetition of that framing in media coverage of the trial.¹⁷⁵ Despite the favorable coverage the speech received,¹⁷⁶ the opening statement did not succeed in quieting all critics, and concerns about the Tribunal's degradation of the law, enactment of victors' justice, and violation of protections against the creation of *ex post facto* law continued to appear in the press.¹⁷⁷ In the more than seventy years since the trial, competing assessments of the IMT have circulated.¹⁷⁸ Numerous references to the IMT within many contemporary legal debates testify to the lasting significance of the Tribunal,¹⁷⁹ even as disagreements exist over Jackson's legacy and the Tribunal's impact on international jurisprudence.

The IMT established legal precedents for the creation of subsequent international tribunals and arguably lent credence to advocates for an expanded international criminal justice system.¹⁸⁰ According to Schabas, the international scaffolding created for prosecuting crimes akin to those committed by Germany essentially remained "dormant" until the end of the Cold War.¹⁸¹ Following atrocities in Yugoslavia and Rwanda in the early 1990s, jurists created international tribunals as vehicles for seeking justice, and in 2004, prosecutors opening the Special Court for Sierra Leone turned to the words of Justice Jackson to demonstrate legal precedent for the proceedings and to affirm the legitimacy of such legal bodies.¹⁸² Furthermore, some scholars and legal experts read Jackson's opening statement and the IMT as a whole as offering an endorsement of an expanded international criminal justice system. These voices have inserted Jackson into debates over contemporary legal institutions, such as the International Criminal Court (ICC), and positioned him as an advocate for strengthening international law.¹⁸³ Based on his review of Jackson's opening statement, attorney Paul Hoffman concludes: "[I]t seems clear that Robert Jackson would be a leader in the fight for United States ratification of the ICC."¹⁸⁴ Accordingly, the U.S. government's refusal to join the ICC is a repudiation of Jackson's legacy. Former prosecutor at Nuremberg, Henry T. King, claims, "the United States . . . has turned its back on Jackson" through its refusal to become party to

the ICC,¹⁸⁵ "besmirch[ing] the memory of all he stood for at Nuremberg."¹⁸⁶ These scholarly and legal interpretations of Jackson's work view the IMT and Jackson's contributions to the trial as advancing the development of international law and chastise the U.S. government for failing to live up to the aspirations contained in Jackson's rhetoric.¹⁸⁷

Viewed from this angle, Jackson's work becomes a component of larger attempts to curtail state sovereignty and establish international legal protections against human rights violations.¹⁸⁸ According to some scholars, the sanctity of national sovereignty, a principle that protects states' affairs from outside "interference,"¹⁸⁹ can function as a barrier inhibiting the prevention and prosecution of human rights abuses.¹⁹⁰ The inclusion of "crimes against humanity" in the indictment at Nuremberg challenged the inviolability of state sovereignty and opened perpetrators of violence to international legal charges.¹⁹¹ As King has claimed, the IMT insinuated that "[t]he veil of national sovereignty could no longer insulate national leaders from responsibility for their crimes."¹⁹² Although other scholars question the extent to which the IMT challenged or affirmed the primacy of state sovereignty,¹⁹³ the IMT's gestures toward individual accountability supported interpretations of the Tribunal as a "birthplace of the human rights movement."¹⁹⁴ Accordingly, Hoffman incorporates Jackson's rhetoric into narratives about the development of an international legal framework for safeguarding human rights.¹⁹⁵

Others fiercely contest such idealistic interpretations of the Tribunal and argue that the trials were not about the sanctity of human rights or international justice. Instead, they heed Marrus's recommendation to "consider Nuremberg as the product of its own time and place,"¹⁹⁶ reflecting the strategic calculations made by trial actors to secure power at the start of the Cold War.¹⁹⁷ Francine Hirsch recommends viewing the trial "as an artifact of the wartime alliance and as a front of the early Cold War" because of the degree of influence early Cold War politics had on the trial,¹⁹⁸ shaping everything from the selection of defendants to when the trials ended.¹⁹⁹ For example, Michael Salter reveals that U.S. intelligence officers negotiated with the prosecutors at Nuremberg to reduce the sentences of former Nazis.²⁰⁰ Bloxham echoes this claim, noting that the U.S. investment in Germany as an ally in the Cold War "placed a limit on the extent of th[e] reckoning."²⁰¹ Put bluntly, as Jonathan Graubart summarizes, "US and allied leaders did not choose legal principles over self-interest."²⁰² Instead, "they adopted the tribunals primarily for self-promotion and maneuvered the prosecutions to promote postwar security aims."²⁰³

Still others argue that celebrations of the Tribunal for advancing human rights law represent selective readings of the trial.²⁰⁴ Donald Bloxham and Devin Pendas contend that such narratives *misremember* the IMT by overselling the importance of the Holocaust or the notion of "human rights" to trial actors at the time.²⁰⁵ To remember Jackson's opening statement as a vehicle for prosecuting the Holocaust is to engage in what Bloxham terms a "certain *ex post facto* reconfiguration of Nuremberg,"²⁰⁶ given that the prosecution's case was primarily concerned with establishing a conspiracy and condemning "aggressive warfare."²⁰⁷ Moreover, other scholars argue that the *absence* of international tribunals between Nuremberg and Yugoslavia undermines idealistic interpretations of Nuremberg's legacy. Joseph Persico has observed that "over one hundred wars, insurrections, civil conflicts, and revolutions . . . have racked the world . . . and claimed more than 21 million lives" in the decades since the IMT; yet, there was little public interest in "Nuremberg-style prosecution[s] of war criminals" until the 1990s.²⁰⁸ If the IMT laid the groundwork for prosecuting human rights abuses, then why were

there no international tribunals between the 1940s and the 1990s?²⁰⁹ The answer, according to some scholars, becomes apparent once one views the trials as reflecting the interests of "major world powers": Tribunals did not occur while these powers were preoccupied with the Cold War and resumed once the Cold War ended.²¹⁰ In other words, the absence of trials during this time period complicates laudatory interpretations of the Tribunal and instead demonstrates that commitments to international law or human rights play a secondary role to the interests of powerful state actors.²¹¹

For these reasons, many critics and scholars contend that the relationship between law and power is far more complicated than the vision of the law contained in Jackson's opening statement, and the legacy of the Tribunal lies in the reinforcement of a lopsided system of international justice.²¹² Beyond the spotty use of tribunals and the debates surrounding the ICC, even a cursory review of some applications of international law in contexts ranging from the war on terror to the prosecution of human rights abuses suggests an inconsistency in legal practices.²¹³ Numerous voices accuse the United States of hypocrisy because the same nation that led the charge to hold Germany accountable for its World War II crimes seeks immunity from prosecution for U.S. acts of aggression, such as abuses committed as part of the "war on terror" and the launch of a "preemptive" war in Iraq.²¹⁴ These critics posit that the legacy of the IMT is not Jackson's idealism, but rather a system of international jurisprudence that sublimates those legal ideals to international politics.²¹⁵ Such a view lends credence to Bloxham's claim that "law may influence the exercise of might, but the process also works in reverse."²¹⁶

These varied and conflicting interpretations of Nuremberg's legacy join debates over the International Military Tribunal's credibility that concerned Jackson more than seventy years ago. Despite his attempts to defend the Tribunal by illuminating the various safeguards built into its structure and affirming the neutrality and purity of the law, Jackson's depiction of the IMT is only one representation among many competing views of the trial's legitimacy and connection to postwar politics. Contemporary readers of Jackson's opening statement must grapple with the substantive questions Jackson's speech raises regarding the relationship between law and power. Did the IMT reflect or reify systemic inequalities in international law and global politics?²¹⁷ Was the Tribunal "one of the most significant tributes that Power has ever paid to Reason," as Jackson averred (2),²¹⁸ or was the Tribunal a vehicle for jockeying for power on the cusp of the Cold War? Sophisticated engagement with the speech demands rejecting simplistic answers to these questions and instead requires that readers find ways to reconcile Jackson's idealism with the undeniably political dimensions of law, order, and justice.

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Notes

¹ David M. Kennedy, "Introduction," in *The Library of Congress World War II Companion*, ed. Margaret E. Wagner, Linda Barrett Osborne, Susan Reyburn, and Staff of the Library of Congress (New York: Simon & Schuster, 2007), xiii.

² Margaret E. Wagner, Linda Barrett Osborne, Susan Reyburn, and Staff of the Library of Congress, *The Library of Congress World War II Companion* (New York: Simon & Schuster, 2007), 912.

³ Michael Bazylar, *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World* (New York: Oxford University Press, 2016), 69.

⁴ Daniele Archibugi and Alice Pease, *Crime and Global Justice: The Dynamics of International Punishment* (Cambridge: Polity Press, 2018), 11.

⁵ As Donald Bloxham explains, the United States sat in a position of relative advantage at the close of the war, which shaped the nation's approach to the Tribunal. Donald Bloxham, "Genocide on Trial: Law and Collective Memory," in *The Nuremberg Trials: International Criminal Law Since 1945*, ed. Herbert R. Reginbogin and Christoph J. M. Safferling in collaboration with Walter R. Hippel (Munich: K.G. Saur Verlag, 2006), 78.

⁶ Robert E. Conot, *Justice at Nuremberg* (New York: Harper & Row, 1983), 16, 19-20, 66.

⁷ *Ibid.*, 15.

⁸ Gordon Dean, "Preface," in *The Case Against the Nazi War Criminals: Opening Statement for the United States of America by Robert H. Jackson and Other Documents* (New York: Alfred A. Knopf, 1946), v-ix; Bazylar, *Holocaust*, 69; David Mayers, *America and the Postwar World: Remaking International Society, 1945-1956* (New York: Routledge, 2018), 35; Christopher Rudolph, *Power and Principle: The Politics of International Criminal Courts* (Ithaca, NY: Cornell University Press, 2017), 21; Michael P. Scharf, "The Cornerstone: Robert H. Jackson and the Nuremberg Tribunal," in *The Founders: Four Pioneering Individuals Who Launched the First Modern-Era International Criminal Tribunals*, ed. David M. Crane, Leila Sadat, and Michael P. Scharf (New York: Cambridge University Press, 2018), 33.

⁹ Concerning public sentiment at the close of the war, Gordon Dean writes that "[s]ome kind of punishment had to be meted out; that much was certain . . . Such crimes could not pass unnoticed." Dean, "Preface," v. Marouf A. Hasian, Jr., *Rhetorical Vectors of Memory in National and International Holocaust Trials* (East Lansing: Michigan State University Press, 2006), 30.

¹⁰ Robert Jackson reported, the "idea of bringing the top Nazi leaders and organizations to trial as criminals had originated and had been the subject of extensive study in the War, State, and Justice Departments long before I was enlisted in the case," suggesting such calls could be heard during the Yalta conference. See Robert H. Jackson, *The Nürnberg Case* (New York: Alfred A. Knopf, 1947), v. See also Bazylar, *Holocaust*, 69; Scharf, "The Cornerstone," 33; Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, Inc., 1981).

¹¹ Dean, preface, viii.

¹² *Ibid.*, ix.

¹³ Jackson, *The Nürnberg Case*, vi; Michael R. Marrus, *The Nuremberg War Crimes Trial, 1945-1946: A Brief History with Documents*, 2nd ed. (Boston: Bedford/St. Martin's, 2018), 18.

¹⁴ Eugene C. Gerhart, *Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate* (Buffalo, NY: William S. Hein & Co., Inc./Jamestown, NY: Robert H. Jackson Center, 1958/2003), 355.

¹⁵ Immi Tallgren is describing "international criminal law" specifically; however, such remarks are also an apt characterization of legal institutions writ large. Immi Tallgren, "The Sensibility and Sense of International Criminal Law," *European Journal of International Law* 13, no. 3 (2002): 594.

¹⁶ Robert Hariman, ed., "Performing the Laws: Popular Trials and Social Knowledge," in *Popular Trials: Rhetoric, Mass Media, and the Law*, (Tuscaloosa: University of Alabama Press, 1990): 20.

¹⁷ Jonathan Mahler, "The Fog of War-Crimes Trials," *New York Times Magazine*, August 3, 2008, <http://www.nytimes.com/2008/08/03/magazine/03wwIn-lede-t.html>.

¹⁸ Donald Bloxham, "Milestones and Mythologies: The Impact of Nuremberg," in *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, ed. Patricia Heberer and Jürgen Matthäus (Lincoln: University of Nebraska Press, 2008), 279. See also Lawrence Douglas, "The Didactic Trial: Filtering History and Memory into the Courtroom," in *Holocaust and Justice: Representation and Historiography of the Holocaust in Post-War Trials*, ed. David Bankier and Dan Michman (Jerusalem: Yad Vashem, 2010), 13.

¹⁹ The International Military Tribunal was not the only vehicle for creating a sense of order in the wake of World War II. See; Patricia Heberer and Jürgen Matthäus, "Introduction: War Crimes Trials and the Historian," in *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes*, ed. Patricia Heberer and Jürgen Matthäus (Lincoln: University of Nebraska Press, 2008), xx-xxi. See also: Donald Bloxham, "From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited," *History* 98, no. 332 (2013): 567–591; Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2011).

²⁰ Sofia Stolk advances a similar argument about international criminal tribunals or courts as responses to "chaos." See: Sofia Stolk, "'The Record on Which History Will Judge Us Tomorrow': Auto-History in the Opening Statements of International Criminal Trials," *Leiden Journal of International Law* 28, no. 4 (2015): 993-1012.

²¹ Although Marouf A. Hasian is talking specifically about the construction of the historical record emerging from the trial, the phrase is also an apt descriptor of the trial as a whole and a description in line with the approach Hasian applies to the IMT. Hasian, *Rhetorical Vectors*, 41.

²² *Ibid.*, 46.

²³ *Ibid.*, 11.

²⁴ Whereas Marouf A. Hasian interrogates the dynamic production of legal memories of the Shoah through his analysis of interactions among competing texts (including Jackson's speech), I am most interested in rhetorical strategies used within this particular single text from the trial. See Hasian, *Rhetorical Vectors*.

²⁵ Ron Levi, Sara Dezalay, and Michael Amiraslani, "Prosecutorial Strategies and Opening Statements: Justifying International Prosecutions from the International Military Tribunal at Nuremberg to the International Criminal Court," in *International Practices of Criminal Justice: Social and Legal Perspectives*, ed. Mikkel Jarle Christensen and Ron Levi (New York: Routledge, 2018), 98-99; Ron Levi, John Hagan, and Sara Dezalay, "International Courts in Atypical Political Environments: The Interplay of Prosecutorial Strategy, Evidence, and Court Authority in International Criminal Law," *Law and Contemporary Problems* 79, no. 1 (2016): 301.

²⁶ Hasian, *Rhetorical Vectors*, 41. The political dimensions of the Tribunal's work are emphasized throughout Hasian's analysis and are at the core of Damien Rogers's analyses of Jackson's opening statement. See: Damien Rogers, *Law, Politics and the Limits of Prosecuting Mass Atrocity* (Cham, CH: Palgrave Macmillan, 2018); Damien Rogers, "Prosecutors' Opening Statements: The Rhetoric of Law, Politics, and Silent War," in *The Legitimacy of International Criminal Tribunals*, ed. Nobuo Hayashi and Cecilia M. Bailliet (Cambridge: Cambridge University Press, 2017), 325-350.

²⁷ By using the term "equivocalness," I underscore the competing interpretations of the politics and legality of the trial operating at the time. Robert Jackson maneuvered within what Marouf A. Hasian terms "contradictory webs of signification," using seemingly paradoxical and competing sets of beliefs within his opening statement. See: Hasian, *Rhetorical Vectors*, 27.

²⁸ My understanding of "plasticity" is inspired by Sue Tait's use of the term in her analysis of viewing practices associated with "body horror." See Sue Tait, "Pornographies of Violence? Internet Spectatorship on Body Horror," *Critical Studies in Media Communication* 25, no. 1 (2008): 91-111. In the field of communication, scholars have used the notion of "plasticity" to describe museum exhibition practices (Gorsevski, Schuck, and Lin), definitions (Beer), corporeal rhetorics (Jordan), journalistic norms (Engelbert and McCurdy), and apocalyptic discourses (Howard). Francis A. Beer, "Words of Reason," *Political Communication* 11, no. 2 (1994): 185-201; Jiska Engelbert, and Patrick McCurdy. "Capitalising on the Plasticity of Impartiality: The BBC and the 2009 Gaza Appeal," *Critical Discourse Studies* 8, no. 3 (2011): 183-201; Ellen W. Gorsevski, Raymond I. Schuck, and Canchu Lin, "The Rhetorical Plasticity of the Dead in Museum Displays: A Biocritique of Missing Intercultural Awareness," *Western Journal of Communication* 76, no. 3 (2012): 314-332; Robert Glenn Howard, "Sustainability and Narrative Plasticity in Online Apocalyptic Discourse After September 11, 2001," *Journal of Media & Religion* 5, no. 1 (2006): 25-47; John W. Jordan, "Reshaping the 'Pillow Angel': Plastic Bodies and the Rhetoric of Normal Surgical Solutions," *Quarterly Journal of Speech* 95, no. 1 (2009): 20-42.

In legal studies, numerous scholars have discussed the "law as plastic." A comprehensive overview of legal scholarship on plasticity is beyond the scope of this paper. Nevertheless, for select examples of these arguments, see Jack M. Balkin, "Critical Legal Theory Today," in *On Philosophy in American Law*, ed. Francis J. Moortz III (New York: Cambridge University Press, 2009), 64-72; David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton: Princeton University Press, 2016); Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education* 36, no. 4 (1986):

518-562; Austin Sarat, "Beyond Law School: Teaching Law in Political Science," *Perspectives on Political Science* 21, no. 3 (1992): 145-151; Robert W. Gordon, "Law and Ideology," *Tikkun*, January/February 1988.

Finally, "plasticity" or "malleability" and "rhetoricity" are related constructs. Thus, recognitions of the rhetorical nature of the law are also important antecedents for this argument. See pages 4 – 5 in this document.

²⁹ Following Robert Hariman, I use the phrase "popular trial" to signify a legal proceeding that garners mass media attention. See: Robert Hariman, "Introduction," in *Popular Trials: Rhetoric, Mass Media, and the Law*, ed. Robert Hariman (Tuscaloosa: The University of Alabama Press, 1990), 2. On the uniqueness of the IMT, See: Susanne Karstedt, "The Nuremberg Tribunal and German Society: International Justice and Local Judgment in Post-Conflict Reconstruction," in *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, ed. David A. Blumenthal and Timothy L. H. McCormack (Leiden: Martinus Nijhoff Publishers, 2008), 13-35.

³⁰ Peter de Mendelssohn, "America's Case at Nuernberg," *The Nation*, December 15, 1945, 652.

³¹ Norbert Ehrenfreund, *The Nuremberg Legacy: How the Nazi War Crimes Trials Changed the Course of History* (New York: Palgrave MacMillan, 2007), 37-39; Hasian, *Rhetorical Vectors*, 27, 41; Valerie Geneviève Hébert, *Hitler's Generals on Trial: The Last War Crimes Tribunal at Nuremberg* (Lawrence: University of Kansas Press, 2010), 20; Jackson, *The Nürnberg Case*, vi-vii; Jinee Lokaneeta, "The Legacies of Nuremberg in International Law and American Policy," in *A Companion to Harry S. Truman*, ed. Daniel S. Margolies, Blackwell Companions to American History, vol. 67 (Malden, MA: Blackwell Publishing, 2012), 455-456.

³² Marrus, *The Nuremberg War Crimes*, v, 21.

³³ Of course, this press coverage waned throughout the duration of the trial, but Brian K. Feltman makes his assertions about precedent based off the trial's opening. See Brian K. Feltman, "Legitimizing Justice: The American Press and the International Military Tribunal, 1945-1946," *The Historian* 66, no. 2 (2004): 307. Feltman substantiates this claim by drawing on the work of Drexel A. Sprecher, *Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account*, vol 1. (Lanham, MD: University Press of America, 1999), 6; Hasian, *Rhetorical Vectors*, 37.

³⁴ See Levi, Hagan, and Dezalay, "International Courts," 291, 313.

³⁵ In Marouf A. Hasian's words, such analyses demand a "rethink[ing] [of] our traditional judicial views that separate the 'rule of law' from 'rhetoric,' opinions from facticity." Hasian, *Rhetorical Vectors*, 14.

³⁶ Trevor Parry-Giles, *The Character of Justice: Rhetoric, Law, and Politics in the Supreme Court Confirmation Process* (East Lansing: Michigan State University Press, 2006), 4. See also Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge: Polity, 2007), 2.

³⁷ Hariman, "Introduction," 3.

³⁸ *Ibid.*, 1.

³⁹ Douglas, "The Didactic Trial," 14-15.

⁴⁰ On the ideological dimensions of law, see Judith Shklar, *Legalism* (Cambridge: Harvard University Press, 1964), 112.

⁴¹ Hasian, *Rhetorical Vectors*, 15.

⁴² Douglas, "The Didactic Trial," 14-15.

⁴³ Shklar's quote refers to the law; however, this use of her words is in line with her arguments. Shklar, *Legalism*, 143.

⁴⁴ Simpson, *Law, War and Crime*, 1. Donald Bloxham and Devin O. Pendas echo this sentiment, charging that "[i]nternational legalism remains a form of politics" (italics in the original). Donald Bloxham and Devin O. Pendas, "Punishment as Prevention? The Politics of Punishing Génocidaires," in *The Oxford Handbook of Genocide Studies*, ed. Donald Bloxham and A. Dirk Moses (Oxford: Oxford University Press, 2010), 618.

⁴⁵ Simpson, *Law, War and Crime*, 1.

⁴⁶ William Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford: Oxford University Press, 2012), 3. See also: Shklar, *Legalism*, 8.

⁴⁷ Parry-Giles, *The Character of Justice*, 4; Hasian, *Rhetorical Vectors*, 159. Notably, Hasian's quote pertains to trials but resonates with his descriptions of the law. See also: Vivian Grosswald Curran, "Politicizing the Crime Against Humanity: The French Example," *Notre Dame Law Review* 78, no. 3 (2003): 678; Francine Hirsch, "The Soviet Union, the Nuremberg Trials, and the Politics of the Postwar Moment," in *Political Trials in Theory and History*, ed. Jens Meierhenrich and Devin O. Pendas (Cambridge: Cambridge University Press, 2016), 159. For a more extensive review of the complicated relationship between perceptions of the law as political and apolitical, see Jonathan Graubart, "Rendering Global Criminal Law an Instrument of Power: Pragmatic Legalism and Global Tribunals," *Journal of Human Rights* 9, no. 4 (2010): 409-426; Rogers, *Law, Politics*; Rogers, "Prosecutors' Opening

Statements;" Simpson, *Law, War and Crime*; Shklar, *Legalism*; Tiphaine Dickson, "Shklar's Legalism and the Liberal Paradox," *Constellations* 22, no. 2 (2015): 188-198.

⁴⁸ Karen J. Alter, Laurence R. Helfer, and Mikael Rask Madsen, "How Context Shapes the Authority of International Courts," *Law and Contemporary Problems* 79, no. 1 (2016): 1-36; Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification," *The European Journal of International Law* 23, no. 1 (2012): 7-41; Jillian Dobson and Sofia Stolk, "The Prosecutor's Important Announcements; the Communication of Moral Authority at the International Criminal Court," *Law, Culture and the Humanities*, published electronically August 30, 2016, doi:10.1177/1743872116666466; Marlies Glasius and Tim Meijers, "Constructions of Legitimacy: The Charles Taylor Trial," *The International Journal of Transitional Justice* 6, no. 2 (2012): 229-52; Friedrich Kratochwil, "Politics, Law, and the Sacred: A Conceptual Analysis," *Journal of International Relations and Development* 16, no. 1 (2013): 1-24; Larry May and Shannon Fyfe, "Legitimacy," in *International Criminal Tribunals: A Normative Defense* (Cambridge: Cambridge University Press, 2017), 4-24; Frédéric Mégret, "The Anxieties of International Criminal Justice," *Leiden Journal of International Law* 29, no. 1 (2016): 197-221; Tim Meijers and Marlies Glasius, "Expression of Justice or Political Trial?: Discursive Battles in the Karadžić Case," *Human Rights Quarterly* 35, no. 3 (2013): 720-52; Levi, Dezalay, and Amiraslani, "Prosecutorial Strategies;" Levi, Hagan, and Dezalay, "International Courts;" Maya Steinitz, "'The Milošević Trial — Live!' An Iconical Analysis of International Law's Claim of Legitimate Authority," *Journal of International Criminal Justice* 3, no. 1 (2005): 103-123.

⁴⁹ Telford Taylor describes the problem this situation created for the IMT. See Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992), 5.

⁵⁰ Lawrence Douglas is describing particular kinds of trial, the "perpetrator trial" and "didactic trial[s]," but his remarks about these trials also function to describe the legitimacy problems in international criminal courts. Douglas, "The Didactic Trial," 13. See also: Gerry Simpson's discussion of legitimation and the courting of dissent. Simpson, *Law, War and Crime*.

⁵¹ Stolk, "'The Record on Which,'" 996; Kathryn Holmes Snedaker, "Storytelling in Opening Statements: Framing the Argumentation of the Trial," *American Journal of Trial Advocacy* 10, no. 1 (1986): 43.

⁵² Stolk, "'The Record on Which,'" 1005.

⁵³ Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Bloxham, "Milestones and Mythologies;" Dickson, "Shklar's Legalism;" Hasian, *Rhetorical Vectors*; Francine Hirsch, "The Nuremberg Trials as Cold War Competition: The Politics of the Historical Record and the International Stage," in *Memory and Postwar Memorials: Confronting the Violence of the Past*, ed. Marc Silberman and Florence Vatan (New York: Palgrave Macmillan, 2013), 15-30; Rogers, *Law, Politics*; Rogers, "Prosecutors' Opening Statements;" Shklar, *Legalism*.

⁵⁴ Shklar, *Legalism*, 143; see also Dickson, "Shklar's Legalism."

⁵⁵ Levi, Dezalay, and Amiraslani, "Prosecutorial Strategies," 106.

⁵⁶ On IMT participants potentially not recognizing their politics, see Hasian, *Rhetorical Vectors*, 46.

⁵⁷ Lawrence Douglas argues the IMT and other Nuremberg trials must be understood as reflections of "the very political-historical circumstances" from which they arose. Douglas, "The Didactic Trial," 14.

⁵⁸ John Q. Barrett, "The Nuremberg Roles of Justice Robert H. Jackson," *Washington University Global Studies Law Review* 6 (2007): 513.

⁵⁹ Gerhart, *Robert H. Jackson*.

⁶⁰ Gerhart, *Robert H. Jackson*, 354.

⁶¹ Norman Birkett, foreword to Eugene C. Gerhart, *Robert H. Jackson: Country Lawyer, Supreme Court Justice, America's Advocate* (1958 & 1961; repr., Buffalo, NY: William S. Hein & Co., Inc./Jamestown, NY: Robert H. Jackson Center, 2003), v.

⁶² Birkett, foreword; Barrett, "The Nuremberg Roles," 519, 523; Jeffrey D. Hockett, "Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial," *The Supreme Court Review* 1990 (1990): 277-78; Gerhart, *Robert H. Jackson*, 461-465; Constance L. Martin, "The Life and Career of Justice Robert H. Jackson," *Journal of Supreme Court History* 33, no. 1 (2008): 51.

⁶³ Ernest O. Hauser, "The Backstage Battle at Nuremberg," *The Saturday Evening Post*, January 19, 1946, 19.

⁶⁴ John Q. Barrett, "Albany in the Life Trajectory of Robert H. Jackson," *Albany Law Review* 68, no. 3 (2005): 513.

⁶⁵ Gerhart, *Robert H. Jackson*, 28-30.

⁶⁶ Barrett, "Albany," 515-516; Gerhart, *Robert H. Jackson*, 31-32.

⁶⁷ Marrus, *The Nuremberg War Crimes*, 14; Taylor, *The Anatomy*, 43.

⁶⁸ Barrett, "Albany," 529; Barrett, "The Nuremberg Roles," 513-514; Gerhart, *Robert H. Jackson*, 35-36.

⁶⁹ Barrett, "Albany," 519; Barrett, "The Nuremberg Roles," 514.

⁷⁰ Barrett, "Albany," 519. See also Barrett, "The Nuremberg Roles," 514. See also Constance L. Martin, who argues that, although "Roosevelt had personal relationships and political alliances with many New Dealers, ... clearly a special bond existed between him and Jackson due to the roots and length of their friendship." Martin, "The Life and Career," 50.

⁷¹ Gerhart, *Robert H. Jackson*, 66.

⁷² These "prominent political positions" included the governor of New York and the president of the United States. Barrett, "Albany," 530-532; Barrett, "The Nuremberg Roles," 515; Gerhart, *Robert H. Jackson*, 122-141; Martin, "The Life and Career," 49. For more on his appointment to the Supreme Court, see Gerhart, *Robert H. Jackson*, 229-233.

⁷³ Martin, "The Life and Career," 53-55, 60-61.

⁷⁴ Barrett, "The Nuremberg Roles," 517; Hockett, "Justice Robert H. Jackson," 281-282; Dennis J. Hutchinson, "The Black-Jackson Feud," *The Supreme Court Review* 1988 (1988): 209. See also John Q. Barrett, "'One Good Man': The Jacksonian Shape of Nuremberg," in *The Nuremberg Trials: International Criminal Law Since 1945*, ed. Herbert R. Reginbogin and Christoph J. M. Safferling in collaboration with Walter R. Hippel (Munich: K.G. Saur Verlag, 2006), 131.

⁷⁵ Gerhart, *Robert H. Jackson*, 253; Hockett, "Justice Robert H. Jackson," 281-282; Martin, "The Life and Career," 52.

⁷⁶ Gerhart, *Robert H. Jackson*, 240-277; Hockett, "Justice Robert H. Jackson," 281-284; Hutchinson, "The Black-Jackson Feud," 209; Martin, "The Life and Career," 52. Notably, Dennis J. Hutchinson criticizes Eugene C. Gerhart's explanation of the Black-Jackson relationship as little more than a mouthpiece for Robert Jackson's perspective. See Hutchinson, "The Black-Jackson Feud," 224-225.

⁷⁷ Gerhart, *Robert H. Jackson*, 257; Hockett, "Justice Robert H. Jackson," 274, 278-286; Hutchinson, "The Black-Jackson Feud," 210; Martin, "The Life and Career," 60-61.

⁷⁸ Gerhart, *Robert H. Jackson*, 258-265; Hockett, "Justice Robert H. Jackson," 281-286; Martin, "The Life and Career," 60.

⁷⁹ Gerhart, *Robert H. Jackson*, 258-265; Hockett, "Justice Robert H. Jackson," 283-285; Martin, "The Life and Career," 60.

⁸⁰ Barrett, "The Nuremberg Roles," 517; Gerhart, *Robert H. Jackson*, 256; Hockett, "Justice Robert H. Jackson," 281-282.

⁸¹ Martin, "The Life and Career," 63.

⁸² Barrett, "The Nuremberg Roles," 516. See also Hockett, "Justice Robert H. Jackson," 274-275.

⁸³ Kim Christian Priemel, *The Betrayal: The Nuremberg Trials and German Divergence* (Oxford: Oxford University Press, 2016), 60-61.

⁸⁴ According to Whitney R. Harris, at the "Teheran Conference during November and December, 1943, Premier Joseph Stalin proposed to Prime Minister Winston Churchill that at the end of the war the German military strength should be extirpated by liquidation of the German General Staff, its officers and technicians—some fifty thousand men in all." See Whitney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, rev. ed. (Dallas: Southern Methodist University Press, 1954), 496-497. See also Archibugi and Pease, *Crime and Global Justice*, 10; Bazylar, *Holocaust*, 70; Marrus, *The Nuremberg War Crimes*, 10, 69; Scharf, "The Cornerstone," 33.

Some Americans, in turn, including Secretary of the Treasury Henry Morgenthau, expressed similar support for executions over trials. See Bazylar, *Holocaust*, 71; Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2001), 38-39; Hasian, *Rhetorical Vectors*, 47; Oona A. Hathaway and Scott J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (New York: Simon & Schuster, 2017), 254-255; Henry T. King Jr., "Robert Jackson's Transcendent Influence Over Today's World," *Albany Law Review* 68, no. 1 (2004): 25; Lokaneeta, "The Legacies of Nuremberg," 456; Michael R. Marrus, "The Nuremberg Trial: Fifty Years After," *American Scholar* (1997): 568; Simpson, *Law, War and Crime*, 112.

⁸⁵ William J. Bosch, *Judgment on Nuremberg: American Attitudes Toward the Major German War-Crime Trials* (Chapel Hill: The University of North Carolina Press, 1970), 90. See also Gary Jonathan Bass, *Stay the Hand of*

Vengeance: The Politics of War Crimes Trials (Princeton: Princeton University Press, 2000), 160-161; Feltman, "Legitimizing Justice," 306; Robert H. Jackson, introduction to Whitney R. Harris, *Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946*, rev. ed. (Dallas: Southern Methodist University Press, 1954), xxxii – xxxiii; Bernard D. Meltzer, "Robert H. Jackson: Nuremberg's Architect and Advocate," *Albany Law Review* 68, no. 1 (2004): 58-59. On the lack of will for the trial, see also: Levi, Dezalay, and Amiraslani, "Prosecutorial Strategies," 98-99.

⁸⁶ Gordon Dean complicates this sentiment by noting the vagueness of the term "war criminals" and stating, "just what that term included was not very clear." Dean, preface, vi.

⁸⁷ *Ibid.*

⁸⁸ The crime of piracy proves an illustrative example. Geoffrey Robertson writes that the "first individuals to be brought within the reach of international criminal law were pirates or 'sea brigands.'" Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 3rd ed. (New York: The New Press, 2006), 240. Piracy had been prosecuted as an international crime for years although its definition was broad and dynamic, and jurists operated with minimal statutory guidance. Harris, *Tyranny on Trial*, 493-494.

⁸⁹ Harris, *Tyranny on Trial*, 491, 493.

⁹⁰ *Ibid.*, 491.

⁹¹ *Ibid.*, 493. See also Taylor, *The Anatomy*, 5.

⁹² Harris, *Tyranny on Trial*, 493.

⁹³ *Ibid.*, 493.

⁹⁴ *Ibid.*, 496.

⁹⁵ Robertson, *Crimes Against Humanity*, 243.

⁹⁶ Uwe Makino, "Final Solutions, Crimes against Mankind: On the Genesis and Criticism of the Concept of Genocide," *Journal of Genocide Research* 3, no. 1 (2001): 50-51; Marrus, *The Nuremberg War Crimes*, 6-7; Taylor, *The Anatomy*, 9-10, 19-20.

⁹⁷ Michael J. Kelly and Timothy L.H. McCormack, "Contributions of the Nuremberg Trial to the Subsequent Development of International Law," in *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, ed. David A. Blumenthal and Timothy L. H. McCormack (Leiden: Martinus Nijhoff Publishers, 2008), 103-104.

⁹⁸ Feltman, "Legitimizing Justice," 302. See also Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants Before the International Military Tribunal at Nuremberg* (New York: The Macmillan Company, 1966), 2-4.

⁹⁹ Davidson, *The Trial*, 3; Robertson, *Crimes Against Humanity*, 243.

¹⁰⁰ Feltman, "Legitimizing Justice," 302.

¹⁰¹ Kelly and McCormack, "Contributions," 104. David Luban, "The Legacies of Nuremberg," in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2008), 651; Marrus, "The Nuremberg Trial," 565; Marrus, *The Nuremberg War Crimes*, 5.

¹⁰² Dean, preface, vii. Bazylzer refers to it as a "disaster." Bazylzer, *Holocaust*, 70.

¹⁰³ Marrus, *The Nuremberg War Crimes*, 5-6.

¹⁰⁴ As Gordon Dean describes it, the "city was a heap of rubble from beneath which rose the stench of thousands of rotted bodies." Gordon Dean, "Mr. Justice Jackson: His Contribution at Nuremberg," *American Bar Association Journal*, October 1955, 913. See also Ehrenfreund, *The Nuremberg Legacy*, 19; Mayers, *America*, 36-37; Priemel, *The Betrayal*, 94-95.

¹⁰⁵ Hathaway and Shapiro, *The Internationalists*, 276-277.

¹⁰⁶ Gerhart, *Robert H. Jackson*, 352.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, 353.

¹⁰⁹ *Ibid.*

¹¹⁰ Of course, this is not to say that the public was unaware entirely of such infighting. See Hauser, "The Backstage Battle." See also Hirsch, "The Soviet Union," 179-180; Levi, Dezalay, and Amiraslani, "Prosecutorial Strategies," 99; Levi, Hagan, and Dezalay, "International Courts," 297; Mayers, *America*, 39.

¹¹¹ Conot, *Justice at Nuremberg*, 66; Marrus, *The Nuremberg War Crimes*, 5-6; Taylor, *The Anatomy*, 123. See also Hockett, "Justice Robert H. Jackson," 277. Notably, Jeffrey D. Hockett derives his description of the situation with Francis Biddle from Robert Jackson's oral history.

¹¹² Conot, *Justice at Nuremberg*, 85.

¹¹³ Conot, *Justice at Nuremberg*, 88; Lord Shawcross, "Robert H. Jackson's Contributions During the Nuremberg Trial," in *Mr. Justice Jackson: Four Lectures in His Honor*, Charles S. Desmond, Paul A. Freund, Potter Stewart, and Lord Shawcross (New York: Columbia University Press, 1969), 105-112; Diary kept by Jackson, 27-Apr.-19 Nov. 1945, Box 95, Reel 1, Nuremberg War Crimes Trials, The Papers of Robert H. Jackson, Library of Congress, Washington, D.C.

¹¹⁴ Conot, *Justice at Nuremberg*, 92; Scharf, "The Cornerstone," 33. See Brian K. Feltman's recounting of the anxiety this produced within some of the American contingent. Feltman, "Legitimizing Justice," 312.

¹¹⁵ Robertson, *Crimes Against Humanity*, 254.

¹¹⁶ These US-USSR conflicts were significant not only prior to and during the IMT, but also in shaping the collective memory of the Tribunal by minimizing the Soviet contribution. See Hirsch, "The Nuremberg Trials," 15-30.

¹¹⁷ Marrus, *The Nuremberg War Crimes*, 70. See also: Marrus, "The Nuremberg Trial," 568.

¹¹⁸ Marrus, "The Nuremberg Trial," 568. See also: Marrus, *The Nuremberg War Crimes*, 71.

¹¹⁹ Gerhart, *Robert H. Jackson*, 363.

¹²⁰ Appendix II: "Text of the Indictment" in *The Case Against the Nazi War Criminals: Opening Statement for the United States of America by Robert H. Jackson and Other Documents* (New York: Alfred A. Knopf, 1946), 113.

¹²¹ Norbert Ehrenfreund records his reaction to the speech and details other responses. See Ehrenfreund, *The Nuremberg Legacy*, 31-32. See also Feltman, "Legitimizing Justice;" Gerhart, *Robert H. Jackson*, 25, 364.

¹²² Shklar notes "the determination to preserve the distinction between law and non-law, and especially law and politics" exhibited by "Western participants at the Trial." Shklar, *Legalism*, 164. See also de Mendelssohn, "America's Case," 652.

¹²³ I have adopted Michael Bazylar's classification scheme for understanding these critiques, but other scholars have parsed the lines of critique differently and prioritized other charges. See: Archibugi and Pease, *Crime and Global Justice*, 13-16; Ehrenfreund, *The Nuremberg Legacy*, 45-49; 52-63; Donald K. Enholm, "Robert Taft and Nuremberg: The Verdict of Time," *Communication Studies* 51, no. 1 (2000): 35-54; Giada Girelli, "The Origins of International Criminal Accountability: The Nuremberg and Tokyo Tribunals," in *Understanding Transitional Justice: A Struggle for Peace, Reconciliation, and Rebuilding* (Cham, CH: Palgrave Macmillan, 2017); Jonathan Hafetz, *Punishing Atrocities Through a Fair Trial: International Criminal Law from Nuremberg to the Age of Global Terrorism* (Cambridge: Cambridge University Press, 2018): 9-12, 15-16; Hasian, *Rhetorical Vectors*, 29-30; Levi, Dezalay, and Amiraslani, "Prosecutorial Strategies," 98-99; Levi, Hagan, and Dezalay, "International Courts," 296-297; Lokaneeta, "The Legacies of Nuremberg," 457-459; Luban, "The Legacies;" Mayers, *America*, 36, 48-51, 59-61; Michael P. Scharf, "Have We Really Learned the Lessons of Nuremberg?" *Military Law Review* 149 (1995): 65-71; Scharf, "The Cornerstone," 42.

¹²⁴ Bloxham, *Genocide on Trial*, 158. Importantly, Donald Bloxham's discussion of *tu quoque* allegations concerns critiques circulating *after* the trial's open.

¹²⁵ "Ex Post Facto." Merriam-Webster, accessed March 6, 2017, <https://www.merriam-webster.com/dictionary/ex-post-facto>.

¹²⁶ Bazylar, *Holocaust*, 83-85. See also Mary Fulbrook, *Reckonings: Legacies of Nazi Persecution and the Quest for Justice* (New York: Oxford University Press, 2018), 219.

¹²⁷ Robert Cryer, "International Criminal Justice in Historical Context: The Post-Second World War Trials and Modern International Criminal Justice," in *International Criminal Justice: Legitimacy and Coherence*, ed. Gideon Boas, William A. Schabas, and Michael P. Scharf (Cheltenham, UK: Edward Elgar, 2012), 166; Ehrenfreund, *The Nuremberg Legacy*, 46-49; Feltman, "Legitimizing Justice," 301; Meltzer, "Robert H. Jackson," 62-63; Rustem Vambery, "Law and Legalism," *The Nation*, December 1, 1945, 573-575.

¹²⁸ Ehrenfreund, *The Nuremberg Legacy*, 59-63; Marrus, "The Nuremberg Trial," 566-568; Meltzer, "Robert H. Jackson," 62-63; Robertson, *Crimes Against Humanity*, 247-248; Shklar, *Legalism*, 161-162. See also: Michael Bazylar's discussion of "unclean hands" and his inclusion of Hermann Göring's remarks about the "victor"/"vanquished" dynamics. Bazylar, *Holocaust*, 85; Rudolph, *Power and Principle*, 20.

¹²⁹ In Joseph E. Persico's words, "Nazi atrocities [had] dwarfed the misdeeds of other belligerents, [but] had not war crimes been committed on all sides? Why were only those on the losing side tried?" Joseph E. Persico, *Nuremberg: Infamy on Trial* (New York: Viking, 1994), xi. See also: Bernard D. Meltzer, "The Nuremberg Trial: A Prosecutor's Perspective," *Journal of Genocide Research* 4, no. 4 (2002): 564.

¹³⁰ Sascha-Dominik Bachmann, "The Legacy of the Nuremberg Trials—60 Years On," *Journal of South African Law*, no. 3 (2007): 539-545; Kerstin Bree Carlson, *Model(ing) Justice: Perfecting the Promise of International Criminal Law* (Cambridge: Cambridge University Press, 2018), 17, 19; Cryer, "International Criminal Justice," 155-156; Ehrenfreund, *The Nuremberg Legacy*, 52-58; Persico, *Nuremberg*, xi; Vambery, "Law and Legalism."

¹³¹ The fear at Nuremberg was that "[p]recedent was being established that would enable a victor in any future war to try a defeated government." Conot, *Justice at Nuremberg*, 90.

¹³² Noah Feldman, "Nuremberg's Complicated Lessons, 70 Years Later," *Gulf News* (Dubai), November 25, 2015, <http://gulfnews.com/opinion/thinkers/nuremberg-s-complicated-lessons-70-years-later-1.1626367>; Thomas V. Hall, "The Legal Speaking of Robert H. Jackson at the Nuremberg Trial of Major War Criminals" (PhD diss., Bowling Green State University, 1977), 155-157; Meltzer, "Robert H. Jackson," 59. Norbert Ehrenfreund suggests that Jackson was aware of these lines of critique. Ehrenfreund, *The Nuremberg Legacy*, 45-49; 52-63. See: Jinee Lokaneeta's summary of debates around these charges. Lokaneeta, "The Legacies of Nuremberg," 457.

¹³³ Barnet Nover, "Nuernberg Trial," *Washington Post*, November 24, 1945.

¹³⁴ Sound Recording 238-1-24B through 238-1-42B, Justice Jackson's Opening Address to the Tribunal, November 21, 1945; Records of the United States Counsel for the Prosecution of Axis Criminality, RG 238-1; National Archives at College Park, College Park, MD. In what follows, I refer to passages from the address by paragraph numbers in parenthetical citations. Paragraph numbers refer to the authenticated version of the address included in this unit.

¹³⁵ Although Michael P. Scharf does not identify these strategies as part of a global defense, he foregrounds quotations from Jackson's opening statement (in response to victors' justice charges) that illustrate both the global surveillance argument and the necessity argument in light of the global nature of the crimes. See Scharf, "The Cornerstone," 38.

¹³⁶ Notably, this number changes depending upon which version of the address one consults. Although Robert Jackson says "15" at the trial, the version of the address published by Knopf puts the number at 17. See Jackson, *The Nürnberg Case*, 31.

¹³⁷ The Knopf version of the address adds Venezuela and India to this list. Jackson, *The Nürnberg Case*, 80.

¹³⁸ Sofia Stolk argues that Jackson constructs a relationship with the past in order to respond to both charges of victors' justice and *ex post facto* law. See Stolk, "'The Record on Which,'" 1002. For more on Jackson's use of time to legitimate the trial, see Stolk, "'The Record on Which,'" 998-1004.

¹³⁹ Michael P. Scharf acknowledges the significance of this line of response. See: Scharf, "The Cornerstone," 38. See also: Douglas, *The Memory of Judgment*, 50; Girelli, "The Origins," 131; Nover, "Nuernberg Trial."

¹⁴⁰ Stolk, "'The Record on Which,'" 1002. See also: Marrus, *The Nuremberg War Crimes*, 5-6; Nover, "Nuernberg Trial."

¹⁴¹ Arguments about depravity, turpitude or villainy invoke descriptions of the Nuremberg trials as "morality plays" (Hasian 27). A substantive body of scholarship has been authored on the symbolic or theatrical dimensions of trials. The intricacies of the scholarly debates on these subjects are beyond this essay's parameters. For an overview of these discussions, see Hasian, *Rhetorical Vectors*, 2-18. On Axis and Allied character differentiation, see Hasian, *Rhetorical Vectors*, 30, 33, 37.

¹⁴² Jackson's strategy in this speech aligns with Priemel's thesis regarding the "othering" of Germany during the Nuremberg Trials. Priemel contends that the trials depicted Germans as "ha[ving] deviated from the Western way," marking the Germans as "others" and mitigating *tu quoque* charges (6). Priemel, *The Betrayal*, 6, 15, 123-124, 407.

¹⁴³ Priemel, *The Betrayal*, 407.

¹⁴⁴ Both Noah Feldman and Sofia Stolk highlight this rhetorical maneuver in Jackson's opening statement. Feldman, "Nuremberg's Complicated Lessons;" Stolk, "'The Record on Which,'" 999-1004.

¹⁴⁵ Thomas V. Hall also notes this strategy as part of Jackson's defense of the trial. Hall, "The Legal Speaking," 129.

¹⁴⁶ For more on this strategy, see: Bazzyler, *Holocaust*, 84; Rogers, *Law, Politics*, 88-89; Rogers, "Prosecutors' Opening Statements" 333.

¹⁴⁷ See Sofia Stolk on the construction of temporality justifying this invention. Stolk, "'The Record on Which,'" 1001-1004. See also Rogers, *Law, Politics*, 89; Rogers, "Prosecutors' Opening Statements" 333.

¹⁴⁸ Damien Rogers captures this argument slightly differently. See Rogers, "Prosecutors' Opening Statements" 333. See also Douglas, *The Memory of Judgment*, 52.

¹⁴⁹ de Mendelssohn, "America's Case," 653.

¹⁵⁰ Michael J. Bazylar, "Contemporary Legal Lessons from the Holocaust," *Jewish Political Studies Review* 19 no. 1/2 (2007): 15-23. See also Bazylar, *Holocaust*.

¹⁵¹ As Jeffrey D. Hockett notes, concomitant with concerns about the perceptions of the law writ large, Robert Jackson's affiliation with the U.S. Supreme Court potentially jeopardized the ethos of that body as well through affiliation with the IMT. Hockett, "Justice Robert H. Jackson," 258-259; Vambery, "Law and Legalism." For more on how this concern generally manifests, see Gerry Simpson's discussion of law and politics. Simpson, *Law, War and Crime*, 11-29.

¹⁵² Sofia Stolk also addresses Robert Jackson's attempts to defend the law and separate it from the Nazi past. Stolk foregrounds the temporal dimensions of this rhetorical challenge, noting that Jackson must find a way to ground the trial in extant legal precedent while creating "a break with the violent past" (1001). See: Stolk, "'The Record on Which,'" 999-1005, 1008. For a broader interrogation of the ways international judicial bodies invoke a sense of "pure law" to mute their politics and increase their legitimacy, see Dickson, "Shklar's Legalism."

¹⁵³ See again Hasian, *Rhetorical Vectors*, 11, 41. Curran, "Politicizing;" Dickson, "Shklar's Legalism." On politics and international law, see Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *The European Journal of International Law* 21, no. 4 (2010): 941-965.

¹⁵⁴ Hall, "The Legal Speaking," 177.

¹⁵⁵ See again: Curran, "Politicizing," 679; Douglas, "The Didactic Trial," 14-15; Hasian, *Rhetorical Vectors*, 11, 15, 27. Donald Bloxham advances a similar argument about Nuremberg itself. See: Bloxham, "Milestones and Mythologies," 264.

¹⁵⁶ Kratochwil, "Politics, Law, and the Sacred," 19-20.

¹⁵⁷ Rogers, "Prosecutors' Opening Statements," 339. See also: Rogers, *Law, Politics*.

¹⁵⁸ Jackson's efforts in this regard are not unique. For more how an "insistence" on "apolitical" law operates to bolster the perceived legitimacy of legal practices, see Dickson, "Shklar's Legalism;" Shklar, *Legalism*.

¹⁵⁹ Hasian, *Rhetorical Vectors*, 34.

¹⁶⁰ Michael Bazylar writes, "Law became one of the leading instruments by which Jews and other victims were stripped of their assets, then their dignity, and eventually their lives." Bazylar, *Holocaust*, xxv.

¹⁶¹ Bloxham, *Genocide on Trial*, 21.

¹⁶² Michael Bazylar contends this quandary "still poses a dilemma for each generation of legal scholars trying to reconcile how the Holocaust could simultaneously have been both legal and criminal." Bazylar, "Contemporary Legal Lessons," 18. See also: Carlson, *Model(ing) Justice*, 19; Curran, "Politicizing," 682.

¹⁶³ Michael Bazylar explains, "A major pedagogical goal of the Western prosecutors and judges at Nuremberg was to demonstrate their judicial independence—in contrast to the wholesale corruption of the German legal system during the Nazi era." *Ibid.*, 17

¹⁶⁴ See also Sofia Stolk on the utility of "lawlessness" as a legitimation tool. Stolk, "'The Record on Which,'" 999.

¹⁶⁵ *Ibid.*

¹⁶⁶ On the importance of this rhetorical move, see Priemel, *The Betrayal*.

¹⁶⁷ Hasian, *Rhetorical Vectors*, 41.

¹⁶⁸ See note 27 and Hasian, *Rhetorical Vectors*, 27.

¹⁶⁹ *Ibid.*, 27, 46. See also: Rogers, "Prosecutors' Opening Statements;" Rogers, *Law, Politics*.

¹⁷⁰ Both Eugene C. Gerhart and Robert Jackson offer detailed descriptions of the amount of time and labor the trial consumed. See: Gerhart, *Robert H. Jackson*, 428; Jackson, *The Nürnberg Case*, xii. For a detailed discussion of the last two days of the trial, see: Gerhart, *Robert H. Jackson*, 427-435.

¹⁷¹ Bazylar, *Holocaust*, 82; Gerhart, *Robert H. Jackson*, 434; Jackson, *The Nürnberg Case*, xii-xiii; Scharf, "The Cornerstone," 40.

¹⁷² Although William Maley highlights these acquittals, he does not suggest the judgments were without faults. William Maley, "The Atmospheric of the Nuremberg Trial," in *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, 9. See also: Girelli, "The Origins," 138; Hafetz, *Punishing Atrocities*, 15; Hasian, *Rhetorical Vectors*, 37; Mayers, *America*, 62; Shklar, *Legalism*, 168.

¹⁷³ Robertson, *Crimes Against Humanity*, 253. See also: Bazylar, *Holocaust*, 83; Gerhart, *Robert H. Jackson*, 434-435; Michael Salter, "Introducing the Rationale, Aims, and Methodology," in *Nazi War Crimes, US Intelligence and Selective Prosecution at Nuremberg: Controversies Regarding the Role of the Office of Strategic Services* (Oxon: Routledge-Cavendish, 2007): 7.

¹⁷⁴ Ehrenfreund, *The Nuremberg Legacy*, 31. Similarly, Michael P. Scharf contends, "Jackson's opening statement...has gone down in history as among the most elegant and powerful words ever uttered by a lawyer." Scharf, "The Cornerstone," 37. See also Bazylar, *Holocaust*, 78.

¹⁷⁵ Feltman, "Legitimizing Justice."

¹⁷⁶ *Ibid.*, 307-310.

¹⁷⁷ See, for example, "The Nürnberg Novelty," *Fortune*, December 1945, 140-141; "The Shape of Things," *The Nation*, December 1, 1945, 565-567, Vambery, "Law and Legalism." See also the summary contained in Gerhart, *Robert H. Jackson*, 436-440.

¹⁷⁸ Bloxham, "Genocide on Trial," 73-74; Bloxham, "Milestones and Mythologies," 263-264; Heberer and Matthäus, "Introduction," xvi-xvii; Priemel, *The Betrayal*, vi, 402, 411.

¹⁷⁹ Guénaël Mettraux, "Judicial Inheritance: The Value and Significance of the Nuremberg Trial to Contemporary War Crimes Tribunals," in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (Oxford: Oxford University Press, 2008), 599. See also Bazylar, *Holocaust*, xxvii; Bloxham and Pendas, "Punishment as Prevention," 618; Cryer, "International Criminal Justice."

¹⁸⁰ Bazylar, *Holocaust*, 237. See, for example, these deployments of Jackson's legacy to make this case: Paul L. Hoffman, "Justice Jackson, Nuremberg and Human Rights Litigation," *Albany Law Review* 68, no. 4 (2005): 1145-1152; King, "Robert Jackson's. Carlson offers a critical read of such precedent setting, charging that "the IMT's . . . defects have remained intact in modern international criminal law practice, and represent the central ideological and structural obstacles international criminal law faces in achieving the social and political goals that underwrite its practice." Carlson, *Model(ing) Justice*, 18. See also Priemel, *The Betrayal*, 411-417.

¹⁸¹ Schabas, *Unimaginable Atrocities*, 13. See also Bachmann, "The Legacy," 549; Bazylar, *Holocaust*, 235; Bloxham, "Milestones and Mythologies," 263-264; James Podgers, "The Legacy of Nuremberg," *ABA Journal*, January 2015, 54-55; Scharf, "The Cornerstone," 32.

¹⁸² Stolk, "The Record on Which," 993-994, 996-998, 1006, 1009.

¹⁸³ Using Donald Bloxham's words, arguments in this vein "draw an optimistic line of progression connecting Nuremberg to the Hague." Donald Bloxham, "Prosecuting the Past in the Postwar Decade: Political Strategy and National Myth-Making," in *Holocaust and Justice: Representation and Historiography of the Holocaust in Post-War Trials*, ed. David Bankier and Dan Michman (Jerusalem: Yad Vashem, 2010), 23. For examples, see: William Eldred Jackson, "Putting the Nuremberg Law to Work," *Foreign Affairs* 25, no. 4 (1974): 550-565; Henry T. King Jr., "Robert H. Jackson and the Triumph of Justice at Nuremberg," *Case Western Reserve Journal of International Law* 35, no. 2 (2003): 263-272; King, "Robert Jackson's Transcendent Influence; Henry T. King and Theodore C. Theofrastous, "From Nuremberg to Rome: A Step Backward for U.S. Foreign Policy," *Case Western Reserve Journal of International Law* 31, no. 1 (1999): 47-106; Mettraux, "Judicial Inheritance;" Scharf, "The Cornerstone," 42.

¹⁸⁴ Hoffman, "Justice Jackson," 1149.

¹⁸⁵ King, "Robert Jackson's Transcendent Influence," 24.

¹⁸⁶ *Ibid.*, 30.

¹⁸⁷ Henry T. King Jr., "The Legacy of Nuremberg," *Case Western Reserve Journal of International Law* 34, no. 3 (2002): 335-356. For a broader perspective, see Anne Bayefsky, "The Legacy of Nuremberg," in *The Nuremberg Trials: International Criminal Law Since 1945*, ed. Herbert R. Reginbogin and Christoph J. M. Safferling in collaboration with Walter R. Hippel (Munich: K.G. Saur Verlag, 2006), 251-255.

¹⁸⁸ Carlson, *Model(ing) Justice*, 24.

¹⁸⁹ Don Hubert, "The Responsibility to Protect: Preventing and Halting Crimes against Humanity," in *Mass Atrocity Crimes: Preventing Future Outrages*, ed. Robert I. Rotberg (Cambridge, MA: World Peace Foundation / Harvard Kennedy School Program on Intrastate Conflict / Washington, D.C., Brookings Institute Press, 2010), 92.

¹⁹⁰ For a definition of sovereignty, see: Stephen D. Krasner, "Compromising Westphalia," *International Security* 20, no. 3 (1995/96): 115. For a discussion of the principle of sovereignty within the context of genocide studies, see: Alexander Laban Hinton, "The Dark Side of Modernity: Toward an Anthropology of Genocide," in *Annihilating Difference: The Anthropology of Genocide*, ed. Alexander Laban Hinton (Berkeley: University of California Press, 2002), 25-27; Leo Kuper, *Genocide: Its Political Use in the Twentieth Century* (New Haven, CT: Yale University Press, 1981), 161-185; Robert I. Rotberg, "Deterring Mass Atrocity Crimes: The Cause of Our Era," in *Mass Atrocity Crimes: Preventing Future Outrages*, ed. Robert I. Rotberg (Cambridge, MA: World Peace Foundation / Harvard Kennedy School Program on Intrastate Conflict / Washington, D.C., Brookings Institute Press, 2010), 7-8; Samuel

Totten, "The Intervention and Prevention of Genocide: Where There *Is* the Political Will, There Is a Way," in *Century of Genocide: Critical Essays and Eyewitness Accounts*, ed. Samuel Totten, William S. Parsons, and Israel W. Charny, 2nd ed. (New York: Routledge, 2004), 477; Ben Voth and Aaron Noland, "Argumentation and the International Problem of Genocide," *Contemporary Argumentation and Debate* 28 (2007): 38-46; Thomas G. Weiss and Don Hubert, *The Responsibility to Protect: Research, Bibliography, Background*, Supplemental Report of the International Commission on Intervention and State Sovereignty (Ottawa, ON: International Development Research Centre, 2001), 5-14.

¹⁹¹ King, "Robert H. Jackson," 267-268; King, "Robert Jackson's Transcendent Influence," 28; King, "The Legacy of Nuremberg;" Robertson, *Crimes Against Humanity*, 250-253; Rudolph, *Power and Principle*, 16; Ninian Stephen, foreword to *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?*, ed. David A. Blumenthal and Timothy L. H. McCormack (Leiden: Martinus Nijhoff Publishers, 2008), xiii-xiv. See also Steven Keeva and James Podgers's summary of King's views. Steven Keeva and James Podgers, "Nuremberg's Mixed Legacy: War Crimes Trials Set International Justice Goals That Have Yet to Be Achieved," *ABA Journal*, October 1995, 108.

¹⁹² King, "Robert Jackson's Transcendent Influence," 28. See also King, "The Legacy of Nuremberg," 339.

¹⁹³ Lawrence Douglas, "Crimes of Atrocity, the Problem of Punishment and the *Situ* of Law," in *Propaganda, War Crimes Trials and International Law: From Speakers' Corner to War Crimes*, ed. Predrag Dojčinović (Abingdon: Routledge, 2012), 271; Lawrence Douglas, "From IMT to NMT: The Emergence of a Jurisprudence of Atrocity," in *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography*, ed. Kim C. Priemel and Alexa Stiller (New York: Berghahn Books, 2012), 281; Douglas, *The Memory of Judgment*, 46-53; Lokaneeta, "The Legacies of Nuremberg," 459-460; Luban, "The Legacies," 638-646; Mettraux, "Judicial Inheritance," 606-607.

¹⁹⁴ King, "Robert H. Jackson," 266. See also Hirsch, "The Nuremberg Trials," 16; Rudolph, *Power and Principle*, 16.

¹⁹⁵ Hoffman, "Justice Jackson." See also King, "Robert H. Jackson," 266; King, "The Legacy of Nuremberg;" Stephan P. Leher, "Two Surprising Facts: There Are a First Case and a First Case International Court to Hold Defendants Responsible for Their Crimes According to the Rule of Human Rights Law," in *Dignity and Human Rights: Language, Philosophy and Social Realizations* (New York: Routledge 2018), 11-20.

¹⁹⁶ Marrus, "The Nuremberg Trial," 568. See also: Marrus, *The Nuremberg War Crimes*, v-vi.

¹⁹⁷ Hirsch, "The Nuremberg Trials," 16.

¹⁹⁸ *Ibid.* See also Hirsch, "The Soviet Union," 159.

¹⁹⁹ Salter, "Introducing," 4, 7-8. See also Bloxham, *Genocide on Trial*, 11, 52; Bloxham, "Prosecuting the Past," 24.

²⁰⁰ Salter, "Introducing," 4, 7-8.

²⁰¹ Bloxham, "Prosecuting the Past," 24. Donald Bloxham advances this claim in multiple places. See also Bloxham, "Milestones and Mythologies," 271-272; Bloxham and Pendas, "Punishment as Prevention," 625. See also Priemel, *The Betrayal*, 399-400.

²⁰² Graubart, "Rendering Global Criminal Law," 414.

²⁰³ *Ibid.* Francine Hirsch charges that trial participants were cognizant of the extent to which the *narrative* emerging out of the IMT "would have great significance for the postwar future." Allied actors thus angled accordingly to influence the image of their states that would result from the trial. Hirsch, "The Nuremberg Trials," 20. See also Hirsch, "The Soviet Union," 160, 179.

²⁰⁴ Graubart, "Rendering Global Criminal Law," 414-415. See also Bloxham and Pendas, "Punishment as Prevention;" Richard Falk, "Telford Taylor and the Legacy of Nuremberg," *Columbia Journal of Transnational Law* 37 (1999): 693-723; Lokaneeta, "The Legacies of Nuremberg," 459-460.

²⁰⁵ Bloxham and Pendas, "Punishment as Prevention." See also Bazzyler, *Holocaust*, 85; Feltman, "Legitimizing Justice," 317-318; Luban, "The Legacies," 639; Rudolph, *Power and Principle*, 33. Gary Jonathan Bass features American approaches to the Holocaust during the planning and execution of the Tribunal. Bass, *Stay the Hand*, 148, 173-180, 203.

²⁰⁶ Bloxham, "Milestones and Mythologies," 278 (emphasis added in the quote). See also: Bloxham, "Genocide on Trial," 73; Bloxham, "Milestones and Mythologies," 274-276.

²⁰⁷ Bloxham, "Genocide on Trial," 73; Bloxham, "Milestones and Mythologies;" Carlson, *Model(ing) Justice*, 21; Noam Chomsky, "The Poisoned Chalice," *Extra!*, July/August 2007, 16-19; Douglas, "Crimes of Atrocity;" Douglas, "From IMT to NMT;" Lokaneeta, "The Legacies of Nuremberg," 455; Meltzer, "The Nuremberg Trial," 566.

²⁰⁸ Persico, *Nuremberg*, ix. See also Donald K. Enholm on post-Nuremberg violence and the IMT's legacy. Enholm, "Robert Taft," 52.

²⁰⁹ Christopher Rudolph asks similar questions. See Rudolph, *Power and Principle*, 17-18. Although many voices stress the absence of Tribunals during this time period, these narratives obscure attempts to hold the United States accountable for its behavior in Vietnam through the creation of a Tribunal. For a brief overview, see: Robert M. Cover, "The Folktales of Justice: Tales of Jurisdiction," *Capital University Law Review* 14 (1984-1985): 199-202.

²¹⁰ In Donald Bloxham and Devin O. Pendas's words, the gap in international criminal tribunals between Nuremberg and Yugoslavia showcases "the primacy of the political order over the legal." Bloxham and Pendas, "Punishment as Prevention," 619. See also Falk, "Telford Taylor," 694.

²¹¹ See, in particular, Donald Bloxham and Devin O. Pendas's critique of the role of "power politics," the U.S., and its actions; Dickson, "Shklar's Legalism," 195; Rudolph, *Power and Principle*, 35-36.

²¹² In numerous IMT postmortems, scholars debating the relationships among international legal practices and international politics suggest that the IMT showcases the extent to which international jurisprudence is inseparable from the broader power politics structuring the international arena. Falk, "Telford Taylor," 705; Richard Falk, "War, War Crimes, Power, and Justice: Toward a Jurisprudence of Conscience," *Transnational Law & Contemporary Problems* 21, no. 3 (2013): 667-684; Rogers, *Law, Politics*; Rogers, "Prosecutors' Opening Statements;" Rudolph, *Power and Principle*. The political implications of these power disparities did not escape the notice of all participants in these post-World War II trials. Latha Varadarajan explains that Justice Radhabinod Pal's dissent in the Tokyo Trials exposed "the connections between the development of seemingly universally applicable international legal norms and the perpetuation of a highly unequal and fundamentally unjust 'international society' as they appeared at the historical crossroads of the post-Second World War order" (800). In contradistinction with Jackson's rhetoric, Varadarajan underscores the ways Pal's dissent highlights the "cloak of universal morality and legal institutionalization" masking "older, existing structure of imperialism" (807). And, Varadarajan critiques "the blinkered narrative about the progressive nature of international law, particularly international criminal tribunals" that results from a lack of attention to the imperial dimensions of these postwar trials (800). See Varadarajan, "The Trials of Imperialism."

²¹³ Regarding the war on terror, see: Raymond M. Brown, "The American Perspective on Nuremberg: A Case of Cascading Ironies," in *The Nuremberg Trials: International Criminal Law Since 1945*, ed. Herbert R. Reginbogin and Christoph J. M. Safferling in collaboration with Walter R. Hippel (Munich: K.G. Saur Verlag, 2006), 21-29; Chomsky, "The Poisoned Chalice;" Kelly and McCormack, "Contributions;" Mahler, "The Fog." For example, Robert Jackson's words have been cited by Brigadier General Mark Martins to justify the military tribunals at Guantanamo Bay. See Steve Fry, "Chief Prosecutor: Guantanamo Cases Are 'Justice,' Not Revenge: Brig. Gen. Martins Lauds Washburn Law School Dean Romig," *Topeka Capital Journal*, January 10, 2015. In contradistinction, Jackson's words have also been used to condemn the U.S. government for its behavior during the Iraq War and to support a case against former President George W. Bush and other top political leaders. See Marjorie Cohn, "Iraqi Woman Uses Chilcot Report in War Crimes Lawsuit Against George W. Bush," *Huffington Post*, September 5, 2016, (updated September 6, 2016), https://www.huffpost.com/entry/iraqi-woman-uses-chilcot-report-in-war-crimes-lawsuit_b_57cd7c38e4b07addc4138b20 (accessed on February 9, 2017). On human rights abuses, see: Bloxham and Pendas, "Punishment as Prevention;" Graubart, "Rendering Global Criminal Law;" Hirsch, "The Nuremberg Trials;" Lawrence P. Rockwood, *Walking Away from Nuremberg: Just War and the Doctrine of Command Responsibility* (Amherst: University of Massachusetts Press, 2007); Danilo Zolo, *Victors' Justice: From Nuremberg to Baghdad*, trans. M.W. Weir (London: Verso, 2009).

²¹⁴ Bloxham and Pendas, "Punishment as Prevention," 619; Brown, "The American Perspective," 27-29; King, "Robert Jackson's;" Lokaneeta, "The Legacies of Nuremberg," 460; Rockwood, *Walking Away*; Zolo, *Victors' Justice*. The U.S. war on terror has prompted concerns about the U.S.'s treatment of detainees. See: Charles Anthony Smith, *The Rise and Fall of War Crimes Trials* (Cambridge, Cambridge University Press, 2012), 246-264. Further, U.S. leaders' embrace of "preemption" as a rationale for war with Iraq can be seen as a repudiation of extant laws and conventions pertaining to war. See: Brown, "The American Perspective," 27-29; Zolo, *Victors' Justice*.

²¹⁵ Bloxham, "Genocide on Trial," 76; Falk, "Telford Taylor;" Falk, "War, War Crimes, Power and Justice;" Graubart, "Rendering Global Criminal Law," 411, 414-415.

²¹⁶ Bloxham, "Milestones and Mythologies," 272. See also Bloxham, "Prosecuting the Past," 23-24; Bloxham and Pendas, "Punishment as Prevention," 619.

²¹⁷ For example, Bernard D. Meltzer contends, "Nuremberg merely reflected the troubling inequality; it didn't produce it." Varadarajan offers a competing answer. Meltzer, "The Nuremberg Trial," 564; Varadarajan, "The Trials of Imperialism." See also Marrus, "The Nuremberg Trial."

²¹⁸ See Varadarajan, "The Trials of Imperialism," 795.