

## To Nuremberg and Beyond

“It fills me with horror to think of our Reich hacked to pieces by the victors, our peoples exposed to the savage excesses of the Bolsheviks and the American gangsters,” Adolf Hitler wrote in his diary on April 2, 1945.<sup>1</sup> Far from becoming Europe’s masters for a thousand years, as the Führer had once promised, Germany now faced the prospect of being overrun by occupying armies. U.S.-led Allied troops had already opened a road to Berlin and were encircling Hitler’s huge military-industrial complex in the Ruhr Valley, while British and Canadian troops were sweeping across northern Germany. To the east, on the banks of the Oder River, Joseph Stalin had amassed more than a million soldiers and 22,000 pieces of artillery, all poised to descend on Berlin, a mere fifty-six kilometers away. Nazi Germany was by mid-April on the verge of collapse, its transport, gas, water, currency, communications, and health care systems in ruins, causing food shortages and spreading disease. Months of incessant Allied bombing had claimed the lives of nearly half a million people and left millions more homeless and destitute.

Yet Hitler remained defiant. Hidden deep inside his thirty-room bunker on the grounds of the Reich Chancellery in Berlin, he rose each morning and dispatched orders to his soldiers to fight to the end. On the eve of the Soviet assault on Berlin, he issued what was to be his last Order of the Day. “Whoever gives you orders to retreat,” he said, “is to be arrested immediately and, if necessary, to be eliminated straight away—no matter what rank he holds.”<sup>2</sup>

On Sunday, April 29, as American and British bombers wracked Berlin with high-explosive and incendiary bombs, news arrived at the bunker that partisans had captured and summarily executed the Italian dictator Benito Mussolini and his mistress, Clara Petacci, dumping their bodies in Milan's Piazzale Loreto, where an angry mob kicked and spat on the corpses before hanging them upside down on meat hooks from the roof of an Esso gas station.

Hitler was horrified. Just nine days earlier, on the occasion of his fifty-sixth birthday, he had received a congratulatory telegram from Mussolini. Now fearing he might meet the same fate, Hitler ordered his favorite German shepherd, Blondi, poisoned and her five puppies shot, then married his thirty-three-year-old mistress, Eva Braun, and, after saying goodbye to his staff, retreated to his study with his bride.<sup>3</sup> A single shot rang out. Martin Bormann, Hitler's private secretary, ran to the door and opened it. Hitler was slumped with his head on the table. Eva Braun lay on the sofa, her head towards him, knees drawn tightly up to her chest, an ampoule of cyanide crushed in her mouth.<sup>4</sup> Bormann barked an order, and guards carried the corpses out of the bunker and laid them in a freshly dug pit in the Chancellery garden. As the Führer's top aides watched, the guards doused petrol over the bodies and set them alight.<sup>5</sup>

With Hitler dead and Soviet troops scrambling over the smoldering embers of the Reichstag building, the remainder of the *Führerbunker* community faced stark choices. They could flee; wait to be captured; or follow their Führer's example and die by their own hand.

Joseph Goebbels, Hitler's minister of propaganda, was the first to choose. Widely known for having planned the *Kristallnacht* attacks that over the course of two November nights in 1938 had left nearly 2,000 Jewish synagogues in Germany and Austria ransacked or destroyed, he told a close associate there was only one way left: "the one Hitler chose."<sup>6</sup> He arranged for his six young children to be killed by Hitler's personal physician, and then he and his wife, Magda, ascended to the Chancellery garden and killed themselves.<sup>7</sup>

It was Bormann who then took nominal command of Hitler's remaining bunker staff<sup>8</sup>—men like Werner Naumann, the newly appointed head of what was left of the propaganda ministry; Hitler Youth leader Artur Axmann; Hitler's pilot, Hans Baur; and Ludwig Stumpfegger, the Führer's personal physician, who had just poisoned Goebbels's children.

The men formed small groups in the Chancellery garden and agreed to meet outside the Friedrichstrasse Station. From there, they would head north to the town of Plön, where the last vestiges of the Third

Reich were gathering.<sup>9</sup> Bormann, Stumpfegger, and Axmann set out together, but at some point the two older Germans became separated from Axmann.<sup>10</sup> Years later, Axmann would tell a West German de-Nazification court that he had lost sight of his companions but a few hours later found them lying face up in the moonlight behind a railway bridge.<sup>11</sup> He quickly examined the two bodies: they were dead, he was sure of it, but he wasn't sure how they had died. Then, as the sound of Russian artillery drew closer, he fled.<sup>12</sup>

For the next five decades, the “Bormann is alive” myth would live on in the press, novels, and cinema. As historian Guy Walters writes, sightings of Martin Bormann became “as ubiquitous as those of Elvis Presley decades later, and in some instances, no less comedic. Bormann was a monk in Rome . . . Bormann had landed in Argentina by submarine . . . Bormann was a hunter called ‘Carlo’ in the Tyrol . . . Bormann frequented the Ali Baba nightclub in Asunción, Paraguay, with Josef Mengele.”<sup>13</sup> The lack of a corpse and the West German government's posting of a \$25,000 reward for Bormann's capture made such chimerical sightings inevitable.

Bormann's demise was finally settled in the early 1970s after workmen in Berlin unearthed two sets of human remains near Lehrter Station. Scientists at the West Berlin Institute for Forensic Medicine identified the skeletons as those of Bormann and Stumpfegger. Lodged in their jawbones were microscopic fragments of glass, suggesting that they had committed suicide by biting cyanide capsules.<sup>14</sup>

As Allied troops took control of Germany and the Occupied Territories, tens of thousands of Nazis and Axis collaborators were on the run.

Some, like the Auschwitz doctor Josef Mengele, known as *der Totenengel* (the Angel of Death) because of his hideous experiments on inmates and his power to decide who would live and die, had already taken flight.<sup>15</sup> On the night of January 17, 1945, with the sound of the Red Army's artillery echoing ever closer, Mengele made one last visit to his office, where he hurriedly stuffed records from his experiments on twins, cripples, and dwarfs into a small suitcase and left Auschwitz. As the Red Army closed in, he found anonymity in the growing exodus of German soldiers heading west. For two months Mengele stayed with a Wehrmacht unit and later joined the ranks of a motorized German field hospital unit, *Kriegslazarett 2/591*.<sup>16</sup>

On May 8, 1945, the date Field Marshal Keitel signed the instrument of unconditional surrender, Mengele's adopted unit crossed into Saxony from Czechoslovakia and settled into a narrow strip of forested land

that served as a buffer between American and Soviet troops. For the next five weeks, this no man's land became a collecting center for thousands of German soldiers. When American troops descended on the forest, Mengele and his unit slipped through the American checkpoints and travelled to Bavaria, where they were finally captured.<sup>17</sup>

By the time of Mengele's arrest, Germany had become a seething mass of humanity, its roads clogged with hundreds of thousands of refugees, liberated foreign workers, and released concentration camp survivors either returning to their home or seeking a new one.<sup>18</sup> Mingled within this horde were tens of thousands of Nazi war criminals and their Axis collaborators—former Eastern European government officials, concentration camp guards, and paramilitary leaders who had carried out some of the worst atrocities of the Holocaust and were now hoping to slip away. Allied troops worked through this chaos, erecting roadblocks and conducting sweeps through the countryside, in search of German soldiers. Those who were captured were dispatched to one of a vast constellation of hastily built prison camps, where they were screened in an attempt to discover whether they were members of the SS (Schutzstaffel), Hitler's elite paramilitary organization, or other units suspected of committing war crimes. Never before had a group of victorious powers sought to secure a defeated country and create a judicial process to prosecute thousands of war crimes suspects while detaining and interrogating enemy soldiers on such a massive scale. The closest precedent had been a frustrating, far less ambitious attempt by the Allies and Associated Powers following the First World War.<sup>19</sup>

In January 1919, largely in response to persistent clamor in the French, Belgian, and British press, the Allied Powers appointed a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to inquire into the causes of and responsibility for the war. The commission concluded that the Central Powers (Germany, Austria-Hungary, the Ottoman Empire, and Bulgaria) had used "barbarous or illegitimate methods" in their conduct of the war and recommended that a tribunal be established to try those responsible for war crimes and violations of the "laws of humanity."<sup>20</sup> The commission's findings caused considerable debate among the Allies, with the Americans and Japanese vigorously challenging a number of its recommendations. The U.S. representatives were particularly opposed to any attempt to assign criminal responsibility for such a vague notion as the "laws of humanity." They also flatly rejected the establishment of an international

court, “for which there is no precedent, precept, practice, or procedure,” and instead proposed that each of the aggrieved countries create military commissions or tribunals to try the accused.<sup>21</sup>

When later drawing up the Treaty of Versailles, which would formally end World War I, the Allies took into account the commission’s conclusions, but only in part. The final text of the treaty did not include provisions for an international tribunal to try those suspected of crimes against the laws of humanity, which the commission had recommended, but it did include a provision for the prosecution of Kaiser Wilhelm II of Germany, which the commission had rejected.<sup>22</sup>

The Allies presented the Germans with a list of 895 suspects (a sharp contrast from the twenty thousand originally named by the commission) to be tried separately by six countries, not including the United States, which was an Associated rather than an Allied Power. The list included the Kaiser, who was accused of offences against “international morality and the sanctity of treaties,” as well as lower-ranking military officers allegedly responsible for mass killings of Belgian civilians and French prisoners of war and for torpedoing British hospital ships. The German government bluntly refused to hand over the defendants, and the Allies, lacking an occupying army, could do little else but consent to what they considered a humiliating compromise: Germany would try the suspects, but the Allies would be allowed to send observers to the trials. If the observers were dissatisfied by the verdicts, the Allies could retry the accused.<sup>23</sup> The Kaiser was not included in this arrangement: in November 1918 he had sought and been granted asylum in the Netherlands, which refused to hand him over for trial.

The trials opened before the German Supreme Court (Reichsgericht) in Leipzig on May 23, 1921. The first case involved two German U-boat commanders who had torpedoed the hospital ships *Dover Castle* and *Llandoverly Castle* and later shelled the ships’ crowded lifeboats. The court sentenced the two defendants to four years’ imprisonment. Another case involved a German general who had allegedly ordered his troops to shoot surrendering French soldiers. When the judges acquitted the officer, the spectators applauded and shouted insults at the French observers.<sup>24</sup> A group of men placed a garland around the general’s neck and carried him into the streets like a hero.

By January 1922, with acquittals stacking up like so many pieces of firewood, the Allies withdrew their observers in protest and demanded that the remaining defendants be surrendered to Allied courts. The Germans responded by holding closed trials. Of the 901 German

defendants, only 13 were convicted and remanded to prison. And, within months, all of them had “escaped.”<sup>25</sup>

Recollection of what had happened in Leipzig and Versailles would weigh heavily on the minds of a new generation of British and American policymakers twenty years later as they began to confront German atrocities of a magnitude never before seen. Fortunately, this time around the victors were in a stronger position. Because Allied forces occupied Germany and her former territories, they were better able to band together and develop a war crimes tribunal that—at least, in theory—transcended many specific national interests.

### THE LONG, TWISTING ROAD TO NUREMBERG

During the first two years of the Second World War, Britain and its allies struggled against a relentless, often victorious German onslaught, with little attention to spare for developing a war crimes policy in the event their fortunes changed. By September 1941, U.S. intelligence had begun receiving weekly totals, corroborated by Polish underground and British intelligence, of thousands of Jews being murdered. Aerial photographs were even available of the early extermination sites, including the Babi Yar ravine outside Kiev, where Nazi soldiers massacred 34,000 Russian Jews. As evidence mounted of massive German crimes, President Franklin D. Roosevelt of the United States—then a neutral nation—stated on October 25, 1941, that “the Nazi treatment of civilian populations revolts the world,” while British Prime Minister Winston Churchill declared that “retribution for these crimes must henceforward take its place among the major purposes of the war.”<sup>26</sup>

Of all the Allied leaders, Franklin Roosevelt was by far the most cautious, often playing down controversial issues that he felt might complicate the war effort, as well as avoiding any commitments to postwar planning. If the Allies publicly threatened specific postwar punishment of German malefactors, he feared, Hitler might retaliate with a wholesale slaughter of Anglo-American prisoners of war. This reticence even extended to closed-door planning: even in late 1944, when prospects for ultimate victory were far brighter than they had been two years earlier, no U.S. task force was yet at work on the practical tasks of gathering evidence of war crimes, interrogating witnesses and suspects, tracking down wanted men, and establishing courts.

In Britain, Winston Churchill was far more outspoken about Nazi crimes, often lacing his radio broadcasts with threats that Britain would

seek both ultimate victory and revenge against the Reich and their collaborators. “Any man or State who marches with Hitler is our foe,” he thundered in a June 22, 1941 broadcast, adding that Britain was fully committed to delivering “the tools and agents of the Nazi regime . . . like the Nazi leaders to justice.”<sup>27</sup> But Churchill’s rhetoric on Nazi accountability didn’t always sit well with officials in the Foreign Office, who worried that the prime minister was boxing Britain into postwar commitments it couldn’t keep. When members of Parliament called on the Foreign Office to expound on Churchill’s June 22 remarks, Sir Roger Makin, a Foreign Office legal officer, denied that his ministry was compiling lists of suspected war criminals and warned that the government should “studiously refrain from saying what we propose to do with [Nazi criminals] in the unlikely event [of] our catching any after the war.”<sup>28</sup>

Not everyone in London and Washington was so reticent on the matter of postwar justice, however. Ever since they had learned of the Babi Yar massacre, the American Jewish Conference and other Jewish organizations in the United States had been campaigning incessantly in the press and in Congress for punitive action. In addition, the eight governments in exile (Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, and Yugoslavia)—together with the French National Committee—were beseeching the Allies to announce a tougher policy of war crimes prosecutions.

On January 13, 1942, moved by a need for concerted action, the governments in exile met at St. James’s Palace, organized themselves as the Inter-Allied Commission on the Punishment of War Crimes, and issued what became known as the Declaration of St. James’s. The declaration repudiated retribution “by acts of vengeance on the part of the general public” and required that the signatory powers place among their principal war aims the punishment, through the channel of organized justice, of those guilty of or responsible for these crimes, whether they had ordered them, perpetrated them, or participated in them.<sup>29</sup>

The Declaration of St. James’s notwithstanding, Churchill let it be known that he had no patience for formal judicial trials of what he called the “Hitler gang.” He believed that the Nazi leaders should be deemed “world outlaws” and brought before a court simply to verify their identities. That accomplished, they were to be “shot to death . . . without reference to higher authority.” Such a policy, which remained Britain’s position until early 1945, would avoid, in Churchill’s words, the “tangles of legal procedure.”<sup>30</sup> Roosevelt and Stalin, however, rejected the

idea of a quick execution in favor of a full trial. Of the two, it was, interestingly, Stalin who played the greater part in ultimately persuading both of his partners that a judicial process was the best way forward. He saw German defeat as a great opportunity for what his critics dismissed as a “show trial,” much as he had used such trials against “deviationists” and “counter-revolutionary filth” during Soviet purges in the 1930s.<sup>31</sup>

In October 1943, the United States, Great Britain, and the Soviet Union—the Big Three—signed the Moscow Declaration, pledging to pursue war criminals “to the uttermost ends of the earth and [to] deliver them to the accusers in order that justice may be done.”<sup>32</sup> Fine rhetoric indeed, but the declaration, when read in its entirety, seemed more intent on justifying a call to arms on the part of the Allies than actually pursuing justice. Nowhere in the text was there any mention of whether those suspected of war crimes would be prosecuted, or simply executed on the spot.<sup>33</sup>

In the meantime, the British Lord Chancellor, Viscount Simon, had introduced a proposal in the House of Lords to establish an international commission—later named the United Nations War Crimes Commission (UNWCC)—to investigate and name those Nazis responsible for war crimes. The commission’s name did not refer to the United Nations itself, as that institution would not come into existence until late 1945, but instead to the “Declaration of the United Nations,” a term coined by President Roosevelt in January 1942, in which twenty-six nations pledged their unity to stop the expansion of the Axis powers.<sup>34</sup> The thirteen-member UNWCC, comprising the governments in exile plus the United Kingdom, United States, China, Australia, and India, held its first meeting in London in October 1943.

From the start, the UNWCC was plagued with operational problems. The Soviet Union, although a victim of massive German atrocities and initially invited to be a member of the commission, refused to participate, claiming it had established its own machinery for collecting evidence of Nazi crimes. Even worse, the commission’s mandate, despite intense lobbying by the Jewish World Congress, was never amended to include Holocaust-related crimes. Further, though the commission was mandated to investigate and collect evidence of war crimes, it lacked staff trained in investigatory procedures. And so it went: the commission met, subcommittees proliferated, and meetings bogged down in legalistic haggling over definitional matters and protocol.<sup>35</sup>

The UNWCC soon became viewed on both sides of the Atlantic as ineffective.<sup>36</sup> Undoubtedly the commission’s most embarrassing moment

took place during a press conference on August 30, 1944, convened by its chairman, Sir Cecil Hurst. When a reporter asked whether Adolf Hitler was on the commission's list of war crimes suspects, Hurst tried to evade the question, but finally admitted that, in fact, Hitler had been singled out for separate treatment, but stopped short of providing more details. In the end, Hurst's blundering further tarnished the UNWCC's blemished image.<sup>37</sup>

It would take a series of sparks and added kindling to reignite the World War II Allies' now-smoldering attempt to create a war crimes program. Fortunately, a thoughtful and bookish American lawyer named Murray C. Bernays was already at work in Washington, DC, drawing up a blueprint for a radical new approach to prosecuting Nazi war criminals. Bernays had served in the U.S. Army in France during World War I and, at the age of fifty, had been promoted to Lieutenant Colonel and appointed head of the Special Projects Branch at the U.S. War Department. He was well versed in the ways of war, having tackled a wide range of problems, including the treatment of POWs in German hands and the development of procedures to help protect them.<sup>38</sup>

In September 1944, Bernays presented a six-page memorandum on the "Trial of European War Criminals" to his superior, Assistant Secretary of War John J. McCloy. Bernays proposed that Nazi Germany be purged through a judicial process that would move swiftly through the ranks of the Third Reich from top to bottom. Leaders and members of six organizations—the Schutzstaffel (SS) and Sturmabteilung (SA), the two major Nazi paramilitary organizations; the Sicherheitspolizei (SiPo), the security police made up of the combined forces of the Gestapo (secret state police) and the Kripo (criminal police); the High Command of the Armed Forces, and the major leaders of the Nazi Party—would be tried before an international tribunal. In what would become known as the Nuremberg Trial Plan, the defendants would be charged with "conspiracy . . . to commit murder, terrorism, and destruction of peaceful populations in violation of the laws of war."<sup>39</sup> Built on a traditionally Anglo-American legal doctrine, that of criminal conspiracy, Bernays's approach would criminalize "everything done in the furtherance of the conspiracy . . . including domestic atrocities induced or procured by the German Government to be committed by other Axis nations against their respective nationals."<sup>40</sup>

McCloy sent the memorandum to Secretary of War Henry Stimson, who was greatly impressed by the proposal, and especially enthusiastic

about the conspiracy concept. At seventy-seven, Stimson was one of the oldest and most venerable officials in the Roosevelt administration. A former Wall Street lawyer and military officer who had served in World War I, he was highly regarded by both military and civil officials. At about the time Bernays's criminal/conspiracy proposal landed on Stimson's desk, the secretary of war was trying to quash another plan for postwar Germany, one that had been put forward to the president by Secretary of the Treasury Henry Morgenthau. The so-called Morgenthau Plan aimed to prevent Germany's rearmament by closing down the Ruhr and Saar industries, effectively turning the country into an agricultural and pastoral backwater. The plan also included provisions for "group detention, the creation of labor battalions, and the summary execution, without hearing or trial, of Nazi leaders."<sup>41</sup>

On September 9, Stimson wrote to Roosevelt condemning every aspect of the Morgenthau Plan and recommending the establishment of an international tribunal to try Nazi war criminals. Stimson argued that only "through apprehension, investigation, and trial of all the Nazi leaders and instruments of the Nazi system of terrorism such as the Gestapo" would the Third Reich be eviscerated.<sup>42</sup>

Two months later, Stimson and his War Department colleagues received further fodder for their tribunal idea from A. N. Trainin, head of the Soviet Extraordinary State Commission for the Investigation of German War Crimes. Trainin sent a précis of the Soviet plan for a tribunal at which the major war criminals would be tried for conspiring to wage aggressive war (crimes against peace) and for waging that war with premeditated brutality (crimes against the laws of war).<sup>43</sup> Stimson and his aides saw the Soviet plan as a tool for outmaneuvering both Morgenthau and those who favored execution. On November 9, the War Department hosted a meeting on war crimes at the Pentagon, where the idea of a full-dress war guilt-conspiracy trial, as originally proposed by Bernays, was approved.

In mid-December 1944 news reached Washington that SS troops had machine-gunned seventy American prisoners at Malmédy, Belgium. Almost immediately newspaper editorial boards across the United States began calling for retribution. "Malmédy fever," as it was called, helped galvanize War Department proponents of an international tribunal. In January 1945, the secretary of war, supported by the secretary of state and the U.S. attorney general, presented Roosevelt with a proposal for an international tribunal to try the leading German war criminals. Even Morgenthau grudgingly accepted the plan.<sup>44</sup>

A month would pass before Roosevelt gave an indication that he fully supported war crimes trials of Nazi perpetrators. On February 24 he issued a directive ordering U.S. army groups stationed in Europe to establish special units to investigate “alleged war crimes against members of the armed forces of the United States.”<sup>45</sup> A month later, the president issued a statement declaring that Nazi leaders would be tried and that the defendants would include those who had “participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes.”<sup>46</sup>

Still, the British stood firm, categorically rejecting the idea of a judicial tribunal as “neither good nor practicable.”<sup>47</sup> What the British feared most was a lengthy trial in which Hitler and his cronies could dismantle a loosely worded conspiracy theory. The end goal for the British was a firing squad, so why take the risk of holding a trial that could potentially turn into a farce?<sup>48</sup>

In the end, it was Harry S. Truman who would make the final break with the British on the issue of summary execution. On May 2, 1945, just three weeks after Roosevelt’s death, President Truman issued a statement from the White House announcing America’s commitment to the judicial path: “It is our objective to establish as soon as possible an international military tribunal; and to provide a trial procedure which will be expeditious in nature and which will permit no evasion or delay—but one which is in keeping with our tradition of fairness toward those accused of crime.”<sup>49</sup> The following day, in a stunning concession that surprised the Americans, the British war cabinet, possibly in response to Truman’s emphatic announcement, reversed its policy on summary executions. News of the British turnabout spread quickly among delegates in San Francisco attending the founding conference of the United Nations. On May 6, American, British, Soviet, and French delegates emerged from a meeting to announce they had reached a tentative agreement to establish an international military tribunal based on judicial principles, with one judge and one chief attorney from each of the four states. Nothing was formally signed, but it was a Rubicon moment: Senior Nazi leaders who fell into Allied hands would be investigated and tried.<sup>50</sup> Only time would tell whether this endeavor would be an anomaly in world affairs, or the beginning of something new and ultimately enduring: the development of a sense of international justice among nation states and a means of adjudicating it.

While the Allies were still arguing over a process for holding Nazis accountable for their crimes, the Supreme Headquarters Allied Expeditionary Force in Paris had established a Central Registry of War Criminals

and Security Suspects (CROWCASS). Building on the experience of both Scotland Yard and the FBI, it was to be the largest database of war criminals ever assembled and would serve as the hub for gathering information on war crimes suspects throughout Europe—or so it was hoped. At its helm was British Lieutenant Colonel William Palfrey, who hired four hundred French women to set up a huge card index, into which they would punch the names of the eight-million-strong German army. This index was to be matched against two datasets: lists of war crimes suspects compiled by the UNWCC, and the names that came up on standard detention forms, on which arresting officers were to place a photograph of the detainee, his fingerprints, and a breakdown of his main physical characteristics. From this mass of information, the women of the central registry were to produce lists of war crimes suspects and distribute them to field commanders and POW camp administrators.

CROWCASS faced a daunting and unprecedented task and suffered as a result. Both its first list of war crimes suspects, published in May 1945, and its second list, released five months later, were deeply flawed. Much of the information was simply incorrect: names were misspelled, ranks and military affiliations mismatched, and the like. By May 1946, CROWCASS had moved from Paris to Berlin, where it was placed under the wing of the Allied Control Council, the governing occupation body, jointly directed by the Soviet Union, the United States, and the United Kingdom. By then, Lieutenant Colonel R. F. Luck had replaced the unfortunate Palfrey as the agency's director. Even so, now with only eight employees, the registry soon became overwhelmed, prompting Luck to send a desperate message to his superior in London, begging for more staff and resources. When the beleaguered agency tried to publish a new list of suspected war criminals, it was unable to do so because of a shortage of typewriter ribbons.<sup>51</sup>

By the time CROWCASS suspended operations in 1948, though, it had processed over a hundred thousand detention requests to investigative teams from a dozen countries and published a total of forty book-length registries of persons being sought for war crimes—the most extensive database on such suspects ever created.<sup>52</sup>

But CROWCASS, like so many postwar intelligence projects, also had a second, more surreptitious function. The crosschecking capacity that helped ferret out the names and backgrounds of possible war crimes suspects could also be used to create a pool of possible candidates from within the Nazi ranks for Allied police and intelligence

work. There was nothing overtly nefarious about using such information to develop a network of local informants: the intelligence agencies wanted to keep tabs on a restive population, hoping to prevent the resurgence of a Nazi threat in Allied-occupied Germany, and this seemed to them an ideal way to do it. As Gene Bramel, a young U.S. army intelligence officer who supervised a number of Nazi informants, put it:

They say, “Why did you use Nazis?” That is a stupid question. It would have been impossible for us to operate in southern Germany without using Nazis. We were Americans. I spoke pretty good German, but by the time I got through ordering dinner they would have suspected I was an American. And who knew Germany better than anyone else? Who were the most organized? Who were the most anti-Communist? Former Nazis. Not to use them would mean complete emasculation. And we used them, the British used them, the French used them, and the Russians used them.<sup>53</sup>

But it was a Faustian pact bound in all the trappings of a utilitarian rationalization. Leon G. Turrou, an American intelligence officer and CROWCASS’s operations chief, oversaw the task of culling lists to find former Nazi officials who could serve as informants. He also became the inside contact for his American intelligence colleagues who wanted incriminating information purged about Nazis who had gone to work for them. Turrou did this by deleting the names of informants that appeared on CROWCASS lists of either wanted suspects or German POWs or by simply sanitizing an informant’s file of any incriminating information. Such selective whitewashing of Nazi personal histories became *de rigueur* as American and British intelligence agents swept through the occupied zones in search of potential German spies to infiltrate Nazi resistance groups. But the process did not end there; these same informants would also be used to penetrate nascent Communist organizations in Eastern Europe, and to track down German and Austrian scientists to send to Britain and the United States to bolster their science and technology efforts.<sup>54</sup>

Allied war crimes investigators faced daunting psychological challenges and operational difficulties as they took control of Germany and Austria in the spring of 1945. Not only did they have to deal with immense human suffering, especially among survivors of the extermination and concentration camps, they also had to make legal sense of the sheer volume of criminality they were uncovering. For the British and Canadians,

the horror especially hit home when a combined infantry unit entered Bergen-Belsen, in northern Germany, on the afternoon of April 15, 1945. The camp was packed with nearly 40,000 inmates in the grips of a typhus epidemic, its grounds pocked with half-filled burial pits and strewn with mounds of corpses in various stages of decomposition. Inside the huts were more bodies, some even in the same bunks as the living.<sup>55</sup>

The Allied soldiers arrested the camp's commander, Josef Kramer, and called in a British war crimes team, which soon became overwhelmed by the task of interviewing dozens of uncooperative camp staff and hundreds of emaciated and highly traumatized survivors. "The evidence flowed in like a deluge and we were submerged in it," an investigator recalled. "Our efforts then and later were like a man standing at the edge of the sea dropping lumps of sugar into it, and saying: 'Behold it is sweet.' We were failing because the wave of criminality was so great and our resources were so inadequate." And as it would turn out, many of the depositions taken from witnesses and victims at Bergen-Belsen and other concentration camps would be worthless as trial evidence: the interrogators, few of whom were trained in law, often asked questions that failed to gather sufficient or appropriate evidence.<sup>56</sup>

Corporal Ben Ferencz, a Jewish-American war crimes investigator, who was born in the mountains of Transylvania and grew up in New York's Hell's Kitchen neighborhood before going on to receive a Harvard law degree, was assigned to investigate concentration camps at Buchenwald, Mauthausen, and Dachau. (He would later be appointed, at the age of twenty-seven, a chief prosecutor of one of twelve U.S.-led trials of Nazi suspects following the famous Nuremberg Tribunal.) He recalled adopting a sort of stoic professionalism to cope with the tremendous anger he felt when he first entered the camps:

Entering a concentration camp very soon after it is liberated is entering hell. Total chaos. The troops are coming in, trucks are coming in, SS are running out into the woods. The inmates—those of them who can still move—many of them are just lying there, dead or dying. And I've got to go in and find out where's the office, where are the records for all of this. . . . Seize all the records. Take testimony wherever [I] can. Go back to headquarters, sit down, type up the report, which subsequently became the basis for war crimes trials.<sup>57</sup>

Now in his mid-nineties, Ferencz goes on to recall how he coped with the emotional stress of witnessing such horrors:

I somehow, automatically I guess by way of self-preservation, created a mental block. This was not real, these were not humans, this is a case. I need the evidence of what is happening here, I need to record it in a manner which is indisputable, I need to determine who could be responsible for these crimes, and I have to move on to the next camp. And I did that, in almost a mechanical fashion. I sometimes thought I was like a doctor on the battlefield having to do triage. Now the effect on me was a permanent trauma, from which I suffer to this day, and that couldn't be concealed, and that couldn't be overcome, but it was put in a side drawer because there was a job to do and that had to be done and it was important and I had no time to waste with emotion or sentiment. I had to get it down and move on to the next camp.<sup>58</sup>

Robert E. Matteson, a former political-science teacher from Wisconsin who was a war crimes investigator with the U.S. 80th Infantry Division, recalled what he and his interpreter, Sydney Bruskin, encountered as they entered the gates of the Ebensee concentration camp early in the morning of May 5, 1945:

Bodies that one would never have believed existed were walking around, covered with sores and lice. The filth was indescribable. Adjacent to the crematorium were rooms piled high with shrunken nude bodies, lye thrown over them to combat the stench and vermin. . . . Worse still was the hospital, where the dying and sick had been herded for experimentation before being carted off to the crematorium. There were no beds in the [hospital]; the inmates lay on shelves covered with dirty rags, groups of two or three huddled together like mice to keep warm. As we entered they put their hands out and begged for food.<sup>59</sup>

After leaving Ebensee, Matteson and Bruskin traveled with an army detachment to the Austrian Alpine resort of Altausee in search of Ernst Kaltenbrunner, the head of the Reichssicherheitshauptamt (Reich Security Main Office), the branch within the SS that ran the domestic and foreign intelligence services, the Gestapo, and the criminal police. In 1943, Kaltenbrunner had ordered the creation of a complex of Austrian camps, including Ebensee, to provide slave labor for the construction of enormous underground tunnels in which German armaments were housed.

In April 1945, the American Office of Strategic Services, the forerunner of the Central Intelligence Agency, had learned that Kaltenbrunner and some other high-ranking Nazis had fled to the mountains above Altausee to establish a redoubt from which they could descend to prey on the Allied occupation forces. Among those who had gathered there were Wilhelm Höttl of the Sicherheitsdienst, the SS intelligence service; Adolf Eichmann, the operational manager of the Final Solution;

General Erich Alt of the Luftwaffe; Walter Riedel, the construction chief of the V-2 rocket program at Peenemünde; and William Knothe, general counsel of the Foreign Office.

Shortly after their arrival in Altausee, Matteson and Bruskin oversaw the capture and initial interrogation of Höttl, Alt, Riedel, and Knothe. Days later, Matteson captured Kaltenbrunner and three SS guards in a small, snow-bound hunting lodge in the mountains above Altausee. Eichmann, however, managed to evade capture.<sup>60</sup>

Allied war crimes teams faced, albeit to varying degrees, three significant challenges in the postwar years: a shortage of personnel and resources, administrative indecision, and, after initial enthusiasm, flagging political support from their governments.<sup>61</sup> Ian Neilson, the head of the British war crimes effort, spoke ruefully to Guy Walters about his constant battle to acquire equipment and personnel:

If the [British War Crimes Unit] had started in the early spring of 1945, I think we would have caught a lot more chaps—and witnesses' memories would have been a lot better than they were. Generally speaking, the whole thing was on a shoestring . . .<sup>62</sup>

Without proper manpower, many British investigators were absurdly overworked. In August 1946, one desperate team leader beseeched London to send more pathologists to deal with the mass graves his men were uncovering, but to no avail. Another team leader grew incensed when he learned that his team was to be cut by sixty investigators. “It does not seem to be appreciated in certain branches of this Headquarters that the War Investigation Unit is engaged in priority work or that it is a highly specialized unit,” he wrote to his superiors.<sup>63</sup> Still, the cuts held, and as his caseload grew, so did the backlog of unresolved investigations.

What neither of these investigators knew was that senior British officials were quickly losing their appetite for Nazi hunting. In November 1946, the Cabinet decided in principle to begin winding down British war crimes trials. In August 1948, Britain effectively ended its war crimes investigations altogether. “I was really upset,” one investigator later told Guy Walters. “We still had ten thousand people on the books. These were criminals, murderers, concentration camp guards—and they disbanded it because they wanted to concentrate on the Russians. It was just filthy politics.”<sup>64</sup>

Why was Britain abandoning its war crimes effort? Sir Hartley Shawcross, the chief British prosecutor at Nuremberg, later recalled that the decision was made because Churchill was worried that future Axis tri-

als might bring attention to the crimes committed by the investigators themselves.<sup>65</sup> Allied war crimes teams, true enough, did face allegations of torture and ill-treatment, especially in the early years. The French became the subject of criticism by their Anglo-American counterparts for using beatings and dog attacks, among other methods, in their attempts to extract information from German prisoners. In one instance, a French interrogator unleashed an Alsatian and a Boxer on a prisoner, who finally acquiesced and signed a confession written in French.<sup>66</sup>

But the French weren't the only ones who had taken up abusive interrogation methods. Ben Ferencz, who decades later became an influential advocate of enshrining due-process principles through the establishment of the International Criminal Court, described to Guy Walters how he handled cases in which he suspected U.S. airmen had been murdered after they were shot down:

I'd drive to where it happened and detain the Burgermeister or the most senior guy, and get some witnesses together. I'd line them up against a wall and threaten to shoot them unless they wrote down exactly what happened. I wasn't going to shoot, but they didn't know that, because I damn well made them know that I was going to blow their heads off. Anyway, they'd soon started scribbling!<sup>67</sup>

British investigators also faced allegations of torture and abuse in their handling of Nazi prisoners. In June 1945, British intelligence opened an interrogation center in Bad Nenndorf, near Hanover, Germany, where ex-Nazis and suspected communist agents were subjected to systematic beatings, whippings, prolonged solitary confinement, exposure to extreme cold, and starvation, according to Inspector Thomas Hayward of Scotland Yard, who later investigated abuse at the facility. Hayward revealed that guards at Bad Nenndorf had been "instructed to carry out physical assaults on certain prisoners with the object of reducing them to a state of physical collapse and of making them more amenable to interrogations."<sup>68</sup> He also found that some detainees were tortured with thumbscrews and other instruments recovered from a Gestapo prison in Hamburg. Hayward's findings dismayed British officials. "I doubt if I can put too strongly the parliamentary consequences of publicity," one foreign officer wrote in a memorandum to then Foreign Secretary Ernest Bevin. "Whenever we have any allegations to make about the political police methods in Eastern European states it will be enough to call out in the House 'Bad Nenndorf,' and no reply is left to us."<sup>69</sup>

Equally serious charges were directed at British interrogators working in the Combined Services Detailed Interrogation Centre, known colloquially as the London Cage, which operated out of three houses in the posh neighborhood of Kensington Palace Gardens. In total, 3,573 German prisoners, military and civilian alike, passed through the Cage between July 1940 and September 1948 without the knowledge of the International Committee of the Red Cross, and more than 1,000 were persuaded to give statements about war crimes. According to two official inquiries, London Cage interrogators used beatings, sleep deprivation, and forced standing, while threatening the use of electric devices and summary execution, to coerce inmates to talk.<sup>70</sup>

Most of the U.S. investigations of Nazi crimes were conducted by a little-known army organization called the Counter Intelligence Corps (CIC). Established in August 1917 as the Corps of Intelligence Police, the unit ran counterintelligence operations in northern France toward the end of the First World War. After the Japanese attack on Pearl Harbor the corps was renamed the CIC and its numbers swelled to nearly 5,000 commissioned and noncommissioned officers. The men selected for the CIC were often multilingual, high-status professionals—bankers, professors, county sheriffs, lawyers, and journalists—with little or no investigative experience. A few agents would become notable figures, such as novelist J. D. Salinger, author of *The Catcher in the Rye*; composer Leroy Anderson; and Aaron Bank, father of the Vietnam special operations commandos, the Green Berets. Once in the “Corps,” agents were expected to remain discreet, wearing plain clothes or uniforms bearing no unit identification or designation of rank.<sup>71</sup>

As U.S. army divisions occupied Germany and Austria, they were accompanied by CIC detachments that provided security for military installations and staging areas, located enemy agents, and acted to counter Nazi stay-behind networks. They also provided training to combat units in security, censorship, the seizure of documents, and the dangers of booby traps. Once in Germany, CIC personnel were regrouped into a single detachment headquartered in Berlin. The CIC’s operational mandate, at least in its early postwar years, was drawn largely from a 120-page counterintelligence directive issued by the Twelfth Army Group in April 1945. The directive was as blunt as it was all-embracing. Germany was to be sealed off from the rest of the world, with martial law imposed on all its inhabitants. Curfews would be enforced, meaning no German could move without an ID pass, and

never more than six kilometers from his or her home. Army checkpoints, backed up by surveillance aircraft, were to be posted along Germany's borders and a "blackout" imposed to stop all communication between Germans and their relatives, friends, and associates outside the country.<sup>72</sup>

The directive also instructed the CIC to carry out a range of special tasks, among them tracking down German scientists and industrial technologists (lest they fall into Soviet hands), detaining anyone who represented a threat to the Allied forces, securing Nazi Party buildings to safeguard documents, and arresting and interrogating suspected war criminals. Some CIC agents were dispatched to POW camps to weed out SS and Nazi Party members from the rank and file. One of the least desirable jobs was being attached to a "CI Annex," a warren of communal and solitary confinement cells and soundproof interrogation rooms, usually located next to a POW camp, where CIC agents would spend hours eavesdropping on interrogations and conversations among internees in the hope of gleaned some actionable intelligence.<sup>73</sup>

The CIC's Berlin office maintained two subsections: the Central Registry, which cataloged all counterintelligence information, and Case Direction, which evaluated all counterintelligence information coming from its field offices, checked it against information already on file, and passed it on to other interested agencies. Case Direction was further divided into two subsections known as the internal and external desks.

The internal desk concerned itself with pursuing war criminals, maintaining security, and implementing an ambitious denazification program. During the first ten months of the occupation the CIC apprehended some 120,000 Germans listed for automatic arrest. This group included top Nazi leaders, SS and Gestapo members, high-ranking military officers, and suspected war criminals.<sup>74</sup> The CIC was also pulled, along with other U.S. intelligence agencies, into a secret project authorized by the Joint Chiefs of Staff in July 1945. The clandestine program, known as Project Overcast, was to "exploit . . . chosen, rare minds whose continuing intellectual productivity we wish to use." The chiefs directed that up to 350 identified specialists in chemical warfare, submarine design, and missile research, mainly from Germany and Austria, should be immediately brought to the United States to work in the then continuing war with Japan and the emerging conflict with the Soviet Union.<sup>75</sup>

By early 1946, the Pentagon's Joint Intelligence Objectives Agency (JIOA) had begun pushing for a revised and larger program, given the clandestine name Operation Paperclip, to recruit German and Austrian

scientists and technicians. In September, President Truman approved Operation Paperclip, contingent on the effort's remaining secret from the public and recruitment restricted to "nominal" Nazis (and not "active supporters" of Nazism). In the recruitment process the Office of Military Government United States (OMGUS) in Germany would prepare a dossier on each scientist and technician based on CIC investigations. These dossiers would then be sent in batches to the JIOA and on to a panel of representatives from the Departments of Justice and State, who would rule on the admissibility of each individual and report back to the JIOA.<sup>76</sup>

But there was a problem. In early 1947, the review panel actually rejected the first batch of dossiers, largely because the OMGUS reports pointed out that at least half of the recruits were Nazi Party members or SS veterans and some were without question still "ardent Nazis." According to Christopher Simson, CIC investigations revealed that some candidates "were accused of participating in murderous medical experiments on human subjects at concentration camps, for example, or brutalizing slave laborers. Another was reported to have established an institute for biological warfare experimentation on humans in Poland."<sup>77</sup>

In response, the JIOA director, Bosquet Wev, wired the director of intelligence at the U.S. European Command: "There is very little possibility that the State and Justice Departments will agree to immigrate any specialist who has been classified as an actual or potential security threat to the United States. This may result in the return [to] Germany of specialists whose skill and knowledge should be denied to other nations in the interest of national security. . . . It is requested . . . that new security reports be submitted where such action is appropriate."<sup>78</sup>

In other words, the files were to be cleansed of any incriminating information. Weeks later, OMGUS sent back new dossiers with all offending language expunged, and subsequent dossiers were careful to point out that the Nazi and SS past of each recruit "did not constitute a security threat to the U.S."<sup>79</sup> This action prompted two members of the screening board to resign. From then on, the Pentagon's recruitment of German scientists ran without a hitch.

Congressional inquiries in the 1980s and 1990s into Operation Paperclip revealed that between 1945 and 1955 alone, 765 scientists, engineers, and technicians were brought to the United States. At least half, and perhaps as many as 80 percent, of these specialists were former Nazi Party members, including some who were responsible for war crimes.<sup>80</sup>

If the CIC's internal desk in Berlin was focused on seeking out war criminals, its external desk was mainly responsible for monitoring the

activities of the Soviet Union and its satellites. When General Dwight Eisenhower, commander of U.S. Forces in Europe, was directed by the Joint Chiefs of Staff in May 1945 to arrest and hold war criminals, he was advised: "In your discretion, you may make such exceptions as you deem advisable for intelligence and other military reasons."<sup>81</sup> By the late 1940s, the CIC had established a wide network of informants and agents, some of whom had tainted wartime backgrounds, within the Allied occupation zones and extending into Eastern Europe. Decades later it would be revealed that in Austria alone the CIC had employed as intelligence informants at least fourteen suspected Nazi war criminals, a number of whom were likely involved in the murder of Jews in occupied Europe.<sup>82</sup>

As the war in Europe came to a close, in May 1945, the CIC began to lose some of its best agents, who were seizing their first opportunity to return to the States and civilian life. To make up for these losses, the CIC scoured American troops throughout Europe to find suitable replacements. The process produced disappointing results, as most of the young soldiers had had no training in intelligence or police work and many were simply attracted to the trappings of authority and benefits that came with a cloak-and-dagger lifestyle. One such recruit was twenty-two-year-old Henry Kissinger, a U.S. Army officer born in the Bavaria region of Germany to an Orthodox Jewish family. As anti-Semitism intensified in Nazi Germany, the Kissinger family had departed for New York in August 1938. Now, several years later, the future secretary of state was posted to southwestern Germany, where, according to CIC historians Ian Sayer and Douglas Botting, Sergeant Kissinger spent his days ferreting out Gestapo and SS officers who were hiding in the town and surrounding countryside, but after hours "lived like a lord in a luxurious villa": "After a visit to the Kissinger ménage an old friend from Washington wrote in his diary for 21 October 1945: 'What a set-up! Like a castle. Had dinner with [Kissinger]. What an intelligent girlfriend.' The girlfriend was German. So were the cook, the maid, the housekeeper and the secretary—and the white 1938 Mercedes-Benz he had confiscated from a Nazi baby powder manufacturer."<sup>83</sup>

Such excesses earned the scorn of hard-boiled British agents like Anthony Terry, a British commando who also worked as an interrogator in the London Cage and later as a journalist. Terry found many of the CIC agents he encountered after the war to be posturing, skirt-chasing "nabobs" who were haphazard in their jobs and couldn't keep their files secure. "They may have been effective in the combat situation during the

war,” he said, “but they were running to seed a bit by the time I met them afterwards. They ran around with a lot of fancy ideas and wrote vast memos full of sound and fury and not signifying very much.”<sup>84</sup>

For a week in February 1945, as Allied forces advanced toward Berlin, the soon-to-be victors—Winston Churchill, Franklin D. Roosevelt, and Joseph Stalin—met at the Black Sea resort of Yalta to discuss Europe’s postwar reorganization. They agreed that Nazi Germany had to surrender unconditionally and that both Germany and Berlin would be split into four occupied zones. France would occupy one of the zones, but it would have to be formed out of the American and British zones. The Big Three also agreed to “remove all Nazi and militarist influences from public office and from the cultural and economic life of the German people.”<sup>85</sup> In effect, the occupying powers, in addition to seeking and trying those suspected of major war crimes, would implement an ambitious denazification program to rid German and Austrian society of any remnants of the Third Reich.

Each of the occupiers took a somewhat different approach to denazification. The Americans viewed their mission as a moral crusade and were by far the most zealous of the occupying powers. They required every German over the age of eighteen to answer a questionnaire or *Fragebogen*, which contained 131 questions in six pages about his or her association with the Nazi Party. After the *Fragebogen* had been filled in, a denazification court would classify the respondent in one of five categories: major offender, offender, lesser offender, follower, or exonerated person. Each of the first four categories carried a penalty, ranging from imprisonment to fines, and those considered some of the worst offenders could potentially be tried for war crimes. In the Soviet zone, the denazification process—at least, in the initial phase—was used to remove capitalists, large landowners, and anyone who seemed hostile to the communist experiment. The British, faced with the responsibility for the zone with the largest concentration of industry and the greatest degree of damage due to the bombing, tended to be more willing to allow people to remain at their jobs for the sake of economic recovery. The French were less interested in purging people on the basis of their Nazi Party membership than in decentralizing and weakening Germany.<sup>86</sup> In all, the Allies penalized nearly a million German nationals for their Nazi Party affiliations.<sup>87</sup>

Denazification tended to be rough justice. This was especially true in the American zone, where the CIC had unlimited powers of search and arrest, prompting many Germans to refer to them as the “American

Gestapo.” CIC agents, frequently armed with more prejudice than knowledge, arrested individuals based on tips provided by shady informers who were seeking revenge or hoping to gain personal advantage. Nor did the American occupiers appreciate that joining the Nazi Party might in some cases have been more a matter of necessity than conviction. Indeed, many teachers and public officials had become party members simply to protect their employment or to improve their career prospects. According to one assessment, approximately 65 percent of all primary-school teachers in the American zone were removed from their posts.<sup>88</sup>

In late 1945 the Allies, mindful of the rising fear and anger among Germans regarding the denazification program, began to relax their occupation regime. German advisory committees worked alongside American and British authorities to help usher in German-run administrations at the regional and district levels.<sup>89</sup> Of all the occupiers, the French were the most lenient toward their German subjects and the first to turn the vetting process over to trusted German officials. Meanwhile, in the Soviet zone, nominal members of the Nazi Party were offered the opportunity to join rehabilitation programs if they broke with their political past and agreed to devote themselves to the task of reconstruction.

#### DAYS OF JUDGMENT

By late 1949, when the victors handed power back to a new German government, the Allies and authorities in Greece, Netherlands, Norway, Poland, and Yugoslavia had conducted 969 war crimes trials, in which 3,470 German defendants were tried. Death sentences were passed for 952; 1,905 were sentenced to varying prison terms; and 613 were acquitted.<sup>90</sup> Of all the postwar trials, the Trial of the Major War Criminals that opened in Nuremberg, in the American Occupation Zone, on November 20, 1945, would be, in the words of British historian Richard Bressel, “the most important expression of the Allied campaign to impose morality through legal proceedings, and simultaneously to establish a record of what the Nazi regime had done.”<sup>91</sup>

Allied representatives had met in London in June 1945 to create the charter for what would become known as the Nuremberg tribunal. They agreed that the court would have jurisdiction over only Nazi crimes committed in connection with Germany’s waging of aggressive war. Each of the representatives had reasons of their own for holding only the German side responsible for war crimes committed during the conflict. The Americans and British, for example, knew that their forces had killed

civilians and wanted to avoid a *tu quoque* argument from the defense that they were equally responsible for war crimes.<sup>92</sup> Of particular concern to the Anglo-American representatives were the bombing raids over Dresden between February 13 and 15, 1945, in which British and American warplanes dropped more than 3,900 tons of high-explosive bombs and incendiary devices on the city, destroying much of the city center and killing more than 23,000 people.<sup>93</sup> Similarly, the Soviets did not want to be charged with the massacre of more than 20,000 Polish officers and civilians at Katyn in April and May 1940, though they included this massacre as a charge in the indictment against the Germans.<sup>94</sup>

On August 8, 1945, after a summer of debate, the four major powers—the Soviet Union, France, Great Britain, and the United States—met again in London to sign the charter establishing the International Military Tribunal in Nuremberg. The charter laid the scaffolding for the Nuremberg trial of the surviving leaders of the Third Reich by determining the structure of the trial, the roles of the countries involved (and their prosecutors), and the rules intended to ensure a fair and public trial for the defendants. Paragraph 6 of the charter defined the crimes that would be prosecuted:

- *Crimes against Peace*: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
- *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
- *Crimes against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.<sup>95</sup>

Three weeks later, the chief prosecutors released a list of twenty-four Nazi leaders to be tried before the tribunal.<sup>96</sup> Between their arrests and their transfer to Nuremberg prison, most of the suspects were held in an American internment camp, known by the derogatory code-name Ashcan, in Mondorf-les-Bains, a small spa town in Luxembourg. A small number were held by the British at Kramsberg Castle, outside Frankfurt am Main, under the code-name Dustbin. The American facility was by far the less accommodating. The prisoners slept in rooms featuring only a bunk and straw mattress (which was removed as a punishment for rule violations), a small table, and a straight-backed chair. The food was limited to 1,550 calories per day, the amount allowed for ordinary German civilians. Once in prison and out of the hands of their army captors, the detainees were rarely physically abused, although there were reports of psychological pressure, including threats to turn them over to the Soviets if they failed to tell interrogators what they wanted to know.<sup>97</sup>

The twenty defendants who had already been transferred to the Nuremberg jail were served copies of the indictment and given a list of German lawyers who might be available to represent them in case they had no choice of their own. Two of the accused, Erich Raeder, the supreme commander of the navy, and Hans Fritzsche, head of the Radio Division of the Propaganda Ministry, were still in Soviet hands. Martin Bormann, who was still believed to be alive, was to be tried *in absentia*. The twenty-fourth suspect, German industrialist Gustav Krupp, was considered too frail to stand trial and remained confined at his hunting lodge in Austria.<sup>98</sup>

On October 18, 1945, the Nuremberg Trial began, and a month later, on November 20, 1945, the indictments were read. The chief American prosecutor, Justice Robert Jackson, opened the proceedings by delivering one of the most memorable and often-quoted prosecutorial statements in modern history. Jackson began:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to reason. . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial

will commend itself to posterity as fulfilling humanity's aspirations to do justice.<sup>99</sup>

Jackson insisted on a strategy of *symbolic* justice that would prove German crimes not from the mouths of witnesses (whom some might consider unreliable) but from the defendant's own documents, drawn from a pool of more than 100,000 captured German documents, of which 4,000 were entered as trial exhibits, along with 1,800 still photographs.<sup>100</sup>

Much of the testimony offered by the witnesses at the Nuremberg trial was of questionable legal relevance: meandering commentaries on German history or sententious endorsements of the character of the defendants which, as Rebecca West, who reported on the trial for the *New Yorker*, recalled, left many spectators "puffy with boredom."<sup>101</sup> Yet at times there were moments of high drama. George Krevit, who, at the age of nineteen, served as a court page in the Nuremberg court, recalled how he was struck by the testimony of survivors of Nazi medical experiments:

Witnesses started to come forward, and it was probably the most horrible time in my life. Men and women came into court, showed the results of operations, torture. I don't even want to mention some things—they were too horrible. . . . I mean, opening up a man's leg and putting seaweed into his veins to see how he reacted to foreign bodies. Castrating people of low moral character, or just to get them off the face of the earth. Experimenting on twins who had the same color eyes. And [the defendants] just sat in the dark and showed no emotion whatsoever.<sup>102</sup>

On the morning of October 1, 1946, the tribunal read the judgments: twelve of the defendants were sentenced to death, three to life imprisonment; four were given prison sentences ranging from ten to twenty years, and three were acquitted. (One of the original defendants, Robert Ley, the leader of the German Labor Front, had hanged himself before the trial began.) Of those given prison sentences, Albert Speer, Hitler's chief architect and minister of armaments and war production, was jailed for twenty years for his use of forced labor. The man who supplied the slave labor, Fritz Sauckel, was hanged. Hermann Göring, also sentenced to hang, killed himself with cyanide the night before his scheduled execution.

Following this landmark trial, the United States held twelve more trials in Nuremberg, involving 144 relatively high-level defendants from the German High Command, the medical profession, big business, the

judiciary, government ministries, SS economic officials, and, most notably, the *Einsatzgruppen*, special SS and Gestapo execution squads that murdered approximately a million Jews in the conquered German territories in Eastern Europe and the Soviet Union, and scores of trials of German camp personnel and others.

What satisfactory justice is, of course, can be interpreted in a variety of ways. According to historian Rebecca Wittmann, many Germans believed the Allied judges at the Nuremberg trials had violated Germany's constitution, which contained a strict ban on retroactivity, by imposing *ex post facto* adjudication on crimes that were not defined as such at the time the acts were supposedly committed. Similarly, there was considerable resentment, particularly among Germans who had been victims of British and American bombing attacks, that no Allied leaders had been held to account for their crimes.<sup>103</sup> "It was a time when Germany couldn't care less about war crimes trials," American investigator Ben Ferencz recalled. "The German public was interested in finding a place to sleep and getting a loaf of bread to eat. They had been beaten to a pulp. And their primary concern was their own self-preservation, the war crimes trials were viewed as victor's justice, as an inevitable price which some people had to pay for the war."<sup>104</sup>

But, for all its flaws and shortcomings, the Nuremberg tribunal established the precedent that individual leaders and administrators, not only states, could be held accountable by the international community for actions that violated widely accepted standards of conduct. It also served as a model, with some variations, for what came to be colloquially known as the Tokyo war crimes trials. Most importantly, the Nuremberg Tribunal established a number of enduring legal principles and procedures that would serve as models for future international and national war crimes tribunals. The world had turned a corner: the vast unregulated gray area of what was permissible in war was now at least a little less gray.

#### THE TOKYO TRIALS: SELECTIVE JUSTICE, STOLEN SECRETS

On August 15, 1945, as Allied prosecutors in Nuremberg were preparing for the trial of the Third Reich's most important political and military leaders, forty-four-year-old Japanese Emperor Hirohito, over 5,000 miles away in the smoldering ruins of Tokyo, made a rare radio address to his subjects. Speaking in such formal Japanese that interpreters were

needed to translate his message, Hirohito announced that his country, which had pledged to fight to the last man, had surrendered the day before to the Allied Powers.<sup>105</sup> Hirohito's announcement came nine days after an American B-29 bomber dropped an atomic bomb dubbed Little Boy over the city of Hiroshima, and six days after a second nuclear bomb, Fat Man, destroyed the city of Nagasaki. Together, these two atomic bombs killed over 200,000 people, the vast majority civilians.

"The enemy has for the first time used cruel bombs to kill and maim extremely large numbers of the innocent and the heavy casualties are beyond measure," Hirohito told his listeners. "To continue the war further could lead in the end not only to the extermination of our race, but also to the destruction of all human civilization."<sup>106</sup> Japan, Hirohito said, was selflessly conceding the war, to save humanity.

Hirohito's picture of Japanese magnanimity and his inferred role as a pacifist was of course not widely shared beyond Japan itself. A month earlier, on July 26, 1945, the United States, Britain, and China adopted the Potsdam Declaration, pledging to punish Japanese leaders for their wartime atrocities:

There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security, and justice will be impossible until irresponsible militarism is driven from the world. . . . We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.<sup>107</sup>

By mid-October 1945, a finished plan for the establishment of the International Military Tribunal for the Far East, more commonly remembered as the Tokyo trial, was presented to the Allied Powers (Australia, Canada, China, France, India, Netherlands, New Zealand, Philippines, Soviet Union, United Kingdom, and United States).<sup>108</sup> In January 1946, the Allied Powers established the Tokyo tribunal and soon charged twenty-eight wartime Japanese political and military leaders with a range of crimes. The principal charge against them was the planning and execution of aggressive war in the Asia-Pacific region, dating to the invasion of Manchuria in September 1931. They were also charged with atrocities committed by the Japanese armed forces against millions of civilians and prisoners of war in various theaters of war. The Allied Powers also created some fifty separate special war crimes courts throughout Asia, including in Australia, Burma, China, Hong Kong, Indonesia, Malaysia, the Philippines, Singapore, and on other Pacific

islands. These courts would go on to hold more than 2,200 trials of 5,600 war crimes suspects.<sup>109</sup>

War crimes investigations had begun in earnest shortly after General Douglas MacArthur, commander of U.S. armed forces in the Far East, arrived in Tokyo on August 30. Months earlier, while stationed in the Philippines, MacArthur and a top aide, General Bonner Fellers, had hatched a plan for occupying Japan and rounding up war criminals. Once in Tokyo, MacArthur quickly compiled a list of the forty most wanted Japanese suspects, all of whom would be charged with crimes by the Tokyo tribunal. As with the Nuremberg tribunal, justice at the Allied-run Tokyo trials would also be one-sided: it avoided any targeting of Allied military actions—such as the firebombing of Tokyo and the destruction of Hiroshima and Nagasaki—that might well have been considered crimes against humanity. In the meantime, Fellers, an expert in psychological warfare, sought to separate the emperor, in the words of the American historian Herbert Bix, “from the militarists, retaining him as a constitutional monarch but only as a figurehead, and using him to bring about a great spiritual transformation of the Japanese people. Because retaining the emperor was crucial to ensuring control over the population, the occupying forces aimed to immunize him from war responsibility, never debase him or demean his authority, and at the same time make maximum use of his existing Japanese government organizations.”<sup>110</sup>

On September 11, 1945, the United States issued arrest orders for the men on MacArthur’s list.<sup>111</sup> Among the most wanted were Hideki Tojo, Japan’s prime minister and war minister, who had ordered the attacks on Pearl Harbor; and Matsuhiro Watanabe, a notoriously sadistic guard at the Omori and Naoetsu prisoner-of-war camps. By December, the Allies’ public list of prominent accused had grown to 218.<sup>112</sup>

Solis Horwitz, an American war crimes investigator, has written that the Allies selected the defendants from a representative group of Japanese suspects. The group was designed to represent both the major organs of wartime Japan’s government and the major phases of the war.<sup>113</sup> The accused were divided into categories, based on the types of crimes they had allegedly committed. Crimes against humanity were identified as class B war crimes; class C crimes included the planning, ordering, authorization of, or failure to prevent war crimes.<sup>114</sup> Those charged with class A crimes, crimes against peace, included some of Japan’s top military, political, and diplomatic leaders named in General MacArthur’s original list. Of these, twenty-eight were tried before the Tokyo tribunal.<sup>115</sup> Like the trial of the major war criminals that opened

the Nuremberg trials, the trials of class A suspects would attempt to showcase both the Allied commitment to fair and impartial justice and the extent of Japanese war crimes. Class B and C war crimes trials were held in many different places in Asia and around the Pacific and dealt with the vast majority of those accused: a total of 5,700 individuals were indicted for class B and C crimes. Of these, 1,018 were acquitted, 475 were given life sentences, and 984 were condemned to death.<sup>116</sup>

In the auditorium of the former War Ministry in Tokyo on May 3, 1946, the International Military Tribunal for the Far East opened the trial against the twenty-eight wartime Japanese political and military leaders. The recently refurbished courtroom—with its soaring ceilings, walnut-toned paneling, imposing daises, klieg lights, and well-positioned balconies for cameramen—seemed like the perfect venue for giving the Japanese public a history lesson. But few journalists covering the opening ceremonies saw it that way. In its first article about the trial, entitled “Road Show,” *Time* magazine openly lampooned the setting: “Nuremberg’s impresarios had used simpler furnishings [and] relied on the majesty of the concept to set the tone.” By contrast, the Tokyo courtroom, *Time* wrote, “looked . . . like a third-string road company of the Nuremberg show.”<sup>117</sup>

The trials consumed two and a half years, compared to a single year at Nuremberg. From the beginning, they were plagued by a rapid waning of political will, most notably on the part of the Americans, who were intent on shifting their attention away from righting past wrongs and increasingly toward building their own national security state dedicated to the global containment of communism. One of the tribunal’s most bitter critics was the State Department’s George Kennan, who visited Japan in March 1948 and filed a top-secret report to the department’s Policy Planning Staff. In it he castigated the Tokyo trials and subsequent proceedings as “profoundly misconceived from the start.” Punishment of enemy leaders, he wrote, had been “surrounded by the hocus-pocus of a judicial procedure which belies its real nature.” Endless delays and “humiliating ordeals” plagued the proceedings. He dismissed the very effort as “political trials . . . not law.”<sup>118</sup>

Yuma Totani, a Japanese historian who has written extensively about the Tokyo tribunal, points to President Truman’s glaringly different choices of chief prosecutors and judges for the Nuremberg and Tokyo tribunals. To Nuremberg Truman sent Robert Jackson, an associate judge of the U.S. Supreme Court; Francis Biddle, attorney general in Roosevelt’s

administration; and John J. Parker, presiding judge of the Federal Appeals Court for the Fourth Circuit. For Tokyo, in contrast, Truman picked Joseph B. Keenan, the director of the criminal division in the Justice Department (with a noted drinking problem), and John P. Higgins, the chief justice of the state court of Massachusetts. “The decision to send someone who on paper ranked far below Jackson suggests Truman’s general indifference to the success of the Tokyo trial,” Totani comments. “Had Tokyo been as important as Nuremberg, he would have taken great care in his selection of personnel, making sure that someone who matched Jackson—at least in qualifications—would be sent to Tokyo.”<sup>119</sup>

Paucity of appropriate documentation also dogged the tribunal. Perhaps second only to shock and grief, the reaction of the Japanese to Hirohito’s surrender announcement was the start of a campaign to destroy as much of the documentation of Japan’s wartime activities as possible. Writes historian John Dower: “Although the emperor’s broadcast put an end to the American air raids, it was said, with a fine touch of hyperbole, that the skies over Tokyo remained black with smoke for days to come. Bonfires of documents replaced napalm’s hell fires as wartime elites followed the lead of their sovereign and devoted themselves to obscuring their wartime deeds.”<sup>120</sup> By the time the first advance contingent of Americans arrived, on August 28, Japanese elites had spent nearly two weeks destroying documents. Although large numbers of Japanese were placed in prison camps at the start of the occupation, the Tribunal’s prosecution was in many cases ill prepared to bring charges against individual defendants because adequate documentation was missing.<sup>121</sup>

There was also the challenge of tracking down and arresting the accused. George H. Johnston, a journalist from the Melbourne daily newspaper, the *Argus*, complained bitterly on September 11 that, twelve days into the Allied occupation of Japan, no accused war criminals had been arrested. On September 25, Johnston noted that, though thirty-four of the thirty-nine accused war criminals whose names were posted on the first list of suspects had been arrested, four of the five that remained were “little men,” such as noncommissioned guards stationed at prison camps. “It will be recalled,” Johnston wrote, “that some days before General MacArthur issued his first black list, I pleaded for immediate action against the war guilty, particularly against ‘little men’ . . . because it was obvious that escape and disappearance would be easier for these men than for leading public and military figures.”<sup>122</sup>

One of those five “little men” still at large was the prison guard Mutshiro Watanabe, known as the Bird. Watanabe’s cruelty was infamous

among Allied POWs who had contact with him. He regularly forced prisoners to stand for hours or beat them mercilessly. One of his favorite amusements was ordering enlisted men to punch their officers in the head. If they refused or punched too lightly, Watanabe would hit them repeatedly in the head with a stick.<sup>123</sup>

Watanabe fled Naoetsu Camp 4-B, where he had been stationed, soon after hearing a radio broadcast that included his name on the list of class A war criminals and disappeared into the mountains around Nagano, a city northwest of Tokyo that would host the 1998 Winter Olympics.<sup>124</sup> Thousands of Japanese police officers were deployed to find him. The Ministry of Home Affairs sent photographs and descriptions of the Bird to every police chief in Japan and ordered them to report regularly on their progress.<sup>125</sup>

On his arrival in the Nagano-area resort town of Manza Spa, Watanabe took on the alias of Saburo Ohta. He grew a mustache and told people that—like many others—he was a refugee from Tokyo whose family had perished during the war. Keeping his real identity hidden, he arranged with a local farmer to work as a laborer in exchange for room and board.<sup>126</sup> That winter, a police officer knocked at the farmer's door and was invited in for tea with the farmer, his wife, and their hired hand—Watanabe. As Watanabe made the tea, the officer produced a photograph of the Bird, dressed in a sergeant's uniform, and asked whether they recognized the war criminal in the photo. The couple honestly replied that they did not.<sup>127</sup>

One day Watanabe paid his family in Tokyo—many of whom believed he was dead—a surprise visit. Despite his family's protest that he must leave quickly because detectives visited their home every afternoon, Watanabe assured them that nothing would happen. Yet, on cue, detectives arrived. Hearing them outside, Watanabe's family hid his clothes while he raced to hide in the tearoom. While detectives questioned his mother and sister just feet away, the former prison guard quietly pried open a closet, squeezing himself inside. He dared not close the door in case it squeaked. Just before leaving, a detective glanced into the room, but did not look toward the closet—if he had, Watanabe would have been in full view, his hand tightly over his own mouth to muffle his breathing.<sup>128</sup>

Later, back in the Nagano area, Watanabe worked as a waiter in a coffee shop the farmer's son had opened, and then as a cowherd. Meanwhile, the police, having located the bodies of a man and a woman in the mountains, took the Bird's family to view them. Yes, they confirmed, the man was Watanabe, and soon after, Japanese newspapers ran a story that the Bird was dead.<sup>129</sup>

Watanabe, still very much alive, continued to hide out in the hills of Nagano for seven years, until the war crimes prosecutions ended, along with the Allied Occupation of Japan, and a general amnesty was granted to any remaining Japanese war criminals. All charges against the Bird were officially dropped in 1952.<sup>130</sup> Watanabe emerged from hiding, married, sold life insurance, and became wealthy.<sup>131</sup>

Hideki Tojo, Japan's prime minister for much of the war and the man directly responsible for the 1941 attack on Pearl Harbor, was easier to find than Watanabe. Within hours of General MacArthur's September announcement of the forty most wanted criminals, American reporters had surrounded Tojo's simple terra cotta house on the outskirts of Tokyo.<sup>132</sup> One of the officers sent to arrest Tojo, First Lieutenant John J. Wilpers of the 308th Counter Intelligence Corps, later recalled, "The best way of finding Tojo was to find our own U.S. newspaper people, because they were there well ahead of us."<sup>133</sup>

Arresting Tojo, however, would prove somewhat more dramatic. According to Wilpers, as the U.S. soldiers surrounded the cottage, Tojo opened a sliding window and announced to the gathered crowd, "I am Tojo." He then closed the window, and a shot rang out.<sup>134</sup> When the soldiers broke down the front door, they found Tojo still standing, "wavering on his feet with smoke curling from his .32 Colt automatic."<sup>135</sup> Tojo had shot himself through the chest, which a doctor had marked with an "X" to show him the spot to plant the muzzle. However, the bullet only nicked his heart, traveling upward and out of his back about six inches below the top of his shoulder.<sup>136</sup>

Suicide was, Japan's military men had been taught, the only acceptable option; surrender was not, and capture was humiliating.<sup>137</sup> Civilians, too, had been indoctrinated to fight to the end and to die, in the historian John Dower's descriptive phrase, "like shattered jewels."<sup>138</sup> One might thus have expected a wave of suicides in the wake of Japan's surrender, and certainly after MacArthur's announcement of wanted war criminals. After the emperor's surrender announcement, several hundred individuals did commit suicide, but roughly the same number of Nazis took their own lives after the surrender of Germany, where there was no culture of suicide.<sup>139</sup>

Yet Tojo did try. For twenty minutes his breathing was labored, while the Americans stood watch. Through interpreters, Tojo told the Americans, "I am sorry for the peoples of Greater East Asia. I will shoulder the whole responsibility. The war of Greater East Asia was a just war. When all our strength was gone, we finally fell. I did not want to stand before

the victors to be tried as a vanquished. I wanted to kill myself at one stroke.”<sup>140</sup> He added, “I am very sorry it is taking so much time to die.”<sup>141</sup>

Lieutenant Wilpers recalled: “We managed, at gunpoint practically, to get a next-door neighbor to get a doctor.”<sup>142</sup> When the doctor arrived, however, it quickly became obvious that he would prefer to let the former prime minister die. Wilpers, holding his gun to the doctor’s head, provided sufficient motivation, and the doctor kept Tojo alive until American doctors and medical staff arrived.<sup>143</sup>

By the time Tojo was placed in U.S. medical care, he was showing signs of a change of heart. Forty-eight hours after his suicide attempt, the former prime minister ate a good breakfast, acknowledged the quality of care he was receiving, and was on his way to recovery.<sup>144</sup> While awaiting trial in Sugano Prison, Tojo was examined by a Navy dentist named Jack Mallory. Mallory immediately realized the former prime minister’s mouth was a mess: all of the upper teeth had been extracted, and only seven of his lower teeth were still intact. Mallory recommended full dentures, but Tojo declined, explaining that he probably would not need his teeth at all in six months. So Mallory agreed to only make an upper denture.<sup>145</sup>

When Mallory’s colleagues caught wind of his task, they encouraged him to play a prank. Military procedure dictated that all dental appliances were to be engraved with the recipient’s name, rank, and serial number. Mallory’s colleagues urged him to etch the phrase “Remember Pearl Harbor” into Tojo’s dentures.<sup>146</sup> Mallory decided to inscribe the message into Tojo’s dentures using the dots and dashes of Morse code to make the phrase less obvious. But word of the prank leaked out, and was soon circulating in newspapers worldwide. “That’s funny as hell,” Mallory’s superior officer, Major William Hill, commented when he ordered that the engraving be removed, “but we could get our asses kicked for doing it.”<sup>147</sup> In the middle of the night on Valentine’s Day, 1947, Mallory woke up Tojo, extracted his dentures, and ground away any trace of his artistry.

Tojo was later found guilty of war crimes, and sentenced to death, on November 12, 1948. Forty-one days later, he was executed by hanging.

Though Tojo was clearly a symbol—and a practitioner—of Japanese military aggression, several prominent historians of Japan, including Herbert Bix, Lucien Pye, and John Dower, believe that the former prime minister’s prosecution and subsequent conviction helped General MacArthur cover up Emperor Hirohito’s role in World War II. Writes Pye: “The emperor was not a passive figurehead manipulated by war-

minded militarists but an active strategic plotter of Japanese wars of aggression—and a certifiable war criminal.”<sup>148</sup> In the early years of the Japanese invasion of China, Hirohito tried unsuccessfully to slow down the escalation of the war. But, according to Bix, from late 1937 forward, the emperor accepted the mantle of “a real war leader, influencing the planning, strategy and conduct of operations in China. Slowly but surely, he became caught up in the fervor of territorial expansion and war.”<sup>149</sup>

Bix argues that MacArthur’s aide Bonner Fellers played a critical role in shielding Hirohito from ever standing trial. Fellers apparently told Japan’s former naval minister, Admiral Mitsumasa Yonai, soon after his arrival in Tokyo: “It would be most convenient if the Japanese side could prove to us that the emperor is completely blameless. . . . Tojo, in particular, should be made to bear all responsibility at his trial.”<sup>150</sup> Fellers also conducted private interviews, mainly in Sugamo Prison, with about forty Japanese leaders, including many who would later be charged as class A war criminals. He reportedly conveyed to them the U.S. desire not to prosecute the emperor and encouraged them to coordinate their stories accordingly. When the Allied prosecutors later interviewed the accused war leaders, they found they all had the same story: “the emperor had acted heroically and single-handedly to end the war.”<sup>151</sup>

Both sides had motivation to shield Hirohito from prosecution. Japanese leaders, loyal to the end, willingly adjusted their stories to shift blame away from their emperor and onto themselves. While Tojo was recovering from his suicide attempt, his former staffers sent word that he must live in order to take on himself responsibility for the war and, in doing so, protect the emperor.<sup>152</sup> When pressured by U.S. prosecutors not to implicate the emperor in his testimony, Tojo complied.<sup>153</sup>

Although the United States left open the possibility of trying Hirohito,<sup>154</sup> it had a clear rationale for absolving the emperor of responsibility for the crimes of his country: postwar political stability. During the war, the Allies followed a policy of not attacking Hirohito in their propaganda. The stated reason, Dower explains, was that the Japanese viewed their emperor as an almost divine figure, and attacking him would only make the Japanese more determined to fight to the end. Even during the war, the Office of Strategic Services issued an internal report that observed, “the desirability of eliminating the present Emperor is questionable; it is probable that he inclines personally toward the more moderate faction and might prove a useful influence later.”<sup>155</sup>

Throughout the occupation the Allies governed Japan indirectly, that is, through existing organs of government.<sup>156</sup> Allowing the emperor to

remain in place—and to do so untainted by criminal indictment—would help solidify the legitimacy and stability of the U.S. occupation. Dower notes: “The Western propagandists, in a word, were ready to take a hand in reimagining an emperor divorced from the policies imperial Japan had pursued in his name, under his authority, and with his active cooperation for almost two decades.”<sup>157</sup>

By not trying the emperor, and by creating a myth of a peace-loving man who was taken advantage of by his subordinates, the American occupiers cleansed Hirohito of any involvement in Japan’s war crimes. Even today, neither country is eager for a full review of Hirohito’s involvement in Japan’s war; the U.S. government still has not opened to the public all of the records it holds on Hirohito, such as his conversations with General MacArthur and a folder in the U.S. National Archives that bears his name.<sup>158</sup>

Another Japanese war criminal who got away scot-free as a result of Cold War politics was Shiro Ishii, Japan’s answer to Josef Mengele. In the late 1920s, as a young army doctor, Ishii studied medicine in Europe, where he became fascinated with the bacteriological weapons used during World War I.<sup>159</sup> On his return to Japan in 1932, Ishii was appointed professor of immunology at the Tokyo Army Medical School and given the rank of major. He eventually travelled to the Chinese region of Manchuria—which had been occupied by the Japanese military since 1931—where he began lobbying army leaders to allow him to begin biological warfare research. Three years later, he was given free rein—virtually unlimited resources and unquestioned authority—to pursue the development of biological and bacteriological weapons for war at a huge research complex spread over six square kilometers in the town of Pingfan, Manchuria.<sup>160</sup> The fifty-plus buildings there included laboratories, warehouses, and housing for animals and between 80 and 120 prisoners.<sup>161</sup> By 1939, more than 3,000 technicians, soldiers, and scientists would be stationed at Pingfan under Ishii. Yet this was only the largest of seven facilities in Manchuria under Ishii’s direction as head of Unit 731.<sup>162</sup>

Ishii and his researchers at Pingfan used human subjects in their experiments with tuberculosis, tetanus, gas gangrene, influenza, anthrax, and bubonic plague. They were particularly interested in creating a bomb that could carry and spread an infection; based on laboratory experiments with human subjects, they found that only anthrax and plague were suitable.<sup>163</sup> On twelve occasions, the weapon was used against Chinese military and civilian populations. Typically, a Japanese

battalion would first advance toward Chinese lines, pushing the Chinese back temporarily. They would spray or spread a biological agent, and then retreat, allowing the Chinese troops and civilians to re-enter the infected area. Within days, many of those who had entered the area showed symptoms of plague or cholera.<sup>164</sup> With the goal of preventing outbreaks of syphilis among Japanese soldiers, Ishii deliberately infected Chinese women with syphilis so that research could be done on how to prevent the disease's transmission.<sup>165</sup> In all, some 400,000 Chinese reportedly died as a result of experiments committed in Ishii's name.<sup>166</sup>

Many sources claim that by May 1944 American intelligence officers were well aware of Ishii's experiments.<sup>167</sup> At the start of the occupation, Allied forces swept Japan for suspected war criminals, and for two years investigators followed leads that suggested Shiro Ishii might have been responsible for war crimes. Over the course of eight days in January 1946, U.S. investigators even interrogated Ishii about his role at Unit 731. He managed to convince them that information he could provide made him incredibly useful.

The U.S. military completed a lengthy report on Ishii in April 1947. In it more than a dozen informants claimed that Ishii had also conducted experiments on Allied POWs.<sup>168</sup> Yet U.S. officials dismissed these charges as propaganda; Ishii was simply too valuable to prosecute. A top-secret cable from occupied Tokyo to Washington, DC, on May 6, 1947, stated, "Experiments on humans were . . . described by three Japanese and confirmed tacitly by Ishii; . . . Ishii states that if guaranteed immunity from 'war crimes' in documentary form for himself, superiors and subordinates, he can describe the program in detail. Ishii claims to have extensive theoretical high-level knowledge including strategic and tactical use of BW [biological warfare] on defense and offense."<sup>169</sup>

Seven months later, Dr. Edwin Hill, chief of basic sciences at Camp Detrick in Maryland, wrote a report arguing in favor of granting Ishii and his colleagues immunity. First, Hill said, the material was a financial bargain for the United States. "Evidence gathered . . . has greatly supplemented and amplified previous aspects of this field. It represents data which have been obtained by Japanese scientists at the expenditure of many millions of dollars and years of work." He continued, "Such information could not be obtained in our own laboratories because of the scruples attached to human experimentation."<sup>170</sup>

Dr. Ishii, his subordinates, and his superiors were all shielded from prosecution as war criminals thanks to the American desire, fueled by the Cold War, to acquire information about biological warfare. The

American investigators and Ishii reached an agreement: Ishii would be granted immunity from prosecution for himself and every one of his subordinates in exchange for the notes and photographs of their experiments at Unit 731 and records of the effective systems for delivering chemical and biological weapons. There were also financial transactions, although not much money was necessary to convince Ishii and his men that freedom would be better than trial.<sup>171</sup> The initial offerings from Ishii and his subordinates included a sixty-page report on experiments on humans and 8,000 slides of tissues from autopsies of humans and animals that had undergone biological warfare experimentation.<sup>172</sup>

Ishii disappeared from public life in 1948, although it is rumored that he was brought to the United States to give lectures on biological warfare at Fort Detrick, in Maryland.<sup>173</sup> The United States was accused of using Ishii's research in attacks with biological agents during the Korean War, although it denies those allegations.<sup>174</sup> Shiro Ishii died in Japan of lung cancer in 1958, at the age of sixty-six, still very much a free man.<sup>175</sup>

On November 4, 1948, the International Military Tribunal for the Far East delivered its judgment: twenty-five of the accused were guilty. Eight days later, the tribunal announced their sentences: seven defendants, including Tojo, were to be hanged; sixteen were to spend their lives in prison; and two others were to be imprisoned, for seven and twenty years, respectively. One defendant had been deemed unfit for trial, and two others had died during the proceedings.<sup>176</sup>

For nearly seventy years, historians have debated the legal and historical significance of the Tokyo trial and the scores of local Allied trials convened in countries formerly under Japanese occupation. By and large, the latter trials had little, if any, lasting impact on the Japanese people. While Japanese newspapers, at the insistence of the occupiers, ran articles about these trials, readers at the time soon lost interest as they, like their German counterparts, had a country to rebuild and their own dead to mourn. Writes historian John Dower:

After a long war that saw the death of several million Japanese servicemen and civilians, the fate of [a] few thousand accused war criminals in faraway places did not initially attract attention within Japan. Although the revelation of widespread Japanese atrocities did make an impact on the general populace, many appear to have regarded these distant exercises in Allied justice as little more than another example of how, in war and in peace, individuals lower in the hierarchy of authority had to pay for the misdeeds of

men with real power. When all was said and done, it was obvious that only a small number of high army and navy officers, few high bureaucrats, no captains of the war economy, and virtually none of the civilian ideologues in politics, academe, and the media who helped prime the pump of racial arrogance and financial militarism paid for the terrible crimes that men on the front committed.<sup>177</sup>

As for the Tokyo trial itself, many of the early commentators believed that it had successfully disclosed the facts about the war and the role played by Japan's political and military leaders, while others dismissed it as a pseudolegal event driven less by the law and more by "victor's justice."<sup>178</sup> In the 1980s, a new crop of historians emerged armed with a trove of trial-related records that had been recently declassified around the world. Kentarō Awaya, a historian at Rikkyo University, studied the records of the Allied occupation authorities, as well as the pretrial records pertaining to investigations of potential war crimes suspects contained in the National Archives in College Park, Maryland. In his view, the "trial was neither a revenge trial nor a just trial, but one that fell somewhere in between."<sup>179</sup> While he agreed with earlier historians that the trial was an important vehicle for disclosing the major facts about the war, he was troubled by what he saw as significant acts of American obstructionism that allowed several high-ranking Japanese civilian and military officials to escape justice and thus denied the Japanese people the truth of the extent and nature of the wartime behavior of their leaders.

Kentarō identified several incidences during the pretrial phase when American officials intervened to withhold evidence for political or military reasons. First, evidence American prosecutors had collected from Shiro Ishii and other commanders on the biological experiments at Unit 731 failed to appear in the charge sheet because of its scientific and military value. Second, evidence that Japan had used poisonous gas in China was omitted from the indictment, in Kentarō's view, because the defense, similar to the *tu quoque* argument over Allied air raids at Nuremberg, "would confute it by citing the American use of atomic bombs."<sup>180</sup> Finally, the failure to indict Emperor Hirohito was a *fait accompli* because General MacArthur needed to use him to entrench American politico-military domination over postwar Japan.

Such political machinations, in the view of Kentarō Awaya and others, turned the Tokyo trial into a decidedly selective process.<sup>181</sup> As we shall see, however, prosecutorial selectivity in the pursuit of suspected war criminals—whether for political, legal, or simply practical reasons—would not end in Tokyo or Nuremberg.