Chapter Three

THE AMERICAN WAR CRIMES PROGRAM

The American plan for an international trial based on radical and untested international legal principles raised a number of difficult questions. Was accounting for atrocities in the aftermath of a total war a moral act or a political act? Did the rules apply to the victors as well as the vanquished? Would the inclusion of Stalinist judges cost the international tribunal its credibility?

In Japan, America's city-bombing campaign would not reach its atomic climax for many months. In the meantime, General Curtis LeMay had taken over XXI Bomber Command in 1944 and ushered in a new era of civilian death and destruction. British officer and military historian B. H. Liddell Hart was so appalled by city bombing that he described it as "the most uncivilized method of warfare the world has known since the Mongol devastations."[1] On a single night in March 1945, American planes dropped incendiary bombs that turned Tokyo into an inferno that burned out 16 square miles of the city and killed between 90,000 and 100,000 civilians. General LeMay had no qualms about waging war against civilian targets: "Nothing new about death, nothing new about death caused

militarily. We scorched and boiled and baked to death more people in Tokyo on the night of 9–10 March than went up in vapor at Hiroshima and Nagasaki combined."[2] How would the new court rule on city bombing? Would Great Britain's Arthur "Bomber" Harris and American Curtis LeMay remain above the law?

Although the United States would wage total war against the Axis powers, the extermination of entire ethnic, racial, religious, and economic groups was never among America's wartime goals. However, similar claims could not be made for the Soviets. Stalinist participation in any trial left the Allies open to charges of employing a double standard, also known as *tu quoque*.[3] For this reason alone, it was shortsighted of the Secretary of War to adopt a tone and legal procedure that did not reflect the geopolitical realities of the post–World War II period. The belief that war crimes proceedings were not political was at best naive and at worst disingenuous, but certainly consistent with America's two-faced relationship with international law.

With the memory of Stalin's unique contribution to political justice, the 1936–1938 Moscow Show Trials, fresh in their minds, many of the foreign policy professionals in the State Department and the British Foreign Office shuddered at the thought of sharing a judges' bench with Stalinists. John Troutbeck of the British Foreign Office wrote a scathing memo about the proposed international trial: "Surely to have a Russian sitting in a case of this kind will be regarded as almost a high point of international hypocrisy." Troutbeck tried to wake his superiors from the moral amnesia that total war and an alliance with Stalin had required. He argued that Russia had waged a similar campaign of aggression "aimed at domination over other nations," which involved atrocities and persecutions that rivaled those of the Nazis. Even worse, the Soviet conquests had just begun: "Is not the Soviet Government employed today in that very same thing in Poland, the Baltic States, Turkey and Persia?. . . . There have been two criminal enterprises this century—by Germans and Russians."[4]

The fate of Poland was one of the many tragedies of World War II. During the glory days of the Molotov-Ribbentrop Pact, both Hitler and Stalin sank their talons into the geographically unfortunate nation. Eastern Poland was seen as the strong point of Stalin's *cordon sanitaire*, which extended from the Black Sea to Finland. Like the Jews, the Polish were subjected to "industrialized extermination, mass deportations, and police

state terror."[5] While the *Wehrmacht* was cutting a swath through Central and Western Europe, Germany and the Soviet Union were bound together by the Molotov-Ribbentrop agreement. To make matters worse, the Soviets had shared in the spoils of the German conquest.[6] Only in 1941, after the Germans launched Operation Barbarossa, was Stalin forced to cast his lot with the Western Alliance.

The most politically damaging Soviet war crime was uncovered in the winter of 1943. A group of Russian laborers working for the Wehrmacht in the Katyn forest near Smolensk, Poland came across fresh human bones that had been dug up by wolves. The Germans exhumed 4,143 neatly stacked corpses buried in eight common graves; the largest was an L-shaped pit, 85 feet by 26 feet.[7] Small birch trees had been planted on top of the mass graves in an effort to render the site indistinguishable from the other scenic vistas overlooking the Dnieper River.

The Soviets had hoped to destroy the Polish intelligensia in an effort to "behead" the nation.[8] In April 1943, Nazi Propaganda Minister Josef Goebbels announced: "A report has reached us from Smolensk to the effect that the local inhabitants have mentioned to the German authorities the existence of a place where mass executions had been carried out by the Bolsheviks and where 10,000 Polish officers had been murdered by the BPU. . . . They were fully dressed, some were bound, and all had pistol shots to the back of the head."[9]

It was not so easy to dismiss this as yet another missive from Goebbel's Ministry of Propaganda; all evidence pointed to the Soviet Union. The bodies were found on territory the Soviets had previously occupied and the men had disappeared in 1940 while in Soviet custody. But the telltale piece of evidence was the manner of execution—one quick shot to the back of the head at close range. According to historian Allen Paul, this bore the fingerprints of the NKVD (Narodnyi kommissariat vnutrennikh del): "It was a vintage, Bolshevik technique developed in the early days of the revolution when Lenin's secret police, the Cheka, routinely shot so-called enemies."[10] The Soviets responded defensively to the accusations, but their denials were unconvincing, particularly to the Polish government in exile.[11] Although the massacre was troubling, Poland had other problems by 1945. The nation was in the process of being absorbed into the Soviet Union's sphere of influence. Would its British and American "friends" shirk the lofty principles of the Atlantic Charter and look the other way? (Between August 9 and August 13, 1941, Roosevelt and

Churchill met in Newfoundland to outline their war aims. The eight-point Atlantic Charter was a vague restatement of Wilsonian goals like collective security and national self-determination.)

The Allies faced a moral dilemma: should they act according to conscience and reveal the massacre as Stalin's own, or turn a blind eye in order to maintain strategic trim? The dilemma highlights the flexibility of morality in twentieth-century international politics. The odious task of informing the Polish leaders that they were about to be sold down the river in the name of strategy fell to Sir Owen O'Malley, British Ambassador to the Polish government in exile. In a confidential memo to the British War Cabinet, O'Malley wrote, "We have in fact perforce used the good name of England like the murderers used the little conifers to cover up a massacre. . . . May it not be that we now stand in danger of bemusing not only others but ourselves; of falling . . . under St. Paul's curse on those who can see cruelty and 'burn not'?" In the end, O'Malley justified the British move as a sort of moral triage: "If the facts of the Katyn massacre turn out to be as most of us incline to think, shall we vindicate the spirit of these brave unlucky men and justify the living to the dead."[12] The need to placate a key strategic ally forced Churchill and Roosevelt to aid Stalin in suppressing evidence and thwarting Polish efforts to expose the truth about the fate of their military elite.[13] This would not have posed such a problem had the Allies not transformed the war into a crusade against evil. If the new war crimes standards were applied across the board, none of the Allied nations would be exempt from prosecution.

However, by April 1945, all Allied atrocities were overshadowed by the grisly discoveries being made by American soldiers as they swept into formerly Nazi-held territory and liberated several Nazi concentration camps. On April 4 and 5, soldiers from Patton's Third Army accidentally discovered the Ohrdürf concentration camp. On the camp's outskirts, they found a large pit filled with charred, half-burned bodies. The Americans were also greeted by the inmates who had survived the ordeal. U.S. soldiers were both saddened and horrified by these living skeletons in striped uniforms. On April 11, American generals Dwight Eisenhower, George Patton, and Omar Bradley toured Ohrdürf. More than the lice-ridden dead, it was the systematic dehumanization that shocked the generals. General Eisenhower cabled Washington, "We are constantly finding German camps in which they have placed political prisoners where

unspeakable conditions exist. From my own personal observation, I can state unequivocally that all written statements up to now do not paint the full horrors." General Eisenhower wanted American troops to visit the camp: "We are told that the American soldier does not know what he is fighting for. Now, at least, he will know what he is fighting against."[14] These were not even the worst Nazi concentration camps; the Nazi leaders had been careful to construct their archipelago of death camps in Poland.

As the liberation of the camps continued, captured German guards and officials were subjected to spontaneous reprisals. U.S. Army Rabbi Max Eichhorn was among the first to enter Buchenwald. He described his feelings at the time: "We cried not merely tears of sorrow. We cried tears of hate. Then we stood aside and watched while the inmates of the camp hunted down their former guards, many of whom were trying to hide in various parts of the camp." American veteran Fred Maercer watched a German soldier attempt to surrender to American forces. However, he was intercepted by an inmate with a large wooden club. The American soldiers watched as the inmate bludgeoned his former captor: "He just stood there and beat him to death. He had to—of course, we did not bother him."[15] American soldiers allowed the former inmates to kill as many as eighty German prisoners. As a result of the American treatment of their German POWs at Buchenwald, Heinrich Himmler issued this April 14, 1945 Order: "No prisoners shall be allowed to fall into the hands of the enemy alive. Prisoners have behaved barbarously to the civilian population at Buchenwald."[16]

After a prolonged attack on Munich, U.S. soldiers from the 45th Division of the 157th Infantry Regiment discovered the Dachau concentration camp on April 29. As the American soldiers approached the camp's gate, they were fired on by a last line of SS defenders. Near the train depot that abutted the camp, the soldiers were confronted by 40 open freight cars filled with stacked dead bodies in striped uniforms. Some of the soldiers retched from the sight and smell, while others openly wept. Bill Allison recalled his reaction: "We were just in a state of shock really, nobody had ever seen anything like that before. You know, I had been in the service and I had seen men die before. I've seen dead bodies, but not stacked up like cordwood."[17]

When the American soldiers stormed Dachau's interior, they were met by the inmates who had survived the horror. Again, American sol-

diers watched and even encouraged concentration camp victims to hunt down and kill their former captors. Many of the guards were shot in the legs before they were brutally beaten to death. American veteran Jack Hallett recalled, "Control was gone after the sights we saw, and the men were deliberately wounding guards that were available and then turning them over to the prisoners and allowing them to take their revenge." Hallett saw an American soldier give his bayonet to an inmate "and watched him behead the man. It was a pretty gory mess."[18] Several haunting photographs survive of the Dachau liberation; in one, two concentration camp inmates tower over a collapsed guard. The German is not yet dead, and by the looks on their faces, the inmates are savoring their revenge. In the background lies a mound of crumpled bodies—not dead camp victims but recently executed German soldiers. According to historian Robert Abzug, an American squad guarding 122 German prisoners spontaneously opened fire on their captives, killing them all.[19] Ironically, the Dachau concentration camp would soon serve as the site of the army's trial of the perpetrators of the Malmedy Massacre.

It is unlikely that American soldiers limited summary executions to Nazi concentration camp workers. Writer Paul Fussell served as an American infantry soldier in France before he was wounded by German artillery in 1945. This experience left him convinced that modern war was "the very quintessence of amoral activity with its mass murders of the innocents." The combat infantry veteran argues that war is "not an appropriate context for invoking moral criteria."[20] Fussell casually describes a massacre he participated in when he encountered a group of German soldiers trapped in a bomb crater: "Earlier there had occurred in F Company the event known as the Great Turkey Shoot. . . . In a deep crater in a forest, someone had come upon a squad or two of Germans, perhaps fifteen or twenty in all. Their visible wish to surrender—most were in tears of terror and despair—was ignored by the men lining the rim." All of the American soldiers simultaneously opened fire. "Laughing and howling, hoo-ha-ing and cowboy and good-old-boy yelling, our men exultantly shot into the crater until every man down there was dead."[21] Fussell considers his motives—"Perhaps some of our prisoners had recently been shot by the Germans. Perhaps some Germans hadn't surrendered fast enough and with suitable signs of contrition. (We were very hard on snotty Nazi adolescents.)"—and reflects on how World War II

transformed him from California golden boy to cold killer: "Impossible for me, once so Pasadena special, not to feel as murderous and cool as the other young officers." Fussell suffered no remorse—quite the contrary: "The result was deep satisfaction, and the event was translated into an amusing narrative, told and retold over campfires all that winter."[22]

Meanwhile, far from the hostilities, in a conference room in London, Allied leaders were finalizing their plans for the trial of the German leaders. On May 28, 1945, an American delegation led by Robert Jackson and former OSS chief William Donovan left for London to hammer out the details of the international trial. Now the Americans had to convert the British, French, and Russians to their radical proposal.[23] The London Conference opened in early June 1945. Many of the beginning sessions were spent wrangling over fundamental differences in the Anglo-American and Continental legal systems.[24] The British and American legal systems were adversarial by nature: the prosecution filed a brief indictment in open court that contained no evidence and the judge knew only the general nature of the case. French delegate and Sorbonne professor of international law André Gros was shocked by the implications of the Anglo-American system.[25] The French objected to the presentation of evidence in open court "by the lawyers, who examine and cross-examine the witnesses and who may exploit and must confront the element of surprise." Under the Continental legal system, evidence was assembled by a court magistrate. If a sufficient basis for a trial was established, the dossier and the indictment were given to the court and the defendant. Judges, prosecutors, and defense attorneys worked together to arrive at the truth and reach a just decision.[26]

The Soviet insistence on a full presentation of evidence provided the first opportunity for American prosecutor Robert Jackson to make his distrust of the Russians publicly known. When Jackson informed his colleagues that this would not sit well with the American public, the French delegate retorted that their system ensured a fair trial and was "not designed to satisfy an ill-informed American public."[27] U.S.-Soviet differences came to an ugly head on July 1, when Soviet representative I. T. Nikitchenko issued a statement that overshadowed all procedural squabbles and seemed to justify the worst assumptions about the Soviet conception of justice. Nikitchenko announced that the defendants had already been convicted by political decree: "The fact that the Nazi leaders are criminals has already been established. The task of the Tribunal is only to

determine the measure of guilt of each particular person and mete out the necessary punishment—the sentences."[28] As if this declaration of collective guilt were not enough, the Soviet representative spoke scornfully of the presumed "fairness" and "impartiality" of the Anglo-American system: "The case for the prosecution is undoubtedly known to the judge before the trial starts and there is therefore no necessity to create a sort of fiction that the judge is a disinterested person. If such a procedure is adopted that the judge is supposed to be impartial, it would only lead to unnecessary delays."[29] Nikitchenko's statements were a breaking point for Robert Jackson. He had harbored deep reservations about the Soviets from the start, but now he hoped that the Soviets would withdraw from the trial.[30]

On July 7, Robert Jackson and William Donovan traveled to Frankfurt to discuss the trial sites with General Lucius Clay and his political advisor, Robert Murphy. General Clay suggested Nuremberg as the site, for the practical reason that part of a courthouse and a jail were still standing. Although the city had been leveled by Allied bombs, the surrounding suburbs were intact and could house members of the court staff. There were also symbolic reasons for the choice: it was the site of the infamous Nuremberg Rallies and had lent its name to the laws that marked the beginning of the Nazi persecution of German Jews.[31]

Justice Jackson returned to London more antagonistic toward the Soviets than ever before. Although this was partially the result of his anti-Soviet feelings, the American negotiating position was strong. Of the twenty-two "major war criminals," the United States held ten, the British five; three more were in joint custody.[32] Unsurprisingly, the Americans were the least accommodating. The British were in no position to resist, as their government was in the midst of a transfer of power to the Labor Party.

When the delegations considered the crimes that would be charged, it quickly became obvious that the Americans would have to recapture old ground. French representative Professor André Gros objected to the aggression charge, contending that any such legislation would be *ex post facto* and offering American Secretary of State Robert Lansing's arguments from the Paris Peace Conference to support his claim. This, according to the Frenchman, undermined "any legal basis for imposing . . . criminal responsibility on individuals who launch aggressive wars."[33] Gros neatly summarized the disagreement by observing that "the Ameri-

cans want to win the trial on the ground that the Nazi war was illegal, and the French people and other people of the occupied countries just want to show that the Nazis were bandits."[34]

Jackson dismissed the French and Russian reservations and the Lansing precedent: "I must say that sentiment in the United States and better world opinion have greatly changed since Mr. James Brown Scott and Secretary Lansing announced their views as to criminal responsibility for the first World War."[35] He claimed that punishing Germans was not the sole objective of the American proposal and seemed to imply that the same rules would apply to American soldiers: "If certain acts of violation of treaties are crimes, they are crimes, whether the United States does them or whether Germany does them, and we must be prepared to lay down the rule of criminal conduct against others which we would not be willing to have invoked against us."[36] The debate raged for five sessions of the conference (from July 19–25). Jackson believed that "there are some things worse for me than failing to reach an agreement and one of them is reaching an agreement that would stultify the position the United States has taken throughout."[37]

The British considered the Americans quarrelsome and felt that Jackson was trying to disrupt the conference. Patrick Dean of the Foreign Office described the American judge as "afraid of the Russians, particularly their method of trial."[38] British Treasury official R. S. Clyde shared Dean's view that "the kernel of the trouble has been his explicit distrust of the Soviets. . . . The Russians are not unaware of this; and I think have begun to question . . . whether he is seeking to codify international law for their discomforture."[39] On July 24, Robert Jackson cabled John McCloy and described the discussions in London in very bleak terms: "Our conference is in serious disagreement today over definition war crimes. All European powers would qualify criminality of aggressive war and not go along on view in my report to President."[40] Jackson met with Secretary of State James Byrnes, who told him that a four-power trial was preferable but that the final decision was Jackson's alone. At Potsdam, the Big Three discussed the war crimes negotiations in London. Stalin proposed naming the defendants, but President Truman refused to commit until he discussed the issue with Jackson. Though the two never spoke directly, a message was relayed via Roosevelt's close advisor, Judge Samuel Rosenman. On August 1, the Big Three met and agreed to try the major Nazi war criminals before an international tribunal. Article VII of the Potsdam

Agreement officially committed them to "bring those criminals to swift and sure justice."[41]

However, the conferees had not yet formulated the charges. When the American plan was tabled, the French and the Soviets launched into a now familiar series of critiques. They did not want the court to declare the innocence or guilt of the defendants. The Soviet representative, Nikitchenko, argued heatedly against "trying an organization to reach all of its members."[42] In the drafting session the charge was diluted to an accusation of "planning" or "organizing" specific crimes.

After a month of contentious meetings, representatives of the four powers signed the London Agreement. The actual "agreement" was little more than a restatement of the Moscow Declaration, announcing quadripartite support for "a trial of war criminals whose offenses have no particular geographic location, whether they be accused individually or in their capacity as members of organizations or groups or in both capacities."[43] The London Agreement Charter contained the charges, defined the rights of the accused, and outlined many of the procedural issues. Count 1 charged the defendants with "The Common Plan or Conspiracy." Count 2, however, charged them with the crime of aggression; the Soviet representative, Professor Tranin, had renamed it "Crimes Against Peace." Ironically, with this count, the delegates were reestablishing a traditional view of statecraft that upheld the sanctity and centrality of sovereignty. According to legal theorist David Luban, "by criminalizing aggression, the Charter erected a wall around state sovereignty and committed itself to an old European model of unbreachable nation states."[44] In Laban's view, the Nuremberg planners came to the brink of truly challenging the traditional rules of statecraft but in the end backed off.[45] They charged the German leaders with both aggression and "participation in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes."[46] Count 3, "War Crimes," charged traditional violations of the laws of war, while under Count 4's "Crimes Against Humanity" category, the definition of war crimes was broadened so that the Germans could be charged with crimes against Jews and other civilians.[47]

The Americans believed that a "free and fair" trial would do more than simply render justice; it would also reeducate the German people after a decade of dictatorship. Traditionally, America's reform efforts had been aimed at non-European nations. While the Germans could accept

total military defeat and occupation, "reeducation" at the knee of the Americans was another matter. For the first time since Napoleon, German soil was occupied by foreign armies. World War II had cost Germany millions of lives (not including German Jews and other persecuted minorities), and most of the nation's cities had been reduced to rubble by the Allied city-bombing campaign. For Germans in the eastern provinces, Stalin's retribution had only just begun.[48] However, by 1945, the German population was resigned to having their cities bombed, their POWs executed, and their territory plundered by a marauding Red Army. As German historian Jörg Friedrich points out, "None of this was justified by international law, nor by justice, nor by humanity. It was brute revenge. The Germans understood this perfectly. Reprisals had been their customary method of occupation."[49] However, what many Germans did not understand were the American social and political reform policies. According to Friedrich, "Nazi propaganda chief Josef Goebbels had announced that the Allied forces, if successful, would destroy the vanquished. So the public regarded the International Military Tribunal as the Allies' way of eliminating an enemy, just as trials had been used in the Third Reich."[50]

The ominous presence of Soviet purge trial prosecutor Andrei Vyshinsky in Nuremberg confirmed German suspicions that the international trial would be a primitive form of political justice, a theatrical prelude to the inevitable executions. This idea was not without merit, given Vyshinsky's opinions on the role of law. In his Stalin Prize–winning book, *Court Evidence in Soviet Law*, Vyshinsky argued against the presumption of innocence and advocated the admissibility of confessions induced by torture. Under the Stalinist model of political justice, defendants were tortured until they were willing to "confess" to their crimes in open court.[51] When the Soviet delegation showed a group of Americans, including Judge Francis Biddle, a film of a Soviet "war crimes trial" conducted in Kharkov in 1943, the Americans sat in stunned silence. The film showed starved and beaten German officers being hanged in front of a crowd of 40,000 cheering Russians. Biddle was appalled: "They are horrible, tortured, naked skeletons, the Kharkov defendants being hung in front of the crowds."[52]

Not only was the Soviet delegation personally overseen by Vyshinsky; there was also the Soviets' "Supervisory Committee for the Nuremberg Trials," which included the Soviet Union's chief prosecutor, K. P.

Gorschenin, and Minister of Justice, I. T. Golyakov. The American trial participants always believed that the Soviet delegation at Nuremberg had to clear all their decisions with Moscow. The record of a discussion between Andrei Vyshinsky and B. Z. Kobulov shows Moscow's concern over the inclusion of potentially embarrassing revelations. "Our people in Nuremberg at the moment are reporting to us on the attitude of the defendants under interrogation. Goering, Jodl, and other persons indicted are putting on a big show," said Kobulov. He was especially concerned about the "anti-Soviet diatribes" of defendant Raeder: "When Raeder was interrogated by the British he said that the Russians tried to convince him that he made his statements under pressure. His testimony was recorded on film." Vyshinsky offered a simple solution to counter these embarrassing attacks: "The chief prosecutor must interrupt the defendant where necessary and deny him the opportunity of making any anti-Soviet attacks."[53] By the time the trial was ready to begin, the Soviet delegation at Nuremberg had been provided with a "list of questions provided by Comrade Vyshinsky which are to be regarded as not permissible for discussion before the Tribunal." These topics included the Hitler-Stalin Pact and the fate of Poland.[54]

Although the IMT was now saddled with a revolutionary indictment, the Americans' views were by no means universally held.[55] Even before the outbreak of the Cold War, there was never a consensus on American war crimes policy, and the alliance between Republicans and Democrats would prove frail once the Cold War began in earnest. The American treatment of the vanquished was heavily influenced by both domestic and international politics. The laws outlined in the London Agreement Charter provided the legislative groundwork for a series of trials that would be unique in legal history. The highest-level war crimes courts (the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, and the subsequent Nuremberg trials) were all loosely modeled after the London Agreement and Charter. Although the three indictments on which these trials were based (the London Agreement, the Tokyo Charter, and Control Council Law No. 10) differed in small ways, they all contained traditional war crimes charges in addition to the novel aggression, conspiracy, and crimes against humanity counts. Each court would have to rule independently on these parts of the indictment.[56]

The international trial at Nuremberg was the symbolic flagship of American and Allied war crimes policy. The Allied Control Council

produced a list of defendants on September 30, 1945 that included some of the highest-ranking Nazi survivors: Hermann Goering, Walter Funk, Wilhelm Frick, Alfred Speer, Julius Streicher, Martin Bormann, Alfred Rosenberg, Joachim von Ribbentrop, Rudolf Hess, Constantin von Neurath, Franz von Papen, Hjalmar Schacht, Baldur von Schirach, Ernst von Kaltenbrunner, Wilhelm Keitel, Alfred Jodl, Eric Raeder, Karl Doenitz, Artur Seyss-Inquart, Fritz Sauckel, and Hans Fritsche. The defendants represented a good cross-section of both the military and the political leadership of the Third Reich.

In the days leading up to the trial, all of the German defense lawyers signed a petition challenging the legal validity of the International Military Tribunal. The November 19, 1945 petition argued that any state, "by virtue of its sovereignty, has the right to wage war at any time and for any purpose," while acknowledging the prosecution's challenge to the idea that "the decision to wage war is beyond good and evil." The defense lawyers accused the Allies of trying to reestablish the concepts of just and unjust war: "A distinction is being made between just and unjust wars and it is asked that the Community of States call to account the State which wages an unjust war and deny it, should it become victorious, the fruits of its outrage." They contended that the victorious powers were holding Germans to archaic standards of international conduct: "More than that, it is demanded that not only should the guilty State be condemned and its liability be established, but that furthermore those men who are responsible for unleashing the unjust war be tried and sentenced by an International Tribunal. In that respect one goes now-a-days further than even the strictest jurists since the early Middle Ages."[57] The petition went on to make more familiar *ex post facto* and *nulla poena sine lege* arguments and asked "That the Tribunal direct that an opinion be submitted by internationally recognized authorities on international law on the legal element of this Trial under the Charter of the Tribunal."[58] The IMT invoked Article 3, which disallowed any direct challenges to the tribunal's legal jurisdiction or a reopening of the debate over the legal validity of the proceedings. This single article precluded any further discussion of the trial's legal legitimacy. German attorneys would not forget this slight. It is also important to note that an influential segment of the German population rejected Nuremberg's legal validity from day one. Legal positivism was a German science, and it would provide the Americans with a worthy foe.

The courtroom in Nuremberg's Palace of Justice was filled to capacity on November 6, 1945, as the International Military Tribunal opened amid much fanfare. The twenty-one Nazi leaders sat in the stagelike defendants' dock. American novelist John Dos Passos described the scene: "The freshly redecorated courtroom with its sage-green curtains and crimson chairs seems warm and luxurious and radiant with silky white light. . . . Under them, crumpled and torn by defeat are the faces that glared for years from the front pages of the world."[59] The American prosecutors began by presenting Count 1 of the indictment. On November 21, Robert Jackson opened the prosecution's case for the United States. His first three sentences would not only be the most-quoted words spoken at the trials; for many, they would come to symbolize the Nuremberg trials:

> The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, 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 ever has paid to Reason.[60]

The American prosecutor described "aggressive war" as "the greatest menace of our times."[61] The defendants and their lawyers were especially irritated when Jackson characterized them as "twenty-odd broken men."[62] He conceded that it was unfortunate that the victors were judging the vanquished; however, the American argued that "The world-wide scope of the aggressions carried out by these men has left but a few real neutrals."[63] Jackson believed that the victors' conduct in this trial would also be sternly judged: "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants the poison chalice is to put it to our own lips as well."[64] While the prosecution admitted that the defendants were "the first war leaders of a defeated nation to be prosecuted in the name of law," he added, "they are also the first to be given a chance to plead for their lives in the name of law."[65] From the beginning it was clear

that the Americans planned to take the broadest view of the Nazi conspiracy. They would consider how each count of the indictment furthered the larger Nazi agenda: "It is my purpose to open the case, particularly under Count One of the Indictment, and to deal with the Common Plan or Conspiracy to achieve ends possible only by resort to Crimes Against Peace, War Crimes, and Crimes Against Humanity. My emphasis will not be on individual barbarities and perversions which may have occurred independently of any central plan."[66]

While the Americans basked in the warm glow of Jackson's rhetoric, German defense attorneys like Otto Kranzbühler bristled: "He was a good speaker without a doubt. Rhetorically good, but totally unrestrained in exploiting emotions." The former German naval judge shared the view held by many Germans in 1945 that the Nuremberg trial was just another form of politics: "From the beginning I regarded it as a political matter, as a continuation of war by other means, if you like. . . . At the time, I could not imagine any rational reason for indicting these men. The Allies were still our opponents with political objectives and one of those was this trial. That was how I saw it then."[67]

In order to establish the broadest range of Nazi criminality, the American prosecutor introduced a diverse array of evidence. In addition to the 485 tons of German diplomatic documents discovered by the Allies in a castle near Marburg, there was even more graphic evidence.[68] In a very dramatic move, on November 29, 1945, the prosecution introduced Document 2430-PS, a one-hour documentary film about the Nazi concentration camps. The film showed the Allied liberation of Dachau, Buchenwald, and Bergen-Belsen. The defendants' dock remained lit as images of emaciated bodies stacked in ditches flickered on the courtroom wall. Some of the defendants, like Ribbentrop, Funk, and Frank, were visibly shaken, while others, like Hjalmar Schacht and Hans Fritsche, turned their backs to the screen.[69]

Great Britain's Attorney General, Sir Hartley Shawcross, opened the British case on December 4, 1945. He offered the most adamant rejection of the traditional rules of statecraft of all the Allied prosecutors. Shawcross maintained that sovereignty no longer provided blanket immunity for national leaders: "The right of war was no longer the essence of sovereignty."[70] He argued that "practically the whole civilized world abolished war as a legally permissible means of enforcing the law or of changing it." He also attached great importance to prewar legislation like the

Kellogg-Briand Pact. "These repeated declarations, these repeated condemnations of wars of aggression testified to the fact that with the establishment of the League of Nations, with the legal developments which followed it, the place of war in international law had undergone a profound change. War was ceasing to be the unrestricted prerogative of sovereign states."[71] The British prosecutor anticipated many of the defense arguments and dismissed them out of hand. "Political loyalty, military obedience are excellent things, but they neither require nor do they justify the commission of patently wicked acts."[72]

The prosecution's key piece of evidence in their aggressive war case was the notes of Adjunct Colonel Friedrich Hossbach from a November 5, 1937 conference at the Reich Chancellery. According to the prosecution, it was there that Hitler introduced the concept of *Lebensraum* and offered various military scenarios that included the taking of Austria and Czechoslovakia. Many of the defendants criticized the prosecution for exaggerating the significance of this document. Hermann Goering stated with typical candor, "Nevertheless, some of these statements naturally do reflect the basic attitude of the Führer, but with the best intentions I cannot attach the same measure of significance to the document as is being attached to it here."[73]

The defendants had a much more pleasant day on December 11, when the prosecution introduced Document 3054-PS, a film entitled *The Nazi Plan*. This four-part film was mostly German footage, including scenes from Leni Riefenstahl's *Triumph of the Will*. Some of the defendants, Ribbentrop and Goering in particular, beamed. Goering joked that the film was so inspiring he was sure that Justice Jackson would now want to join the party.[74] The defendants' courtroom levity ended when the court readjourned in early January 1946 and *Einsatzgruppen* leader Otto Ohlendorf took the witness stand. Each of the four Einsatzgruppen (A–D) was attached to a German army and followed them into the Soviet Union with the specific intent of killing Jews and Communist Party officials.

The U.S. Army had discovered the Einsatzgruppens' daily "Morning Reports" at Gestapo headquarters in Berlin. The reports covered the period of June 23, 1941–April 24, 1942, during which, according to their own careful records, the Einsatzgruppen killed more than one million people. The "Morning Reports" provided some of the most damning evidence presented at Nuremberg. When asked how many people his men killed, Ohlendorf answered matter-of-factly, "In the year between

June 1941 and June 1942 the *Einsatzcommandos* reported 90,000 people liquidated." Ohlendorf confirmed that the figure included women and children.[75] His explanation of why he preferred his soldiers to shoot their victims reveals much about how guilt is diffused in a modern, bureaucratic state: "The aim was that the individual leaders and men should be able to carry out the executions in a military manner acting on orders. They should not have to make a decision on their own."[76] American prosecutor Telford Taylor remembers being amazed by Ohlendorf's casual ruthlessness: "He said it just that way, as if there was nothing remarkable about it. The whole audience was shocked."[77]

Telford Taylor cross-examined SS General Erich von dem Bach-Zelewski on January 7, 1946. The witness had been in charge of SS antipartisan units and killing squads like the Einsatzgruppen and reported directly to Heinrich Himmler. Bach-Zelewski was best known for overseeing the brutal repression of the Warsaw uprising in 1944. Earlier in the trial, American prosecutors had introduced a homemade, leather-bound book made by German Police Major General Stroop and entitled *The Warsaw Ghetto Is No More*. The book gleefully recounted the annihilation of more than 50,000 Polish Jews: "The resistance put up by the Jews and bandits could be broken only by the relentless and energetic use of our shock-troops by day and night." Stroop concluded his account with a summary of the killing done by Wehrmacht, Waffen SS, and Police: "Only through the continuous and untiring work of all involved did we succeed in catching a total of 56,065 Jews whose extermination can be proved. To this should be added the number of Jews who lost their lives in explosions or fires but whose numbers could not be ascertained."[78]

Taylor attempted to establish the fact that the Wehrmacht, irrespective of their leaders' vigorous denials, had played an integral role in brutal "antipartisan" campaigns in the Soviet Union. Taylor was also trying to prove that the execution squads' activities were coordinated by the German army's leadership. The American prosecutor asked Bach-Zelewski very simple, direct questions and carefully built his case fact by fact. "In the course of your duties did you confer with the commanders of army groups and armies on the Eastern Front?" The SS general's answer implicated the army leaders: "With the commanders of the army groups, not of the armies, and with the district commanders of the Wehrmacht." Taylor bore down on the witness: "Did the highest military authorities

issue instructions that anti-partisan operations were to be conducted with severity?" "Yes," Bach-Zelewski replied. He claimed that because the German high command had not drafted detailed antipartisan orders, policy descended into "a wild state of anarchy in all anti-partisan operations." Taylor asked if the leaders of the German army were aware of this state of "anarchy." "The state of affairs was generally known. There was no necessity to make a special report about it, since every operation had immediately to be reported in all detail, and was known to every responsible leader," Bach-Zelewski replied. Taylor was fast emerging as one of the legal stars of the IMT; many took notice of his skill as a cross-examiner.[79]

Soviet prosecutor Yuri Pokrovsky next took up the questioning of Bach-Zelewski. He tried to prove that the havoc wrought by the Wehrmacht during the invasion of the Soviet Union was the result of a specific plan. However, the witness stuck to his story that the mayhem had happened for the opposite reason—the lack of a clear policy directive. According to the witness, it was nearly impossible to punish a soldier for atrocities committed in the Soviet Union: "orders emanating from the highest authorities definitely stated that if excesses were committed against the civilian population in the partisan areas, no disciplinary or judicial measures could be taken." The witness confirmed the fact that the Germans had waged an unrestricted war of annihilation in the Soviet Union. "I believe that these methods would definitely have resulted in the extermination of 30 million if they had been continued, and if developments of that time had not completely changed the situation."[80] Adolf Eichman's former assistant, Dieter Wisliceny, testified that European Jews were "all taken to Auschwitz and there to the Final Solution." The Soviet prosecutor asked, "Do you mean they were killed?" "Yes, with the exception of about twenty-five to thirty percent that were used for labor," the witness replied. Hermann Goering bristled in the defendants' dock, "What does the swine expect to gain by it? He'll hang anyway!"[81]

Although French prosecutor François de Menthon had been a member of his nation's resistance, many of his countrymen had collaborated with the Nazi-imposed Vichy government. De Menthon opened the war crimes case for the French on January 17, 1946. According to him, the Germans attempted to take the world back to the Middle Ages: "In the middle of the 20th century Germany goes back, of her own free will, beyond Christianity and civilization to the primitive barbarity of ancient

Germany." The French prosecutor contended that the Third Reich had "raised inhumanity to the level of principle."[82] De Menthon argued that "We are brought back . . . to the most primitive ideas of the savage tribe. All the values of civilization accumulated in the course of centuries are rejected, all traditional ideas of morality, justice, and law give way to the primacy of race, its instincts, its needs and interests."[83]

Soviet Major General Roman A. Rudenko was the last Allied prosecutor to give his opening address, on February 8, 1946. Rudenko anticipated the German defense claim that Operation Barbarossa was a "preventive" war: "In its attempts to conceal its imperialistic aims the Hitlerite clique hysterically shrieked, as usual, about a danger alleged to be forthcoming from the U.S.S.R. and proclaimed that the predatory war which it started against the Soviet Union with aggressive purposes was preventative war."[84] He mocked the Germans' defensive claims in classic Stalinist language—"Much as the fascist wolf might disguise himself in sheep's skin, he cannot hide his teeth!"[85]—and pointed to the many Nazi euphemisms for killing in a June 17, 1941 order signed by Heinrich Himmler's deputy Reinhard Heydrich: "the systematic extermination of Soviet people in fascist concentration camps in the territories of U.S.S.R and other countries occupied by the fascist aggressors was carried out under the form of 'filtration,' 'cleaning measures,' 'purges,' 'extraordinary measures,' 'special treatment,' 'liquidation,' 'execution,' and so on."[86]

Major General Rudenko offered this shocking (and probably exaggerated) inventory of the destruction wrought in the Soviet Union by marauding Nazi armies: "The German fascist invaders completely or partially destroyed or burned 1,710 cities and more than 70,000 villages and hamlets . . . or destroyed six million buildings."[87] According to the Soviet prosecutor, the German invasion left more than 25 million homeless and destroyed 40,000 hospitals and 65,000 of Russia's 122,000 kilometers of railroad tracks. In addition, Rudenko claimed that the German invaders killed seven million horses, 17 million head of cattle, 20 million pigs, and an astounding 110 million chickens. Rudenko put the cost of the German destruction at 679,000 million rubles.[88] He next catalogued the human cost of the Soviet invasion. The wanton slaughter of civilians by the Wehrmacht, the SS, and special killing squads like the Einsatzgruppen were clear violations of the traditional laws of war. The 1907 Hague Convention provided a clear precedent because it expressly forbade such blatant mistreatment of civilians and war prisoners. While the Germans

had fought a cleaner war on the Western Front, on the Eastern Front they waged a war of annihilation that summoned memories of Count Wallenstein's ten-year rampage during the Thirty Years War.

Abram Suzkever, a Soviet Jew from Vilna, took the stand on February 27 and described what happened when the *Sonderkommandos* came to town. A subdivision of the Einsatzgruppen, these were killing squads, and even their victims knew this. The Dirlewanger Brigade was an especially notorious Sonderkommando group that was composed entirely of convicted game poachers and convicted felons. Their primary task was to hunt humans. Under questioning from the Soviet prosecutor, the survivor painted a chilling portrait: "The man-hunters of the *Sonderkommandos*, or as the Jews called them, the '*Khapun*,' . . . broke into the Jewish houses at any time of day or night, dragged away the men, instructing them to take a piece of soap and a towel, and herded them into certain buildings near the village of Ponari." When the men did not return, many of the city's 80,000 Jews went into hiding and the Germans hunted them down with packs of vicious dogs. The larger objectives of Nazi policy were not lost on their victims: "I have to say that the Germans declared that they were exterminating the Jewish race as though legally."[89] Suzkever's wife gave birth to their son in violation of a Nazi order that required all pregnant Jewish women to abort and all Jewish babies to be killed. Sympathetic doctors delivered the baby and hid him in one of the hospital rooms. When the witness approached the hospital, he saw that it was already surrounded by Sonderkommandos and that they were dragging sick and old people outside. Suzkever felt a cold rush of terror but had to wait until the soldiers left before he could go inside. When he found his wife, she was sobbing. "She saw one German holding the baby and smearing something under its nose. Afterwards he threw it on the bed and laughed. When my wife picked up the child, there was something black under his nose. When I arrived at the hospital, I saw that my baby was dead. He was still warm," he testified.[90] Of Vilna's original population of 80,000 Jews, the witness estimated that only about 600 survived. The Soviets introduced a film of their own that included footage of Nazi death camps in Poland and Warsaw Ghetto in Poland.[91]

German Field Marshal Wilhelm Keitel, next on the witness stand, attempted to shift the blame for Nazi atrocities to the SS. He was not unconvincing and appeared genuinely shocked and horrified by the concentration camp films. When prison psychiatrist Gustav Gilbert asked the

Field Marshal about them, he was unequivocal in his condemnation of the perpetrators: "It is terrible. When I see such things, I'm ashamed of being German!—It was those dirty SS swine!—If I had known I would have told my son, 'I'd rather shoot you than let you join the SS.' But I did not know.—I'll never be able to look people in the face again."[92] The Soviet prosecutor was unconvinced by Keitel's contrition and forced him to admit that Operation Barbarossa was a war of extermination. Under cross-examination on March 6 and 7, Rudenko reminded Keitel of the directive that he had signed in May 1941, a month after the beginning of the German invasion. It read, "one must bear in mind that in the countries affected human life has absolutely no value and that a deterrent effect can be achieved only through the application of extraordinarily harsh measures."[93] Rudenko asked Wilhelm Keitel if he recalled the order, and he replied affirmatively. The prosecutor focused his questioning on the phrase "human life has absolutely no value" and asked the Field Marshal to explain what this meant to him. Rudenko succeeded in getting the high-ranking German officer to admit that the German army fought in the east according to a different set of rules: "It does not contain these words; but I knew from years of experience that in the Southeastern territories and in certain parts of Soviet territory, human life was not respected in the same degree."[94]

When Hermann Goering finally took the stand on March 13, 1946, he basked in the spotlight. After months in captivity, he had slimmed down from 264 to 186 pounds, and more important, rid himself of a nasty Percodan-and-champagne habit.[95] It was clear from the moment that Goering was asked for his initial plea of guilty or not guilty that he would not play the game of Nuremberg. Unlike many of the other defendants, the former *Reichsmarshall* seemed proud of his role in Germany's National Socialist revival. Above all, Goering rejected the international legal presumptions of the Nuremberg trial and refused to abandon the traditional rules of the European state system.

Under the friendly questioning of defense attorney Otto Stahmer, Goering described why he considered the 1907 Hague Conventions to be outdated by the nature of modern warfare. He believed that due to the rapid expansion of technology, it was impossible to wage a modern war without violating any number of the Hague rules.[96] Legitimate targets, according to Goering, now included food supplies, infrastructure, and civilians. He compared World War II to the Boer War and the Russo-

Japanese War to show how the very nature of military conflict had changed. He stated that nothing had done more to undermine the laws of war than city bombing: "A war at that time between one army and another, in which the population was more or less not involved, cannot be compared with today's total war, in which everyone, even the child, is drawn into the experience of war through the introduction of air warfare."[97] Goering dismissed the accounts of Nazi atrocities: "Also whatever happened in the way of atrocities and similar acts, which should not be tolerated, are in the last analysis, if one thinks about it calmly, to be attributed primarily to the war of propaganda."[98]

Hermann Goering was especially incensed by the idea put forward by the prosecution that soldiers should examine orders as international legal questions: "How does one imagine a state can be led if, during a war, or before a war, which the political leaders had decided upon, whether wrongly or rightly, the individual general could vote whether he was going to fight or not, whether his Army corps was going to stay at home or not, or could say, 'I must first ask my division.' Perhaps one of them would go along, and the others stay at home!" In the end, he simply rejected the idea that law had any place in international politics: "In the struggle for life and death there is in the end no legality."[99]

Goering's testimony began to lose momentum on March 14, when he was questioned about Nazi policy toward the Jews. "After Germany's collapse in 1918 Jewry became very powerful in Germany in all spheres of life, especially political, general intellectual and cultural, and, most particularly, the economic spheres," Goering stated. Prominent German Jews "did not show necessary restraint and . . . stood out more and more in public life." He and the early National Socialists were especially incensed by modernist "degenerate art": "I likewise call attention to the distortion which was practiced in the field of art in this direction, to plays which dragged the fighting at the front through the mud and befouled the ideal of the brave soldier."[100] When Goering began to discuss the Nuremberg Laws, he tried to portray himself as a moderating influence on Hitler when it came to the treatment of Germany's Jews. "I suggested to him that, as a generous act, he should do away with the concept of persons of mixed blood and place such people on the same footing as German citizens." The defendant claimed that Hitler "took up the idea with great interest and was all for adopting my point of view," but before the plan could be implemented "came more troubled times as far as foreign policy

was concerned."[101] Although Goering claimed that the Final Solution had not been planned in advance, he was significantly less gregarious when he was confronted with his July 31, 1941 communiqué to Reinhard Heydrich describing "a total solution to the Jewish question within the area of Jewish influence in Europe."[102]

After the friendly questioning from defense counsel, Otto Stahmer, Robert Jackson was eager to rein in the witness. He began his cross-examination on March 18, 1946. Jackson asked Goering about the Nazi abolition of Germany's parliamentary government. Goering's cynical candor seemed to disarm Justice Jackson. The American prosecutor asked, "After you came to power, you regarded it as necessary, in order to maintain power, to suppress all opposition parties?" The former Reichsmarshall responded affirmatively, "We found it necessary not to permit any more opposition, yes."[103] Jackson's frustration grew as quickly as Goering's confidence. When the American prosecutor asked the witness about Germany's secret plans to occupy the Rhineland, the defendant answered snidely, "I do not think I can recall reading beforehand the publication of the mobilization preparations of the United States."[104] Robert Jackson was beginning to lose his cool and appealed to the bench, "We can strike these things out. I do not want to spend time doing that, but this witness, it seems to me, is adopting, and has adopted, in the witness box and in the dock, an arrogant and contemptuous attitude towards the Tribunal which is giving him the trial which he never gave a living soul, nor dead ones either."[105]

With that exchange, Justice Lawrence adjourned the proceedings for the day. The next morning, Jackson again appealed to the bench to control the defendant: "The difficulty arises from this, Your Honor, that if the witness is permitted to volunteer statements in cross-examination there is no opportunity to make objection until they are placed on the record." Jackson argued that under Article 18 of the London Agreement Charter, the tribunal could "rule out irrelevant issues and statements of any kind whatsoever." Justice Lawrence asked Jackson, "What exactly is the motion you are making? Are you asking the Tribunal to strike the answer out of the record?" Jackson replied that the defendant's answers should be limited to the issues in question: "Well, no; in a Trial of this kind, where propaganda is one of the purposes of the defendant, striking out does no good after the answer is made, and Goering knows that as well as I." Lawrence gently overruled Jackson: "As to this particular observation of the defendant, the

defendant ought not to have referred to the United States, but it is a matter which I think you might well ignore."[106]

The professional military were watching the case of Admiral Karl Doenitz very closely. Despite British objections, the Americans insisted on trying him. Although Doenitz was a devoted Nazi who had been handpicked by Hitler to serve as his successor, he made an unlikely war crimes trial defendant because the submarine war had been relatively clean. As in World War I, it was impossible for submarine commanders to warn armed merchant ships of their imminent destruction and then rescue the survivors. Even so, Germany had lost 650 submarines and 25,000 of its 40,000-man U-boat force.[107]

Former German naval judge Otto Kranzbühler had been personally selected by Admiral Doenitz to defend him. At the time, Kranzbühler "felt myself obligated, on the German side, to cooperate as much as possible."[108] Although Admiral Doenitz was an unrepentant Nazi who, like Julius Streicher, continued to admire Adolf Hitler, had he committed war crimes? Kranzbühler was able to point to the gap between the victors' professed standards and contemporary naval practices. The admiral would contend that the "merchant vessels" attacked by German submarines not only had been armed but also had been attacking German submarines. Therefore, the ships could no longer be considered neutral. This was very similar to the situation that arose during World War I.

Although *tu quoque* arguments were banned by Article 3 of the London Agreement Charter, Otto Kranzbühler found a way around this technicality. He submitted questionnaires to Admiral Chester Nimitz, the commander of America's Pacific fleet, and to the British Admiralty about Allied naval practices during World War II. Kranzbühler was trying to establish the fact that refusing to rescue survivors was not the same as ordering their killing. Both Nimitz and the British Admiralty admitted that they too waged unrestricted submarine warfare. Admiral Nimitz appeared to side with his former adversary:

> [Question]: *Was it customary for submarines to attack merchant men without warning?*
>
> [Nimitz]: *Yes, with the exception of hospital ships and other vessels under safe conduct voyages for humanitarian purposes. . . . On general principles, U.S. submarines did not rescue enemy survivors if undue additional hazard to the*

submarine resulted, or the submarine would be prevented from accomplishing its further mission. Therefore, it was unsafe to pick up many survivors.[109]

Admiral Doenitz also challenged the claim that he had ordered survivors killed and grew especially edgy when the prosecution raised the *Laconia* affair. In 1942, German U-boats sank the passenger ship *Laconia*. When the German commander realized his mistake, he radioed Admiral Doenitz, who immediately ordered the submarines to rescue the survivors and take them to the nearest port under a Red Cross flag. The German submarines surfaced, collected the survivors, and were towing the lifeboats to safety when two American B-24s passed overhead. The bombers circled and then began to strafe the flotilla. The planes sank one submarine and killed a number of survivors. After this event, Doenitz ordered his submarines not to pick up survivors. He became exasperated with the American prosecutors: "I saved, saved, and saved! I didn't see any help from you! . . . It was quite clear to me that the time had passed where I was able to be on the surface and do things like that. You had a very powerful air force against me."[110]

On April 15, 1946, Auschwitz commandant (1940–43) Rudolf Hoess took the witness stand. He had served as a concentration camp commander at Sachsenhausen before being transferred to Auschwitz in May of 1940. Located in Poland, Auschwitz held as many as 140,000 inmates while the witness was in charge. The camp's site was chosen because it was isolated and approachable by rail only. Although the town of Auschwitz was only three kilometers away, the 20,000 acres surrounding the camp had been leveled. The actual site was deep in the woods in a "prohibited area and even members of the SS who did not have a special pass could not enter it." When the trains arrived, the prisoners were first examined by doctors for their physical condition. According to the witness, "The internees capable of work at once marched to Auschwitz or to the camp at Birkenau and those incapable of work were at first taken to the provisional installations, then to the newly constructed crematoria."[111]

Defense attorney Dr. Kurt Kauffmann tried to push the majority of the blame onto Adolf Eichmann. Rudolf Hoess claimed that he had no exact idea how many inmates had been killed because only Eichmann was allowed to keep notes about the numbers exterminated. "Is it furthermore true that Eichmann stated to you that in Auschwitz a total sum of more than 2 million Jews had been destroyed?" asked Dr. Kaufmann.

"Yes," replied Hoess. In the summer of 1941, Hoess was summoned to a meeting in Berlin where he was to receive personal orders from SS Chief Heinrich Himmler. "He told me something to the effect—I do not remember the exact words—that the Führer had given the order for the Final Solution of the Jewish question. We, the SS, must carry out that order. If it is not carried out now then the Jews will later on destroy the German people."[112]

The low point in the IMT came when the Soviet prosecutor, acting on orders from Moscow, charged Nazi Germany with the murders of Polish officers at Katyn. General R. A. Rudenko announced, "One of the most important criminal acts for which the major war criminals are responsible was the mass execution of Polish prisoners of war shot in the Katyn forest near Smolensk by the German fascist invaders."[113] Even in 1946, most suspected that the Soviets had committed the massacre. All of the evidence pointed toward them: none of the documents found on the victims was dated later than May 6, 1940, during the time the U.S.S.R. controlled the area; moreover, the victims were dressed in winter clothes, and their hands were tied with cord manufactured in the Soviet Union.[114] According to German historian Jörg Friedrich, nothing did more to discredit the proceedings in the eyes of those they were trying to reeducate than the bogus Katyn charges. "The fact that the Soviet Union, an aggressive and genocidal state, was participating in a legal proceeding strengthened this belief. The masters of the gulag would convict the masters of Auschwitz for crimes against humanity."[115]

On April 1, much to the discomfort of the Soviet delegation, defense attorney Alfred Seidl questioned former Nazi Foreign Secretary Joachim von Ribbentrop about the Hitler-Stalin Pact. The Foreign Secretary went out of his way to implicate the Soviet Union: "In keeping with this understanding, the eastern territories were occupied by Soviet troops and the western territories by German troops after the victory. There is no doubt that Stalin can never accuse Germany of an aggression or of an aggressive war for her action in Poland. If it is considered an aggression, then both sides are guilty of it."[116] Von Ribbentrop outlined the Soviet demands—Finland, the Balkans, Bulgaria, and the naval outlets in the Dardanelles and the Baltic Sea. If this was not sufficiently embarrassing, on May 21, while questioning former German State Secretary Ernst von Weizsäcker, Seidl claimed to have a copy of the Hitler-Stalin Pact's secret protocol: "I have before me a text and Ambassador Gaus [Ribbentrop's

senior legal advisor] harbors no doubt at all that the agreements in question are correctly set out in the text."[117]

Justice Lawrence interrupted the defense lawyer and reminded him that the document had been ruled out of evidence because of its unknown origin. However, Seidl had an affadavit from Dr. Friedrich Gaus stating that he had witnessed the document's signing in Moscow. Soviet prosecutor Rudenko exploded, "Your Honors! I would like to protest against these questions for two reasons. First of all, we are examining the matter of crimes of the major German war criminals. We are not investigating the foreign polices of other states." He claimed that the document was a forgery and had no evidentiary value. However, Justice Lawrence allowed Seidl to ask the witness, von Weizsäcker, "what his recollection is of the treaty without putting the document to him." The witness deftly summarized the salient details of the Pact's secret protocol from memory: "It is about a very incisive, a very far-reaching secret addendum to the nonaggression pact concluded at the time. The scope of this document was very extensive since it concerned the partition of spheres of influence and drew a demarcation line between areas which, under given conditions, belonged to the sphere of Soviet Russia and those which would fall in the German sphere of interest. . . . Finland, Estonia, Latvia, Eastern Poland and, as far as I can remember, certain areas of Romania were to be included in the sphere of the Soviet Union." Seidl asked if the secret addendum "contained an agreement on the future destiny of Poland?" "The secret agreement included a complete redirection of Poland's destiny," replied the former State Secretary. Although the court did not allow the introduction of the Hitler-Stalin Pact into evidence, on May 23, the *St. Louis Post-Dispatch* published the document.[118] On that day, General N. D. Zorya, the Soviet official in Nuremberg responsible for the slip-up that allowed Seidl to introduce the Molotov-Ribbentrop Agreement, was found dead from a single gunshot to the head. The Soviets regretfully informed Zorya's international colleagues that he had committed suicide at the Soviet residence in Nuremberg.[119]

The case of Minister of Armaments and War Production Albert Speer was growing increasingly complicated. Unlike Goering, who refused to play the game of Nuremberg, Speer admitted his guilt, cooperated with the prosecution, and labored to save his life both in and out of the courtroom. However, Speer had clearly violated the Geneva conventions by demanding and utilizing concentration camp inmates and POWs as slave

laborers on various armament-related projects. He had visited the underground factories that produced the engines for the V-2 rockets and the jet engines for the Messerschmitt 262 airplanes.[120] Not only had Speer taken 30,000 concentration camp inmates from Heinrich Himmler, he had also instituted a program under which factory "slackers" were sent to the camps.[121] If this blatant misuse of slave labor were not enough, between October 18 and November 2, 1941, Speer had helped Adolf Eichmann with the forced evictions of 50,000 German Jews from Berlin under the Reich's "Slum Clearance" project. Speer would claim on the stand that "There was no comprehensive authority in my hands. . . . But I, as the man responsible for production, had no responsibility in these matters. However, when I heard complaints from factory heads or from my deputies, I did everything to remove the cause of the complaints."[122] Most incriminating was Albert Speer's presence at Himmler's famous Posen speech on October 6, 1943, on the "Final Solution." Himmler had even addressed the defendant directly as "party comrade Speer" during the speech.[123]

Although Speer pled weakly that he had considered assassinating Hitler in the final days of the war, his guilt was more certain than his innocence. However, on the stand he claimed to have had little knowledge of his personal friend Adolf Hitler's intentions and even said that he had never read *Mein Kampf*.[124] On June 21, 1946, under Soviet cross-examination, Speer testified, "I was in close contact with Hitler, and I heard his personal views; these views of his did not allow the conclusion that he had any plans of the sort which appeared in the documents here."[125] Compared to the "Statement of Remorse" read by Walter Funk on May 6, 1946, many thought Speer's testimony unconvincing. "I nearly died of shame," Goering quipped after Speer's attorney had shown his client's hand by asking Otto Ohlendorf under cross-examination if his old friend, Albert Speer, had ever mentioned his plans to assassinate Adolf Hitler. Goering vividly expressed his disgust: "To think that a German could be so rotten, just to prolong his wretched life—to put it crudely, to piss in front and crap behind a little longer." As far as Goering was concerned, they would all surely be executed; however, there was "such a thing as honour."[126]

Contrasting most sharply with Speer's upper-middle-class propriety was the dark presence of Julius Streicher. Journalist Rebecca West described Streicher during the trial as "the sort who gives trouble in

parks."[127] An unlikely choice as a defendant in a major war crimes trial, Streicher had been the publisher of the racist and borderline pornographic Nazi periodical *Der Strumer*. However, he had not been involved in either policy making or military decision making, and the prosecution would need to establish the fact that the periodicals he produced helped to create a climate conducive to carrying out the Final Solution. Of the defendants at Nuremberg, the former comic book publisher had scored the lowest on the I.Q. test given to all the prisoners.[128] Although Streicher expressed odious personal views, had he committed war crimes?

When the time came to rule, the IMT proved very conservative in applying the hotly debated conspiracy and aggression charges.[129] While the judges found eight (Goering, Hess, Ribbentrop, Keitel, Rosenberg, Jodl, Seyss-Inquart, Neurath, and Raeder) guilty of crimes against peace, they acquitted four of the charge (Fritzsche, Speer, Schacht, and Papen). The court offered no expansive definition of aggression, only vague references to "aggressive acts."[130] The cautious precedent of the IMT did not establish a definitive standard for aggression.[131] David Luban describes the IMT precedent as "resting on the shakiest of grounds."[132] When it came to the criminalization of the Nazi organizations, the IMT carefully distinguished between the SS and other organs of terror and the professional soldiers. While the court criminalized the SS, SD, Gestapo, and Leadership Corps of the Nazi Party, they acquitted the General Staff, High Command, Reich Cabinet, and SA.[133]

Otto Kranzbühler remembered the day of the sentencing as "full of gloomy tension. We knew that we would reckon with a large number of death sentences."[134] On November 6, 1946, the IMT sentenced twelve men to death (Goering, Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sauckel, Jodl, Bormann, and Seyss-Inquart). The biggest surprises were the acquittals of Schacht, Papen, and Fritzsche. Speer's repentance and his guilty plea got him twenty years in prison, Doenitz received a ten-year sentence, and Rudolf Hess was sentenced to life in Spandau Prison. Because of this and other examples of what they considered leniency, the Soviet judges issued a dissenting opinion on the acquittals; the majority's decision not to criminalize the Reich Cabinet, the General Staff, and the High Command; and finally the Hess sentence.[135] Although the IMT sentenced Hermann Goering to hang, he had made other plans. Goering had befriended an American guard

named "Tex" Wheelis and plied him with expensive gifts like a Bulova watch and a Mont Blanc pen. Because Wheelis had access to the prisoners' baggage room, he could find Goering's hidden cyanide capsules. Hours before his scheduled execution, the former Reichsmarshall was found dead in his cell from cyanide poisoning. He left a final letter: "This grand finale is typical of the abysmal depths plumbed by the court and prosecution. Pure theater, from start to finish! All rotten comedy!" Hermann Goering was unrepentant and self-aggrandizing until the end. "I would have let you shoot me without further ado! But it is not possible to hang the German Reichsmarshall. . . . I have therefore chosen the manner of death of the Great Hannibal."[136]

The other ten convicts were hanged by Master Sergeant John Woods of the U.S. Army on October 16, 1946. German historian Jörg Friedrich describes how some of the German public reacted to the Nuremberg verdicts:

> The Germans learned from posters on the street that their former leaders had been hanged at Nuremberg. In the last three months of the war, more than 700,000 German soldiers and civilians had lost their lives. Now people crowded around the pillars on which the posters hung, reading in silence that ministers, field marshals and police chiefs had also died. There were no signs of remorse. In Wuppertal, schoolgirls dressed in black on the morning of the execution; in Hamburg, people whispered that the British leaders responsible for the bombing of the city also deserved to hang.[137]

In terms of providing fallen foes with a legitimate forum, the IMT was unprecedented in modern history. The accused were informed of the charges filed against them and given access to the evidence, legal representation, and an opportunity to state their cases in open court. The court simply refused to rule in the case of the Katyn Massacre, and any mention of it was conspicuously absent from its judgment. The acquittals and even the Soviet dissents all bolstered the court's credibility. Above and beyond all else, Nuremberg provided an international legal inquiry that was unique in history. Due to the acrimony surrounding the London Agreement Charter, the court began and ended divided. An accidental result of this division were carefully considered judgments and dissenting opinions. One of the most significant challenges the judges faced was

reconciling a number of differing interpretations of international law (Continental, Anglo, and American) and preventing the differences among them from undermining the trials.[138]

Was the Nuremberg judgment a primitive form of punitive political justice like the U.S.–Dakota War Trials and the Wirz case? Or was it a form of strategic legalism like the Jacob Smith case or the Leipzig trials? Or was Nuremberg's IMT a new form of twentieth-century political justice? It certainly contrasts sharply with the forms of political justice exercised by both the Soviets and the Nazis against their respective enemies. Compared to Stalin and Vyshinsky's 1930s Moscow purge trials or to Hitler's 1944 trial of the "Bomb plotters," Nuremberg stands up quite nicely.

Ironically, the quadripartite disagreements over war crimes policy prevented the kinds of strategic legalist nonjudicial sentence reductions that would become all too familiar in Germany and Japan during the 1950s. Moreover, the Soviets failed to turn Nuremberg into "a continuation of political warfare in judicial robes."[139] The IMT proved that successor trials were not farcical by their very nature. The Allies managed to punish the guilty and to create a strong documentary record of the German dictatorship.

However, in terms of reeducation, reform, and overall social engineering, the trials were less successful.[140] The lessons of Nuremberg were lost on war-weary Germans, many of whom had grown cynical and apathetic and considered the trial a form of ritual or political theater. Nonetheless, the assumption that trials could reeducate an entire nation proved both naive and erroneous.[141] Instead of embracing national guilt after surviving World War II, many Germans chose to become "blind in one eye": "German critics ignored—and continue to ignore—some distinctive characteristics of Nuremberg, such as due process of law. They glossed over the sober presentation of abundant evidence of German atrocities. Instead, they insisted that Nuremberg was legally flawed, with the reservation that the major Nazis got what they deserved," observes Friedrich.[142]

The IMT stands in stark contrast to the International Military Tribunal for the Far East (IMTFE) or the "Tokyo trial." On April 29, 1946, the IMTFE arraigned twenty-eight of Japan's military and civilian leaders under a 55-count indictment that included charges of crimes against peace and crimes against humanity. Although Emperor Hirohito was

not among the defendants, they did include Hideki Tojo and a number of other high-ranking officials.[143]

Dutch judge B.V.A. Röling later described the Tokyo trial as "very much an American performance. . . . I didn't see it at the time, and I didn't see that there were more 'Hollywoodesque' things around than there should have been." The decision not to try the Emperor was made unilaterally by General MacArthur himself. The Soviets grew extremely suspicious about the American refusal to indict Hirohito. MacArthur argued that if the Emperor were tried like a common criminal, "the nation will disintegrate" and went on to claim that the United States would need a million additional troops to restore order. At lower levels, the Americans under the Supreme Commander Asia Pacific (SCAP) occupation government would attempt to purge the Japanese government of wartime functionaries as had been done in Germany.[144] Japan was undergoing a similar social reconstruction, and they hoped that the trial of the high-ranking Japanese would, like Nuremberg's IMT, serve as the centerpiece of the American reeducation effort. However, prosecuting Japanese leaders for war crimes would prove to be far more difficult.

The four-power Nuremberg court with a four-count indictment was simple in comparison to the IMTFE. That Tribunal was composed of eleven judges from Australia, Canada, China, France, the Philippines, the Netherlands, New Zealand, the Soviet Union, Great Britain, the United States, and India. Unlike the IMT, whose indictment (the London Agreement and Charter) was an international agreement, the IMTFE was established by a Proclamation issued by Allied Supreme Commander General Douglas MacArthur. The chief counsel for the Americans was a former criminal lawyer and New Dealer named Joe Keenan who overzealously pushed the Americans' broadened conception of international criminality. Keenan claimed that the trial "served as a cockpit for a death struggle between two completely irreconcilable and opposed types of legal thinking" (natural law and positivism).[145]

The presiding judge in the Tokyo trial was William Webb of Australia. Unlike Justice Lawrence, the presiding judge in the IMT, who was elected by his peers, Webb was appointed by General MacArthur. Years later, B.V.A. Röling, the justice from the Netherlands, described Webb as "completely unsure of his position"; this manifested itself in "dictatorial behavior toward his colleagues as well as toward the prosecutors and

defense counsel."[146] Legal historian John Appleman writes, "After examining the proceedings of the International Military Tribunal at Nuremberg . . . the proceedings before the International Military Tribunal for the Far East seem strangely autocratic."[147]

The case for German aggression was more easily made than that for Japanese aggression; the mountains of captured German documents provided enough proof to make the crimes against peace charges arguable. The same charges were far less certain in the case of the Japanese because the prosecution lacked the same type of documentary evidence. And because Nuremberg's IMT had not defined standards of aggression, the IMTFE had to render independent judgment.[148] The indictment in the Tokyo trial was significantly more complicated than the IMT's London Agreement Charter. Crimes against peace were covered by Counts 1–36, murder by 37–52, war crimes and crimes against humanity by 53–55. This indictment was legally problematic in a number of respects.[149] Some of the defendants were charged with not having prevented war crimes—in other words, negative criminality. The fifty-fourth count of the indictment accused the defendants of having "deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws of war.[150] In other words, they were charged for what they didn't do. Others were accused of cannibalism: "On 10 December 1944 an order was issued from 18 Army Headquarters that troops were permitted to eat the flesh of Allied dead but must not eat their own dead."[151]

On May 6, U.S. Army defense lawyer Major General Bruce Blakney challenged the court's jurisdiction over the defendants because "war is not a crime."[152] Unlike the defense lawyers in the first Nuremberg trial, those in Tokyo were not forbidden from attacking the court's international legal legitimacy. During the first week of the trial, the defense filed more motions challenging the legal basis of the tribunal. They questioned the criminality of aggression under international law. Japanese defense counsel Kenzo Takayanagi rejected the validity of the charge on the grounds that the Kellogg-Briand Pact had a provision for self-defense and that the Japanese war effort had been an act of self-defense.[153] Takayanagi also cited Robert Lansing's now well-worn conservative rejection of aggression charges from the Paris Peace Conference.[154] Prime Minister Tojo accepted full responsibility for Japan's actions. In a 50,000-word statement, he argued that the attacks on Pearl Harbor, China, and

Indonesia, and other so-called acts of "aggression," were responses to an Allied policy that intended to slowly strangle the island nation with economic and military blockades. According to the defendant, the fact that the Japanese had fired the first shot was inconsequential when placed within the larger context of U.S.-Japanese relations of the 1930s and early 1940s.[155] Although the trial began in May 1946; due to the size of the court and the number of defendants, the prosecution case would take seven months to present and the entire trial would last more than two and half years. Only the Axis leaders faced the War Department's aggression, conspiracy, and crimes against humanity charges and as a result, Allied war crimes policy was uneven in a number of ways.

Because of the logistical requirements of two occupations, Allied policy possessed a strong ad hoc character; theater officials were often forced to interpret vague policies. Historian Kurt Tauber has offered this explanation for the confusion that resulted: "Without a clear unambiguous decision at the highest level in favor of one or the other course, there was uncertainty at the lower echelons, where policy is actually executed. The ambiguity was never entirely removed."[156] The end result was the emergence of a hydra-headed American war crimes policy. High-ranking Axis leaders were given elaborate trials and judged according to new standards of international law. Meanwhile, the overwhelming majority of war crimes cases were tried by the Allied military under military law in both Europe and in the Pacific. Of the 1,672 tried by the U.S. Army at the Dachau concentration camp, approximately two thirds of the defendants had been guards or personnel at the Buchenwald, Flossenburg, Mauthausen, Nordhausen, Hadamar, and Muhldorf concentration camps; another large group (1,000) was charged with lynching Allied pilots; and a small number were tried for the Malmedy Massacre.[157] In the Pacific theater, U.S. military courts tried 215 in Manila, 966 in Yokohama, and 116 in trials at the Kwajalein Atoll and Guam for traditional war crimes.[158]

There were two series of trials that would come back to haunt the Americans and help to discredit American war crimes policy. These trials were conducted by the U.S. army in both Asia and Europe. While the military courts were not up to the lofty standards of the international courts, they were examples of traditional, punitive political justice. But because the Americans had loudly and conspicuously committed themselves to higher standards for the IMT and the IMTFE, all of their trials would be judged by those standards.

The most famous victor's justice occurred in the Philippines in 1945, where General Douglas MacArthur evened the score with his former Japanese adversaries Tomoyuki Yamashita and Masaharu Homma. General Yamashita had earned fame and glory in 1943 when with only 30,000 men he overwhelmed 100,000 British troops at Malaya. Because Yamashita's popularity threatened to eclipse even Tojo's, the general was transferred to an inactive front.[159] But on October 20, 1944, Yamashita returned to Manila as Japanese Supreme Commander in the Philippines, in direct command of Japan's 14th Army. In January 1945, he declared Manila an open city because the flat, spread-out city with its highly flammable buildings would be difficult to defend.[160] General Yamashita retreated to Baguio, and beginning on February 3, 1945, 20,000 Japanese sailors and marines began to enter Manila and set about destroying the city and slaughtering its inhabitants. When the general heard about the atrocities nine days later, he radioed Admiral Iwabuchia (the commander of the navy) and ordered him to withdraw. However, the admiral was dead.[161] General Yamashita would later claim that he was unable to command the troops due to a breakdown in communications caused by the onslaught of the U.S. forces.

Two days before the trial began, defense attorney Frank Reel learned that the prosecution had added fifty-nine new charges to the indictment. Reel petitioned for more time to address the new charges, but this request was rejected.[162] A reception hall in the High Commissioner's residence in Manila was transformed into a courtroom, and the general was arraigned by a five-man military commission on October 8, 1945. General MacArthur charged that General Yamashita "unlawfully disregarded and failed to discharge his duty as commander to control the ops of the members of his command." MacArthur divided the crimes into three categories: starvation, executions, and massacres; torture, rape, murder, and mass executions; and burning and demolition without military necessity.[163]

Nuremberg this was not, and General MacArthur offered no apologies or excuses. The "American Caesar" did not feel compelled to observe any law but his own. The trial of his former adversaries was a throwback to traditional, punitive political justice. Not only did MacArthur select the judges and draft the trial procedure, all of the generals on the five-man legal commission were under his command, and none was a lawyer. Moreover, the tribunal was not "bound by

technical rules of evidence."[164] One prosecution witness testified that the Japanese soldiers had bayoneted her, and lifted her shirt to display twenty-six bayonet-wound scars. Another testified that Japanese soldiers killed her young child in front of her. The witness began to shake her fist at the general and scream, "*Tandaan mo!* [Remember it!] Yamashita!"[165]

The prosecution did great damage not so much to their case but to the trial's reputation when they introduced a pseudodocumentary movie as the "evidence which will convict." The film showed an American soldier removing a piece of paper from the pocket of a dead Japanese soldier; the paper read (in English), "Orders from Tokyo." The narrator broke in: "We have discovered the secret orders to destroy Manila."[166] After the prosecution rested on November 20, the defense called Australian Norman Sparnom, the Allied chief translator in charge of captured Japanese documents. The defense attorney asked, "A film was shown before this committee in which a statement was made that the United States of America had captured an order from Tokyo for the destruction of Manila. Have you ever seen such an order among the captured documents?" "No, I have not," Sparnom replied.[167]

Yamashita's attorney, Frank Reel, did not challenge the evidence presented by the prosecution. Instead, he attempted to distance Yamashita from the atrocities committed in Manila, claiming that the general was thrown into a desperate situation in the Philippines. After Yamashita entered Manila, he immediately declared it indefensible and retreated to Baguio, 150 miles away. Throughout his trial, Yamashita maintained that he did not hear of the atrocities until more than a week after they had occurred.[168] Yamashita claimed,

> I absolutely did not order [any atrocities] nor did I receive the order to do this from any superior authority, nor did I ever permit such a thing . . . and will swear to heaven and earth concerning these points.[169] . . . The facts are that I was constantly under attack by large American forces, and I had been under pressure day and night. . . . I believe that under the foregoing conditions I did the best possible job I could have done. However, due to the above circumstances, my plans and my strength were not sufficient to the situation, and if these things happened, they were absolutely unavoidable. They were beyond anything I would have expected.[170]

On December 7, 1945, the fourth anniversary of the Japanese attack on Pearl Harbor, MacArthur's military commission announced its decision. General Reynolds described the atrocities as "not sporadic in nature but in many cases were methodically supervised by the Japanese officers and noncommissioned officers."[171] The second part of the opinion announced the most significant precedent to come out of the Yamashita case—"command responsibility"[172]—the idea that a commanding officer could be held accountable for the actions of his troops. Major General Russell Reynolds, Major General Clarence Sturdevant, Major General James Lester, Brigadier General William Walker, and Brigadier General Egbert Bullens sentenced Tomoyuki Yamashita to death by hanging. Yamashita maintained his innocence until the end: "I wish to state that I stand here today with the same clear conscience as on the first day of my arraignment, and I swear to my Creator and everything that is sacred to me that I am innocent of all charges made against me."[173]

America's highest court had been conspicuously silent on the question of war crimes until Frank Reel, Yamashita's attorney, appealed to the U.S. Supreme Court for a writ of *habeas corpus*.[174] In February 1946, the court upheld Yamashita's death sentence by a clear six-to-two margin. The majority based their ruling on the 1942 decision in *Ex parte Quirin*, which authorized congressional passage of the articles of war and sanctioned the use of military tribunals during wartime.[175] This ruling allowed the court's majority to avoid the substantive legal questions of the Yamashita case. Chief Justice Harlan Stone applied a narrow reading of the Constitution, concluding that it was not the court's responsibility to reexamine the case: "We do not here appraise the evidence on which petitioner was convicted. . . . These are questions within the peculiar competence of the military officers composing the commission and were for it to decide."[176]

Not all of Stone's Supreme Court brethren were willing to take such an easy way out: Justices Murphy and Rutledge issued strong dissenting opinions that did lasting damage to the reputation of the Yamashita case. Justice Murphy described the trial as "a practice reminiscent of that pursued in certain less respected nations in recent years" and went on to attack the logic of the army tribunal.[177] "We will judge the discharge of your duties," wrote Murphy,

> by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them. Nothing in

> all history or in international law, at least as far as I am aware, justifies such a charge against a fallen commander of a defeated force. To use the very inefficiency and disorganization created by the victorious forces as the primary basis for condemning officers of defeated armies bears no resemblance to justice or to military reality.[178]

At the time, Robert Shaplen of *Newsweek* wrote, "In the opinion of probably every correspondent covering the trial the military commission came into the courtroom the first day with the decision already in its collective pocket."[179] Once General MacArthur received word that the U.S. Supreme Court had upheld the death sentence, he ordered Yamashita stripped of his uniform and decorations and hanged.

MacArthur's Manila tribunal arraigned Masaharu Homma on December 19, 1945; he too was charged with failure to control his troops. When American General Edward King surrendered to Homma's forces on Bataan on April 9, 1942, he was assured that his troops would be treated humanely. Between 80,000–100,000 American and mostly Philippine soldiers began the 80-mile walk to Bataan; 7,000 and 10,000 died or were killed by Japanese soldiers. Homma's trial lasted from January 3 to February 11, 1946. General Homma had few doubts about his postwar fate: "Win and you are the official army, lose and you are the rebels." He believed that "there is no such thing as justice in international relations in this universe." Unlike Yamashita, who was hanged, Homma was sentenced to death by firing squad. Again, the Supreme Court rejected Homma's lawyer's writ of *habeas corpus* by a six-to-two majority, with Rutledge and Murphy again issuing dissenting opinions.[180]

While it is important to note the legal irregularities in the Yamashita case, it is also important to keep in mind that legal guilt and moral guilt are two entirely different things. Japanese soldiers treated American POWs significantly worse than the Germans. Of the approximately 235,000 American and British POWs taken by Germany and Italy, approximately 4 percent died in captivity, whereas 27 percent of 132,000 British and American prisoners died in Japanese captivity.[181] Australian POWs suffered most as prisoners of the Japanese: of the 21,726 captured, 7412 or 34 percent died. While the Manila trials contained some glaring procedural flaws, Yamashita and Homma were the leaders of a losing army that wantonly and brutally slaughtered civilians throughout Asia. Japanese soldiers tended to view POWs with contempt for surrendering.

While the motives will never be known, it is clear beyond a reasonable doubt that in Nanking, Manila, Canton, and many other parts of Asia, civilians were killed almost for sport. In six weeks in Nanking, Japanese soldiers killed approximately 300,000 civilians and raped 20,000 women.[182] Two soldiers even engaged in a contest to see who would be first to behead 100 POWs, and the contest was closely monitored by a Japanese newspaper.

With the surrender of Japan came the discovery of the Japanese special warfare Units 731, 100, and 112. In a laboratory in Manchuria they conducted medical experiments on Chinese, Korean, and Russian POWs, similar to those the Nazis conducted at Dachau for the *Luftwaffe*. Prisoners were frozen alive, infected with syphilis, given transfusions of horse blood, subjected to vivisection with no anaesthesia, and given numerous x-rays to test the effects of radiation.[183] Although the Soviets captured the laboratories in Manchuria, most of the 3,600 doctors and technicians made their way back to Japan. The head of Unit 731, Lieutenant General Shiro Ishi, traded his research results to American authorities in exchange for immunity from prosecution for himself and his staff.[184] In his recent book, *Embracing Defeat*, John Dower contends that the U.S. government gave immunity to General Ishii and his men in infamous bacteriological warfare Unit 731, "Americans who controlled the prosecution chose to grant blanket secret immunity to . . . the officers and scientific researchers in Unit 731 in Manchuria. . . . The data gained from human experimentation once again became ammunition: this time in the bargaining room, rather than on the battlefield. The Japanese hoped to use their knowledge as a tool for gaining freedom from prosecution as war criminals."[185] Similar to Germany, war crimes prosecutions in Japan were extremely uneven.

If anything, the Yamashita case, like the *U.S.-Dakota War Trials* and the trial of Captain Henry Wirz, was an example of traditional, punitive political justice. The conquered had no choice but to submit to the judicial fiat of the victors. A soldier from an earlier era, MacArthur had few legal pretensions and considered professional military men bound by "warrior's honor." In the final opinion, MacArthur wrote that "The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates his sacred trust, he not only profanes the entire cult but threatens the very fabric of international society."[186] General Douglas

MacArthur's treatment of his former foe, although abhorrent when measured by the new standards of the U.S. War Department, was consistent with history.[187]

The Yamashita case raised questions about the laws of war in the twentieth century. Was the objective of modern total war to defeat the enemy's army on the battlefield, or to attack and demoralize their civilian population? If civilians had become legitimate targets, were the laws of war outdated by the expansion of military conflict? These questions were especially relevant in Germany. Many Germans considered the destruction of their nation's cities and infrastructure punishment enough. Even William T. Sherman had advocated a merciful peace after total war. However, for the perpetrators of the Malmedy Massacre, it appeared that there would be no mercy.

Due to the symbolic importance of the slaughter of surrendered American soldiers, the United States was under a great deal of pressure to identify and prosecute those who had committed the executions. American intelligence blamed the killings on the men of *Kampfegruppe* Peiper, and they were transferred to a century-old prison near Ludwigsberg called Schwabisch Hall for interrogations. The army investigation team soon became frustrated by the stonewalling of Joachim Peiper and his men. A suspiciously large number of them claimed the killings had been ordered by the now dead SS Commander Walter Pringel.[188] The interrogators, Lieutenant Colonel Burton Ellis and Lieutenant William Perl, were pressured by the army to begin the trial as soon as possible.[189] An Austrian lawyer who had been forced out of Vienna in 1938, Perl had been trained at the U.S. Military Intelligence Center in Fort Ritchie, Maryland. He returned to Europe as a U.S. Army interrogator. The interrogation of Paul Zwiggart, a twenty-two-year-old member of Kampfegruppe Peiper, was described by his attorney in an obviously biased but telling account years later.

After Zwiggart's six weeks of solitary confinement in Schwabisch Hall, a guard entered his cell and put a hood over his head.[190] He and the other prisoners were taken to the mock court through long corridors, down a flight of stairs; "suddenly heavy iron chains had been trailed near the prisoners which rattle must produce a corresponding psychological effect." According to the defense attorney, the men were forced to face the wall with their arms raised up. "During about twenty minutes, he received in that position kicks without any interruption. . . . That treat-

ment continued further by thrashing until Zwiggart gave sufficiently in. Finally, First Lieutenant PEARL pulled with a sudden push the capuche from the head of the prisoner and insulted him, first of all, using diverse terms." The suspect was taken to a small room with "a writing-table in the middle of which a crucifix was placed and two burning candles on the left and the right." Zwiggart's attorney described the American "court" that "tried" him: "Behind the writing-table, an American officer . . . who was indicated as being the judge. On the left stood Mr. THON who was presented as attorney-general and on the right of the prisoner First Lieutenant PEARL had taken place whereby he indicated that he was personally his defender and that this event was an 'American summary court.' " Because Zwiggart refused to confess, he was "sentenced" to death. According to the prisoner, the day after the fictitious trial, an execution was solemnly staged by his American interrogators: "A cord was bound around the neck of the young Zwiggart—he still had the capuche over his head—and then he heard the voice of First Lieutenant PEARL who said that he had only one chance to save himself by pleading guilty for himselves and his comrades." Zwiggart finally signed a "statement" dictated by his interrogators.[191] One of the accused, Arvid Freimuth, hanged himself after Lieutenant Perl threatened to hand him over to the Belgians.[192]

By December, a torrent of confessions began to pour in to American interrogators. One German commander claimed that he had been ordered to take no prisoners.[193] A number of confessions indicated that this had been a standing order. Disobeying was not a simple proposition in the SS; one soldier recalled, "those who showed consideration to the enemy were shown no consideration by him [Pringel]. Pringel's method of showing displeasure with a subordinate had been to require him to go to battle exposed on the hull of a tank."[194]

The confession of Joachim Peiper provided the prosecution with a major break in their case. Like Yamashita, Peiper made no effort to challenge the facts of the case and candidly confessed his orders, which included "an order of the Sixth SS Panzer Army, with the contents that, considering the desperate situation of the German people, a wave of terror and fright should precede our troops."[195] Symbolically, Peiper was an important figure to both the Americans and the Germans. To the Americans he was an unrepentant Nazi, but to the Germans he was a decorated officer and war hero.

The confessions obtained at Schwabisch Hall provided enough evidence for the General Military Government Court to begin. On May 16, 1946, seventy-four Waffen SS veterans were charged with various violations of the laws of war. As in the Yamashita case, the defense team was at a huge disadvantage.[196] The army argued that the defendants were not prisoners of war but "civilian internees" accused of war crimes. According to this interpretation, the prisoners were not protected by the Geneva Convention of 1929; the tribunal had the power to create and employ any evidentiary standard it desired.[197]

When the first reports of forced confessions came in the spring of 1945, Theatre Judge Advocate Major Claude Mickelwait investigated the charges and established that some of the defendants had been punched or slapped by guards. However, there was no evidence of systematic torture, only "psychological duress."[198] Chief prosecutor Burton Ellis admitted that "all the legitimate tricks, ruses, and stratagems known to investigators were employed—stool pigeons, witnesses who were not *bona fide*."[199] The defense argued that since the confessions had been obtained before the defendants' status had been changed, they were inadmissible as evidence. The tribunal dismissed these motions.[200]

Although the eight-man General Military Government Court was the highest level of military justice, it labored under none of the presumptions of the Nuremberg trial. The prosecution was headed by Colonel Burton Ellis, while the defense would be handled by Wallace Everett Jr. The defense was at a major disadvantage: not only did Everett have no prior courtroom experience, he had to defend seventy-four men.[201] On May 16, 1946, the prisoners were led into a defendants' dock at the Dachau concentration camp. Die-hard Nazi soldiers like Sepp Dietrich, Joachim Peiper, Fritz Kramer, and Herman Preiss sat in the hastily constructed courtroom, their only decorations the large number-bearing placards draped ingloriously around their necks. The court was presided over by Brigadier General Josiah Dalbey. The indictment stated that the defendants, "at the vicinity of Malmedy, Honsfeld, Büllingen, Stavelot, Wanne and Lutrebois, all in Belgium, at sundry times between 16 December 1944 and 13 January 1945, willfully, deliberately and wrongfully permit, encourage, aid, abet and participate in the killing, shooting, ill-treatment, abuse and torture of members of the Armed Forces of the United States of America, then at war with the then Third Reich."[202]

Joachim Peiper attacked the prosecution for the way in which they

obtained his confession.[203] He claimed that after five weeks of solitary confinement, he was told by interrogators that some of those killed by his troops were the sons of prominent American politicians and businessmen. The cry for his head had grown so loud that not even the President of the United States could save him. However, if he cooperated with investigators, the army might spare his men. Peiper claimed that this was why he signed the confession of guilt prepared by Lieutenant Perl.[204] As for actual violations of the laws of war, he argued that those laws had been rendered obsolete by the realities of total war. Perl could elicit no remorse from the hardened combat veteran:

> Perl: *Well were your men so ill-trained in the rules of the Geneva Convention that they killed prisoners of war without orders?*
> Peiper: *In the answer on that question, it is the same as on the question before. During combat there are desperate situations, the answer to which is given out very fast to main reactions and which do not have anything to do with education and teaching.*[205]

Peiper fought in the courtroom with the same tenacity that had earned him the Iron Cross with the oak-leaf cluster. To Peiper, morality and restraint had no place in the final days of a total war; he pointed to the destruction wrought by British and American bombers on German cities: "Also, this order pointed out that the German soldiers should, in this offensive recall the innumerable German victims of the bombing terror. . . . At this meeting, I did not mention anything that prisoners of war should be shot . . . because those present were all experienced officers to whom this was obvious."[206]

Joachim Peiper and Admiral Karl Doenitz became two of Germany's most important post–World War II martyrs. However, it was not only German nationalists who claimed that their military had been unjustifiably persecuted. A large portion of the world's professional military was beginning to close ranks on the subject of war crimes. Although Peiper was tried by the U.S. Army under military law, this mattered little, as such distinctions were lost on German nationalists who considered all of the Allied war crimes trials part of a "victor's justice."[207] The precedent most threatening to professional soldiers was the rejection of the superior orders defense; many believed that this would erode the military chain of command.

Like the Yamashita case, the Malmedy trial was initially a traditional example of punitive political justice. Although the format had to be updated to fit the twentieth century, the message remained the same. On July 16, after a five-week trial, Peiper, Dietrich, and forty-two of his men were sentenced to death; twenty-two others were sentenced to life in prison. Defense counsel John Everett followed the example of Yamashita's attorney, Frank Reel, and petitioned the U.S. Supreme Court for a writ of *habeas corpus*. Everett maintained that the confessions were obtained under physical and psychological duress.[208] Although the court rejected the argument, the fate of Kampfegruppe Peiper was by no means sealed. By the time the Malmedy trials and the international Nuremberg trial had concluded, it was late 1946, and the larger political landscape was changing rapidly. German war crimes were now overshadowed by the perceived threat of the Soviet Union, and American policy toward Germany began to reflect this change.