CHOICES UNDER FIRE

MORAL DIMENSIONS OF WORLD WAR II

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Chapter Eleven

JUSTICE FOR THE UNSPEAKABLE?

The Enduring Legacy of the War Crimes Trials at Nuremberg and Tokyo

In his last meeting with Stalin, Churchill had remarked that whenever they captured one of the Nazi bigwigs, he ought to be summarily shot. With that, Stalin announced sanctimoniously, "In the Soviet Union, we never execute anyone without a trial." Churchill responded, "Of course, of course. We should give them a trial first."

—From an account given by Samuel Rosenman, chief speechwriter for Franklin Roosevelt, of a conversation he had with Churchill in 1944[1]

Individuals have international duties which transcend the national obligations of obedience imposed by the individual State.

—Judgment of the International Military Tribunal, Nuremberg, October 1946[2]

It was not until about halfway through the war that the Allied leaders began seriously considering a trial for the Nazi archcriminals in the wake of victory. Until that point, both Roosevelt and Churchill had leaned toward summary execution. But gradually, between 1942 and 1944, Roosevelt's thinking on the subject changed completely, ultimately coming around to an adamant insistence on dealing with the vanquished enemies through due process of law. Within the Roosevelt administration, this decision reflected the final outcome of a long and fierce bureaucratic battle between the secretary of the treasury, Henry Morgenthau, who advocated harsh vengeance against the German people, and the secretary of war, Henry Stimson, who argued that such a vindictive policy would not only violate the values that underpinned American democracy, but would breed

Defendants' dock in the Nuremberg trials (1946). Seated in front row, from left to right: Hermann Göring, Rudolf Hess, Joachim von Ribbentrop, and Wilhelm Keitel. Seated in second row, from left to right: Karl Dönitz, Erich Raeder, Baldur von Schirach, and Fritz Saukel.

more enmity and violence among the Germans for decades to come.[3] Roosevelt ultimately found Stimson's logic more persuasive; the president prevailed upon Churchill to accede to this policy, and at Yalta in February 1945 the Big Three formally announced their intention to hold a major trial.

It was, admittedly, a risky business. The American and British leaders were determined that this should *not* take the form of a mere show trial, echoing the rigged travesties of interwar Nazi justice (and Soviet justice): the defendants would be given a fair chance to plead their cases, aided by well-qualified defense lawyers, with full acquittal as a possible outcome. That was one risk. A real danger existed, moreover, that the Nazi officials, speaking from the prisoner's dock, would use the trial as a platform for Hitlerite propaganda or self-exculpatory lies; nor was it clear exactly what kind of legal framework Allied jurists could bring to bear in judging the actions of the accused. Anthony Eden, the British foreign secretary, had even argued in 1942 that "the guilt of such individuals [as Hitler and

Himmler] is so black that they fall outside and go beyond the scope of any judicial process."[4] But in the end, Roosevelt and Churchill concluded that anything less than a fair trial would amount to a betrayal of the very liberal ideals for which they had fought the war: in their moment of military triumph, they would not dispense "victor's justice," but would inaugurate the transition into peacetime by returning to the rule of law.

In a sense, one might think it should have been a cinch for the prosecution. Here in the prisoner's dock sat a group of men who had presided over one of the most heinous series of crimes in all history, ranging from genocide to enslavement, from medical experiments on prisoners of war to the killing of civilian hostages. Just their names, by themselves, had already become synonymous worldwide with gruesome atrocities: Hermann Göring, Rudolf Hess, Joachim von Ribbentrop, Albert Speer, Ernst Kaltenbrunner, Hans Frank. The challenge, however, lay in presenting the evidence against these men in a way that the German people themselves would find irrefutable and compelling—and to do so through legal procedures that not even the craftiest of defense lawyers could portray as biased or unfair. In a larger sense, therefore, the Nuremberg trials were an attempt to do properly what had been so badly botched in 1919: assigning war guilt to a defeated nation, in a way that would resonate with the people of that nation itself.[5]

The trials took place in two phases. From November 1945 to October 1946 a group of twenty-two prominent Nazis faced a panel of judges from the four main Allied victors, Britain, the United States, France, and the Soviet Union. (Hitler himself, of course, along with Heinrich Himmler, Joseph Goebbels, and several other top figures, had removed themselves from the hands of justice by committing suicide.) Then, from late 1946 until the spring of 1949, a second series of trials was held at Nuremberg under the sole jurisdiction of the United States: here a total of 185 lesser-known defendants faced a wide array of charges, ranging from mass murder to the use of slave labor, from illegal confiscation of Jewish property to conducting medical experiments on human beings.

The twenty-two defendants in the first trial faced four principal counts. Count One, "Conspiracy to Commit Aggressive War," relied on a concept of American jurisprudence that had been successfully used in the 1930s to prosecute elusive gangsters and racketeers: it aimed to hold individual German leaders responsible for working together over a sustained period of time with an avowed intention to violate international laws. Count Two,

"Crimes Against Peace," related to the specific acts of aggression committed by the German government in the 1930s and during the war. Count Three, "War Crimes," covered violations of internationally accepted norms in the conduct of warfare, such as shooting prisoners of war or attacking civilian populations. Count Four, "Crimes Against Humanity," embodied a concept created by the Allied jurists to deal with the unprecedented nature of the Nazi campaign against the Jews and other defenseless European populations.

From the start, the trials produced high drama: Hermann Göring, the number two man in the Third Reich, delivered an unexpectedly self-confident performance, adroitly playing the four judges against one another, and passionately portraying himself as a German patriot whose primary motivation had been to save his country from the evils of communism. He had already sensed the emergent tensions of the Cold War world, and astutely sought to position himself as a prescient defender of the West against Soviet aggression. (At that point in the trial, however, the prosecution screened a movie graphically showing the carnage in several extermination camps, and Göring's carefully scripted self-portrayal came apart: "And then," he wrote in his notes, "they showed that awful film, and it just spoiled everything.")[6] Ernst Kaltenbrunner, the highest-ranking SS man on trial, astounded the court with his coldly unrepentant acknowledgment of his wide-ranging brutal deeds. Albert Speer, Hitler's economic prodigy, chose the opposite path: he not only admitted the prosecution's claims against him, but denounced his own wartime behavior as unjustifiable, claiming that he bore the sole responsibility for having swallowed Nazi ideology as uncritically as he had (the judges ultimately rewarded his stance by sentencing him to twenty years' imprisonment instead of execution).

In October 1946 the judges delivered their verdict in the first trial. Three prominent figures in the Third Reich were acquitted: Franz von Papen, the Weimar politician who had handed over power to Hitler in 1933; Hjalmar Schacht, the financial genius behind Germany's stunningly successful economic recovery during Hitler's first three years in power; and Hans Fritzsche, one of Goebbels's lieutenants in the Nazi propaganda machine. All three were deemed to have been morally culpable for the evils of Nazism, but the judges decided that their misdeeds did not fall within the legal purview of the Nuremberg Charter. Twelve prominent Nazis received the death sentence: the political leaders Göring, Ribbentrop, Wilhelm Frick, Alfred Rosenberg, Julius Streicher, Martin Bormann (in absentia), and Arthur Seyss-Inquart; two top Wehrmacht officers, Wilhelm Keitel and Alfred Jodl; and three administrators of the death camps

and slave labor camps, Kaltenbrunner, Frank, and Fritz Saukel. Seven others, including Admirals Karl Dönitz and Erich Raeder, and the Nazi Party boss Rudolf Hess, received sentences ranging from fifteen years' imprisonment to life. Hermann Göring managed one final *coup de théâtre* a mere two hours before his scheduled execution on October 15, 1946: he committed suicide in his prison cell by swallowing a cyanide capsule concealed in one of his teeth. Wilhelm Frick's last act, as he approached the gallows, was to shout out "Long Live Eternal Germany!"[7] It formed a neat piece of historical symmetry: Frick had been one of the chief architects of the Nuremberg racial laws of 1935.

The second series of trials ultimately resulted in acquittal for thirty-five defendants, death sentences for twenty-four, life sentences for twenty, and eighty-seven sentences of prison terms for varying lengths of time. Many of those imprisoned, however, found that the changing political climate of the 1950s worked in their favor: with a new West German republic formed in 1949, and the growing tensions of the Cold War increasingly diverting the public's attention, the Allies chose to ignore the decision of the West German government to reduce the sentences of many former Nazis and begin releasing them back into civilian life. By 1966, two of the most famous Third Reich personalities, Speer and Dönitz, had both served their sentences and were discharged from jail; they lived on peaceably as retirees until their deaths in the 1980s (enjoying handsome royalties from the publication of their memoirs). Thousands of lesser Nazi officials and party members served much shorter prison terms, then returned without further ado to their old prewar professions: teacher, farmer, civil servant, politician, banker.

In the Potsdam Declaration of July 1945, the Allies had promised to mete out "stern justice" to all Japanese war criminals: the instrument of this justice was a tribunal closely modeled on the Nuremberg precedent, convened in the old Imperial Army Ministry building in Tokyo between May 1946 and November 1948. Eleven justices sat on the bench, each representing one of the nationalities claiming a grievance for Japanese aggression: the United States, the Soviet Union, Britain, France, China, Australia, New Zealand, India, Canada, the Netherlands, and the Philippines. In the dock sat twenty-eight Japanese military and civilian leaders, the most famous of whom were Hideki Tojo, the general and former prime minister, and Yosuke Matsuoka, the hawkish foreign minister who had done so much to prod the Japanese government toward war in 1941. They faced a

set of criminal counts that deliberately echoed the principles concurrently in use at Nuremberg: crimes against peace ("conspiracy" and "aggressive war"), war crimes, and crimes against humanity. The war crimes count also formed the primary judicial basis for a long series of secondary tribunals, convened outside Japan in various nations where Japanese military officers had surrendered at war's end.

Perhaps the most significant feature of the Tokyo trial was the glaring absence in the dock of Emperor Hirohito. Douglas MacArthur, the new shogun of occupied Japan, had decided (with the full concurrence of the Truman administration) that the United States stood to lose far more in prosecuting this man than it would gain by using him as a transitional figure, softening the humiliation of defeat for the Japanese people: the tacit "deal" was that the Japanese would get to keep their beloved emperor, and in exchange would accept a far-reaching set of social, economic, and political reforms under American tutelage. Institutional continuity under the emperor, in other words, would help to legitimize the process of radical Americanization that the occupation forces were busily carrying out: from women's suffrage to land reform, from educational restructuring to breaking up the prewar industrial conglomerates. But in order for this trade-off to work, Hirohito had to be made to appear before world opinion as a mere figurehead leader, a man who bore no direct responsibility for any of the bestial policies pursued in his name during the preceding two decades. Such became the official American position on the emperor's role—and as it turned out, this stance coincided perfectly with the ardent wish of virtually all the defendants who testified in the Tokyo trial: to protect their emperor from any suggestion of guilt by systematically minimizing his role in the direction and conduct of the war. Hirohito, therefore, sat quietly in his palace while the trial went on, powerfully shielded by the convergent complicities of his disgraced Japanese subordinates and his new American mentors.[8]

Tojo, like his counterpart Göring, gave the most impressive performance of the trials: proud, unrepentant, crisp and terse in his statements, he claimed that Japan's resort to war had been purely defensive in nature—a response to European and American imperialism in general, and to the draconian American, British, and Dutch economic sanctions of 1941 in particular. His broad array of arguments sufficiently impressed three of the judges—Radhabinod Pal of India, Henri Bernard of France, and B. V. A. Röling of the Netherlands—that they ultimately dissented from the court's majority verdict of guilty in November 1948.[9] Nevertheless, the eight remaining judges concurred in pronouncing a death sentence for

seven defendants (Tojo included) and life sentences for sixteen others, and lesser terms for the remaining five. Meanwhile, the war crimes trials conducted in various Allied nations for captured Japanese officers went on with their work; in the end (by 1951), 5,700 individuals had been tried; some 2,000 were given long prison terms, and approximately 1,000 were executed.

Here, however, as in the case of West Germany (but with a notably greater degree of insouciance), the hand of justice was soon restrained by the more forceful hand of political expediency. Japan returned to full sovereignty and self-government in 1952: a nascent economic powerhouse, it quickly became the primary ally and agent of American anti-communist policy in Asia during the Cold War. Under these changed circumstances, no Western outcry ensued when the Japanese government, in 1958, issued a blanket pardon to all the convicted war criminals who still remained in prison: they were released and returned to civilian life.[10] "In this milieu of willful forgetting," writes the historian John Dower,

> the years that followed [the verdict of 1948] witnessed the almost wholesale rehabilitation of . . . war criminals. . . . Defendants who had been convicted and sentenced to imprisonment became openly regarded as victims rather than victimizers, their prison stays within Japan made as pleasant and entertaining as possible. Those who had been executed, often in far-away lands, were resurrected through their own parting words. One remembered the criminals, while forgetting their crimes.[11]

Despite the good intentions of the Allies in choosing due process of law rather than summary execution for their vanquished enemies, most historians and legal scholars concur today that the postwar trials of the Japanese and German leaders egregiously violated numerous fundamental principles of judicial fairness. Here are some of the main objections they have raised.

1. *Retroactivity.*

A basic principle of legal practice is *nullum crimen sine lege:* in order for any deed to count as a crime, that deed must violate a legitimately established law that is already on the books. The defense lawyers in both Nuremberg and Tokyo maintained that their clients were being tried for deeds that—however gory or immoral—had not been defined as crimes until after the fact. No statute of international law existed before 1945, for example, to define genocide and to establish punishments for it. The Allied

prosecutors realized all too well that this constituted a serious weakness in their case: they sought to work around it by weaving together a tissue of legal precedents from existing laws and treaties that might plausibly apply to the atrocities committed during the war.

The first international treaty to set formal limits on the conduct of warfare had been the Geneva Convention of 1864, organized by the founder of the Red Cross, Henri Dunant: it established rules for the treatment of the enemy sick and wounded during war. A second Geneva Convention came into effect in 1899, banning the use of asphyxiating gases and dumdum bullets on the battlefield; a prohibition on bacteriological warfare followed in 1925. In 1929 a third Geneva Convention established basic rules for the decent treatment of prisoners of war; this latter agreement had been formally signed by forty-six nations, including Japan and Germany.[12]

Equally as important as the Geneva Conventions were the Hague Conventions of 1899 and 1907, which together established numerous formal rules of humane conduct during wartime. One clause in particular, known as the Martens Clause after the Russian jurist Fedor Martens, who drafted it, stated that even in cases not explicitly covered by the Hague restrictions, the "belligerents remain under the protection of . . . the principles of the laws of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience."[13] Here, according to the Allied prosecutors at Nuremberg, lay a solid legal precedent for the modern concept of "crimes against humanity." All that the Nuremberg judges had to do, they argued, was interpret this existing law as it applied to the misdeeds of the various Nazi defendants.

The judges, as we know, agreed. But most legal scholars believe that this reading of the existing laws was dubious at best: the Martens Clause had certainly constituted a major step forward in establishing basic principles of international criminality, but its extremely vague language, and the fact that it had never been backed up by formal enforcement procedures, severely weakened it as a legal precedent. The Nuremberg judges were certainly *establishing* such a precedent by convicting the Nazi leaders under these principles, but they were doing so by stretching existing laws well beyond the customary limits.[14]

2. *Double standard.*

The defense lawyers at both Nuremberg and Tokyo argued that numerous military and civilian officials of the Allied nations had themselves committed many of the same types of acts—or comparable acts—for which the defendants were now being tried. This, they claimed, violated

the basic principle of fairness known as *tu quoque:* "You did it too!" Had not the Anglo-Americans deliberately killed hundreds of thousands of noncombatants with their bombardment of enemy cities? Had not Allied submarines sunk the ships of the enemy and refused to rescue survivors? Had not hundreds of thousands of German POWs died through deliberate maltreatment in Soviet camps? Had not the Russians killed thousands of captured Polish officers in cold blood during the Katyn Forest massacres in 1940?

One can imagine the unease of the Allied judges, because every one of these accusations was straightforwardly and undeniably true. (The furious Russian judge vehemently denounced the German claim that the Katyn murders had been committed by Soviet agents: the issue remained controversial until Mikhail Gorbachev formally acknowledged Soviet responsibility in 1989.) Faced with this line of argument, therefore, the Nuremberg judges had no choice but to rule summarily that any such *tu quoque* defense would simply be deemed out of order. Somewhat lamely, they lectured the defendants: "We are not the ones on trial here. The aim of this tribunal is to establish whether you did or did not commit such acts."

One does not have to be a Nazi apologist to regard this kind of ruling as grossly unfair. In the eyes of many postwar Germans and Japanese, it constituted the single most obvious reason for dismissing the trials as victor's justice.

3. *Tenuous conspiracy.*

The thrill of nabbing bootleggers and mobsters in gangland America had given the United States juridical team at Nuremberg an unshakable confidence in the power of the "conspiracy" count: but in the end this concept proved ill-suited to the complexities of international politics. Demonstrating that Hitler's Germany had engaged in wanton and unprovoked aggression was one thing; showing that a large number of German officials and military men had engaged in a conspiracy to commit such aggression—a conspiracy dating back to 1933 or even earlier—turned out to be entirely another matter. Defense lawyers detailed the many iniquities of the Versailles treaty; they quoted British criticisms of the 1923 French invasion of the Ruhr; they cited Hitler's speeches, many of which had been ostensibly directed at achieving peace; they pointed to the abject failure of the 1932 World Disarmament Conference, in which no nation proved willing to reduce its weaponry; they offered documents from Hitler's military advisors counseling him to avoid military action; they described in detail the long-running disagreements and bureaucratic struggles among Nazi lead-

ers over foreign policy; they challenged the prosecution to show any tangible evidence of a concerted and long-term plot among the German leadership to commit aggressive war.

In retrospect, it is easy to see why the prosecution failed in this effort: there was no such conspiracy. German foreign policy in the 1930s—like any other nation's foreign policy—resulted from a complex nexus of causal factors: bureaucratic struggles, ideological shifts, rivalries between individuals, opportunistic responses to international events. To reduce this complicated interweaving of factors to a clear and linear story line—a bunch of bad guys meeting in smoky rooms to plot bad deeds—could not help but result in a ridiculously oversimplified and distorted account of the interwar years: it was like trying to explain the workings of an airplane cockpit by using the schematics of a kitchen stove.

In the end, the Nuremberg count of "conspiracy to commit aggressive war" proved the weakest of the four charges: it resulted in fourteen acquittals and only eight guilty verdicts—and even those required a stretching of the available evidence. In the Tokyo trial, the conspiracy count yielded twenty-three guilty verdicts and two acquittals: this lopsided outcome so outraged the French, Indian, and Dutch judges that they openly declared the tribunal to be engaging in a travesty of justice. No high-level and sustained conspiracy in Japanese ruling circles had been remotely proven, they argued: this simplistic and highly partial reading of the run-up to war amounted to little more than victor's vengeance cloaked in judicial language. Most historians and legal experts who have studied the trials concur.[15]

Few (if any) historians would want to deny that the Germans and the Japanese engaged in acts of unprovoked aggression against their neighbors during the 1930s; but pursuing this charge through the legal concept of conspiracy was a serious mistake. By setting out to prove a grossly simplistic version of history, it significantly undermined the legitimacy of the tribunals.

4. *Procedural iniquities.*

Both trials—but especially the Tokyo tribunal—engaged in a wide array of irregular or questionable judicial practices that would disqualify any normal tribunal.[16]

- Though able and experienced defense lawyers were provided to most of the defendants, the prosecution was allowed to draw on a much larger set of resources: more lawyers, research personnel, secretaries, archivists, paralegals.

- Some of the judges should have been barred from serving. The Soviet judge at Nuremberg distinguished himself for his frankness: "The whole idea is to secure quick and just punishment for the crime. . . . If . . . the judge is supposed to be impartial, it would only lead to unnecessary delays."[17] In the Tokyo trial, the Chinese judge had never served as a magistrate before; the Soviet judge spoke no Japanese or English (the official languages of the court); and the Philippine judge was himself a survivor of the Bataan Death March.[18]
- The selection of defendants gave a marked impression of arbitrariness, particularly in the Tokyo trial. The prosecution arraigned a total of 250 Japanese military and civilian officials, but decided to try only 28—a group that would constitute a "representative sample of the country's prewar and wartime leadership."[19] The remaining 222 individuals were simply released from custody in 1948 without undergoing trial at all.
- One of the concepts adopted at the Tokyo tribunal was that of "negative criminality": a military officer could be held responsible for failing to prevent his men's misdeeds, even if the prosecution could not demonstrate that the officer in question had any knowledge of those misdeeds being perpetrated.[20]
- The judges at the Tokyo tribunal regularly allowed the prosecution to present hearsay evidence against the defendants, often accepting this highly questionable source at face value.[21]

5. *Political interference.*

In too many instances, the trials gave way to political pressures from one or another of the Allied powers, thereby resulting in a blatant miscarriage of justice. At Nuremberg, for example, the Anglo-American judges ultimately chose to maintain an embarrassed silence over the Nazi-Soviet Pact of 1939 and over the question of responsibility for the Katyn massacres. But the most troubling example of political interference undoubtedly arose in the context of the Tokyo trial: the case of Shiro Ishii and his biological warfare research team known as Unit 731.

Ishii, a Japanese medical doctor, had begun work on biological weapons as early as 1932, establishing his base of operations near the city of Harbin in Japanese-occupied Manchuria—far from the eyes of journalists and other outsiders. After the outbreak of World War II, Ishii received authorization (and lavish funding) from the Japanese government to expand his research efforts, creating a top secret facility in the Manchurian countryside at a place called Pingfan.[22] Here, over the following four years, Ishii and his team conducted experiments on several thousand human subjects,

most of them Chinese civilians arrested for various forms of resistance to the Japanese occupation. Some of the experiments involved animal-to-human blood transfusions, or freezing the limbs of individuals to investigate the most effective ways of treating extreme frostbite. Bubonic plague and other diseases were deliberately released in the surrounding Chinese villages, the deadly effects carefully recorded by Japanese observers as the villagers succumbed over several weeks. Inside the research facility, the Japanese team injected plague, anthrax, cholera, malaria, beriberi, tuberculosis, glanders, typhoid, and several dozen other exotic pathogens into the bodies of their prisoners, meticulously chronicling the fatal course of disease. In most cases, the infected prisoners were dissected while still alive, since this afforded researchers better insight into the progression of the infection and its effect on the subjects' internal organs. Here is how one of Ishii's technicians, a young man named Yoshio Shinozuka, later recalled his role:

> I still remember vividly the first vivisection I participated in. I knew the Chinese individual we dissected . . . because I had taken his blood once for testing. At the vivisection I could not meet his eyes because of the hate he had in his glare at me. This intelligent-looking man was systematically infected with plague germs. As the disease took its toll, his face and body became totally black. Still alive, he was brought on a stretcher by the special security forces to the autopsy room. Transferred to the autopsy table, the chief pathologist ordered us to wash his body. I used a rubber hose and a deck brush to wash him. Since this was my first vivisection, I think I was somewhat sloppy in washing him. I remember feeling somewhat hesitant in using the brush on his face. Watching me, the chief pathologist, with scalpel in hand, impatiently signaled me to hurry up. I closed my eyes and forced myself to scrub the man's face with the deck brush. The chief pathologist listened to the man's heartbeat with his stethoscope and then the procedure started. The man's organs were methodically excised one by one and I did as I was ordered to. I put them in a culturing can we had already prepared.[23]

In August 1945, after hearing Hirohito's surrender speech on the radio, Ishii ordered the destruction of the Pingfan facility and hastily returned to Japan, taking with him his most essential laboratory records (along with a good deal of stolen cash). After successfully evading the American occupation authorities for several months, he was finally apprehended by United States military intelligence (G-2) operatives and placed under house arrest.

The G-2 agents soon realized that this man possessed a veritable treasure trove of information on biological warfare—a research area that the United States had been pursuing at its facility in Fort Detrick, Maryland. During 1946 and 1947, G-2 officials repeatedly interviewed Ishii and several of his close subordinates: Ishii played his cards like a master, each time offering the Americans more detailed and more comprehensive experimental data.

But time was running out: several left-wing publications in Japan began airing testimonials by repentant former employees at the Pingfan facility about Unit 731's activities; they called for Ishii and his men to be handed over to the Tokyo tribunal for trial as war criminals. The American officials responded swiftly: in great secrecy, they granted full immunity from prosecution to Ishii and his entire team, in exchange for their continued cooperation in furnishing biological warfare data exclusively to their American handlers. Douglas MacArthur himself lent his authority to this move: in a secret radio message to Washington, transmitted on May 6, 1947, he explained, "Exemption [from prosecution] requested. Information about vivisection useful."[24] It remains unclear to this day exactly how the U.S. military intelligence officers exerted pressure on the multinational Allied prosecution team in Tokyo, but the result was that neither Ishii nor any of his subordinates in Unit 731 ever faced trial for their deeds. Dr. Shiro Ishii lived peacefully as a free man until his death in 1959.

The United States, in this episode, disgraced itself in two ways. First, it deliberately circumvented and undermined an international judicial process in which its own jurists were playing a central role: by shielding Ishii, it cynically cheated justice. And second, in the name of pursuing its own national security, it eagerly seized upon that most heinously tainted of scientific data, the laboratory and field records derived from deadly experiments on unwilling human subjects. The irony, according to one scholar, is that American experts on biological warfare later came to deem the information retrieved from Unit 731 as being "at best of minor significance."[25] But even if the data had proved excellent in quality, the entirety of it should have been swiftly destroyed. Any information gleaned from the torture and murder of helpless people is not science: it is an abomination, and can never be legitimately put to use in any way. There are certain lines that no self-respecting scientist should ever cross, and that no self-respecting government should ever allow its agents to cross: never, no matter what the reason. The United States crossed that line in the Ishii case: this despicable chapter in American history has still not been clearly acknowledged or confronted by the U.S. government.

The foregoing catalogue of serious judicial flaws makes it hard to avoid the conclusion that the Nuremberg and Tokyo trials did in the end amount to a form of victor's justice. The ex post facto nature of some of the trials' legal judgments; the double standard of trying Axis leaders for some deeds that had also been committed by the Allies; the inappropriateness of the conspiracy count; the multitude of procedural irregularities; and the clear-cut influence of political pressures on the final outcome—all these defects might lead one to conclude that the trials were a failure, a mistake. Might it not have been better, in the end, simply to apprehend and execute the Axis leaders, forthrightly and honestly, without going through an elaborate and potentially problematic judicial process?

In order to sustain such a position, however, one would have to ignore the very significant positive features of the trials—features that far outweigh even the most serious defects witnessed at Nuremberg and Tokyo. For all their flaws, the trials constituted a historic turning point in international affairs, and the Allied insistence on conducting them has been more than vindicated in the decades that followed. Here are the major reasons why.

1. *These were not mere show trials.*

Let us imagine for a moment that the war had ended differently, and that it was triumphant Germans and Japanese who were sitting in judgment in 1945 on men like Stalin, Zhukov, Eisenhower, Nimitz, Churchill, Eden, Truman, Harry Hopkins, and Henry Ford. Would they even have bothered with a trial? And if they had, can we expect that such a trial would have been any different than the cynically rigged proceedings that characterized the *Volksgericht* in Nazi Germany during the 1930s? A series of screamed indictments, a laborious brow-beating by party-certified jurists, a few photos for propaganda purposes—and off to the firing squad or gallows.

This was very far from being the case at Nuremberg and Tokyo: the most convincing proof lies in the significant number of acquittals and relatively tempered prison sentences that resulted from both tribunals. A man like the banker Hjalmar Schacht, for example, who had done so much to advance Hitler's economic agenda between 1933 and 1936, was allowed to walk, because the judges determined that his deeds had not constituted crimes suitable for conviction under the specific four counts of the trial. A man like Albert Speer, who showed sincere remorse and who argued convincingly that his intentions had not been genocidal in nature, received a

mitigated sentence. A man like the former Japanese foreign minister Mamoru Shigemitsu, who had intervened on the side of the moderates during the Imperial Council's debates over surrender in August 1945, received from the Tokyo tribunal a relatively modest sentence of seven years' imprisonment.

These trials, in short, fell somewhere between the full standard of due process that one would expect in the courtroom of a Western democracy, and the thoroughly sham justice that characterized the Nazi (or Soviet) tyrannies. The Nuremberg and Tokyo judges systematically made the kinds of nuanced distinctions that gave an innocent man, or a manifestly less culpable man, a very real opportunity to make his case. While imperfect, these two tribunals still conducted their business according to identifiable standards that limited the discretion of the judges and that gave the defendants a legitimate chance of establishing their innocence.

2. *The proportionality of atrocious crimes.*

Hermann Göring argued, in effect, that the Nuremberg trials were illegitimate because all sides in the war had committed atrocities, and therefore all sides were equally culpable. It was a logic that exerted a strong appeal for many Germans and Japanese in the postwar years: they claimed that they were being singled out unfairly for condemnation, when in fact they had only done what everyone else had also done. Bad things had happened on all sides: the Anglo-Americans had killed hundreds of thousands of civilians with their bombardment of cities; the Russians had killed hundreds of thousands of German POWs through starvation and neglect. Why should Germany and Japan have to suffer the sole opprobrium for the gross evils perpetrated by all sides in the war?

One lasting achievement of the Nuremberg and Tokyo tribunals was to demolish this argument, showing it clearly for the casuistry it was. The documentation presented at the trials demonstrated conclusively that the Germans and Japanese had committed a series of crimes of a historically unprecedented nature—crimes that crossed a qualitative threshold, into a new level of evil. For Göring to have made the *"tu quoque!"* argument with any degree of persuasiveness, he would have had to show that various Anglo-American and Russian policies were morally just as bad as the methodical extermination of 6 million Jews. This is a judgment that most historical observers are understandably unwilling to make. Soviet abuse of German POWs could be at least partially (though not wholly) explained as the result of dire supply shortages in a country whose entire population was suffering terribly because of an unprovoked attack by the Germans. The Anglo-American policies of area bombing and firebombing cities, as

we saw in chapter 5, were undeniably atrocities, but they could not be placed on a par with the slaughter of the European Jews or the Japanese rampages in cities like Manila. Strategic bombing—even in those clearly unjustifiable cases when it needlessly slaughtered noncombatants—still formed part of a military campaign aimed at destroying the German and Japanese ability to wage war. By contrast, the Nazi death camps and the Japanese massacres of civilians yielded no military advantage whatsoever. They amounted to nothing more than gratuitous murder on a colossal scale.

This is by no means to minimize the very real burden of guilt borne by the Anglo-Americans and Russians for the brutality that characterized some of their wartime policies: but it does help us to gain a sense of proportion for the *tu quoque* claim that is sometimes raised by right-wing nationalists in Germany and Japan. The trials established, through massive and incontrovertible evidence, that in World War II the Germans and Japanese had descended several steps further into barbarism than the other nations of the world: they had distinguished themselves as perpetrators of uniquely heinous acts.

3. *Judicial sentence versus summary execution.*

The suicides of people like Hitler and Himmler leave us with a somewhat empty feeling: for death, by itself, offers no moral judgment. Everybody dies, sooner or later. In a somewhat similar way, a firing squad, a summary execution of Axis leaders at war's end, might well have given the victims of German and Japanese aggression some sense of closure; but it could not have provided a larger sense of real justice being served.

What the Nuremberg and Tokyo trials offered, by contrast, was the spectacle of the criminal being confronted with his deeds: Göring having to watch "that awful film," staring into the eyes of his victims. It presented before world opinion a detailed and reasoned explanation of what the defendants had done, why they had done it, whom they had harmed, and why this was wrong. It gave the defendants a chance to explain their actions; it gave the victims (speaking on behalf of countless others) a chance to explain the suffering they had endured.

In the end, the tribunals restored some compass of moral meaning to the nihilistic acts committed during the war. A summary execution of Axis leaders in 1945 would have vindicated that nihilism, showing to the world the naked triumph of superior force, the loser crushed beneath the heel of the winner's boot. But when individuals like Kaltenbrunner and Tojo went to the gallows as tried and convicted war criminals, their deaths meant something more. These men had not merely failed to win the war: their

actions, their choices, had debased the image that humankind could henceforth have of itself. Through the medium of the tribunals, their deaths became not merely a question of winning and losing, but of multileveled shame: the shame of individuals, of perpetrator nations, and of bystander nations. The two tribunals, for all their failings, took the deaths of these men and inscribed them into history with the full measure of indelible dishonor they deserved.

4. *Thwarting the Holocaust deniers.*

Periodically, on university campuses or in the mass media, one encounters the passionate debates stirred up by groups of individuals who have come to be known as Holocaust deniers. Their organizations appear to be rather small and marginal in nature: two of the better-known ones are the Institute for Historical Review and the Committee for Open Debate on the Holocaust.[26] Their approach varies from episode to episode, but the underlying message remains essentially the same: the Nazi gas chambers were not really used to kill millions of Jews; the attempted genocide of European Jews never happened (some Jews were killed, yes, but never in the systematic way that historians claim); the National Holocaust Museum in Washington, D.C., is putting out a false and manipulative message.[27] In short, the Holocaust is a hoax that has fooled the overwhelming majority of historians since World War II.

Who perpetrated the hoax, and who is still actively promoting it? Here the Holocaust deniers remain rather unclear. But the underlying point is that the hoax benefits the state of Israel, and Jews in general, because the sufferings of the (alleged) Holocaust have generated enormous sympathy for Jews all over the world. The Holocaust deniers' tactic is simple: they take advantage of the high value we place in our society on free speech; they appeal to our sense of open-mindedness and fair play, the obligation to hear out all points of view, no matter how different from our own.

One of the lasting effects of the Nuremberg trials is that the Holocaust deniers have very little purchase for their anti-Semitic propaganda. The prosecution team at Nuremberg wisely decided to build its case primarily on the basis of documentary evidence, supplemented by the testimony of several hundred firsthand witnesses. The German government, it turned out, had kept extremely detailed records of the bureaucratic apparatus and physical plant required for carrying out the transportation and murder of its millions of victims; a surprisingly large portion of those records survived the war and fell into Allied hands. They filled literally hundreds of boxes: official correspondence, government memoranda, lists of prisoners, receipts for delivery of poison gas canisters, photographs, personal letters,

soldiers' diaries, blueprints for crematoria, medical records, budgetary ledgers, railroad schedules for the deportation trains, telegrams among government ministries. These mountains of documents were carefully sorted by the prosecution team, then brought powerfully to bear in the trials, supplemented by oral testimony and sworn affidavits from German officials, death camp guards, camp survivors, and other direct participants in the Holocaust.[28]

To deny that the Holocaust happened, in the face of the evidence accumulated at Nuremberg, is just about like denying today that the First World War happened—that the whole thing, the assassination in Sarajevo, trench warfare, the Battle of Ypres, the Red Baron, and so on, is all just a devilishly clever fabrication. To be sure, historians have gathered together still more evidence concerning the Holocaust in the decades since 1946—an overall amount outweighing the trove assembled at Nuremberg. But it was the Nuremberg prosecution team that laid the foundation for that subsequent scholarship, piecing the evidence together into the first systematic portrait of the Nazi genocide—laying it out in detail for all the world to see. In this sense, one of the important legacies of the Nuremberg trials has been to keep the Holocaust deniers on the fringe of contemporary society.

Among the positive achievements of the Nuremberg and Tokyo trials, however, the one that future historians will probably consider most significant lies in the area of international law. The trials need to be understood not just as the concluding acts of World War II, but as the catalysts of a revolutionary shift in the defense of basic human rights. Bringing men like Göring and Tojo to justice was vitally important, but more important still was the laying of legal and institutional foundations for dealing with the crimes of future Görings and Tojos who might arise in later generations. Herein lies the trials' real historical (and moral) legacy: they constituted a qualitative leap toward a truly global system of justice.

In order to appreciate what a major development the trials represented in the advance of international law, we need to survey the overall trajectory of that process as it has unfolded from the late 1800s to the early 2000s. States have established bilateral and multilateral treaties and other legal arrangements for dealing with one another since ancient times, but it was only toward the end of the nineteenth century that the notion of creating an international tribunal began to gather serious momentum. Growing technologies of communication and transportation were bring-

ing people from the farthest corners of the globe increasingly into contact (and conflict) with one another; growing technologies of military destruction were rendering clashes among states increasingly bloody and costly; and so the concept of creating a permanent body for international arbitration and jurisprudence began to strike many late-nineteenth-century statesmen as an eminently sensible "next step" in the evolution of human civilization. Theodore Roosevelt, for one, became a passionate advocate of the idea.[29]

The first faltering moves in this direction accordingly took place at the Hague Conferences of 1899 and 1907, when some forty-six nations (including an American delegation dispatched by Roosevelt) agreed on the goal of establishing a world court that would possess binding authority over its members. But when it came to the moment of actually handing over sovereignty to such a body, the delegates balked: they squabbled over procedures for selecting judges, they bickered over the wording of the treaty, and in the end inserted so many loopholes into the proposed legislation that it became practically meaningless.[30] Nevertheless, the delegates did agree to proceed with the construction of a building to house the new international tribunal: Andrew Carnegie provided the cash, and the magnificent Peace Palace at The Hague duly opened its doors—in August 1913. History, unfortunately, is all too rich in such piquancies.

The bloodletting of World War I forcefully concentrated minds once more; and again the United States played a key leadership role, this time incarnated in the driving personality of Woodrow Wilson. The League of Nations, as Wilson envisioned it, would not only arbitrate disputes among states, but would also possess the authority to enforce its decisions by levying economic sanctions against recalcitrant nations. In addition, the League would perform vital administrative functions at the global level: regulating labor practices, promoting public health, and seeking to alleviate poverty. It was a heady vision, but it proved too advanced for its time: the isolationist U.S. Senate broke Wilson's heart by refusing to allow the United States to join the new organization.

As we saw in chapter 3, the League lacked the means to deal effectively with the combined crises of a severe economic depression, coupled with the rise of fascism and communism in the political sphere. In 1929 France and the United States launched a quixotic endeavor to "outlaw war as a means of resolving international conflicts." The resultant Kellogg-Briand Pact was solemnly signed by sixty-two nations, including Germany; it became risibly irrelevant over the coming decade as the European peoples lurched spastically toward war. A similarly idealistic impulse resulted in the World

Disarmament Conference of 1932, held under the auspices of the League of Nations at its offices in Geneva: once again, the nations all agreed that disarmament lay in everyone's best interest; but they balked when it came to actually laying down arms. Hitler astutely used the failure of this conference to justify German rearmament in violation of the Treaty of Versailles.

The Hague Conferences, the Geneva Conventions, and the League of Nations: these were the principal entities humankind had been able to create, in the effort of building international legal institutions, during the first half of the twentieth century. Their abysmal inadequacy convinced a new generation of leaders, in the wake of World War II, that it was time to push much further—all the way into a qualitatively different system. The central problem, they concluded, lay in the concept of national sovereignty itself: the stubborn refusal by virtually all national governments to hand over real decision-making powers and judicial authority to a body higher than themselves. Now, at war's end, with the imagery of Auschwitz and Hiroshima still fresh in their minds, the world's leaders launched a three-pronged attack on the principle of national sovereignty:

- the Nuremberg and Tokyo judicial processes (1946–1951);
- the United Nations (1945);
- and a bevy of new international treaties focusing on human rights, most prominent among them the Universal Declaration of Human Rights, or UDHR (1948); the Convention Against Genocide (1948); and the Fourth Geneva Convention (1949).

All three of these undertakings rested on a firm rejection of the notion, once held sacrosanct, that a national government's right to self-determination—to do as it pleases within its own territory—is absolute. No longer: the Nuremberg trials established a solid precedent that certain misdeeds would henceforth be punishable through the instruments of a higher law than that of the mere nation-state. The UDHR, the Convention Against Genocide, and the Fourth Geneva Convention spelled out the details of that higher set of laws with great precision; and the United Nations provided an instrument for enforcement, using economic sanctions and its own military corps to do so when necessary. This revolutionary shift in the nature of international politics—a major step beyond the principles of untrammeled state sovereignty and competitive balance of power—can only be understood as a vehement reaction to the horror that had just laid half the globe to waste. It was a reaction shared by virtually all the world's peoples with an unprecedented degree of unanimity.

And once again—as with the Hague Conventions, the League of Nations, and the Kellogg-Briand Pact—it was the United States that stepped forward as a prime mover in the creation of this new order. American diplomacy spearheaded the establishment of the United Nations; American leadership saw through the Nuremberg and Tokyo tribunals to fruition; American jurists helped to draft the UDHR and the Convention Against Genocide. Those who argue, today, that supporting the United Nations is "un-American" need to sit down for a few hours with a good history textbook: the building of international bodies for peace and justice reflects a long tradition of American foreign policy, a tradition reflecting the convictions held by some of the most eminent Republican and Democratic statesmen of the past 120 years.[31]

This is not to deny, of course, that United States foreign policy over the past century has also exhibited an equally significant tradition of reluctance to engage in foreign entanglements: examples include the isolationism of the interwar years; the growing distrust of the United Nations as U.S. dominance in that organization began to fade after the 1950s; the long hesitancy (until 1988) in ratifying the U.N. convention on genocide;[32] and the more recent withdrawal from such international treaties as the Kyoto Protocol on climate change. The point here is twofold: First, American history reflects a fundamental tension between these two impulses, the internationalist and the nationalist, both of which have played strong roles in determining how American power came to be applied at different times. And second, the decade following World War II undoubtedly marked one of the all-time high points of United States internationalism: not only the government leadership under Truman and Eisenhower, but the broader citizenry, overwhelmingly embraced the idea that American interests required vigorous international institutions and active American leadership through those institutions.

Nevertheless, the principle of national sovereignty refused to give up easily: it did not "go gentle into that good night." The rubble of World War II had barely begun to cool when the first signs of East-West tension began to manifest themselves; by 1949 the United Nations found itself completely hamstrung by the mutual antagonism and suspicion between the two rival blocs of the Cold War. For the next four decades, until the collapse of the Soviet empire in 1989, the world lived in the polarized force field of these two economic and military colossi. International organs of justice, and the good offices of the United Nations, would register few significant achievements during those decades.[33] Only in those rare instances when both superpowers happened to agree on a major issue—such as the

reckless illegality of the Anglo-French-Israeli incursion into the Suez in 1956—was the U.N. able to take prompt and effective action. (On that particular occasion the U.N. General Assembly, backed by strong support from Washington and Moscow, peremptorily ordered the Anglo-French-Israeli forces to return home; they immediately obeyed; and a U.N. peacekeeping force moved in to stabilize the situation on the ground.)

A second reason for the slow progress of international law during the Cold War years lay in the drastically limited powers of the U.N.'s primary judicial arm, the International Court of Justice at The Hague. The ICJ was an almost comically impotent institution, crippled by the restrictions imposed on its rules of procedure at its founding in 1946. It could not try individual persons, but only national governments; and any government brought before it had to consent to the court's jurisdiction before legal action could proceed. This was, in the words of one scholar, tantamount to "requiring an accused murderer to give his consent before he could be tried."[34] For example, when Nicaragua sued the United States at The Hague in 1984 for having mined its harbors, the United States simply withheld its consent to ICJ jurisdiction and walked away: not a particularly edifying moment in the conduct of international jurisprudence.

The near-paralysis of the U.N. abruptly ended after Mikhail Gorbachev's reforms in the Soviet Union spun out of control and brought about the implosion of one of the two Cold War rivals. Suddenly, amid talk of a "new world order," the U.N. began taking action once again—sometimes successfully, sometimes more hesitantly and fecklessly. When Saddam Hussein's Iraq invaded Kuwait in 1990, a potent U.N. coalition (led by the Americans but broadly supported and financed by most other great powers) moved in swiftly and expelled the Iraqis; U.N. officials imposed a tough regime of sanctions and weapons inspections on the aggressor government. When Yugoslavia slid into civil war in the early 1990s, however, the U.N.'s response proved less impressive: it dithered until the violence had degenerated to genocidal levels, then delegated NATO forces to clean up the mess. When a civil war tore apart the African nation of Rwanda in the mid-1990s, the U.N. once again failed to intervene promptly enough to stop a genocide in progress: some 800,000 civilians perished before peacekeepers finally moved in.[35]

The Yugoslavian and Rwandan genocides, however, did prompt a decisive return to the judicial precedent of the Nuremberg and Tokyo trials. By the late 1990s, two U.N. tribunals had convened at The Hague: the ICTY (International Criminal Tribunal for the Former Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda). (Anyone who deals

even briefly with the United Nations soon learns that its institutions thrive, perhaps unavoidably, within an A.R.E. [acronym-rich environment].) The Serbian statesman Slobodan Milosevic, one of the most cynical instigators of the Yugoslavian nightmare, soon found himself hauled before a U.N. judge in the Netherlands to answer for his many misdeeds; Jean Kambanda, the prime minister of Rwanda when that country's civil war took place, pled guilty at The Hague in 1998 to six counts of genocidal crimes.[36]

Building on the success of the tribunals for Yugoslavia and Rwanda, U.N. jurists moved in 1998 to create a permanent International Criminal Court (ICC).[37] This new tribunal, however, would possess several key differences from its predecessor, the irretrievably wimpy International Court of Justice: it would be the real thing. The ICC would try individual persons, not national governments; its jurisdiction would be universal, applying to all member states and their citizens without need for prior consent; it would be empowered to initiate prosecutorial action rather than waiting for aggrieved parties to present cases before it. This court, in other words, would function in much the same manner as the ad hoc tribunals for Yugoslavia and Rwanda, but on a permanent basis and with a global mandate. Like its predecessors, it would be housed at The Hague; but unlike its predecessors it would operate independently from the United Nations, rigorously insulated from the political maneuvering in the Security Council and General Assembly. Its legal authority would focus on four categories of crime that transcend national jurisdictions: genocide, crimes against humanity, war crimes, and aggression.[38] Nothing like it had ever existed before.

After several years of international negotiations, the court's statute officially went into force in 2002: sixty nations, including the United States and most of its closest allies, had ratified the transfer of sovereignty to this pioneering judicial body. This time around, however, the role played by the United States was much more openly ambivalent than in the past: influential groups of American conservatives had come to regard any transfer of sovereignty to this kind of international tribunal as unacceptable. They feared that American soldiers might someday find themselves summoned to The Hague to stand trial as war criminals, simply for participating in military actions that their own government had sent them to perform. In May 2002 the new administration of President George W. Bush formally withdrew the United States from membership in the ICC.

Nevertheless, the International Criminal Court now existed, its role powerfully backed by a remarkable array of the world's nations. By 2005

these included ninety-nine countries: all the member states of the European Union, twenty countries from Latin America, fifteen from Eastern Europe, twelve from Asia, and twenty-seven from Africa—over half the membership of the U.N.[39] Henceforth, when a future Saddam Hussein or Slobodan Milosevic decides to initiate policies involving serious violations of human rights, they will have to do so knowing that a court is sitting in The Hague, open for business, closely monitoring their actions, and ready to pursue them as individuals and try them for their deeds. To quote from the ICC's Web site:

> This is the first-ever permanent, treaty based, international criminal court established to promote the rule of law and ensure that the gravest international crimes do not go unpunished. . . . Anyone who commits any of the crimes under the Statute after [July 1, 2002] will be liable for prosecution by the Court.[40]

From The Hague, 1907, to The Hague, 2002: the principle of international criminal justice came a long way during the arc of the twentieth century. Most probably, it was the very nature itself of that century—its breathtaking cruelties, its terrifying weaponry—that prodded the process along. The reflex of national sovereignty dies hard, and it took extraordinary sufferings and dangers to move the world's peoples toward an acceptance of supranational legal structures. But the movement is there, plain to see, if one stands back from the past hundred years and assesses the overall thrust of the achievements that have marked human endeavors in this domain. The progress is slow, faltering, punctuated by periodic setbacks—but unmistakable.

Nuremberg and Tokyo constituted the chronological halfway mark; but from a qualitative point of view, they clearly amounted to much more than that. For all the flaws we have laid out in the foregoing discussion, these trials took humankind over the threshold of a new era—one of universal human rights, enshrined in written laws, protected by a court whose jurisdiction is global. The trials took a very bad business—genocide, hatred, nihilism—and used it as a springboard for something constructive, the solid foundations of a future hope.