

TRANSITIONAL JUSTICE FOR TŌJŌ'S JAPAN: THE UNITED STATES ROLE IN THE ESTABLISHMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST AND OTHER TRANSITIONAL JUSTICE MECHANISMS FOR JAPAN AFTER WORLD WAR II

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INTRODUCTION

Although the creation of the first international war crimes tribunal—the International Military Tribunal (IMT), also known as the Nuremberg Tribunal—has been the focus of significant scholarly attention, much less academic analysis has concentrated on the establishment of the second such body—the International Military Tribunal for the Far East (IMTFE), also known as the Tokyo Tribunal.¹ To further fill this gap in the history of “transitional justice”² institutions generally, and international war crimes tribunals specifically, this Article documents and examines the United States

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¹ See Zachary D. Kaufman, *The Nuremberg Tribunal v. The Tokyo Tribunal: Designs, Staffs, and Operations*, 43 J. MARSHALL L. REV. 753, 753–54 (2010) [hereinafter Kaufman, *IMT v. IMTFE*]; see also NEIL BOISTER & ROBERT CRYER, *THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 1* (2008) (noting that the IMTFE is “relatively unstudied”). Interest in the IMTFE may be increasing, however. On September 2, 2013, the Shanghai Jiao Tong University (SJTU) Press released an eighty-volume, nearly 50,000-page book about the IMTFE that was co-compiled by the National Library of China and the SJTU. *80-Volume Tokyo Trials Account Debuts in Beijing*, CHINA DAILY (Sept. 2, 2013, 2:51 PM), http://usa.chinadaily.com.cn/china/2013-09/02/content_16937887.htm.

² “Transitional justice” refers to both the process and objectives of societies addressing past or ongoing genocide, war crimes, crimes against humanity, and other serious human rights violations through judicial and non-judicial mechanisms. *But see* Phil Clark, Zachary D. Kaufman & Kalypso Nicolaïdis, *Tensions in Transitional Justice*, in *AFTER GENOCIDE: TRANSITIONAL JUSTICE, POST-CONFLICT RECONSTRUCTION, AND RECONCILIATION IN RWANDA AND BEYOND* 381, 381–82, 390–91 (Phil Clark & Zachary D. Kaufman eds., 2009) (arguing that “transitional justice” may be a misnomer because the context may not result in any sort of “transition” and “justice” does not necessarily encapsulate other objectives pursued in the aftermath of a conflict, such as reconciliation, peace, healing, forgiveness, and truth).

government's (USG) role in the origins of the IMTFE. Elsewhere I have compared the twin immediate post-World War II tribunals, noting similarities and differences in their designs, staffs, and operations.³

Part I provides an overview of what is popularly known as "Tokyo," discussing the negotiations leading to this transitional justice institution and then the trials themselves. Part II enumerates the transitional justice options the Allies generally and the USG specifically seriously considered and actually implemented for addressing Japanese suspected of perpetrating atrocities during WWII. Alongside the IMTFE, the Allies dealt with Japanese suspects through ad hoc Allied military tribunals, amnesty, and lustration.⁴ Part III assesses the USG role in the establishment of the IMTFE. Part IV explains several key developments in the process of establishing the IMTFE and other transitional justice mechanisms for postwar Japan. Finally, Part V concludes by reflecting on lessons learned from this case study of transitional justice.

I. THE "TOKYO" TRIALS

This Part presents an overview of "Tokyo," recounts the diplomatic negotiations leading to the establishment of the IMTFE, and discusses the organization and outcome of the trials themselves.

A. *Overview of "Tokyo"*

What is commonly referred to as "Tokyo" is actually a series of trials that took place in Tokyo, Japan, and elsewhere in East Asia from 1945 to 1951.⁵ These trials can be divided into two sets. The first was the "trial and punishment of the major war criminals in the Far East" before the IMTFE in Tokyo between 1946 and 1948 (what is commonly known as the "Tokyo Tribunal").⁶ The second set was the 1945–51 proceedings by ad hoc, unilateral Allied military commissions throughout the Far East.⁷

³ Kaufman, *IMT v. IMTFE*, *supra* note 1.

⁴ Transitional justice expert Neil Kritz defines lustration, or *épuration*, as the non-criminal sanction of "purging from the public sector those who served the repressive regime." Neil Kritz, *The Dilemmas of Transitional Justice*, in 1 *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* xix, xxiv (1995). For more discussion of lustration, see Zachary D. Kaufman, *The Future of Transitional Justice*, 1 *ST. ANTHONY'S INT'L REV.* 58, 64, 68–69 (2005) [hereinafter Kaufman, *The Future of Transitional Justice*].

⁵ For an example of this expansive definition of "Tokyo," see TIM MAGA, *JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS* xi (2001).

⁶ Charter of the International Military Tribunal for the Far East art. 1, Jan. 19, 1946, T.I.A.S. No. 1589, 4 *Bevans* 20 (as amended Apr. 26, 1946, 4 *Bevans* 27) [hereinafter IMTFE Charter], *reprinted in* DOCUMENTS

B. *Negotiations Leading to “Tokyo”*

As with the IMT, the creation of the IMTFE was not preordained.⁸ In fact, much like their decision-making regarding suspected Nazis, the Allies, including the USG, considered alternative transitional justice options for addressing Japanese atrocities at various points during WWII.⁹ Six major diplomatic steps ultimately led to the creation of the IMTFE.

1. *Early American Responses to Japanese Atrocities During WWII*

Imperial Japan, which officially allied with both Nazi Germany and Fascist Italy under the Tripartite Pact of September 27, 1940, invaded and occupied various parts of Asia and committed other acts of aggression against some Western powers in the first few years of WWII.¹⁰ In response, President Franklin Roosevelt froze all of Japan's assets in the United States, terminated the U.S.-Japanese Treaty of Commerce and Navigation, placed an embargo on Japan's oil supply, and threatened to suspend diplomatic relations between the two states.¹¹ Japan then launched a surprise attack on Pearl Harbor on December 7, 1941, damaging the U.S. Pacific Fleet, killing over 2400 Americans, and wounding 1100 more.¹² The United States (joined by the United Kingdom) declared war on Japan the following day.¹³ The United States, Japan, and their respective allies fought in the Pacific Theater (and in Europe) over the following four years.¹⁴

ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: CHARTER, INDICTMENT AND JUDGMENTS 7–11 (Neil Boister & Robert Cryer eds., 2008).

⁷ This Article will not discuss the proceedings of the Tokyo trials, only the negotiations leading to the establishment of them.

⁸ JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* 444 (1999) (“It was by no means inevitable that major war-crimes trials, let alone precedent-breaking ones, would follow the war.”).

⁹ See *infra* Part II.

¹⁰ *Three-Power Pact Between Germany, Italy, and Japan*, Sept. 27, 1940, available at <http://avalon.law.yale.edu/wwii/triparti.asp>. See generally LAURENCE REES, *HORROR IN THE EAST: JAPAN AND THE ATROCITIES OF WORLD WAR II* (2001).

¹¹ GEORGE MORGENSTERN, *PEARL HARBOR: THE STORY OF THE SECRET WAR* 99 (1947).

¹² See, e.g., *id.* at 11; GORDON W. PRANGE ET AL., *AT DAWN WE SLEPT: THE UNTOLD STORY OF PEARL HARBOR* 539 (1981); GORDON PRANGE ET AL., *PEARL HARBOR: THE VERDICT OF HISTORY* xxxii (1986); ROBERT B. STINNETT, *DAY OF DECEIT: THE TRUTH ABOUT FDR AND PEARL HARBOR* (2000); ROBERTA WOHLSTETTER, *PEARL HARBOR: WARNING AND DECISION* (1962).

¹³ MORGENSTERN, *supra* note 11, at 190–91.

¹⁴ See, e.g., JOHN COSTELLO, *THE PACIFIC WAR* (1981); JOHN W. DOWER, *WAR WITHOUT MERCY: RACE AND POWER IN THE PACIFIC WAR* (1986); HARRY A. GAILEY, *THE WAR IN THE PACIFIC: FROM PEARL HARBOR TO TOKYO BAY* (1995); RONALD SPECTOR, *EAGLE AGAINST THE SUN: THE AMERICAN WAR WITH JAPAN* (1985).

The Allies, including the United States, claimed that, in addition to illegally waging an aggressive war, Japan committed widespread atrocities (war crimes, crimes against humanity, and crimes against peace) during WWII, including against American prisoners of war (POWs) (for example, during the notorious 1942 Bataan Death March) but worst of all against Chinese and Korean combatants and civilians.¹⁵ The total number of victims of Japanese atrocities may never be known, but it is clear that the Japanese murdered, mutilated, tortured, beat, poisoned, starved, raped, enslaved (for both sexual and labor purposes), cannibalized, decapitated, burned alive, buried alive, froze, hanged by the tongue of, impaled the genitals of, pillaged from, and performed medical experiments on millions of men, women, and children.¹⁶ The brutality of the Japanese was so severe that, for example, upon witnessing the infamous 1937 Rape of Nanking, even the Nazi *chargé d'affaires* stationed there remarked: "The Japanese Imperial Army is nothing but a beastly machine."¹⁷ This Nazi and his colleagues eventually provided sanctuary to Chinese refugees and lodged complaints about Japan's behavior to more senior Nazi officials in Germany.¹⁸

As information about Japanese atrocities emerged during WWII, the USG gradually took public and private steps to deter these crimes and to hold their perpetrators accountable. FDR and Vice President Henry Wallace voiced the earliest significant public pronouncements to this effect. FDR delivered a speech on August 21, 1942 denouncing Japanese (and German) atrocities, a point he reiterated on March 24, 1944. FDR also used the earlier speech to warn Japanese (and Germans) suspected of perpetrating atrocities that they would be prosecuted.¹⁹ On a related point, in a December 28, 1942 speech,

¹⁵ See generally DONALD KNOX, DEATH MARCH: THE SURVIVORS OF BATAAN (1981); REES, *supra* note 10, at 73–96.

¹⁶ See, e.g., YVES BEIGBEDER, JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE 52–54 (1999); THE BURMA-THAILAND RAILWAY: MEMORY AND HISTORY (Gavan McCormack & Hank Nelson eds., 1993); IRIS CHANG, THE RAPE OF NANKING: THE FORGOTTEN HOLOCAUST OF WORLD WAR II (1997); GAVAN DAWS, PRISONERS OF THE JAPANESE: POWS OF WORLD WAR II IN THE PACIFIC (1994); GEORGE HICKS, THE COMFORT WOMEN: JAPAN'S BRUTAL REGIME OF ENFORCED PROSTITUTION IN THE SECOND WORLD WAR (1994); JAPANESE WAR CRIMES: THE SEARCH FOR JUSTICE (Peter Li ed., 2003); KNOX, *supra* note 15; REES, *supra* note 10; YUKI TANAKA, HIDDEN HORRORS: JAPANESE WAR CRIMES IN WORLD WAR II (1996); WITH ONLY THE WILL TO LIVE: ACCOUNTS OF AMERICANS IN JAPANESE PRISON CAMPS 1941–1945 (Robert La Forte et al. eds., 1994).

¹⁷ HOWARD BALL, PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH-CENTURY EXPERIENCE 67 (1999) (citing Kevin Uhrich, *The Other Holocaust*, L.A. READER, July 1, 1994).

¹⁸ *Id.* at 69 (citing CHANG, *supra* note 16, at 52).

¹⁹ Franklin D. Roosevelt, President, War Refugees: Statement by the President (Mar. 24, 1944), in 10 DEP'T ST. BULL. 277 (1944).

Wallace declared that the USG—without pursuing pointless, purely retributive punishment—would seek to prove the guilt of suspected Japanese leaders, holding them responsible for crimes they committed during WWII.²⁰

Other states also joined the USG in publicly condemning and threatening Japanese suspected of committing atrocities. On December 1, 1943, the USG partnered with the governments of China and the United Kingdom to issue the Cairo Declaration (the outcome of a conference held in Cairo among the three states four days earlier).²¹ This meeting apparently generated the first Allied war-crimes policy concerning Japan. The joint proclamation by these self-described “Three Great Allies” declared their intention to “restrain and punish the aggression of Japan.”²² The Allies explicitly asserted that they would punish Japan by stripping it of the territory it had acquired since the beginning of not just WWII, but also WWI, with specific reference to Chinese and Korean lands.²³ Although the declaration was not explicit on the topic of atrocities, it nevertheless did not preclude holding Japanese individuals accountable for them.²⁴

During WWII, the USG also issued private threats and promises about its intention to punish Japanese leaders for offenses they committed during the war, especially against Americans. For example, a few days after the Japanese attack on Pearl Harbor, FDR asked the Japanese government to abide by the law of armed conflict and international agreements concerning POWs.²⁵ On August 21, 1942, FDR reiterated his position, stating that the USG was aware of the Axis powers’ war crimes in both Europe and Asia and warned that they would be prosecuted.²⁶ On April 12, 1943, U.S. Secretary of State Cordell Hull communicated a message to the Japanese government via Swiss emissaries that if American POWs were mistreated or illegally abused, then “the American government [would] visit upon the officers of the Japanese Government responsible for such uncivilized and inhumane acts the punishment they

²⁰ Solis Horwitz, *Tokyo Trial*, 28 INT’L CONCILIATION 473, 477–78 (1950) (citing Henry Wallace, Vice President of the United States, *America’s Part in World Reconstruction* (Dec. 28, 1942)).

²¹ *Cairo Conference 1943* (Dec. 1, 1943), available at <http://avalon.law.yale.edu/wwii/cairo.asp>.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ MAGA, *supra* note 5, at 27.

²⁶ PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951*, at 3–4 (1979).

deserve.”²⁷ Hull reiterated his position in late January 1944, issuing a simultaneous warning with the British government in which the two countries promised not to forget acts like the recent Bataan Death March and vowed to mete out “just punishment.”²⁸ Hull’s messages were sufficiently vague as to imply virtually any transitional justice mechanism. At one point during WWII, Hull communicated to his British and Soviet counterparts his preference for dealing with suspected atrocity perpetrators from Japan (and Germany and Italy): The Allies “would take [German Chancellor Adolf] Hitler and [Italian Prime Minister Benito] Mussolini and [Japanese Prime Minister Hideki] Tōjō and their arch accomplices and bring them before a drumhead court-martial. And at sunrise the following day there would occur an historic incident.”²⁹ Some USG officials (along with U.K. government officials) thus initially favored summary execution for leaders of the Axis powers, including the Japanese, suspected of committing atrocities during WWII.

In addition to these unilateral and multilateral efforts to denounce and deter Japanese atrocities, the USG also partnered with other states to investigate offenses. On May 10, 1944, the USG and some of its allies established the Special Far Eastern and Pacific Committee of the UN War Crimes Commission (UNWCC).³⁰ This committee—which was created in part because of lobbying by Herbert Pell, the U.S. representative on the UNWCC—was a significant international entity that observed, reported on, and made recommendations about responding to Japanese atrocities.³¹ On August 28, 1945, the Committee issued its final report, finding that the Japanese had committed various atrocities in violation of existing international law (e.g., the 1907 Hague Conventions).³² The report also recommended that senior Japanese political, military, and economic officials “should be surrendered to or apprehended by the United Nations for trial before an international military tribunal.”³³ The report further suggested that other

²⁷ RICHARD L. LAEL, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* 40 (1982).

²⁸ PICCIGALLO, *supra* note 26, at 4.

²⁹ DOWER, *supra* note 8, at 444–45.

³⁰ Horwitz, *supra* note 20, at 479 n.9.

³¹ MAGA, *supra* note 5, at 28.

³² Special Far E. & Pac. Comm., *Draft Summary of Recommendations Concerning Japanese War Crimes and Atrocities* (Aug. 28, 1945), *reprinted in* Donald Cameron Watt, *Historical Introduction to 1 THE TOKYO MAJOR WAR CRIMES TRIAL* xi (R. John Pritchard & Sonia Magbauna Zaide eds., 1981).

³³ *Id.* at xii.

Japanese who have been responsible for, or have taken a consenting part in, the crimes or atrocities committed in, or against the nationals of, a United Nation should be apprehended and sent back to the countries in which abominable deeds were done or against whose nationals crimes and atrocities were perpetrated in order that they may be judged in the courts of those countries and punished.³⁴

Moreover, the report stated that the Supreme Commander of the Allied Powers (SCAP) should appoint “one or more International Military Tribunals for the trial of the war criminals” and that the SCAP should assume responsibility for appointing its members and adopting its rules of procedure.³⁵ As occurred during the transitional justice process that birthed the IMT, the Allied Powers thus precluded a civilian prosecutorial option for the principal suspected atrocity perpetrators in the Far East. However, according to historian Donald Cameron Watt, compared to the London Agreement, which provided for the “Prosecution and Punishment of the Major War Criminals of the European Axis,”³⁶

The novelty [of the UNWCC report] . . . [was in recognizing] the military supremacy of the United States in the Far East by laying the responsibility for setting up one or more international military tribunals to try the Japanese major war criminals squarely on the shoulders of the American Supreme Allied Commander in the Pacific and left it to him to select the members of the tribunals.³⁷

2. *July 1945: The Potsdam Declaration*

The Allies did not jointly formalize their general policy toward suspected Japanese atrocity perpetrators until WWII was ending. In the section of the Potsdam Declaration of July 26, 1945 (a proclamation signed in the German city of Potsdam by President Truman, British Prime Minister Winston Churchill, and Chinese Generalissimo Chiang Kai-shek) that defined the terms of Japan’s surrender and provided for the Allied occupation of Japan, the signatories declared:

³⁴ *Id.*

³⁵ *Id.* at xiii.

³⁶ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S 280, *reprinted in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 8, 8 (1947) [hereinafter London Agreement].

³⁷ Watt, *supra* note 32, at xiv.

Following are our terms. We will not deviate from them. There are no alternatives. We shall brook no delay There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace security and justice will be impossible until irresponsible militarism is driven from the world We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.³⁸

With this declaration, the Allies publicly made clear that, without negotiation or hesitation, they would seek removal of suspected Japanese war criminals from public office and hold them accountable. The precise form the transitional justice mechanism would take remained undefined, but the Allies continued to rule out inaction and amnesty. John Dower, the Pulitzer Prize-winning historian of post-WWII Japan, contends that this decision was intentional: The Potsdam Declaration “was highly generalized, and necessarily so, for the victors were still deliberating about how to handle Japanese war crimes right up to the end of the war.”³⁹ The Japanese did not immediately respond to this ultimatum.

3. August–September 1945: Critical Developments

August 1945 witnessed a momentous evolution in U.S.-Japanese relations and the development of a coherent transitional justice strategy for addressing Japanese suspected of committing atrocities. First, hostilities in the Pacific Theater climaxed that month with the U.S. atomic bombings of Hiroshima on August 6, 1945, and of Nagasaki three days later. Five days afterwards, Japan accepted the unconditional surrender demanded in the Potsdam Declaration, thus ceding to the Allies three months after Germany did.⁴⁰

³⁸ Berlin (Potsdam) Conference, July 17–Aug. 2, 1945, *Protocol of the Proceedings* (Aug. 1, 1945), available at http://avalon.law.yale.edu/20th_century/decade17.asp; see also DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra* note 6, at 1–2.

³⁹ DOWER, *supra* note 8, at 445.

⁴⁰ See, e.g., GAR ALPEROVITZ, *THE DECISION TO USE THE ATOMIC BOMB* (1996); *THE ATOMIC BOMB: VOICES FROM HIROSHIMA AND NAGASAKI* (Kyoko Seldon & Mark Seldon eds., 1989); ROBERT J. C. BUTOW, *JAPAN’S DECISION TO SURRENDER* (1954); JOHN HERSEY, *HIROSHIMA* (1989); RONALD TAKAKI, *HIROSHIMA: WHY AMERICA DROPPED THE ATOMIC BOMB* (1995); J. SAMUEL WALKER, *PROMPT AND UTTER DESTRUCTION: TRUMAN AND THE USE OF ATOMIC BOMBS AGAINST JAPAN* (1997).

Second, after surrendering and before the Allied occupation, the Japanese attempted to thwart Allied efforts to prove their atrocities. During August 1945, the Japanese government employed a massive campaign within the country and its occupied territories to doctor, damage, or destroy (mostly by burning) much of the incriminating evidence (records, witnesses, and corpses) of their atrocities.⁴¹

Third, on August 4, President Harry Truman appointed Douglas MacArthur, who was General of the U.S. Army since December 18, 1944, to be the SCAP.⁴² In that role, MacArthur oversaw the Allied occupation of Japan, which commenced on August 28, including the transitional justice system. MacArthur's broad authority essentially rendered him the dictator, or "American Caesar," of postwar Japan.⁴³ Truman eventually relieved MacArthur of his command as SCAP on April 11, 1951 because of insubordination.⁴⁴ However, by that time, the IMTFE had concluded, and so MacArthur was the only SCAP to possess and use all of the powers of appointment and judicial review enumerated in the IMTFE's Charter.⁴⁵ The Allies would occupy Japan until all parties signed a peace treaty in San Francisco on April 8, 1952.⁴⁶

Fourth, Japanese political and military officials engaged in mass suicides during this eventful month.⁴⁷ They presumably did so because they felt guilty for their collective crimes, they were ashamed of their defeat by the Allies, they wanted to demonstrate their loyalty to their conquered leaders, or they wanted to avoid being held accountable by the Allies. Other Japanese either

⁴¹ ARNOLD C. BRACKMAN, *THE OTHER NUREMBERG: THE UNTOLD STORY OF THE TOKYO WAR CRIMES TRIALS* 40–42, 57, 60 (1987).

⁴² WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880–1964*, at 439 (1978).

⁴³ *See id.*

⁴⁴ For more biographical information on MacArthur, see, e.g., JOHN GUNTHER, *THE RIDDLE OF MACARTHUR: JAPAN, KOREA AND THE FAR EAST* (1975); *MACARTHUR AND THE AMERICAN CENTURY: A READER* (William M. Leary ed., 2001); DOUGLAS MACARTHUR, *REMINISCENCES: GENERAL OF THE ARMY* (1964); GEOFFREY PERRET, *OLD SOLDIERS NEVER DIE: THE LIFE OF DOUGLAS MACARTHUR* (1996); RICHARD H. ROVERE & ARTHUR SCHLESINGER, JR., *GENERAL MACARTHUR AND PRESIDENT TRUMAN: THE STRUGGLE FOR CONTROL OF AMERICAN FOREIGN POLICY* (1992); STANLEY WEINTRAUB, *MACARTHUR'S WAR: KOREA AND THE UNDOING OF AN AMERICAN HERO* (2000); *Commander of Armies that Turned Back Japan Led a Brigade in World War I*, *N.Y. TIMES*, Apr. 6, 1964, at 26.

⁴⁵ *See infra* Part I.B.6 & Part I.C.

⁴⁶ *See, e.g.*, DOWER, *supra* note 8; TAKEMAE EIJI, *INSIDE GHQ: THE ALLIED OCCUPATION OF JAPAN AND ITS LEGACY* (Robert Ricketts & Sebastian Swann trans., 2002); MICHAEL SCHALLER, *THE AMERICAN OCCUPATION OF JAPAN: THE ORIGINS OF THE COLD WAR IN ASIA* (1985).

⁴⁷ BRACKMAN, *supra* note 41, at 43–44.

faked or, in the case of Tōjō, failed in their attempts to commit suicide.⁴⁸ In total, over 1000 Japanese committed suicide, usually using pistol, poison, or pointed blade.⁴⁹

The following month also proved decisive for efforts to pursue transitional justice in Japan. On September 2, more than two weeks after unconditionally surrendering, Japan accepted all of the remaining Potsdam Declaration provisions at a ceremony aboard the USS *Missouri* in Tokyo Bay.⁵⁰ Four days later, the USG issued a “Statement of the Initial Surrender Policy for Japan,” proclaiming:

Persons charged by the [SCAP] or appropriate United Nations Agencies with being war criminals, including those charged with having visited cruelties upon United Nations prisoners or other nationals, shall be arrested, tried and, if convicted, punished. Those wanted by another of the United Nations for offenses against its nationals, shall, if not wanted for trial or as witnesses or otherwise by the [SCAP], be turned over to the custody of such other nation.⁵¹

This statement made it clear that the USG and its allies had selected prosecution as the general transitional justice option and that MacArthur would exercise primary jurisdiction over all Japanese suspects. Like the Potsdam Declaration, this statement explicitly and exclusively mentioned citizens of the United States and its allies among the United Nations as alleged victims. Two days later, on September 8, MacArthur established his office in Tokyo.⁵²

Later that month, on September 22, the U.S. Joint Chiefs of Staff, at the direction of Truman and with the approval of all governments occupying Japan, sent orders to MacArthur to create an international military tribunal for prosecuting alleged Japanese atrocities.⁵³ The Joint Chiefs also instructed MacArthur to apprehend, investigate, prosecute, and—if convicted—punish Japanese suspects, who were to be divided into three classes.⁵⁴ Class A war criminals were suspected of committing the most egregious offenses: planning, initiating, and waging aggressive war; Class B war criminals allegedly

⁴⁸ *Id.* at 44.

⁴⁹ BALL, *supra* note 17, at 71, 73; BRACKMAN, *supra* note 41, at 44.

⁵⁰ BUTOW, *supra* note 40, at 249–50.

⁵¹ U.S. Initial Post-Surrender Policy for Japan (Sept. 22, 1945), in DEP’T ST. BULL., July 1–Dec. 30, 1945, at 425.

⁵² BALL, *supra* note 17, at 73.

⁵³ Horwitz, *supra* note 20, at 480.

⁵⁴ *Id.*; TANAKA, *supra* note 16, at 1.

committed conventional war crimes; and Class C war criminals were suspected of committing crimes against humanity.⁵⁵

4. *October–December 1945: Negotiating the Specific Features of Transitional Justice*

Transitional justice policy continued to develop apace through the autumn of 1945. On October 25, the USG distributed to its allies its “Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East.”⁵⁶ This proposal outlined the SCAP’s many powers and indicated that allies would be significantly involved in transitional justice issues in Japan through advisory roles to the SCAP and as staff on an international military tribunal.⁵⁷ American allies, including Australia, the United Kingdom, and the Union of Soviet Socialist Republics (the Soviet Union), accepted the proposal more or less as a *fait accompli*.⁵⁸

Since most initiatives concerning the occupation of Japan, including transitional justice issues, had been led to date by the USG, its allies began lobbying for a broader and more substantive decision-making authority. On October 30, a Far Eastern Advisory Commission (FEAC), comprising the USG and several of its allies in the war against Japan, met in Washington, D.C.⁵⁹ However, the Soviet government expressed concerns about the mere advisory nature of the commission and lobbied for a greater voice in decisions concerning the occupation of Japan.⁶⁰ While the USG worked with its allies to expand their occupational roles, the pursuit of transitional justice for alleged Japanese atrocity perpetrators endured. On November 30, Truman appointed Joseph Keenan to be the IMTFE’s chief prosecutor, called Chief of Counsel.⁶¹ Because of his distinguished military and legal service to the United States and his expertise in criminal law, Keenan was well-respected by senior USG officials, including Truman and MacArthur.⁶²

⁵⁵ TANAKA, *supra* note 16, at 1.

⁵⁶ Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East (Oct. 25, 1945), *reprinted in* 1 THE TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 32, at xiv.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Horwitz, *supra* note 20, at 481.

⁶⁰ *Id.*

⁶¹ Executive Order No. 9660, 10 Fed. Reg. 14591 (Nov. 30, 1945). According to one historian, Tim Maga, MacArthur personally lobbied for Keenan’s appointment. MAGA, *supra* note 5, at 31.

⁶² Keenan, who was nicknamed “Joe the Key” because of his effectiveness in political circles, was educated at Brown University and Harvard Law School before serving in the U.S. military during WWI. MAGA, *supra* note 5, at 29–31. Prior to his IMTFE appointment, Keenan had served as an assistant to the U.S.

Keenan arrived in Tokyo on December 6 with forty aides, and MacArthur established the IMTFE's International Prosecution Section (IPS) two days later.⁶³ Since an American citizen was serving as the chief prosecutor, each of the other ten United Nations parties that had waged war with Japan⁶⁴—and which were thus members of what would become the Far Eastern Commission (FEC)—had the power to appoint one of its citizens to serve as an Associate Counsel.⁶⁵ Still, more staff members were needed to undertake the great amount of investigative and prosecutorial work. In total, the IPS would be comprised of fifty attorneys, half of whom were American.⁶⁶

5. *December 1945: The Moscow Agreement and American Reflections*

The Moscow Agreement of December 27 signified a crucial development in Allied cooperation concerning the occupation of Japan and the more specific issue of transitional justice. Several highly relevant portions of the agreements were solidified during meetings held in Moscow from December 16 to 26. At these meetings, the Allies agreed to establish the FEC, which would be headquartered in Washington, D.C.⁶⁷ The FEC, which held its first meeting on February 26, 1946, replaced the FEAC and had more teeth.⁶⁸ Participating states endowed the FEC with the authority to review any directive or action the SCAP took within the FEC's jurisdiction, including the future IMTFE's operations.⁶⁹ The Allies also agreed at this conference to establish an Allied

Attorney General and director of the Justice Department's Criminal Division. BRACKMAN, *supra* note 41, at 54–56. During that time, Keenan developed a reputation as a tough and successful prosecutor from his personal experience trying some of the most notorious organized criminals of the era, including George “Machine Gun” Kelly, and as an effective White House and Justice Department liaison to Congress on legislation and political appointments. MAGA, *supra* note 5, at 29–31. For more biographical information on Keenan, see, e.g., RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 5, 40 (1971); Joseph B. Keenan, *Prosecutor, Dies*, N.Y. TIMES, Dec. 9, 1954, at A33.

⁶³ BALL, *supra* note 17, at 76; DOWER, *supra* note 8, at 319; Horwitz, *supra* note 20, at 482.

⁶⁴ The ten states were: Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippine Commonwealth, the Soviet Union, and the United Kingdom. *War and Transitional Organizations: Allied Control Councils and Commissions*, 1 INT'L ORG. 162, 176–77 (1947) (regarding “The Far Eastern Commission”).

⁶⁵ IMTFE Charter, *supra* note 6, at art. 8(b).

⁶⁶ BALL, *supra* note 17, at 76.

⁶⁷ *Interim Meeting of Foreign Ministers of the United States, the United Kingdom, and the Union of Soviet Socialist Republics, Moscow*, § II.A.VI.1 (Dec. 16–26, 1945), available at http://avalon.law.yale.edu/20th_century/decade19.asp [hereinafter *Interim Meeting*].

⁶⁸ Horwitz, *supra* note 20, at 481; *War and Transitional Organizations*, *supra* note 64, at 169 (regarding the “Allied Control Council for Japan”).

⁶⁹ Horwitz, *supra* note 20, at 481; see also *Far Eastern Commission*, 3 INT'L ORG. 180, 180–82 (1949); *Interim Meeting*, *supra* note 67, at § II.A; Samuel S. Stratton, *The Far Eastern Commission*, 2 INT'L ORG. 1, 1–18 (1948); *War and Transitional Organizations*, *supra* note 64, at 176–78; *War and Transitional*

Council for Japan (ACJ), chaired by MacArthur as the SCAP, which would consult with and advise the SCAP on his overseeing the occupation of Japan.⁷⁰ The ACJ would be comprised of one representative each from China, the United States, the Soviet Union, and one member jointly representing Australia, India, New Zealand, and the United Kingdom.⁷¹

The Moscow Agreement declared the SCAP to be “the sole executive authority for the Allied Powers in Japan”; instructed the FEC to “respect existing control machinery in Japan, including the chain of command from the [USG] to the [SCAP] and the [SCAP]’s command of occupation forces”; and agreed that the USG would prepare and transfer the FEC’s directives to the SCAP and could, under certain circumstances, issue interim directives directly to the SCAP.⁷² Consequently, the Moscow Agreement cemented the roles of MacArthur specifically and the USG generally in overseeing the Allied occupation of Japan and related transitional justice issues, including those concerning the IMTFE. In addition to the USG’s already implicit oversight of the Japanese occupation, the United States, along with China, the Soviet Union, and, to a lesser extent, the United Kingdom, explicitly possessed a disproportionately greater voice in the FEC and the ACJ than the other represented states.⁷³

The December 30 report of U.S. Secretary of State James Byrnes regarding the conference and agreement in Moscow earlier that month provides crucial insight into why the USG favored the inclusion of certain states in an unequal decision-making structure for the occupation and transitional justice system in Japan. Byrnes described the USG position that all states that had fought Japan during WWII should participate in the post-conflict peacemaking, including the occupation.⁷⁴ At the same time, Byrnes conveyed the USG belief, reflected in the roster of permanent members of the recently established United Nations Security Council (UNSC),⁷⁵ that “greater” powers, which shouldered a

Organizations: Political and Legal Organizations, 2 INT’L ORG. 156, 156–57 (1948) (regarding the “Far Eastern Commission”).

⁷⁰ *Interim Meeting*, *supra* note 67, at § II.B.

⁷¹ *Id.* § II.B.2; *see also War and Transitional Organizations*, *supra* note 64, at 169 (regarding the “Allied Control Council for Japan”); *War and Transitional Organizations: Allied Control Councils and Commissions*, 2 INT’L ORG. 151, 151–52 (1948) (regarding the “Allied Council for Japan”).

⁷² *Interim Meeting*, *supra* note 67, at §§ II.A.II.C, II.A.III, II.B.5.

⁷³ *Id.* at §§ II.A.V.2, II.A.VII, and II.B.2.

⁷⁴ James F. Byrnes, U.S. Sec’y of State, *Report by the Secretary of State on the Meeting of Foreign Ministers* (Dec. 30, 1945), in DEP’T ST. BULL., Dec. 30, 1945, at 1033, 1033 [hereinafter *Byrnes Report*].

⁷⁵ When established in 1945, the permanent members of the UNSC were China, France, the Soviet Union, the United Kingdom, and the United States. *Id.* In 1991, the Russian Federation replaced the Soviet

disproportionately large burden in defeating Japan, should play a greater role in postwar peacemaking.⁷⁶

6. *Early-1946: The Establishment of the International Military Tribunal for the Far East*

The IMTFE Charter, based in large part on the IMT Charter addressing Nazi atrocity perpetrators, was established by MacArthur's order on January 19, 1946.⁷⁷ USG officials, particularly Keenan, initially drafted the IMTFE Charter; the USG consulted its allies about it only after MacArthur issued it.⁷⁸ The IMTFE's Rules of Procedure also were established on January 19 and were promulgated by the IMTFE on April 25.⁷⁹ According to Solis Horwitz, who served on the IMTFE's prosecution staff during the trial, the USG exclusively drafted the IMTFE Charter.⁸⁰ It did so because Keenan, as the IMTFE's Chief of Counsel, was tasked with preparing the details of the IMTFE, and none of the associate prosecutors had arrived in Japan before the Charter was promulgated.⁸¹ However, on April 26, the Charter was amended slightly to reflect the views of the Allied delegations.⁸²

Union. UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLE IN INTERNATIONAL RELATIONS 534 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993).

⁷⁶ *Byrnes Report*, *supra* note 74. Secretary Byrnes stated:

The agreement at Moscow meets our insistence that all states which took an active part in the war should participate in the peace. It also frankly recognizes the responsible role of the larger powers in the making of peace. Our agreement is that the terms of peace in the first instance should be drawn by the principal powers which were signers of the respective armistices. But it was decided that as soon as these terms were drawn up, they should be submitted to a peace conference called by the five states—the United States, the Soviet Union, Great Britain, France, and China who constitute the Council of Foreign Ministers and are the permanent members of the [UNSC] While the United States sustained the major burden in crushing the military power of Japan, we have always considered the war against Japan a part of the war against the Axis. From the outset we have planned to make the control of Japan an Allied responsibility.

Id. at 1033–35.

⁷⁷ IMTFE Charter, *supra* note 6.

⁷⁸ MINEAR, *supra* note 62, at 20; PICCIGALLO, *supra* note 26, at 11; B.V.A. RÖLING, THE TOKYO TRIAL AND BEYOND: REFLECTIONS OF A PEACEMONGER 2 (Antonio Cassese ed., 1993).

⁷⁹ Rules of Procedure for the International Military Tribunal of the Far East, Apr. 25, 1946, *reprinted in* DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra* note 6, at 12–15.

⁸⁰ See Horwitz, *supra* note 20, at 482–83.

⁸¹ *Id.* at 483.

⁸² *Id.* The amended Charter featured, for example, that the bench was expanded to include the nominated members of India and the Philippines, that six members were sufficient to convene the IMTFE, and that a quorum could be constituted by a majority of all members. See BOISTER & CRYER, *supra* note 1, at 27.

The Charter indicated that Tokyo would be the permanent seat of the tribunal. The proceedings were held in the auditorium of the old Japanese War Ministry in the Ichigaya neighborhood of Tokyo.⁸³ This venue was symbolic: It had been the auditorium of the Imperial Army Officers School and then temporary headquarters of the Japanese military during WWII.⁸⁴

On February 15, MacArthur appointed eleven judges to the IMTFE,⁸⁵ one nominated by each of the nine members of the Instrument of Surrender⁸⁶ plus one judge each from India and the Philippine Commonwealth.⁸⁷ MacArthur never rejected any of the judicial nominees.⁸⁸ These eleven judges thus represented the eleven-state membership of the FEC. The first American judge was John Higgins, Chief Justice of the Superior Court of Massachusetts.⁸⁹ He was compelled to return (or chose to, because, according to Dower, his qualifications had been criticized) to the United States in July 1946 and therefore resigned.⁹⁰ Higgins was replaced by Major General Myron Cramer, former Judge Advocate General of the U.S. Army.⁹¹ MacArthur also had the power to appoint the IMTFE's President, or chief judge, from among the judges at-large,⁹² and he chose the Australian representative, Sir William Webb. Whenever Webb was absent—not an uncommon event—Cramer served as acting President.⁹³

Four months after the IMTFE's IPS was established, three months after the IMTFE was created, and just before the IMTFE's proceedings started in April, an International Defense Panel was created.⁹⁴ Japanese citizens and, at the request of the Japanese government to the USG, Americans, too, served as defense counsel.⁹⁵

⁸³ BRACKMAN, *supra* note 41, at 18.

⁸⁴ *See id.*

⁸⁵ Horwitz, *supra* note 20, at 488.

⁸⁶ The nine states were: Australia, Canada, China, France, the Netherlands, New Zealand, the Soviet Union, the United Kingdom, and the United States. *Id.* at 488–89.

⁸⁷ IMTFE Charter, *supra* note 6, art. 2.

⁸⁸ BRACKMAN, *supra* note 41, at 63.

⁸⁹ Horwitz, *supra* note 20, at 489.

⁹⁰ DOWER, *supra* note 8, at 465.

⁹¹ Horwitz, *supra* note 20, at 489.

⁹² IMTFE Charter, *supra* note 6, art. 3(a).

⁹³ BRACKMAN, *supra* note 41, at 19 (noting that Webb was absent for over two months during the defense presentation).

⁹⁴ *See* BALL, *supra* note 17, at 76–77.

⁹⁵ BRACKMAN, *supra* note 41, at 74–75; PICCIGALLO, *supra* note 26, at 13–14; RÖLING, *supra* note 78, at 36–37; Horwitz, *supra* note 20, at 492.

Exercising its authority with respect to the Japanese occupation, the FEC issued a statement on April 3 concerning the “Apprehension, Trial and Punishment of War Criminals in the Far East,” which was communicated to MacArthur twenty days later.⁹⁶ This statement basically included all of the USG’s original directives to MacArthur—apparently a mere rubberstamp of USG policy.

C. *The International Military Tribunal for the Far East’s Trials*

On April 29, Keenan and the ten associate prosecutors issued a joint indictment on behalf of all eleven states that had been at war with Japan and thus comprised the FEC.⁹⁷ The indictment charged twenty-eight men⁹⁸ with three sets of crimes⁹⁹ (crimes against peace, war crimes, and crimes against humanity) comprising fifty-five counts.¹⁰⁰

The IMTFE trial structure and procedure borrowed directly from the IMT’s.¹⁰¹ Opening statements preceding the arraignment, including Keenan’s introduction of the indictment, were delivered on May 3.¹⁰² What Webb called “the trial of the century”¹⁰³—so momentous in his view that he believed “[t]here has been no more important criminal trial in all history”¹⁰⁴—had commenced and would not conclude until the IMTFE’s judges rendered their verdict two and a half years later, between November 4 and November 12,

⁹⁶ Watt, *supra* note 32, at xxi–ii.

⁹⁷ Prosecutor v. Araki et al., IMTFE, Indictment (Apr. 29, 1946), *reprinted in* 2 TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 32.

⁹⁸ The twenty-eight indicted individuals were: Sadao Araki, Kenji Doihara, Kingoro Hashimoto, Shunroku Hata, Kiichirō Hiranuma, Kōki Hirota, Naoki Hoshino, Seishiro Itagaki, Okinori Kaya, Kōichi Kido, Heitaro Kimura, Kuniaki Koiso, Iwane Matsui, Yōsuke Matsuoka, Jirō Minami, Akira Mutō, Osami Nagano, Takasumi Oka, Shūmei Ōkawa, Hiroshi Ōshima, Kenryo Sato, Mamoru Shigemitsu, Shigetarō Shimada, Toshio Shiratori, Teiichi Suzuki, Shigenori Tōgō, Hideki Tōjō, and Yoshiji Umezu. *Id.*

⁹⁹ For definitions of these crimes, see IMTFE Charter, *supra* note 6, art. 5.

¹⁰⁰ See DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra* note 6, at 18–33.

¹⁰¹ WHITNEY R. HARRIS, TYRANNY ON TRIAL: THE TRIAL OF THE MAJOR GERMAN WAR CRIMINALS AT THE END OF WORLD WAR II AT NUREMBERG, GERMANY, 1945-1946, at 543 (1999) (The IMTFE “conducted a trial of major Japanese war criminals in which the Nuremberg pattern was closely followed.”); Whitney R. Harris, *A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court*, 6 WASH. U. GLOBAL STUD. L. REV. 689, 696 (2007) (same).

¹⁰² The Transcripts of the Proceedings, May 3, 1946, *reprinted in* 2 THE TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 32, at 21 [hereinafter The Transcripts of the IMTFE Proceedings].

¹⁰³ BRACKMAN, *supra* note 41, at 18.

¹⁰⁴ The Transcripts of the IMTFE Proceedings, *supra* note 102.

1948.¹⁰⁵ As a result, the IMTFE's proceedings started about a year and a half after the IMT's began and ended approximately two years after the IMT concluded;¹⁰⁶ the IMTFE earned the distinction at that time as "the longest continuous trial in history."¹⁰⁷ The trial also earned the distinction of "absorb[ing] one-quarter of the paper consumed by the Allied Occupation forces in Japan during the Trial."¹⁰⁸ The IMTFE eventually sentenced seven defendants to death by hanging,¹⁰⁹ sixteen to life imprisonment,¹¹⁰ one to twenty years imprisonment,¹¹¹ and one to seven years imprisonment.¹¹² None was acquitted.¹¹³ Three individuals were not sentenced: Two died during the trial,¹¹⁴ and one had been judged unfit for trial.¹¹⁵

On November 24, 1948, MacArthur affirmed the convictions.¹¹⁶ Some of the convicted Japanese immediately filed habeas petitions with the U.S. Supreme Court.¹¹⁷ On December 7, exactly three years after Keenan arrived in Tokyo, the Supreme Court granted the motions (thus staying the sentences).¹¹⁸ Justice Robert Jackson—having returned to the Supreme Court from his post as the IMT's chief U.S. prosecutor—filed a memorandum in that decision explaining his reluctant agreement, because of his involvement in negotiating

¹⁰⁵ Prosecutor v. Araki et al., IMTFE, Judgment (Nov. 4-12, 1948), reprinted in DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra* note 6, at 71 *passim* (including the majority judgment and other opinions).

¹⁰⁶ See Judgment, Monday, September 30, 1946, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411-589 (1948) (containing the IMT's judgment and pronouncement of sentences as read on Sept. 30 - Oct. 1, 1946); see also Judgment of the International Military Tribunal for the Trial of German Major War Criminals, in 1 INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG, GERMANY COMMENCING 20 NOV. 1945 (1946), available at <http://avalon.law.yale.edu/imt/judgen.asp>.

¹⁰⁷ JOHN L. GINN, SUGAMO PRISON, TOKYO: AN ACCOUNT OF THE TRIAL AND SENTENCING OF JAPANESE WAR CRIMINALS IN 1948, BY A U.S. PARTICIPANT 37 (1992).

¹⁰⁸ R. John Pritchard, *The International Military Tribunal for the Far East and its Contemporary Resonances*, 149 MIL. L. REV. 25, 26 (1995).

¹⁰⁹ Those sentenced to death by hanging were Dohihara, Hirota, Itagaki, Kimura, Matsui, Mutō, and Tōjō. See DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra* note 6, at 627-28 (Webb's pronouncement of the sentences).

¹¹⁰ Those sentenced to life imprisonment were Araki, Hashimoto, Hata, Hiranuma, Hoshino, Kaya, Kido, Koiso, Minami, Oka, Ōshima, Sato, Shimada, Shiratori, Suzuki, and Umezū. *Id.*

¹¹¹ The individual sentenced to twenty years imprisonment was Tōgō. *Id.* at 628.

¹¹² The individual sentenced to seven years imprisonment was Shigemitsu. *Id.*

¹¹³ *Id.* at 227-28.

¹¹⁴ Matsuoka and Nagano died during the trial in 1946 and 1947, respectively. See BRACKMAN, *supra* note 41, at 101, 268.

¹¹⁵ Ōkawa had been judged medically unfit for trial. See *id.* at 104.

¹¹⁶ For the text of MacArthur's explanation for not commuting the sentences delivered by the IMTFE, see DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra* note 6, at 70.

¹¹⁷ See GINN, *supra* note 107, at 123.

¹¹⁸ Hirota v. MacArthur, 335 U.S. 876 (1948).

the IMT Charter and then representing the United States at that trial, to cast the tie-breaking vote.¹¹⁹ Oral arguments were then delivered on December 16 and 17, and the Court, without Jackson's participation, announced its per curiam decision three days later.¹²⁰ The Court denied the motions for jurisdictional reasons.¹²¹ Specifically, the IMTFE was an international military tribunal and thus not a U.S. court; rather, it had been established by a U.S. general (MacArthur) acting as the agent of the Allied Powers, including the USG.¹²² The Court reasoned that these circumstances limited the Supreme Court's power to intervene: "[T]he courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners"¹²³ Three days later, the Japanese petitioners the IMTFE had sentenced to death were executed at their place of confinement: Sugamo Prison in the Ikebukuro district of Tokyo.¹²⁴

II. TRANSITIONAL JUSTICE OPTIONS SERIOUSLY CONSIDERED AND IMPLEMENTED FOR ALLEGED JAPANESE WAR CRIMINALS

I have described elsewhere the main transitional justice options that are theoretically possible for confronting alleged atrocity perpetrators: inaction, amnesty, lustration, exile, assassination, prosecution, and various permutations of each.¹²⁵ The IMTFE was only one of several such options seriously considered and actually implemented to address Japanese suspected of committing atrocities during WWII.

This Part summarizes what transitional justice options the Allied Powers—in particular, the USG—considered and then implemented for these Japanese. In doing so, this Part compiles thematically the transitional justice decision-making that was presented chronologically in Part I—while adding discussion of some other decisions. Part II.A describes the impact the existing and ongoing IMT precedent made on deliberations concerning Japanese. Parts II.B and II.C discuss the transitional justice options seriously considered and actually implemented for the primary and lower-level Japanese war criminals, respectively. As discussed below, for each group of alleged atrocity

¹¹⁹ *Id.*

¹²⁰ *Hirota v. MacArthur*, 338 U.S. 197 (1948).

¹²¹ *Id.* at 197–98.

¹²² *Id.* at 197.

¹²³ *Id.* at 198.

¹²⁴ For a description of Sugamo Prison, see GINN, *supra* note 107, at 1–13.

¹²⁵ See Kaufman, *The Future of Transitional Justice*, *supra* note 4, at 61–67.

perpetrators, the general options were the same: prosecution, inaction/amnesty, and lustration.¹²⁶

A. *The Precedent of Addressing Nazis*

Because negotiations leading to the IMT's establishment effectively doubled as the negotiations for creating the IMTFE, options seriously considered for addressing principal Nazi suspects were also implicitly or explicitly considered for addressing the principal Japanese suspects.¹²⁷ However, because the IMT set a precedent for prosecuting atrocity leaders through an international criminal tribunal established by executive fiat, there is little indication that the use of lethal force through extra-judicial summary execution (i.e., assassination), prosecution in an international criminal tribunal established via treaty, or unilateral or bilateral prosecution by individual Allied Powers were considered as seriously for the principal Japanese as they had been for the principal Nazis.¹²⁸ As in the case of dealing with the principal Nazis,¹²⁹ the Allied Powers never seriously considered unilateral prosecution for Class A Japanese war criminals by Japan or even a third-party state (e.g., a neutral country during WWII hostilities).

B. *Primary Japanese War Criminals*

Part I demonstrated that two transitional justice mechanisms USG officials seriously considered for addressing the principal suspected Japanese atrocity perpetrators—the designated Class A Japanese war criminals—were prosecution in an international criminal tribunal established through executive

¹²⁶ During WWII, however, the USG instituted an additional mechanism for confronting people of Japanese descent residing in the United States: indefinite detention. On February 19, 1942, two months after the Japanese attack on Pearl Harbor, FDR signed Executive Order 9066, which empowered the USG to intern Japanese and Japanese-Americans. 7 Fed. Reg. 1407 (1942). It was not until President Gerald Ford's proclamation exactly thirty-four years later that this executive order officially terminated. President Gerald R. Ford's Proclamation No. 4417, *Confirming the Termination of the Executive Order Authorizing Japanese-American Internment During World War II*, (Feb. 19, 1976), available at <http://www.fordlibrarymuseum.gov/library/speeches/760111p.htm> (noting that “[o]ver one hundred thousand persons of Japanese ancestry were removed from their homes, detained in special camps, and eventually relocated”); see also *Korematsu v. United States*, 323 U.S. 214 (1944) (finding constitutional exclusion orders based on Executive Order 9066).

¹²⁷ See Zachary D. Kaufman, *From Nuremberg to The Hague: United States Policy on Transitional Justice* 158 (Dec. 31, 2011) (unpublished Ph.D. dissertation, University of Oxford) (on file with author) [hereinafter *Kaufman Dissertation*].

¹²⁸ See *id.*

¹²⁹ See *id.*

agreement and lustration. The Allies implemented both of these mechanisms, along with a third: inaction/amnesty.

1. Prosecution

For the Class A war criminals the USG and its allies decided to hold accountable through prosecution, the forum was a newly established, ad hoc international military tribunal created outside the UN through an executive order by MacArthur acting as the SCAP.¹³⁰ This tribunal had limited subject-matter (crimes against peace, war crimes, and crimes against humanity), temporal (crimes committed since 1928, when Japanese assassinated Chang Tso-lin, a Chinese warlord), and personal (major war criminals in the Far East) jurisdiction.¹³¹ Unlike the immediate post-Cold War ad hoc tribunals,¹³² the IMT and the IMTFE did not have any institutional overlap.

2. Inaction / Amnesty

Unlike the case of the principal suspected Nazi atrocity perpetrators,¹³³ the USG seriously considered at least one other option for addressing some Class A Japanese war criminals and Hirohito: inaction. While the Allies, including the USG, were trying thousands of Classes A, B, and C Japanese suspected of committing atrocities during WWII, the USG also provided amnesty to other Japanese who were suspected of similarly heinous crimes.¹³⁴ For those Japanese Class A war criminals the USG decided *not* to hold accountable through the IMTFE, the USG released from custody and effectively extended de facto unconditional amnesty. Japanese Emperor Hirohito, who was never taken into Allied custody, also was effectively extended de facto unconditional amnesty.¹³⁵

¹³⁰ The UN Charter was signed on June 26, 1945, and ratified on October 24, 1945. See U.N. Charter; UNITED NATIONS, DIVIDED WORLD: THE UN'S ROLE IN INTERNATIONAL RELATIONS, *supra* note 75, at 6, 529.

¹³¹ IMTFE Charter, *supra* note 6, art. 5

¹³² The UN International Criminal Tribunals for the Former Yugoslavia and for Rwanda share an appeals chamber, and for part of their existence, they also shared a chief prosecutor. See Zachary D. Kaufman, *International Criminal Tribunal for Rwanda*, in 3 ENCYCLOPEDIA OF TRANSITIONAL JUSTICE 233, 235 (Nadya Nedelsky & Lavinia Stan eds., 2012); Zachary D. Kaufman, *The United States Role in the Establishment of the United Nations International Criminal Tribunal for Rwanda*, in AFTER GENOCIDE, *supra* note 2, at 229, 231, 233, 243, 248, 258; Kaufman Dissertation, *supra* note 127, at 8, 55, 276–79.

¹³³ See Kaufman Dissertation, *supra* note 127, at 158.

¹³⁴ See *infra* Part II.C.4, Part IV.D.

¹³⁵ See *infra* Part IV.D.

The U.S. Joint Chiefs of Staff specifically ordered MacArthur not to attempt to apprehend Hirohito as MacArthur made efforts to capture individuals from whom a smaller group of people would eventually be tried before the IMTFE.¹³⁶ MacArthur thus declined to request or even support Hirohito's abdication.¹³⁷ As a result, on June 18, 1946, Keenan announced that Hirohito would not be charged, thus publicly and officially exonerating the emperor of responsibility for Japan's actions during WWII.¹³⁸

A second grant of amnesty occurred after MacArthur selected twenty-eight individuals to indict before the IMTFE from all of the Class A war criminals he detained at Sugamo Prison.¹³⁹ The Allies, led by the USG, eventually released (by December 24, 1948) and never held accountable the more than fifty Class A war criminals remaining, many of whom eventually returned to Japanese politics.¹⁴⁰

3. *Lustration*

The Allied Powers adopted a lustration policy, which MacArthur administered as the SCAP, which purged the principal Japanese war criminals, at least temporarily, from public office. The Class A war criminals not prosecuted were not permitted to immediately serve again in government.¹⁴¹ Some Japanese implicated in or convicted of atrocities, however, would later return to public life, even rising to prominent senior political roles. For example, Mamoru Shigemitsu, whom the IMTFE had convicted on six counts and sentenced to seven years imprisonment,¹⁴² was appointed Japanese Foreign Minister in 1954.¹⁴³ In addition, Nobusuke Kishi, an unindicted Class A war criminal, became Prime Minister in 1957.¹⁴⁴ The USG later would collaborate

¹³⁶ BRACKMAN, *supra* note 41, at 47; Watt, *supra* note 32, at vii, xxi (citations omitted).

¹³⁷ DOWER, *supra* note 8, at 323.

¹³⁸ *Id.* at 467.

¹³⁹ Maga claims, incorrectly, that, "Classified as Class A war criminal suspects, the eighty [indicted men] were tried between May 3, 1946, and November 12, 1948, in Yokohama, near Tokyo." MAGA, *supra* note 5, at 2. Only twenty-eight of the Class A war criminals were indicted by the IMTFE's prosecutors. John Ginn, who worked as a guard at Sugamo Prison during the trials, claims that there were originally eighty-four Class A war criminals held at the prison, from which the twenty-eight eventually tried were chosen. *See* GINN, *supra* note 107, at 44.

¹⁴⁰ BALL, *supra* note 17, at 78; BRACKMAN, *supra* note 41, at 405; GINN, *supra* note 107, at 242; MINEAR, *supra* note 62, at 39.

¹⁴¹ DOWER, *supra* note 8, at 627, n.19.

¹⁴² 103 THE TOKYO MAJOR WAR CRIMES TRIAL, *supra* note 32 (transcript of Webb's pronouncement of the judgment).

¹⁴³ BRACKMAN, *supra* note 41, at 411.

¹⁴⁴ *Id.* at 385.

with many of these convicted or suspected war criminals in efforts to combat communism.¹⁴⁵ That the USG “embraced many erstwhile war criminals in the common cause of anticommunism,” Dower states, “gave a perverse binational coloration to this repudiation of the [IMTFE’s] verdict.”¹⁴⁶

C. Lower-Level Japanese War Criminals

The USG and some other Allies seriously considered and implemented at least five transitional justice options for addressing Japanese suspected of committing lesser atrocities: (1) prosecution in U.S. military tribunals, (2) prosecution in U.S. civilian courts, (3) prosecution in military courts established by other states, (4) inaction through de facto amnesty, and (5) lustration. Those Japanese whom the USG and its allies decided to hold accountable were prosecuted through unilateral ad hoc Allied military tribunals (options 1 and 2). Some of those cases were (unsuccessfully) appealed to the USG’s permanent domestic federal judiciary, including the U.S. Supreme Court (option 3). Many of these and other Japanese Class B and C war criminals also were the targets of lustration (option 4). Others whom the USG did not hold accountable, including several thousand Japanese involved in medical experimentation, were effectively provided de facto conditional amnesty (option 5) because the USG presumably would have revoked immunity had they not cooperated.

1. Prosecution in U.S. Military Tribunals

Although the decision was made to prosecute only some of the Class A war criminals before an international military tribunal, the USG addressed suspects of Classes B and C through an alternative transitional justice option. On September 12, 1945, Truman ordered the U.S. Joint Chiefs of Staff to instruct MacArthur to try apprehended Japanese suspected of committing atrocities before unilateral ad hoc U.S. military tribunals.¹⁴⁷ This directive, aimed at “smaller fish” (Classes B and C),¹⁴⁸ was thus separate from the one that established the IMTFE for the principal (Class A) alleged Japanese atrocity perpetrators.

¹⁴⁵ DOWER, *supra* note 8, at 474.

¹⁴⁶ *Id.*

¹⁴⁷ *In re Yamashita*, 327 U.S. 1, 10–11 (1946).

¹⁴⁸ See *supra* text accompanying 55.

From 1945, a year before the IMTFE began operations, to 1951, several years after the IMTFE had rendered its verdict, the USG held trials of Classes B and C Japanese before these ad hoc U.S. military tribunals in Japan and in other territories the Japanese formerly occupied, including China and the Philippines.¹⁴⁹ Through these tribunals, the USG tried 1409 Japanese, convicting 1229 of them; 163 received death sentences.¹⁵⁰ As such, the United States officially prosecuted more Japanese through *bona fide* trials than any other state.¹⁵¹ Some argue that, because of their organizing authority (under MacArthur as the SCAP), these U.S. military tribunals were technically Allied tribunals.¹⁵² According to Dower, unlike the IMTFE, “these local trials established no precedents, attracted no great attention, and left no lasting mark on popular memory outside Japan.”¹⁵³ Some, however, stress these military tribunals’ significance. As historian Philip Piccigallo observes:

[F]or all its importance, the IMTFE constituted but a small part of a much larger process . . . [the Allied military trials] by far exceed[ed] in scope and ambition those of the IMTFE The Tokyo Tribunal, in short, was a constituent part of the entire Allied Eastern war crimes operation, albeit the most celebrated, longest, most discussed and, some felt, most important single component.¹⁵⁴

2. Prosecution in U.S. Civilian Courts

Some convictions before these ad hoc military tribunals achieved additional prominence when the affected defendants appealed to the U.S. Supreme Court. The most famous of these cases was the trial of Tomoyuki Yamashita, who—as the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands from October 9, 1944, until September 3, 1945 (the date he surrendered to the U.S. Army)—oversaw the commission of mass atrocities.¹⁵⁵ Yamashita was subsequently categorized as a Class B war criminal for his alleged command responsibility during these offenses.¹⁵⁶ He was tried by an ad hoc U.S. military commission in Manila

¹⁴⁹ TANAKA, *supra* note 16, at 2.

¹⁵⁰ PICCIGALLO, *supra* note 26, at 95 tbl. For a description and analysis of some of these trials, see BALL, *supra* note 17, at 74; GINN, *supra* note 107, at 56–119; MAGA, *supra* note 5, at 1–33, 93–119.

¹⁵¹ PICCIGALLO, *supra* note 26, at 6.

¹⁵² See, e.g., BRACKMAN, *supra* note 41, at 53.

¹⁵³ DOWER, *supra* note 8, at 443–44.

¹⁵⁴ PICCIGALLO, *supra* note 26, at 32.

¹⁵⁵ *In re Yamashita*, 327 U.S. 1, 5, 14 (1946).

¹⁵⁶ Kaufman Dissertation, *supra* note 127, at 153.

from October 8 to December 7, 1945, and sentenced to death by hanging.¹⁵⁷ Yamashita appealed his conviction to the U.S. Supreme Court, which heard his argument on January 7–8, 1946.¹⁵⁸ He argued that the U.S. military commission that had tried, convicted, and sentenced him possessed neither the authority nor the jurisdiction to do so and that he had been denied due process of law.¹⁵⁹ The Court rendered its judgment in the *Yamashita* case on February 4, 1946, upholding the jurisdiction of the U.S. military commission and therefore dismissing Yamashita's appeal.¹⁶⁰ He was subsequently executed on February 23, after MacArthur decided not to exercise his authority to intervene.¹⁶¹ Because the *Yamashita* case was the first war crimes trial charging a military officer (who had not been accused of personally committing atrocities) with a failure to exercise control over persons under his command who allegedly had perpetrated the underlying offenses, it established the U.S. legal standard concerning "command responsibility."¹⁶² For this reason—and also because it was a high-profile forerunner to the IMTFE—the *Yamashita* case is better known in some circles than the IMTFE itself.¹⁶³

3. Prosecution in Military Courts Established by Other States

Six other Allied states—Australia, China, France, the Netherlands, the Philippines, and the United Kingdom—also held their own unilateral ad hoc military tribunals.¹⁶⁴ In total, between 1945 and 1951, 2200 ad hoc Allied military tribunals tried approximately 5700 Classes B and C war criminals, convicting 4400 of them.¹⁶⁵ Of the remaining suspects, 1018 were acquitted and 279 were either never tried or not sentenced.¹⁶⁶ Approximately seventy-five percent of all of these defendants were charged with offenses against POWs.¹⁶⁷ These trials were not wholly disconnected from the IMTFE; in fact,

¹⁵⁷ *In re Yamashita*, 327 U.S. at 5.

¹⁵⁸ *Id.* at 1.

¹⁵⁹ *Id.* at 6.

¹⁶⁰ *Id.* at 1, 25–26.

¹⁶¹ A. FRANK REEL, *THE CASE OF GENERAL YAMASHITA* 234, 239 (1949).

¹⁶² *Id.* at 1; LAEL, *supra* note 27, at xi.

¹⁶³ MAGA, *supra* note 5, at 18.

¹⁶⁴ TANAKA, *supra* note 16, at 2.

¹⁶⁵ 984 were sentenced to death (920 of whom were actually executed), 475 were sentenced to life imprisonment, and 2944 were sentenced to more limited prison terms. *Id.*; DOWER, *supra* note 8, at 447.

¹⁶⁶ DOWER, *supra* note 8, at 447; TANAKA, *supra* note 16, at 2. For a description of some of these Allied trials, see, e.g., GINN, *supra* note 107, at 56–119. Some of the Class B and C war criminals faced multiple trials. MINEAR, *supra* note 62, at 6 n.3.

¹⁶⁷ DOWER, *supra* note 8, at 447.

some of the records of the unilateral ad hoc military trials were used in the proceedings of the IMTFE.¹⁶⁸

The unilateral prosecutions conducted by the Soviet Union are particularly noteworthy given how many were mostly show trials. The Soviet Union conducted these trials summarily, after which the Soviet government probably executed as many as 3000 Japanese.¹⁶⁹ These trials were propaganda tools. As former U.S. Army attorney and legal academic Robert Barr Smith recounts:

The Russian trials were mostly pulpits for propaganda attacks on the West. The “imperialist policy” of their erstwhile allies, said the Russians, had led them to abandon “the struggle against war criminals.” The Russians never tired of harping on Western decisions not to try the “greedy capitalists,” the zaibatsu of Japanese industry. . . . [The] Communist media let the world know that “Japan and its American allies” were plotting to use . . . hideous [biological] weapons against Russia. . . . The West had “unleashed the most inhuman carnage in history, warfare with the assistance of microbes, fleas, lice and spiders”¹⁷⁰

Unilateral prosecution through ad hoc Allied military tribunals thus served not only to supplement the IMTFE’s proceedings but also to foreshadow—and even, because of Soviet propaganda, to foment—the coming Cold War.

4. *Inaction Through De Facto Amnesty*

The USG offered immunity and other incentives—including money, food, and entertainment—to over 3600 Japanese government agents, physicians, and scientists involved in Japanese experiments performed during WWII on thousands of civilians and Allied soldiers, possibly including American POWs.¹⁷¹ The Imperial Japanese Army’s Unit 731, led by Lieutenant General Shiro Ishii, conducted the most notorious research in Manchuria. These experiments, also known as the “Asian Auschwitz,” included vivisections, dissections, weapons testing, starvation, dehydration, poisoning, extreme temperature and pressure testing, and deliberate infection with numerous

¹⁶⁸ Horwitz, *supra* note 20, at 521.

¹⁶⁹ DOWER, *supra* note 8, at 449.

¹⁷⁰ Robert Barr Smith, Japanese War Crime Trials, *WORLD WAR II MAG.*, Sept. 1996, available at <http://www.historynet.com/japanese-war-crime-trials.htm>.

¹⁷¹ Zachary D. Kaufman, *Transitional Justice Delayed is not Transitional Justice Denied: Contemporary Confrontation of Japanese Human Experimentation During World War II Through a People’s Tribunal*, 26 *YALE L. & POL’Y REV.* 645, 647 (2008) [hereinafter Kaufman, *Transitional Justice Delayed is not Transitional Justice Denied*].

deadly diseases, such as bubonic plague, cholera, anthrax, smallpox, gangrene, streptococcus bacteria, and syphilis.¹⁷² The Japanese intended to transform the research from these experiments into biological weapons to attack the U.S. military in the Pacific and possibly even America's West Coast.¹⁷³ After being granted immunity, some Japanese participants in these experiments assumed prominent roles—including senior positions in the health ministry, academia, and the private sector—in postwar Japanese society, allegedly with the assistance or at least knowledge of the USG.¹⁷⁴

Through each of their conscious decisions not to hold alleged perpetrators accountable, the Allies, including the USG, provided de facto amnesty to thousands of Japanese suspected of direct involvement in some of the most horrific crimes of WWII, including those who participated in offenses allegedly planned and perpetrated against Americans.

5. *Lustration*

Finally, through the Allied lustration policy, by mid-1948 more than 200,000 Japanese had been removed or barred, at least temporarily, from public office.¹⁷⁵

III. THE UNITED STATES ROLE IN “TOKYO”

The USG is not currently a party to the Rome Statute, the treaty that established the International Criminal Court, the world's first permanent international war crimes tribunal. Indeed, the United States was one of only seven countries that voted against the Rome Statute when it was adopted in 1998.¹⁷⁶

However, the United States was the most critical actor in what became known as “Tokyo.” The USG served as the foremost proponent and host of

¹⁷² *Id.* at 646 n.3.

¹⁷³ *Id.* at 646.

¹⁷⁴ *Id.* at 647.

¹⁷⁵ *See, e.g.*, HANS H. BAERWALD, *THE PURGE OF JAPANESE LEADERS UNDER THE OCCUPATION* 99 (1959).

¹⁷⁶ For an explanation of the U.S. vote against the Rome Statute from the senior American diplomat involved in the treaty's negotiations, see DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 163–247 (2012); David J. Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 21–22 (1999). For an analysis of options for future U.S. engagement with the Rome Statute, see Zachary D. Kaufman, *The United States, Syria, and the International Criminal Court: Implications of the Rome Statute's Aggression Amendment*, 55 HARV. INT'L L.J. ONLINE 35, 41–43 (2013).

discussions leading to the creation of the IMTFE, including by successfully lobbying for the creation of the UNWCC's Special Far Eastern and Pacific Committee.¹⁷⁷ The 1945 Moscow Agreement laid out the general role of the USG in postwar Japan's occupation, including its transitional justice process.¹⁷⁸ This function included, *inter alia*, the USG's responsibilities with respect to the FEC.¹⁷⁹ The USG was tasked with hosting the FEC's headquarters in Washington, D.C. and, on behalf of the four signatories to the Moscow Declaration, presenting the Terms of Reference of the FEC to other specified governments and inviting them to participate.¹⁸⁰

The USG was responsible for producing the initial draft of the IMTFE Charter and then for lobbying the other Allies to accept it with minimal changes.¹⁸¹ As such, the USG effectively made all of the design decisions, modeled on the IMT, and then presented its plan to the other Allies as a *fait accompli*. Yves Beigbeder, who served as legal secretary to the IMT's French judge, thus calls the IMTFE Charter "essentially an American project."¹⁸² The USG also asserted its cultural dominance in the design of the IMTFE, by having English serve as the only official language other than Japanese and in having so much of the tribunal's design and operation based on the American system of law and criminal justice.¹⁸³ The USG had such significant—even unilateral—authority over the transitional justice process for Japan largely because of the practical fact that it led the Japanese occupation, at least in the short-term. As Dower recounts of the September 1945 USG orders to MacArthur:

The original directives, although known and approved by the other allied nations, represented unilateral action on the part of the United States. This method of operation was not limited to the question of war crimes. It was a temporary device for conducting a joint occupation under the command of a national of one of the allied nations until the joint machinery for carrying on such an occupation could be perfected.¹⁸⁴

¹⁷⁷ See *supra* text accompanying note 32.

¹⁷⁸ See *supra* Part I.B.5.

¹⁷⁹ *Interim Meeting*, *supra* note 67, at § II.A.III.

¹⁸⁰ *Id.* at §§ II.A.III, II.A.VI.

¹⁸¹ See MINEAR, *supra* note 62, at 20; PICCIGALLO, *supra* note 26, at 11.

¹⁸² BEIGBEDER, *supra* note 16, at 55.

¹⁸³ Horwitz, *supra* note 20, at 485, 565.

¹⁸⁴ *Id.* at 480–81.

The USG dominated prosecution at the IMTFE. An American served as the sole chief prosecutor and Americans comprised not only the plurality of nationalities represented on the IPS's Executive Committee, but also half of the IPS itself.¹⁸⁵ The USG provided the first legal staff to arrive in Tokyo, thus leading the early work of the IMTFE.¹⁸⁶ Furthermore, the USG supplied a significant share of eyewitnesses, experts, and senior political and military officials who testified at the IMTFE.¹⁸⁷

The USG also contributed a great amount of assistance to the IMTFE defendants. Unlike at the IMT,¹⁸⁸ the USG furnished Americans to serve as defense counsel alongside the Japanese at the IMTFE. Not only did the USG pay the salaries of all American defense counsel, but it also spent millions of U.S. dollars on the transportation and accommodation of all defense counsel in their overseas trips (to China, Germany, the United Kingdom, and the United States) to obtain evidence and locate witnesses.¹⁸⁹ As such, the USG involvement in the defense led the Dutch judge on the IMTFE, Bernard Röling, to conclude that the Americans "dominated the defen[s]e."¹⁹⁰ Furthermore, the USG saved Tōjō's life after his failed suicide attempt.¹⁹¹ As Arnold Brackman, a journalist who covered the IMTFE trials, reported on the incident: "The tough old warrior was rushed to a U.S. Army field hospital and given transfusions of American blood."¹⁹²

In addition to dominating the prosecution and arguably also the defense, the USG eventually would lead the most important aspect of the bench. For reasons unknown (because they are not documented), the power of presiding over the drafting of the IMTFE's decision shifted from Australian Chief Judge/President Webb to American judge Cramer, who chaired the seven-member Majority Drafting Committee.¹⁹³

Perhaps the most obvious way that the USG dominated the establishment of the IMTFE was the fact that a senior American military officer served as the SCAP. As Piccigallo observes, the IMTFE "functioned throughout under the

¹⁸⁵ *Id.* at 490; BALL, *supra* note 17, at 76.

¹⁸⁶ *See* Horwitz, *supra* note 20, at 494.

¹⁸⁷ *Id.* at 509, 517–18.

¹⁸⁸ Kaufman Dissertation, *supra* note 127, at 149–50.

¹⁸⁹ Pritchard, *supra* note 108, at 31; Smith, *supra* note 170; Kaufman Dissertation, *supra* note 127, at 149–50.

¹⁹⁰ RÖLING, *supra* note 78, at 37.

¹⁹¹ GINN, *supra* note 107, at 16.

¹⁹² BRACKMAN, *supra* note 41, at 44.

¹⁹³ *Id.* at 365–66.

all-pervading shadow of SCAP.”¹⁹⁴ The IMTFE provided enormous powers to MacArthur. He was responsible for appointing most of the senior officers of the tribunal: the judges,¹⁹⁵ including the Chief Judge/President of the tribunal,¹⁹⁶ the General Secretary,¹⁹⁷ and the Chief of Counsel (chief prosecutor).¹⁹⁸ In addition to choosing, as noted, an American to serve as chief prosecutor, MacArthur also chose an American, Colonel Vern Walbridge, to serve as the General Secretary.¹⁹⁹ Furthermore, MacArthur could exercise judicial review, so he literally held the power to make decisions over life and death.²⁰⁰ In this sense, MacArthur therefore wielded a power similar to that in the United States of a governor or the president to grant clemency for a convict on death row. As yet another example of USG influence over the IMTFE, the chairman of the ACJ, which consulted with MacArthur during the sentencing review process, was William Sebald, the U.S. representative.²⁰¹ Moreover, it was the USG that made the decision to release the remaining Class A war criminals who were not indicted by the IMTFE.²⁰²

The USG therefore was the most crucial actor in the establishment of the IMTFE. As political scientist Howard Ball argues: “The United States was the prime mover in the creation and implementation of the [IMTFE].”²⁰³ Dower concurs, arguing, “the American control of prosecution policy and strategy bordered on the absolute.”²⁰⁴ Some tribunal participants agree. As Rōling observes, the IMTFE “was very much an American performance.”²⁰⁵ Even those who reviewed appeals from the IMTFE shared these sentiments. As U.S. Supreme Court Justice William Douglas observed, “the [IMTFE] is dominated by American influence.”²⁰⁶ The fact of U.S. dominance was not lost on Americans involved in the trials. Anticipating criticisms of their heavy influence, some American participants proactively sought to undermine this charge for fear of how the perception might affect the IMTFE’s functioning

¹⁹⁴ PICCIGALLO, *supra* note 26, at 6.

¹⁹⁵ See IMTFE Charter, *supra* note 6, art. 2.

¹⁹⁶ See *id.* art. 3(a).

¹⁹⁷ See *id.* art. 3(b)(1).

¹⁹⁸ See *id.* art. 8(a).

¹⁹⁹ See BRACKMAN, *supra* note 41, at 72.

²⁰⁰ IMTFE Charter, *supra* note 6, art. 17.

²⁰¹ MINEAR, *supra* note 62, at 164–65.

²⁰² Awaya Kentarō, *In the Shadows of the Tokyo Tribunal*, in THE TOKYO WAR CRIMES TRIAL: AN INTERNATIONAL SYMPOSIUM 79, 83–84 (C. Hosoya et al. eds., 1986).

²⁰³ BALL, *supra* note 17, at 76.

²⁰⁴ DOWER, *supra* note 8, at 458.

²⁰⁵ RÖLING, *supra* note 78, at 31.

²⁰⁶ *Hirota v. MacArthur*, 338 U.S. 197, 207 (1948) (Douglas, J., concurring).

and success. Keenan, for example, urged that the “international character of the court and of the authority by which it is appointed should be properly recognized and emphasized, particularly in dealings with the Japanese people.”²⁰⁷

Some even argue that the USG’s dominance in the establishment of the IMTFE was so great that it defined the tribunal itself. First, some state that the IMTFE was a misnomer. As Dower contends,

The top-level war-crimes trials that accompanied the occupation, formally known as the International Military Tribunal for the Far East . . . were misleadingly named. An international panel of judges did preside and the president of the tribunal was Australian, but the Tokyo trial was a predominantly American show. Americans dominated the [IPS] that set the agenda for the tribunal, and they brooked scant internal dissent from other national contingents.²⁰⁸

Others claim that the USG’s dominance of the IMTFE exceeded that of the IMT. As commentator Wu Tianwei states: “Although the United States played a major role in both the Nuremberg and Tokyo trials, having had her legal views and opinions well pronounced, she virtually dominated the latter, in which her policy toward Japan took precedence.”²⁰⁹ The IMTFE appears to be one of—if not the—most unilateral, in terms of the establishment, design, staffing, and procedure of all the international criminal tribunals ever created. Consequently, the United States would forever be linked with evaluations of the IMTFE. As IMTFE defense counsel Ben Blakeney, an American, argues, “it is to the United States that will inure, in great measure, the credit or discredit which history will attach to the proceedings of the [IMTFE]—and not history only, but contemporary opinion.”²¹⁰

Beyond the USG writ large, the role of individual USG officials in the establishment of the IMTFE cannot be overstated. As the IMT served as the model for the IMTFE, all of those who contributed to the establishment of the

²⁰⁷ FAR E. COMM’N, APPREHENSION, TRIAL, AND PUNISHMENT OF WAR CRIMINALS IN THE FAR EAST, reprinted in 16 DEP’T ST. BULL. 804, 804 (1947).

²⁰⁸ DOWER, *supra* note 8, at 74.

²⁰⁹ Wu Tianwei, *The Failure of the Tokyo Trial*, CENTURY OF CHINA, 1995, available at www.zzwave.com/cmfweb/wihist/japdeny/tokyo-trial.html.

²¹⁰ MAGA, *supra* note 5, at 63 (quoting Petition to the Supreme Commander for the Allied Powers for Review of the Verdict and Sentence of the International Military Tribunal of the Far East in the Case of Tōgō Shigenori at 23 (Nov. 19, 1948), available at https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?page number=1&documentdate=1948-11-19&documentid=1-8&studycollectionid=nuremberg).

IMT thus implicitly contributed to the establishment of the IMTFE. Those individuals include Lieutenant Colonel Murray Bernays, Raphael Lemkin, Jackson, Secretary of War Henry Stimson, Treasury Secretary Henry Morgenthau, Jr., FDR, and Truman.²¹¹ In the case of the IMTFE, several other individuals made important contributions. Pell, as the U.S. representative on the UNWCC, prompted the coordinated international investigation of alleged Japanese atrocities by successfully lobbying for the establishment of the UNWCC's Special Far Eastern and Pacific Committee.²¹² Pell's leadership was so widely known that international efforts to investigate alleged Japanese atrocities were referred to by some American allies as "Pell's cause."²¹³ Keenan played an incalculably critical role in leading the IMTFE's investigation and prosecution, and in negotiating decisions on which Japanese to indict in the first place.²¹⁴ MacArthur's influence was felt through his various establishment, appointment, and review powers. Also, although Keenan led the Allied decision-making on which Japanese to indict, MacArthur (in consultation with Truman and other senior USG officials) made the decision against indicting Hirohito.²¹⁵ The individual Justices of the U.S. Supreme Court played a critical role in deciding against reviewing the IMTFE's judgment. Finally, Truman decided to appoint MacArthur as the SCAP and issued numerous directives to him, thus overseeing the overall establishment and operation of the IMTFE.

Besides the United States, certain other states played important roles in the establishment of the IMTFE. According to Horwitz, the IMTFE indictment "was largely a British document," owing in large part to the fact that the subcommittee tasked with preparing the indictment was headed by the U.K.'s associate prosecutor, Arthur Comyns-Carr.²¹⁶ The United Kingdom also exercised significant influence because Comyns-Carr chaired the Chief Prosecutor's Executive Committee, which oversaw the selection of IMTFE defendants.²¹⁷ In addition, Australia significantly impacted the proceedings, as MacArthur appointed its representative on the bench to be the IMTFE's Chief

²¹¹ See Kaufman Dissertation, *supra* note 127, at 97, 103–08, 128, 148.

²¹² See MAGA, *supra* note 5, at 28.

²¹³ See *id.* at 29 (citations omitted) (quoting French and Dutch officials).

²¹⁴ BOISTER & CRYER, *supra* note 1, at 50–54.

²¹⁵ MAGA, *supra* note 5, at 35.

²¹⁶ Horwitz, *supra* note 20, at 498.

²¹⁷ GINN, *supra* note 107, at 43–44. For a description of the selection of the accused, see, e.g., BOISTER & CRYER, *supra* note 1, at 50–54; BRACKMAN, *supra* note 41, at 75–82; MINEAR, *supra* note 62, at 93–117; PICCIGALLO, *supra* note 26, at 14–16; Horwitz, *supra* note 20, at 495–98.

Judge/President. Finally, since the IMTFE's Charter was almost wholly a copy of the IMT's Charter, those states involved in drafting the latter document—France, the Soviet Union, the United Kingdom, and the United States²¹⁸—implicitly contributed to drafting the former document.

IV. EXPLAINING THE UNITED STATES ROLE IN THE ESTABLISHMENT OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

Throughout the negotiations leading to the establishment of the IMTFE, several events occurred that were surprising or counterintuitive and thus demand additional scrutiny. This Part explores several of those puzzles involving the USG to understand further the process leading to the creation of the IMTFE and implementation of other transitional justice mechanisms.

A. *The United States Government's Motivations To Lead the Transitional Justice Institution for Japan*

First, why did the USG take such a leading role in the establishment of the IMTFE? The USG's involvement was, in many ways, even greater than its role in the establishment of the IMT. This is somewhat unexpected, especially considering that the United States suffered more casualties in the European Theater²¹⁹ and that Americans were (and still are) more familiar with individual Nazi leaders and their crimes.²²⁰

There are three likely, perhaps mutually supportive, political reasons for the USG's motive to lead the transitional justice process for Japanese suspected of committing atrocities during WWII. First, the USG was undoubtedly highly sensitive to the fact that Americans suffered more at the hands of Japanese than Germans. In the European Theater, the United States incurred comparatively fewer deaths than its allies, whereas in the Pacific Theater, Americans bore as many or more deaths than many of their allies.²²¹ In particular, the United States had withstood Japan's surprise attack on Pearl Harbor. Japanese

²¹⁸ London Agreement, *supra* note 36.

²¹⁹ Of a total of 16,354,000 Americans who served in WWII, 405,400 were killed or went missing, 670,800 were wounded, and 139,700 were POWs. During campaigns in Northwest Europe, Tunisia, and Italy, a total of 143,000 Americans were killed or went missing and 448,090 were wounded, as compared to a total of 58,710 Americans who were killed or went missing and 164,830 who were wounded during campaigns in Southeast Asia and the Pacific. JOHN ELLIS, *WORLD WAR II: A STATISTICAL SURVEY: THE ESSENTIAL FACTS AND FIGURES FOR ALL THE COMBATANTS* 254–56 (1993).

²²⁰ BRACKMAN, *supra* note 41, at 23.

²²¹ Watt, *supra* note 32, at x.

treatment of American POWs was arguably more brutal than the Axis powers' practices in Europe. While four percent of Allied POWs captured by Germans and Italians died while imprisoned, almost seven times as many Allied POWs (twenty-seven percent) detained by the Japanese died (mostly from murder, disease, starvation, or torture). Death rates among Americans imprisoned by the Japanese even exceeded the average among the Allies: Of 21,580 American POWs held by the Japanese, 7107, or 32.9%, died.²²² Consequently, according to Dower: "Long after the war had ended, and notwithstanding the revelation of the enormity of Nazi atrocities, great numbers of Americans, British, and Australians continued to believe that the enemy in Asia had been even more heinous than the German one."²²³ As a result of this perceived disparity, some believe that the IMTFE was "a vehicle for America's taking revenge" against the Japanese.²²⁴ As Beigbeder observes, some experts believe that "MacArthur's real aim was to avenge the treacherous attack on Pearl Harbor, which had brought humiliation on the US nation and its military forces"²²⁵

The USG likely was motivated not only by retrospective but also prospective concerns. Thus, a second explanation is that the USG wished to assert its presence in Asia, where American and Soviet spheres of influence were less defined, in large part to stem the spread of communism from the Soviet Union. In fact, some commentators connect this very objective—intimidating the Soviet Union and demonstrating American military preeminence—to the USG's deployment of atomic bombs in Japan.²²⁶ By leading the transitional justice institution for Japan, along with a greater role in the occupation, the United States could raise its stature and position in Asian—and global—affairs.

Third, discrimination probably also drove USG decision-making, at least subconsciously. Dower contends that because of its "reflective ethnocentrism," the USG "excluded Japan's Asian antagonists from any meaningful role in the occupation."²²⁷ Not content to allow Asians (particularly Chinese)—who had suffered as much or more than Americans—to play a

²²² TANAKA, *supra* note 16, at 3; *see also* BALL, *supra* note 17, at 84.

²²³ DOWER, *supra* note 8, at 446.

²²⁴ Antonio Cassese, *Introduction to THE TOKYO TRIAL AND BEYOND*, *supra* note 78, at 5; *see also* RÖLING, *supra* note 78, at 78–81.

²²⁵ BEIGBEDER, *supra* note 16, at 61.

²²⁶ *See, e.g.*, GAR ALPEROVITZ, *ATOMIC DIPLOMACY: HIROSHIMA AND POTSDAM* 234–35 (1994); ALPEROVITZ, *supra* note 40, at 127–29.

²²⁷ DOWER, *supra* note 8, at 419.

leading role in establishing and operating the IMTFE, the USG seized the initiative.

Beyond the likely reasons that motivated the USG to take such a leading role in the establishment of the IMTFE, there are some unlikely reasons, as well. International law scholar Antonio Cassese stated that some believe that the IMTFE was “a means of assuaging American national guilt over the use of atomic weapons in Japan.”²²⁸ I have found no evidence to suggest that this motive was held by USG officials or that many scholars believe this assertion.

B. Other States’ Motivations To Defer to the United States in Leading the Transitional Justice Institution for Japan

Just because the USG may have wanted to lead the transitional justice institution for Japan need not have meant that other states would follow suit. A second question, therefore, is why the USG’s allies decided to defer to the USG taking such a prominent role in the establishment of the IMTFE. As Dower observes, “[a]lthough the countries Japan had invaded and occupied were all Asian, and although the number of Asians who had died as a consequence of its depredations was enormous, only three of the eleven judges were Asians. . . . The trial was fundamentally a white man’s tribunal.”²²⁹ The U.S.’s commanding role was especially unanticipated considering that some of the USG’s allies suffered much more from Japanese activities than the United States. Most significantly, China was the greatest victim of Japanese atrocities, with approximately six million Chinese having been killed, in what is sometimes referred to as “the forgotten Holocaust.”²³⁰

The authority to lead Japan’s transitional justice process was not based, though, solely on victimhood. Instead, it was grounded at least as much in global power. The USG’s allies were content to defer to it because the USG was both willing and able to oversee the post-conflict occupation and administration of Japan, including the IMTFE.²³¹ In contrast to the European Theater, in which the victorious powers each played a substantial role and each placed a significant military presence in postwar Germany, it was almost exclusively the United States that led the Allied defeat of Japan and which

²²⁸ Antonio Cassese, *supra* note 224, at 5.

²²⁹ DOWER, *supra* note 8, at 469.

²³⁰ CHANG, *supra* note 16, at 199–214, 216–17.

²³¹ See PICCIGALLO, *supra* note 26, at 6–7.

stationed a disproportionate amount of troops on Japanese territory.²³² In some ways, precisely because the USG deferred to other states to shoulder the burden of fighting Japan earlier in WWII, those states' resources were then depleted and so they deferred to the USG to shoulder the burden of dealing with post-conflict Japan. The United States not only won the Pacific War but also established itself, with the atomic bombings of Nagasaki and Hiroshima and its subsequent occupation of and overwhelming military presence in Japan, as by far the strongest power in Asia, if not the world.²³³ Thus the USG's dominance in the IMTFE reflected the fact that the USG also dominated the occupation of Japan.²³⁴ Specifically referring to the fact that the IMTFE's single chief prosecutor was American, whereas the IMT had four chief prosecutors, Horwitz observes:

While this plan was wholly consonant with the principles governing the occupation of Japan, it was an unusual departure from ordinary international practice. For the first time eleven nations had agreed in a matter other than actual military operations to subordinate their sovereignty and to permit a national of one of them to have final direction and control.²³⁵

American postwar hegemony, at least regionally, was therefore clear. As Watt argues, “[t]hat America should lead in matters concerned with war crimes trials was only one facet, albeit an important one, of that fact.”²³⁶ The United States even had enough resources to provide much of the funding for, and staff of, the IMTFE, which further compelled its allies to let the United States lead the IMTFE effort.²³⁷ American prosecutors at the IMTFE made similar arguments at the time, pointing out the USG's “predominant contribution” to defeating Japan and therefore claiming that “it was the universally admitted right and duty of the United States” to oversee Japanese war crimes trials.²³⁸ The United States' WWII Asian allies, crippled by and suffering from the war, deferred to it on the occupation of, and transitional justice process for, Japan, mostly because there was nothing else they could do about the inertia built from, and the hierarchy derived by the USG's leadership in, winning the Pacific Theater.

²³² See *id.* at 6.

²³³ See *id.*

²³⁴ See, e.g., *id.*

²³⁵ Horwitz, *supra* note 20, at 486–87.

²³⁶ Watt, *supra* note 32, at ix.

²³⁷ Tianwei, *supra* note 209.

²³⁸ PICCIGALLO, *supra* note 26, at 6–7.

C. *The Appointment of a Non-American as Chief Judge/President of the International Military Tribunal for the Far East*

A particularly puzzling feature of the establishment of the IMTFE was the selection of its Chief Judge/President. Why did MacArthur, who, according to the IMTFE Charter held the unilateral power to appoint whomever he wished, select a non-American (Webb) to serve as the head jurist and presiding officer of the tribunal? MacArthur's choice is especially unanticipated given the following circumstances: (1) MacArthur need not have consulted any other state in this appointment; (2) the tribunal's Chief Judge/President held significant power because his vote could break any ties in the tribunal's decisions and judgments (including convictions and sentences);²³⁹ and (3) the IMT already featured a non-American (U.K. Colonel Sir Geoffrey Lawrence) as its Chief Judge/President.²⁴⁰

MacArthur initially did, in fact, plan to appoint the American judge as the IMTFE's Chief Judge/President. However, that plan was foiled by Keenan's outrage at the appointment of Higgins, whom Keenan did not consider prominent enough to assume his seat on the IMTFE's bench.²⁴¹ Keenan had instead lobbied for the appointment of any of the following, in descending order of preference: Willis Smith, President of the American Bar Association; Roscoe Pound, Dean of Harvard Law School; a federal appellate judge; or a military official holding a rank no less than major general.²⁴² In Keenan's view, the selection of a member of the Superior Court of Massachusetts was not on par with the prestige and position of the nominees from each of the other states represented on the IMTFE's bench, nor the USG's own senior members of the IMT.²⁴³ Indeed, the chief prosecutor, Jackson, was a member of the U.S. Supreme Court, and one of the judges, Francis Biddle, was the U.S. Attorney General.²⁴⁴

By the time MacArthur was to appoint the IMTFE's Chief Judge/President, the USG's allies had already expressed interest in playing a more direct and prominent role in post-conflict occupation and transitional justice issues in Japan; several of them had recently lobbied for a more directly and officially

²³⁹ IMTFE Charter, *supra* note 6, art. 4(b).

²⁴⁰ 1 INT'L MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 1 (1947).

²⁴¹ See BRACKMAN, *supra* note 41, at 63–64.

²⁴² *Id.* at 63.

²⁴³ *Id.* at 64.

²⁴⁴ *Id.* at 70–71; 1 INT'L MILITARY TRIBUNAL, *supra* note 240, at 1.

involved FEC to replace the FEAC.²⁴⁵ Precisely because MacArthur had already appointed an American to be the IMTFE's single chief prosecutor, the only senior role left to fill with a non-American could be the tribunal's Chief Judge/President. If MacArthur wanted to accommodate the USG's allies by broadening the decision-making authority of transitional justice for Japan and to dampen allegations and criticisms that the process was dominated by the USG, this was the prime opportunity.

MacArthur was familiar with Webb's work and views on Japanese atrocities. Webb had been involved in the Australian War Crimes Commission, through which, between 1943 and 1945, he produced three prominent reports on Japanese wartime atrocities.²⁴⁶ Webb's home country of Australia had been a victim of Japanese atrocities, and it was a strong ally of and had a similar judicial system (at least more so than Asian states) to the United States.²⁴⁷ Perhaps most crucially, Webb was a personal friend of MacArthur.²⁴⁸ MacArthur was therefore sufficiently informed about Webb's background and views to be reasonably confident that Webb would preside similarly to any American jurist MacArthur would otherwise appoint. And, just in case, MacArthur appointed Cramer (Higgins' successor as the American representative on the IMTFE's bench) to be the tribunal's acting Chief Judge/President whenever Webb was absent or otherwise unable or unwilling to carry out his duties.²⁴⁹ Webb was therefore the ideal candidate to make the tribunal appear less dominated by the USG without really losing much, if any, influence or violating MacArthur's assumptions about how the bench would behave and rule.

D. American Provision of Amnesty to Alleged Japanese Atrocity Perpetrators

Perhaps the most shocking aspect of the transitional justice process in Japan is that the USG provided amnesty to thousands of individuals suspected of committing atrocities, including against Americans. In the case of Hirohito, this policy can be explained by three political factors. First, the occupying authorities (especially MacArthur) were, according to legal scholar Mark Osiel, "convinced that the Japanese public, although willing to blame the

²⁴⁵ See *Interim Meeting*, *supra* note 67, at prml.; *Byrnes Report*, *supra* note 74.

²⁴⁶ *World War II War Crimes—Fact Sheet 61*, NAT'L ARCHIVES AUSTR., <http://www.naa.gov.au/collection/fact-sheets/fs61.aspx> (last visited Jan. 16, 2014).

²⁴⁷ See *id.*

²⁴⁸ MAGA, *supra* note 5, at 29, 65.

²⁴⁹ Horwitz, *supra* note 20, at 489.

Emperor's underlings, would not tolerate the punishment and consequent dethronement of Hirohito himself."²⁵⁰ Therefore, these USG officials imagined that indicting Hirohito would have provoked a violent insurgency in Japan, one that would have required vast resources to suppress. Second, other senior USG officials believed that Hirohito, as Japan's emperor, was the "best ally" of the Allies' occupation and would be essential to combating Soviet-led "communization of the entire world."²⁵¹ Third, some Allied leaders opposed Hirohito's indictment, fearful that his removal would trigger a contentious succession struggle among his relatives, which would further complicate postwar reconstruction and reconciliation efforts.²⁵²

Some scholars suggest that an additional reason the Allies did not indict Hirohito before the IMTFE was his "figurehead" status, which would have effectively precluded accountability for Japan's wartime atrocities.²⁵³ On the contrary, many thought that Hirohito's indictment by the IMTFE would have been appropriate or even helpful. For example, in delivering their opinions, both Webb and Henri Bernard, the French representative on the IMTFE bench, suggested that the prosecution should have indicted Hirohito and criticized the fact that he had been granted immunity.²⁵⁴ Scholarly research supports their contention that Hirohito was directly involved in the Japanese commission of atrocities during WWII.²⁵⁵

As with Hirohito, the USG's provision of amnesty to more than four dozen Class A war criminals was driven by political considerations. The USG wished to facilitate Japan's reentry into the international community, particularly as a partner in the USG's postwar efforts to prepare for rising tension with the Soviet Union.²⁵⁶ As historian James Bowen argues,

²⁵⁰ MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 138 (1997); see also BALL, *supra* note 17, at 73–74; BRACKMAN, *supra* note 41, at 77–78; MACARTHUR, *supra* note 44, at 287–88; PICCIGALLO, *supra* note 26, at 16–17.

²⁵¹ DOWER, *supra* note 8, at 323.

²⁵² *Id.* at 324.

²⁵³ See Horwitz, *supra* note 20, at 497.

²⁵⁴ Henri Bernard, *Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East, Nov. 1, 1948*, in DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra* note 6, at 661, 677; William Flood Webb, *Separate Opinion of the President, Nov. 1, 1948*, in DOCUMENTS ON THE TOKYO INTERNATIONAL MILITARY TRIBUNAL, *supra*, at 629, 638–39.

²⁵⁵ See, e.g., HERBERT P. BIX, *HIROHITO AND THE MAKING OF MODERN JAPAN* 336–39, 447–48 (2000).

²⁵⁶ For further discussion of U.S. encouragement of Japanese postwar remilitarization, see Zachary D. Kaufman, *No Right to Fight: The Modern Implications of Japan's Pacifist Postwar Constitution*, 33 YALE J. INT'L L. 266, 268–69 (2008).

With the Cold War intensifying, the government of President Harry S. Truman felt that Japan needed to be moulded into an American ally and a bulwark against the spread of communism. Truman believed that these aims would be difficult to achieve if the Japanese people were alienated by continuing prosecutions of their war criminals The decision to halt the prosecutions was entirely based on political expediency. It had nothing to do with issues of legality, morality, or humanity.²⁵⁷

Of these amnesties, Dower observes, “[o]rdinary people . . . could be excused for failing to comprehend exactly where justice left off and political whimsy began.”²⁵⁸

Perhaps the most unlikely group granted immunity may be the numerous Japanese involved in medical experimentation on humans. Two particularly vexing aspects of their exclusion merit attention. First, Japanese supposedly used American POWs as human guinea pigs, although this allegation has never been conclusively proven.²⁵⁹ Such offenses presumably would have bolstered the USG’s resolve to hold these Japanese accountable. Second, providing de facto conditional amnesty to these suspected perpetrators was identical to the USG’s treatment of Nazi scientists as well as counterintelligence and anticommunist assets, but the opposite of how the USG handled Nazis suspected of conducting medical experiments on humans. The USG prosecuted these Nazis in *United States v. Brandt* (also known as the “Doctors’ Trial”), the first case before the Nuremberg Military Tribunals, the ad hoc U.S. military commission trials in Germany that followed the IMT.²⁶⁰

Recently declassified USG documents and testimony from Japanese involved in or knowledgeable about the experiments reveal that the USG was interested in the potential utility of the work of Ishii and other Japanese, however unethical, to the U.S. military.²⁶¹ Senior USG officials felt that obtaining data from the experiments was more valuable than bringing those involved to justice, because the information could be used to advance the

²⁵⁷ James Bowen, *How the United States Protected Japanese War Criminals and Facilitated Japan’s Denial of War Guilt and War Crimes*, PAC. WAR HISTOR. SOC’Y, http://www.pacificwar.org.au/JapWarCrimes/USWarCrime_Coverup.html (last visited Jan. 16, 2014); see also Tianwei, *supra* note 209.

²⁵⁸ DOWER, *supra* note 8, at 454.

²⁵⁹ Kaufman Dissertation, *supra* note 127, at 164.

²⁶⁰ *Id.*

²⁶¹ C.A. WILLOUGHBY, REPORT ON BACTERIOLOGICAL WARFARE (1947) (on file with the author); Letter from C.A. Willoughby, U.S. Army Forces, Pac., Military Intelligence Section, Gen. Staff, to Major Gen. S.J. Chamberlin, Dir. of Intelligence, War Dep’t Gen. Staff (July 22, 1947) (on file with the author).

USG's own weapons development program.²⁶² USG officials also were concerned about preventing other countries, particularly the Soviet Union, from obtaining the data.²⁶³ Unlike Josef Mengele and his Nazi cohorts who performed similar experiments on humans but who "were too well known for their war crimes" to become collaborators with the United States,²⁶⁴ the Japanese human experimenters were relatively anonymous. As a result, the USG could pursue its strategy undetected, and USG policymakers could partner with implicated Japanese officials without much fear of a public relations backlash.²⁶⁵

The incipient Cold War—and the superpowers' attendant desire to secure competitive advantages and scientific advancements—thus chilled the USG's enthusiasm for investigating and prosecuting Japanese human experimenters. USG officials believed that their research would be useful in the arms race developing between the Soviet Union and the United States. Apparently untroubled by the ethical problem of enjoying fruit from the poisonous tree—consistent with its own postwar human experiments in Guatemala²⁶⁶—the USG reasoned that it could keep its deal with involved Japanese secret.²⁶⁷ Even if it could not, the exchange would be worth the fallout. In other words, one can presume the USG genuinely believed it could benefit from the pain and death of Japanese victims of medical experiments, experiments which possibly included Americans, and that the USG could maintain confidentiality over its profiting from the attendant misery and casualties. Regardless, one U.S. soldier who served in immediate postwar Japan argues that the U.S. deal with Japanese involved in wartime human medical experimentation was not only unethical but also unnecessary:

No matter what the American authorities believed those research papers contained, the objectives cannot possibly justify their actions. The research was in any case crude, backward, and barbaric. Any

²⁶² Kaufman Dissertation, *supra* note 127, at 164–65.

²⁶³ *Id.*

²⁶⁴ JOHN LOFTUS & MARK AARONS, *THE SECRET WAR AGAINST THE JEWS: HOW WESTERN ESPIONAGE BETRAYED THE JEWISH PEOPLE* 290 (1994).

²⁶⁵ Kaufman, *Transitional Justice Delayed is not Transitional Justice Denied*, *supra* note 171, at 647.

²⁶⁶ In the immediate aftermath of WWII, the USG also deliberately infected humans with disease. From 1946 to 1948, USG-funded American researchers—using prostitutes, injections, and other methods—intentionally exposed approximately 1300 Guatemalan prisoners, soldiers, and mental patients to syphilis, gonorrhea, and chancroid. Donald G. McNeil, Jr., *Panel Hears Grim Details of V.D. Test on Inmates*, N.Y. TIMES, Aug. 30, 2011, at A4. One stated purpose of the experiments was to determine if penicillin could prevent infection after exposure to disease. *Id.*

²⁶⁷ Kaufman Dissertation, *supra* note 127, at 165.

nation that had a monopoly on nuclear power certainly did not need this kind of research information—nor did we need to embarrass ourselves in such a despicable manner.²⁶⁸

And embarrass the USG this deal did. As Beigbeder argues, “the later discovery that the USA had secretly bargained with and granted immunity to the leaders of Unit 731 could only be taken as an affront to any human rights concern, besides making the USA a belated accomplice to a particularly odious war crime and crime against humanity.”²⁶⁹

CONCLUSION

Several lessons emerge from this case study about the etiology of the IMTFE—one of the first and most significant, yet least studied, occurrences of transitional justice in history. Specifically, this Article reveals that almost every major decision regarding the transitional justice method for addressing the principal Japanese suspected of committing atrocities during WWII was made primarily from a combination of political and pragmatic factors.²⁷⁰ USG officials’ normative beliefs feature, sometimes inconsistently, as influences in very few of these decisions. The recent establishment of the IMT and the unfolding Cold War were ever-present factors driving U.S. foreign policy on this issue.²⁷¹

The USG, as the lead occupier of postwar Japan, had no choice but to “do something.” The USG’s initial pragmatic concern was thus the same as with the Nazis: The USG held in custody many of the principal Japanese and had to determine what to do with them.²⁷² As with the Nazis, even keeping the Japanese imprisoned or letting them go would have been decisions to “do something”; the former would have constituted indefinite detention and the latter would have constituted de facto unconditional amnesty. Some USG officials, such as Hull, initially preferred summary execution for Japanese suspects.²⁷³ However, these USG officials later changed their minds or were overruled, and this transitional justice option does not seem to have been a popular or serious USG consideration with respect to Japanese. The recent establishment of the IMT prompted the USG to act similarly for comparable

²⁶⁸ GINN, *supra* note 107, at 245.

²⁶⁹ BEIGBEDER, *supra* note 16, at 73–74.

²⁷⁰ *See supra* Part IV.A–B.

²⁷¹ *Id.*

²⁷² *See supra* Part I.B.3.

²⁷³ *See supra* Part I.B.1.

atrocities elsewhere in the world.²⁷⁴ Had the USG not acted consistently in the case of Japanese atrocities, it likely would have been vociferously criticized for being regionalist and racist.

Also consistent with their treatment of the Nazis, USG officials were conscious of the domestic political ramifications of their decisions. The American public demanded that Japanese be held accountable, especially after the Japanese government's devastating sneak-attack on Pearl Harbor.²⁷⁵ USG officials, concerned about the developing threat of communism, sought to bolster American presence and influence in Asia—a battleground for the approaching ideological clash.²⁷⁶ Establishing and leading a high-profile transitional justice institution provided a clear opportunity toward that end.

The decision to prosecute many of the chief Japanese also was driven by a combination of political and pragmatic concerns. The IMT precedent again served as an important political factor. As with the decision to “do something,” the precedent of prosecuting atrocity perpetrators from Germany significantly influenced the decision to extend that precedent—independent of nationality, ethnicity, or location—to the Japanese case.²⁷⁷ Pragmatically, even if the USG prosecuted some of the Japanese, the USG still would have been able to pursue other options as well, such as unilateral ad hoc military tribunals, amnesty, and lustration, which were indeed instituted.²⁷⁸

The USG's decision to support an *international* military tribunal stemmed from a combination of politics, pragmatics, and normative beliefs. Again, the IMT and the Cold War featured prominently. Pragmatically, the USG already had the IMT as a working model for a transitional justice system, which facilitated a quick application to Japan with minimal structural changes under the assumption that all those who supported the IMT design for Germany would probably do so for Japan.²⁷⁹ Path dependency thus underlays this transitional justice decision.²⁸⁰

²⁷⁴ See *supra* Part II.A.

²⁷⁵ See *supra* Part IV.A.

²⁷⁶ *Id.*

²⁷⁷ See *supra* Part II.A.

²⁷⁸ See *supra* Parts II.B–C.

²⁷⁹ See *supra* Parts I.C, II.A.

²⁸⁰ As Yale Law School Professor Oona Hathaway states:

In broad terms, ‘path dependence’ means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it. It entails, in other words, a causal relationship between stages in a temporal sequence, with each stage strongly influencing the direction of the

At the same time, it is clear what pragmatic factor did *not* persuade the USG to support an international transitional justice option: burden-sharing. Given that the USG provided most of the staff and financial support for the IMTFE, involving other states in the process probably had little to do with the extent of the USG's resource contributions. Instead, the USG supported an international tribunal because it wished to maintain positive political relations with wartime allies, especially in light of its increasingly troubled affairs with the Soviet Union.²⁸¹ Prosecution through a broadly multilateral institution also promoted the legitimacy of the transitional justice process, especially at a time when other states criticized the USG for its dominant occupation of Japan. USG officials held a normative belief that states involved militarily with Japan should also be involved in peace efforts, including transitional justice, further driving the USG to favor a multilateral transitional justice option.²⁸²

We also learn from the origins of the IMTFE the limitations of certain factors in explaining the U.S. role in transitional justice. Most significantly, it is apparent that normative beliefs played only a partial and inconsistent role in the USG's transitional justice approach to the Japanese. Although many USG officials felt obliged to hold Japanese accountable for their heinous crimes, they chose not to when they believed certain Japanese—including Hirohito, more than fifty Class A war criminals, and over 3600 human experimenters—were potentially useful.²⁸³ The large number of Japanese the USG helped escape justice or addressed through lustration demonstrates that the USG was not committed to a principled conception of justice through legal prosecution, even for those suspected of direct involvement in planning and perpetrating offenses against Americans. Notwithstanding the lofty rhetoric the USG employed in establishing the IMTFE, the emerging Cold War, which had served as one of the principal factors driving the USG to establish the IMTFE, simultaneously chilled the USG's enthusiasm for investigating and prosecuting some Japanese. USG officials envisioned greater benefit from an alliance with postwar Japan against the looming communist threat and to prevent the Soviet

following stage. At the most basic level, therefore, path dependence implies that what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time.

Oona A. Hathaway, *Path Dependence in the Law: The Court and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 603–04 (2001) (citations omitted) (internal quotation marks omitted).

²⁸¹ See *supra* Parts IV.A–B.

²⁸² See *supra* text accompanying note 74.

²⁸³ See *supra* Part II.C.4.

Union from obtaining advantages in weapons technology.²⁸⁴ Not until the Cold War thawed half a century later would the next international war crimes tribunal—the United Nations International Criminal Tribunal for the Former Yugoslavia—be established.²⁸⁵

²⁸⁴ See *supra* Part IV.A.

²⁸⁵ S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).