Chapter Two

THE CHANGING RULES OF WAR AND PEACE

In fittingly paradoxical fashion, the United States, the country that brought the world total war and drove the American Indians to the brink of extinction, was simultaneously advocating stringent new codes of conduct for the rest of the world. Though the major legal efforts of the late nineteenth and early twentieth centuries differed in tone, they grew logically from the American code.[1] By the late nineteenth century, the efforts to limit war with law grew more intellectually adventurous. In 1898, Russia's Czar Nicholas II called for a conference on the limitation of armaments.[2] Representatives of twenty-six states met at the Hague in 1898. The United States delegation included Andrew White, Seth Low, Stanford Newell, Admiral Alfred Thayer Mahan, and Fredrick William Hols. Like the Lieber Code, most of the Hague Conventions that resulted from the conference were practical measures designed to mitigate excessive suffering in war. Rules were laid down relating to the treatment of prisoners, casualties, and spies. Technical issues such as flags of truce, capitulation, armistice, and neutrality were also dealt with.[3] Three of the conference's declarations addressed technological developments that fell

outside the previously accepted rules of war. Bombing from balloons was prohibited for a period of five years and the use of poison gas was banned.

American statesmen wanted to go further: they were not content to codify customary military laws and wanted to reform statecraft itself.[4] The American delegation hoped to create a permanent international court where signatories to the Hague Conventions "would resort for a settlement of . . . differences which could not be adjusted by diplomatic negotiations, and were not of a character compelling or justifying war."[5] The Americans argued that arbitration would eventually replace war as the most common means of conflict resolution. This view was based on the assumption that delinquent or aggressive states could be treated under international law the same way as criminals were handled under domestic law.[6] However, this was a difficult proposition. Was there a "community" of nations, and how could they punish grave human rights violations without a monopoly on state power? The Americans would have to dislodge the keystone of the European state system—sovereignty—to implement their radical new plan. If they could not revoke sovereign immunity, their plan stood no chance.

German leaders were incensed by the implications of the American plan, and they were not about to cede at the bargaining table what they had won on the battlefield. The leadership of the Second Reich believed that treaties to limit arms and provide for "neutral" arbitration of disputes negated their most important strategic advantage: the ability to mobilize and strike more quickly and effectively than any other nation. The Germans also rejected the concept of neutrality, arguing that in international politics there were only friends and enemies. Outnumbered and surrounded by hostile neighbors, Prussia was among the first nations to recognize the need for developing a practical relationship with war rather than attempting to eliminate it altogether. Late to enter the game of colonialism, Germany would oppose America's attempt to rewrite the rules of international affairs.

At one point during the Hague Conference, a German representative voiced opposition to a permanent court of arbitration on the ground that such an idea was too radical for his government to accept. The German delegation refused to sign the relevant convention until they had hamstrung the proposed court with limitations. The most significant omission in the final draft was of the phrase "obligatory arbitration." Although the spirit of the convention remained unchanged, it was no longer binding.[7]

Colonel von Schwarzhoff, the military member of the German delegation at the Hague, rejected mandatory disarmament and instead advocated preparedness and self-reliance: "As for compulsory military service, which is intimately associated with these questions, the German does not regard it as a heavy burden but a sacred patriotic duty, to the performance of which he owes his existence, his prosperity, his future."[8] Historian John Keegan wrote, "The truth of Europe's situation at the turn of the century lay rather with the German than the American."[9]

The 1898 Hague Conference saw the beginning of an American attempt to broaden the laws of war to include acts that had previously been considered beyond the realm of objective judgment. Francis Lieber was a soldier; he accepted war as a constant in human affairs and had hoped only that his code would help to mitigate its ill effects. What occurred at the Hague was the tentative first attempt to go beyond laws regulating war to laws governing the conduct of international relations. At the vanguard of this movement were American lawyer-statesmen like Elihu Root and Joseph Choate who had come of age far from the Byzantine power struggles and diplomatic double-crossing that characterized international relations under the European public law. Choate, the American representative at the Hague, claimed war was "an anachronism, like dueling or slavery, something that international society had simply outgrown."[10] However, again there was a paradox or duality inherent in the American position.

By 1893, Fredrick Jackson Turner had deemed the American frontier closed; to Turner this marked the end of "the first period of American history."[11] Historian John Fiske, one of America's earliest evolutionists, coined the term "Manifest Destiny" in an 1880 speech. He believed that the American Anglo-Saxon was "one of the dominant races of the world" and that "The day is at hand when four-fifths of the human race will trace its pedigree to English forefathers, as four-fifths of the white people in the United States trace their pedigree to-day." Fiske freely admitted the American duality in foreign policy, or as he put it, "the seeming paradoxes," and conceded that "the possibility of peace can be guaranteed only through war."[12] A messianic justification for the American expansion was offered by Reverend Josiah Strong in his hugely popular 1885 book, *Our Country*. Strong, the head of the Christian Home Mission, described America as "Time's noblest offspring"[13] and predicted a "final competition of the races."[14] Many Manifest Destiny advocates were

drawing explicitly or implicitly on the recent work of Charles Darwin to justify American expansion. In *The Descent of Man* (1871), Darwin had predicted that "at some future period, not very distant as measured by centuries, the civilised races will almost certainly exterminate, and replace, the savage races throughout the world." According to nineteenth-century German nationalist scholar Heinrich von Treitschke, the laws of war only applied to wars between European nations: "International law becomes phrases if its standards are also applied to barbaric people. To punish a Negro tribe, villages must be burned, and without setting examples of that kind, nothing can be achieved. If the German reich in such cases applied international law, it would not be humanity or justice but shameful weakness."[15]

To secular advocates of Manifest Destiny like John Fiske, it was self-evident that non-Anglo-Saxons like the American Indians must either accept America's civilizing influence or face extinction: "So far as relations of civilization with barbarism are concerned to-day, the only serious question is by what process of modification the barbarous races are to maintain their foothold upon the earth at all. While once such people threatened the very continuance of civilization, they now exist only on sufferance." In his book, *The Beginnings of New England*, Fiske argued that American colonists had been fully justified in slaughtering the Indians because they were "barbarians." He believed that in wars against "savages," Western armies could fight with significantly less restraint; women and children were fair game. Fiske believed that "the annihilation of the Pequots can be condemned only by those who read history so incorrectly as to suppose that savages, whose business is to torture and slay, can always be dealt with according to methods in use between civilized peoples. . . . If the founders of Connecticut, in confronting a danger which threatens their very existence, struck with savage fierceness, we cannot blame them." Finally, Fiske justified any military action taken against savages and barbarians on the ground of racial superiority: "The world is so made that it is only in that way that the higher races have been able to preserve themselves and carry on their progressive work."[16] In 1885, John Fiske's Manifest Destiny speech was published by *Harper's* magazine, and soon the historian was in Washington lecturing President Rutherford B. Hayes, Secretary of State William Everts, General William T. Sherman, John Hay, and others. Fiske reported to his wife, "I have got all the brains of Washington to hear me, and they are delighted."[17]

By 1898, Admiral Alfred Thayer Mahan's plan for the U.S. expansion, outlined in his influential 1890 book, *The Influence of Sea Power upon History*, was unfolding nicely as the United States was rapidly acquiring overseas territories in both the Pacific (Hawaii and Samoa) and the Caribbean. After crushing the Spanish in Cuba, American leaders had to decide what to do with Spain's other colonial war prize, the Philippine Islands. San Juan Hill veteran Theodore Roosevelt remarked to Senator Henry Cabot Lodge in a June 24, 1898 letter, "Mahan and I talked the Philippines . . . for two hours;" all agreed that the United States "could not escape our destiny there."[18] The most vexing questions revolved around the Spanish possession of the islands. Twenty-nine-year-old revolutionary leader Emilio Aguinaldo believed that if, with U.S. assistance, he ousted the Spanish from the archipelago, it would become an independent republic. However, once the Spanish were defeated, President McKinley refused to grant independence to the Philippines.[19] Aguinaldo and a group of prominent Filipinos refused to accept the American assumption of power and declared the Philippines an independent republic on June 18, 1898. The rebel leader implored his people: "Filipino citizens! We are not a savage people; let us follow the example of the Europeans and American nations. . . . Let us march under the flag of Revolution whose watchwords are Liberty, Equality, and Fraternity!"[20]

President McKinley's decision to send a 59,000-man expeditionary force to crush Aguinaldo and the movement for Philippine independence raised a number of difficult questions for the young republic. The obvious disparity between words and deeds—the champion of liberty and self-determination fighting to thwart independence and reimpose colonialism—forced American leaders to justify the duality. In the language of Manifest Destiny, America was not engaged in colonialism; instead, the United States was rescuing the natives from their own barbarism. At the time, one American wrote, "What America wants is not territorial expansion, but expansion of civilization. We want, not to acquire the Philippines for ourselves, but to give the Phillipines free schools, a free church, open courts, no caste, equal rights to all."[21] European critics were less bothered by the substance of American policy than the style. Britain's *Saturday Review* commented: "There have been more wicked wars than this . . . but never a more shabby war. . . . Of all that curious mixture of sentiments, noble and ignoble, out of which the war with the Filipinos sprang, only the element of hypocrisy seems to

have retained its original vigor." At roughly the same time, General Horatio Herbert Kitchener and his troops mowed down approximately 11,000 Sudanese soldiers in the Battle of Omdurman in 1898. The British lost less than 100 soldiers. It was clear that the new laws of war did not apply universally. Whether it was the U.S. Army fighting the Sioux on the American plains or the European armies fighting in Africa, western armies fought with few restraints in nineteenth-century colonial wars. In a speech at Albert Hall, Lord Salsbury stated: "One can roughly divide the nations of the world into the living and the dying . . . the living nations will fraudulently encroach on the territory of the dying."[22]

When McKinley appointed international law advocate and New York corporate lawyer Elihu Root Secretary of War in 1899, it marked the beginning of a new legalist era in American foreign policy. Political scientist Judith Shklar has defined "legalism" as "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." Root best articulated the American lawyer-statemens' view of the relationship between law and public policy in an 1899 letter: "It is not a function of law to enforce the rules of morality."[23]

The choice of a Wall Street lawyer to conduct a colonial war says a great deal about the convergence of law and war in twentieth-century American foreign policy. As America's global aspirations grew, so did the need for justifications more sophisticated than Manifest Destiny. American leaders would learn to wield law as a political tool like any other. Those who used it most effectively had learned their trade on Wall Street, where what could be justified legally did not have to be justified morally.[24] America's lawyer-statesmen would try to apply these same tactics to foreign policy and their "strategic legalism" would grow into their dominant "nonideological" ideology.[25] As the United States became a global power, a two-sided relationship with international law developed, and what began as the simple hypocrisy of the age grew into a more profound and lasting duality. There was a tension between the ethical and legal principles that American leaders espoused and the actual conduct of American foreign policy. At moments of crisis and contradiction, American leaders attempted to rephrase complex moral questions into apolitical disputes that required only the application of law to a set of facts. Was it that simple? As Shklar points out, "Here legalism is projected into the greater

political environment of multiple and competing ideologies."[26] American leaders were no longer content to use law for primitive forms of political justice; they were growing more ambitious, and now had the power to back their words with force.

When asked what a lawyer knew about managing a foreign war, the Philippine Civil Governor, William Howard Taft, commented, "I don't want a man who knows about war and the army. I want a lawyer to handle the problems of the new islands."[27] Roosevelt pointed out that Elihu Root was an unlikely choice for Secretary of War, the work was "really out of his line," but wrote, "Root is taking hold of his work in just the right way. He went into it "only because he felt the task was so serious, so difficult and of such vital importance to the nation."[28] In his first public speech as Secretary of War on October 7, 1899, Root flatly rejected the calls for Filipino independence. He put forward the argument that there were no Philippine people, only tribes of barbarians scattered throughout the archipelago. As with America's Indians, if he could deny them their civility, he could deny them their natural rights and take over their territory. In his first press conference, the new Secretary of War asked, "Well, whom are we fighting? Are we fighting the Philippine nation? No!" He declared, "There is none. There are . . . more than sixty tribes . . . all but one ready to accept American sovereignty."[29] Root phrased the American acquisition as a legal question, one of contracts and titles, not people and sovereignty: "Gentlemen, the title of the America to the island of Luzon is better than the title we had to Louisiana."[30] He declared that the Jeffersonian principle that a government derives its just powers from the consent of the governed did not apply to the Filipinos because they were simply unfit for self-government: "Nothing can be more misleading than a principle misapplied. . . . Government does not depend on consent. The immutable laws of justice and humanity require that people shall have government, that the weak shall be protected, that cruelty and lust shall be restrained, whether there be consent or not."[31]

Secretary of War Root tried to cast the new American soldier less as a warrior than as an ambassador of democracy and Christianity—a social worker with a Springfield rifle: "I claim for him the higher honor that while he is as stern a foe as ever a man saw on the battlefield, he brings the schoolbook, the plow, and the Bible. While he leads the forlorn hope of war, he is the advance guard of liberty and justice, of law and order,

and peace and happiness."[32] The task of restraining the "cruelty and lust" of the Philippine insurgents fell to the U.S. military.

The leaders of America's expeditionary force had a more sober assessment of their foes. Many in the Philippine campaign had fought in America's nineteenth-century wars, like General Henry Lawton, the veteran of twenty-six Civil War battles who received the Congressional Medal of Honor and was best known for capturing Geronimo in 1886. General Lawton was in awe of his adversaries in the Philippines: "They are the bravest men I have ever seen. . . . These men are indomitable. . . . At Bacoor Bridge they waited until Americans had brought their cannon to within twenty-five yards of their trenches."[33] He paid his adversaries the ultimate compliment and in the process contradicted Secretary Root's glib assessment of the situation: "Such men have a right to be heard. All they want is a little justice. . . . What we want is to stop this accursed war." Henry Lawton was shot and killed by a sniper's bullet in San Mateo on December 18, 1899.[34]

Winning this undeclared war was not as easy as American political leaders had imagined. The insurgent forces, despite their inferior weaponry, proved to be fierce and terrifying adversaries. The Filipinos had a great deal of experience in fighting invading armies. When the Spanish tried to disarm them, they simply replaced their knives with rattan sticks and the martial art of escrima was born. Although they used firearms whenever they could, the guerrillas' favorite method of attack was with a bolo or machete-type knife in each hand. Charles Burke Elliott described the Philippines' Moro tribesmen in 1916 as "not open and fair in fight, and frequently resorts to what white men regard as improper methods of attack." The Moros' wavy-bladed Kris knives "are often prized for their service in having killed a great number of persons, and the selling price is established accordingly. Individuals have an uncomfortable habit of getting into a religious frenzy and running amok among the Christians. A Moro who goes juramentado and runs amok often finds many victims before he is killed."[35]

Some of Aguinaldo's orders (captured by the Americans) described a different style of war, far removed from the gentlemanly rules of engagement outlined by Francis Lieber: "The Chief of those who go on to attack the barracks should send in first four men with a good present for the American commander. They should not, prior to the attack, look at the Americans in a threatening manner. To the contrary . . . the attack

should be a complete surprise with decision and courage."[36] Three men and a man dressed as a woman would enter the camp and attack only with their bolos: "The Sandatahan should not attempt to secure rifles from their dead enemies, but shall pursue slashing right and left until the Americans surrender."[37] Aguinaldo then ordered six men to nearby rooftops; when retreating American troops passed underneath, the insurgents were to drop furniture, boiling oil, molasses, and red-hot iron on them.[38] Because the Filipinos responded to the American invasion with the brutal strategy of guerrilla warfare, the distinction between soldier and civilian began to disappear. There were a number of instances where the insurgents used the Americans' self-restraint to their strategic advantage, for example, raising a white flag and then opening fire on the approaching Americans.[39]

Although there is no formal record of a policy of not taking prisoners, the U.S. government's own casualty list raises a troubling question: Was the army refusing to grant quarter to the Philippine guerrillas? In March of 1899, Brigadier General Lloyd Wheaton left Manila and traveled south down the bank of the Pasig River. One week later, General Wheaton and his men reached Laguna de Bay Lake. In that week, according to the U.S. Army, 2,500 Filipinos were killed or wounded and 36 Americans were killed.[40] One soldier described the offensive in a letter home: "In the path of the Washington regiment and Battery D of the Sixth Artillery there were 1,008 dead niggers and a great many wounded. We burned all their houses. I don't know how many men, women and children the Tennessee boys did kill." An infantryman from Tennessee recalled, "They would not take any prisoners."[41] Another army private recalled General Wheaton's reprisal for a Philippine atrocity: "Last night one of our boys was found shot and his stomach cut open. Immediately orders were received by General Wheaton to burn the town and kill every native in sight, which was done."[42] Private Barnes's letter to his brother provides strong evidence that the distinction between soldier and civilian had disappeared in the Philippines. "I am probably growing hard-hearted, for I am in my glory when I can sight my gun on some dark skin and pull the trigger. Should a call for volunteers be made for this place do not be so patriotic as to come here."[43]

During the bloodiest battles of the American Civil War, the ratio of dead to wounded soldiers was never any higher than 1:5. At Gettysburg, for example, 2,834 were killed and 13,709 wounded. Even in

Great Britain's brutal Boer War, the dead-to-wounded ratio was 1:4. In the Philippines the ratio of dead to wounded guerrillas was an astounding 5:1, five dead for every wounded man.[44] As early as 1899, soldiers like Captain Edwin Boltwood wrote that "On more than one battlefield they were treated like Indians. At Caloocan I saw natives shot down that could have been prisoners, and the whole country around Manila set ablaze with apparently no other object than to teach the natives submission by showing them that with the Americans war was hell."[45]

In December 1900, Secretary of War Elihu Root announced that the United States would adopt the "methods which have proved successful in our Indian camps in the West" to defeat the insurgents.[46] On December 20, General Arthur MacArthur placed Philippine civilians under martial law. The United States resettled much of the population into concentration camps throughout the island chain. This action was not unlike the methods employed by the Spanish in Cuba and the British in South Africa. Natives found outside of the resettlement camps were considered hostile and often fired upon. The soldiers relied on a favorite Spanish torture technique called "the water cure" to get information from prisoners. Three to five gallons of water mixed with salt were funneled down the throat and nose of the victim, coupled with a few blows to the stomach; this made even the hardest guerrillas talk.[47]

When reporters tried to file stories about the harsh nature of this war, they were censored. The journalists became so enraged by the U.S. government's attempts to silence them that in February 1900, eleven reporters sent a letter by regular mail (to avoid army censors) to Hong Kong. It read:

> The undersigned, being all staff correspondents of American newspapers stationed in Manila, unite in the following declaration: We believe that, owing to official despatches from Manila made public in Washington, the people of the United States have not received a correct impression of the situation in the Philippines, but that these despatches have presented an ultra-optimistic view that is not shared by the general officers in the field. . . . We believe the despatches err in the declaration that "the situation is well in hand," and in the assumption that the insurrection can be speedily ended without a greatly increased force.[48]

When Carl Shirz reported the atrocities in the American press, he described U.S. policy as based on "deceit, false pretense, brutal treachery to friends . . . without parallel in the history of the republics."[49] By 1900, prominent citizens were lining up against the American annexation of the Philippines. The anti-imperialist outcry was led by Andrew Carnegie, Samuel Gompers, William Jennings Bryan, Mark Twain, and others who wondered how the brutal suppression of an indigenous independence movement served American interests.

When President McKinley was assassinated in 1901, Vice President Theodore Roosevelt assumed the Presidency. A veteran of the Spanish-American War, Roosevelt had no moral qualms about annexing the Philippines. Like Senator Lodge and Senator Albert Beveridge, he was a confident exponent of Manifest Destiny. The new President believed that "our whole national history has been one of expansion." Barbarians either accepted the uplifting and civilizing influence of the United States or faced extinction: "The Barbarians recede or are conquered . . . that peace follows their retrogression or conquest, is due solely to the power of the mighty civilized races which have not lost the fighting instinct."[50] Senator Beveridge argued that "God has been preparing the English-speaking and Teutonic peoples for a thousand years for nothing but vain and idle self-admiration? No! He has made us the master organizers of the world where chaos reigns."[51]

President Roosevelt considered the war against Spain "a great anti-imperialist stride."[52] Like Secretary Root, Roosevelt compared the Filipinos to native Americans and in doing so placed them outside the category of legitimate combatant: "Of course the presence of our troops in the Philippines . . . has no more to do with military imperialism than their presence in the Dakotas, Minnesota and Wyoming during the many years which elapsed before the final outbreaks of the Sioux were definitely put down." To Roosevelt, granting independence to Aguinaldo "would be like granting self-government to an Apache reservation under some local chief."[53] On March 23, 1901, Emilio Aguinaldo was captured in an elaborate ruse and the war entered its most brutal phase. By 1901, the last insurgent strongholds were the island of Samar and southern Luzon. American generals like Lloyd Wheaton recommended that the United States emulate the colonial methods that the Europeans "found necessary . . . through centuries of experience in dealing with Asiatics." According to Wheaton, "Unexampled patience was exercised throughout the

department in the treatment of these savages, habitually violating all the laws of war as known to civilized nations."[54]

September 26, 1901, was an exciting day for the seventy-four American soldiers stationed at the small garrison at Balangiga on the island of Samar. The American soldiers were about to receive their first mail in four months. The American commander, a "puritanical Irish Catholic" captain named Thomas Connell, was in the process of "cleaning and civilizing" the town. The Filipino mayor asked Connell if men could "work off back taxes" by laboring for the Americans. When Connell agreed, the mayor contacted rebel leader Vicente Lukban, who "transferred one hundred of his best bolomen" to masquerade as laborers. Captain Connell believed that by cleaning up the town, it would give it "a semblance of civilization."[55] The guerrillas worked peacefully for two weeks before they decided to strike.[56] The American mailboat arrived in the evening of September 26 with the news of President McKinley's assassination. Captain Connell ordered his men to make preparations for a memorial service in honor of the fallen President the next day.[57] The following morning, after a 6:30 A.M. reveille, the troops began to eat in an outdoor dining area a few hundred feet away from their rifles, which were stacked outside their barracks. When the church bell rang, a conch shell blew and hundreds of Filipinos descended on the camp swinging bolos and hatchets. Most of the officers were killed in their quarters; many in the dining area were still in their chairs when they were butchered alive. The cook armed himself with a cleaver and threw cans and pots of boiling water to stave off a blur of slashing bolomen. After Captain Connell was hacked to death in front of his men, Sergeant Breton took command of the American survivors and formed them into a British square formation, and killed approximately 250 Filipinos (in the end, 59 Americans were killed at Balangiga, 23 were wounded, and only six came away unscathed).

When the survivors from Company C arrived at the American garrison at Basey, the American commander, Captain Bookmiller, planned a reprisal mission. He led fifty-five men and the six uninjured survivors from Company C back to Balangiga aboard the gunboat *Pittsburgh*. When the Americans returned to the scene of the massacre, they found Captain Connell's corpse decapitated and a fire smouldering in his nearby head. Also missing was the finger on which he wore his West Point ring. The American troops happened to stumble upon a mass funeral for the Filipinos killed at Balangiga. The soldiers captured 20 men and ordered

them to remove the Filipino dead from their freshly dug mass grave and to replace their bodies with those of the Americans. The soldiers built a giant fire to burn the Filipino dead. According to historian Stuart Creighton Miller, as the pyre's flames leaped in the background and the bodies burned, Captain Bookmiller read from the Bible: "They have sown the wind and they shall reap the whirlwind." Bookmiller then handed over the 20 prisoners to the survivors from Company C, and as they were being executed, Company G set the town ablaze. Captain Bookmiller reported back to Manila, "Buried dead, burned town, returned Basey."[58]

General "Hell Roaring" Jacob Smith was sent to Samar to put down Lukban's insurgents. Jacob Smith was another old Indian fighter who had participated in the Wounded Knee Massacre in 1890. Earlier in the war, then Colonel Smith told a group of reporters in the Philippines that fighting the Philippine rebels was "worse than fighting Indians." According to Miller, "he had already adopted the appropriate tactics that he had learnt fighting 'savages' in the American West, without waiting for orders to do so from General Otis." In the intervening years, Smith had made a name for himself as an aggressive leader. Traveling to Balangiga with General Smith was Marine Major Littleton Waller, in command of three hundred U.S. Marines.[59] When the relief party finally arrived at Balangiga, they saw a man hanging out of a window. His face was hard to make out because it was covered with swarming ants. Upon closer inspection, they could see that his eyes were gouged out, his face was cut from nose to throat, and the wound was filled with jam. When the Americans reached the scene of the slaughter at Balangiga, they were horrified by the sight that greeted them—hogs had dug up and partially eaten the American bodies that Captain Bookmiller and his men had carefully buried.[60] When a Major Combe entered the town, he found more atrocities: "a deep wound across the face of Lieutenant Bumpus had been filled with jam"; another man had "his abdomen cut open and codfish and flour had been put in the wound."[61]

According to Major Combe, the guerrillas had consistently and flagrantly violated the laws of war: "No prisoners of war were taken. Noncombatants were put to death. Poison was used. Flags of truce were not respected and persons traveling under their protection were killed."[62] After General Jacob Smith examined the carnage, he issued the following orders to Major Littleton Waller, "I want no prisoners. I wish you to

kill and burn. The more you kill and burn, the better you will please me. The interior of Samar must be a howling wilderness." Even a seasoned veteran like Major Waller was shocked by Smith's order, and when he passed it on to Captain David Porter, he tempered it: "Porter, I've had instructions to kill everyone over ten years old. But we are not making war upon women and children, only on men capable of bearing arms. Keep that in mind no matter what other orders you receive."[63] Captain Porter was also present when Smith issued his order. He would later claim that the general's order was a reprisal for the Balangiga Massacre and that this was clearly allowed by Article 24 of the Lieber Code: "After describing the situation General Smith spoke of the 'need to adopt a policy that will create in the minds of the people a burning desire for the war to cease.' "[64] Smith was voicing what had been American policy for most of the war.

General Adna Chaffee described Jacob Smith as "an energetic officer" whose mission on Samar was "to disarm these people and to keep them disarmed, and any means to that end is advisable." General John Franklin Bell believed that "These people need a thrashing to teach them some good common sense."[65] On November 11, 1901, the *Manila Times* reported this account of General Smith's first ten days on Samar: "He already ordered all natives to present themselves in certain of the coastal towns saying that *those who were found outside would be shot and no questions asked.* The time limit had expired . . . and General Smith was as good as his word. The policy of reconcentration is said to be the most effective thing of the kind ever seen under any flag. All suspects including Spaniards and half-breeds were rounded up in big stockades and kept under guard."[66] Major Waller reported from Basey, "in accordance with my orders, destroyed all villages and houses, burning in all 165." General Smith recommended a decoration for Major Waller, who was "an officer of exceptional merit and carries out my wishes and instructions loyally and gallantly."[67]

News of General Smith's orders caused an uproar in the United States that threatened to derail Roosevelt's Philippine policy. On November 11, an American officer who served in the war wrote in a letter to the *Philadelphia Ledger*, "Our men have been relentless, have killed to exterminate men, women, and children, prisoners, and captives, active insurgents and suspected people, from lads of ten up, an idea prevailing that the Filipino was little better than a dog." On December 7, 1901, General John Franklin Bell announced that the time had come for reprisals. He argued

that the Filipinos had violated twenty-six articles of the Lieber Code and that now the United States was justified under the Lieber Code to carry out reprisals to "severely punish, in the same or lesser degree, the commission of acts denounced in the aforementioned articles."[68] On January 13, 1902, Senator George "Frisbie" Hoar introduced a resolution calling for an examination of the American conduct of the war in the Philippines. After some foot dragging, Henry Cabot Lodge consented to the request and established a committee of seven senators to examine the charges. The committee would hear from Admiral George Dewey, Civil Governor of the Philippines William Howard Taft, General Ewell Otis, General Arthur MacArthur, a survivor from the Balangiga massacre, and a number of other Americans.

Much of the early testimony before the Senate committee was aimed at establishing the cruel and barbarous nature of the foe. Army Private Leroy Hallock described administering the water cure to a captured guerrilla. The impact of the private's testimony was lessened when Hallock claimed that after the guerrilla had been tortured, he confessed to roasting an American soldier alive before hacking him to death.[69] Irish-born Senator Tom Paterson of Colorado viewed the laws of war in racial terms: "When a war is conducted by a superior race against those whom they consider inferior in the scale of civilization, is it not the experience of the world that the superior race will almost involuntarily practice inhuman conduct?"[70] William Howard Taft concurred: "There is much greater danger in such a case than in dealing with whites. There is no doubt about that."[71]

However, it was the army's casualty lists that drew the most attention. General MacArthur had a difficult time explaining away the disparity in American and Philippine losses. Senator Patterson appeared dumbfounded by the army's own body count (800 killed and 30 wounded in one battle). MacArthur tried to argue that the numbers were inaccurate because the guerrillas, like the American Indians, recovered their wounded and weapons from the battlefield. Patterson pressed him about the statistics for the battles around Manila, "a total of killed and wounded of 3,204, against 112 Americans killed and wounded." General MacArthur replied tellingly, "If that is what the mathematics of the situation call for I presume it is true."[72] Senator Beveridge sensed trouble and interjected, "In battle the object is to kill and wound as many of the enemy as possible, and to put them out of action." "Yes," MacArthur replied. Senator Pat-

terson attempted to steer him back to the original question: "Where you have a uniform disproportion in the killed and wounded of the two contending armies, anywhere from fifteen to one . . . does not that become pretty near slaughter instead of war?" "No, no," General MacArthur replied testily, "not when your adversary stands up and fights."[73]

In early January in the Philippines, Major Littleton Waller launched an ill-fated land campaign in which his troops got lost and ran out of supplies. When Waller and the remnants of his forces returned from the field, he charged eleven of his native Philippine porters with "treachery" and had them shot by a firing squad.[74] Major Waller informed his superiors that he had had "to expend eleven prisoners" just as the Philippine investigation was getting under way in Washington.[75]

Subsequently, Secretary of War Root cabled General Adna Chaffee and ordered a number of the participants to Manila:

> The President desires to know in the fullest and most circumstantial manner all the facts, nothing being concealed, and no man being for any reason favored or shielded. . . . The President intends to back up the army in the heartiest fashion in every lawful and legitimate method of doing its work, he also intends to see that the most rigorous care is exercised to detect and prevent any cruelty or brutality, and that men guilty thereof are punished. Great as the provocation has been in dealing with foes who habitually resort to treachery, murder, and torture against our men, nothing can justify or will be held to justify, the use of torture or inhuman conduct of any kind on the part of the American Army.[76]

Major Littleton Waller was brought before military court in Manila in March of 1902. According to Stuart Creighton Miller, Elihu Root was looking to use Waller as a scapegoat, "At least Root was eager to cast Waller in that role if the major would only cooperate and play the sacrificial victim." The anti-imperialist press in the United States had already condemned Waller as "the butcher of Samar" and compared him to Kitchener in the Boer War. Major Waller was tried by a court-martial led by Major General William Bisbee, Major Edgar Robertson, and three other cavalry officers. When the trial opened on March 7, 1902, Waller's defense attorney challenged the court's jurisdiction over him. Bisbee was sympathetic to Waller's argument and turned to Adna Chaffee, who ordered the court to reconvene and to try him for murder. Although

Waller admitted to the killings, he claimed that they were justified by both General Smith's orders and the laws of war. Waller told the court that he had personally witnessed similar executions of Arab cavalrymen in Alexandria in 1892 and Chinese Boxers in 1900. Waller planned to defend himself using General Orders No. 100, which authorized reprisals and described them as "the sternest feature of war." However, when General Jacob Smith appeared in court as a witness for the prosecution, he testified that Waller had acted on his own by executing the prisoners. A shocked Major Waller produced both General Smith's written orders and witnesses who convincingly refuted Smith.[77] Although he was found not guilty of murder and sentenced only to a loss of pay, he implicated Major General Jacob Smith, whose order to kill and burn was condemned in the strongest terms by the anti-imperialist press in the United States.

The headline of the April 8, 1902 *New York Journal* read, "KILL ALL: MAJOR WALLER ORDERED TO MASSACRE THE FILIPINOS. The media now focused their enmity on "Howling Jake," also known more simply as "The Monster." Now the United States would have to investigate General Jacob Smith to extinguish this controversy. Adna Chaffee suggested that General Smith simply say that he issued the orders under duress and that they were not meant to be taken literally. General Smith refused and argued that his action was totally justified under the Lieber Code. However, when President Roosevelt signed the indictment of Jacob Smith on April 21, 1902, he was not charged with murder or war crimes. Instead, he faced the far more benign charge of "conduct to the prejudice of good order and military discipline."[78] This was an entirely different type of political justice from that exercised in the Sioux and the Wirz cases; the Jacob Smith case would provide an early example of strategic legalism. Secretary Root would attempt to use the judicial machinery to quell a controversial political problem that threatened to undermine the larger objectives of American foreign policy. On a more basic level, the Roosevelt administration needed to close the gap between words and deeds in America's Philippine policy.

When the trial began, most of the witnesses were very friendly to General Smith and attempted to establish the savage nature of their foes and the "irregular" nature of the war. Lieutenant Baines testified: "All the natives that I have seen in the interior of Samar, outside of the towns, were what I consider savages; they were very low intelligence, treacherous, cruel; seemed to have no feeling, either for their families or for anybody

else."[79] Lieutenant Hoover testified that the fighting ability of twelve-year-old guerrillas was sufficient to consider them both "legitimate and fearsome, maniacal adversaries."[80] Lieutenant Ayer testified: "When one gets to the interior among the tribes who live there, religious fanaticism, stolid indifference, and great personal bravery are conspicuously in evidence."[81]

Major Waller testified that under the laws of war he was not obliged to give quarter and pointed to the Lieber Code. "General Orders, No. 100, covers it. For instance, if in actual experience we find that certain bands give us no quarter, or surrender and then become treacherous immediately afterwards—and we had that experience several times—we had a perfect right under the laws of war to shoot anybody belonging to that band."[82] Waller said that he tempered General Smith's order: "Always when prisoners came in and gave themselves up they were saved, they were not killed—not slaughtered, at that time. But in the field, whenever they opposed us we fought until there was nothing else to fight."[83] Major Waller's testimony demonstrated how blurry the line between soldier and civilian was in guerrilla warfare.

Q: *What do you mean by insurrectos in the island of Samar?*
Waller: *I mean those people actually bearing arms against us or who were openly aiding or abetting the insurrection.*
Q: *Whether they had arms or not?*
Waller: *They all had arms. Even the women carried arms.*[84]

The court's ruling was consistent with Chaffee's view that General Smith "did not mean everything that his unexplained language implied." Upon hearing the court's decision, an unrepentant General Smith was reported to have turned to the press in the courtroom "to declare he meant every word and that burning and shooting 'the treacherous savages' was the only way to win the war." Although General Smith had been found guilty of the vague crime of "prejudicing officers," he was not sentenced and boarded a steamship bound for the United States on August 1, 1902. In a letter, President Roosevelt commented on the Smith case to a friend: "Inspector General Breckinridge happened to mention quite casually to me with no idea that he was saying anything in Smith's disfavor, that he met him [Smith] and asked him what he was doing, he responded, 'Shooting niggers.' Breckinridge thought this a joke. I did not." Back in Washington, Root concocted a scheme to have Smith

declared "temporarily insane." Chaffee could not persuade the medical officers to back his plan. The proceedings of the general court-martial were submitted to President Theodore Roosevelt, who made the final ruling. The President qualified his decision:

> I am well aware of the danger and difficulty of the task our Army has had in the Philippine Islands and of the . . . intolerable provocations it has received from the cruelty, treachery, and total disregard of the rules and customs of civilized warfare on the part of its foes. I also heartily approve of the employment of the sternest measures necessary to put a stop to such atrocities, and to bring this war to a close.[85]

Roosevelt was careful to distinguish the American atrocities as exceptional events and praised the army's "wonderful kindness and forbearance in dealing with their foes." Smith's order was considered an "isolated incident," not a matter of policy. "Loose and violent talk by an officer of high rank is always likely to excite to wrongdoing . . . among his subordinates whose will are weak or whose passions are strong," Roosevelt wrote. General Smith's wrongdoing was mitigated by "a long career distinguished for gallantry and on the whole for good conduct. . . . I hereby direct that he be retired from the active list."[86]

Shortly after the trials, antiwar activists Moorefield Storey and Julian Cadman wrote a 119-page pamphlet analyzing Elihu Root's handling of the Philippines atrocities and concluded that the trials had been a farce. Storey wrote that Root "was silent in the face of certain knowledge and by his silence he made himself responsible for all that was done in his acquiescence. . . . Mr. Root, then is the real defendant in this case. The responsibility for what has disgraced the American name lies at his door."[87]

The War Department telegraphed a summary of the attack to the Secretary of War during a stop in Peoria, Illinois. Root argued that the guerrillas had violated the rules of "civilized warfare":

> The war on the part of the Filipinos has been conducted with the barbarous cruelty common among uncivilized races, and with the general disregard for the laws of civilized warfare. . . . Filipino troops have frequently fired upon our men from under the protection of flags of truce, tortured to death American prisoners who have fallen into their hands,

> buried alive both Americans and friendly natives, and horribly mutilated the bodies of the American dead.

Root justified any American atrocities under the doctrine of reprisal: "That such soldiers fighting against such an enemy, and with their own eyes witnessing such deeds should occasionally regardless of their orders retaliate by unjustifiable severities is not incredible."[88]

Elihu Root went on to defend the American military's "scrupulous regard for the rules of civilized warfare, with careful and genuine consideration for the prisoner and non-combatant, with self-restraint, and humanity, never surpassed, if ever equaled, in any conflict, worthy only of praise, and reflecting credit upon the American people."[89] However, when pressed, he offered a more complex defense for America's Philippine policy and, like John Fiske, pointed to the "history and the conditions of the warfare with cruel and treacherous savages who inhabited the island" and offered two "precedents of the highest authority." These were George Washington's 1779 order to General John Sullivan to carry out reprisals against hostile Iroquois Indians and William T. Sherman's reprisal order after the Fort Kearney Massacre in 1866. Historian Richard Drinnon attaches great importance to Root's reference to these precedents: "Now, in the process of ransacking the War Department records for authorizations of terror, Root had unwittingly disclosed two important and related truths. The first was that the national past contained authorizations of terror and could easily be made to share the guilt of current killings, hurtings and burnings."[90]

Secretary of War Root wrote Senator Henry Cabot Lodge: "Every report or charge of this description which has been brought to the attention of the War Department, has been made the subject of prompt investigation." He enclosed "the record of thirteen such inquiries in which the results have been reported. You will perceive that in substantially every case the report has proved to be either unfounded or grossly exaggerated."[91] In a personal letter to Lodge, Root tellingly described the trials in Manila as "the token courts-martial of a total of ten officers." In the Jacob Smith case, the strategic legalism came in the form of a vague indictment, a sympathetic court, and a narrow reading of the laws of war that in the end produced little more than a symbolic chastisement. This action allowed the U.S. government to admonish a scapegoat and deem the atrocities isolated incidents.

An important element of strategic legalism was and remains the public-private split. Once the public has been served its symbolic "justice," post-trial, nonjudicial legal "devices," like pardon, clemency, and parole, are used to mitigate the original, public sentence. The case of American Lieutenant Preston Brown provides a good example. He was tried in Manila, found guilty of killing a prisoner of war, and sentenced to five years of hard labor. However, after the trial, Secretary of War Root quietly reduced Brown's sentence to the loss of half his pay for nine months and a demotion in the army promotions list. Lieutenant Bissell Thomas was convicted of "assaulting prisoners and cruelty," what amounted to "acute torture"; he was fined $300 and given an official reprimand.[92] As historian Godfrey Hodgson points out, "It is hard to avoid the judgment that Root did know that things had gone badly wrong in the Philippines, and that he used his lawyer's skill with words to deny charges that were in substance true."[93]

By the time the United States prevailed in the Philippines, approximately 200,000 Filipinos and 5,000 Americans were dead.[94] The duality in America's relationship with international law was personified by Secretary of War Elihu Root. With no sense of hypocrisy or contradiction, Root defended America's brutal colonial acquisition on the narrowest positive legal grounds, while simultaneously advocating a radical expansion of international law. To men like Roosevelt and Root there was nothing odd about this duality or duplicity—they believed that equity only existed among equals. Again, there were clearly two sets of rules and American leaders were very candid about this until the twentieth century.

Many of the Americans who were beginning to turn their attention to international law were high-level international corporate lawyers from New York City. Senator Daniel Patrick Moynihan notes that even though the U.S. capital moved south, "The culture would remain in New York. One result was that much of the international affairs of the new nation continued in the hands of New York lawyers. This indeed gave a legalist cast to American foreign relations that was distinctive among nations."[95] In December 1904, Elihu Root addressed a group in New York and declared, "Today the United States is practically sovereign on this continent, and its fiat is law upon the subjects to which it confines its interposition."[96] Under the new strategic doctrine of Manifest Destiny, American leaders could create and enforce stern new rules

for the rest of the world to follow while keeping a free hand in the Western Hemisphere.

In 1905, President Theodore Roosevelt negotiated an end to the Russo-Japanese War at the Lotos Club on Fifth Avenue in New York City. Encouraged by the success of this effort, Roosevelt called for a second conference at the Hague. The American delegation was led by Joseph Choate, General G. B. Davis, Admiral Charles Sperry, David Hill, General Horace Porter, and Dr. James B. Scott. The group was given special marching orders from (now) Secretary of State Root, who urged them to take the most "progressive" view and to "always keep in mind the promotion of this continuous process through which the progressive development of international justice and peace may be carried on."[97] Forty-four nations convened in the Hague in June of 1907. Because the first Hague Conference had more or less codified the practical rules of war, the second could address more radical issues like international arbitration.

When the American delegation pressed for an international court with compulsory jurisdiction, the Germans again refused to relinquish their national interests to such a court. Foreign Minister Bernard von Bülow ordered the German delegation to demand modifications to that convention—most significantly, the omission of all references to obligatory jurisdiction.[98] In the end, the second Hague Conference succeeded in further defining the rules of war and committing more nations to observing them, but again, America's more ambitious plans were foiled by German conservatism. It was obvious that the Germans were not comfortable with the American assumption that war could be judged legitimate or illegitimate. To them, it was an instrument of policy bound by its own set of rules. The *London Times* mockingly described the second conference as a gathering of wide-eyed utopians, insisting that "We do not believe that any progress . . . in the cause of peace, in the mitigation of the evils of war, can be accomplished by a repetition of the strange and humiliating performance which has just ended."[99]

Undaunted, Secretary of State Root said that the second Conference provided concrete evidence that the world "had entered upon a more orderly process." The objective of these conferences, he proclaimed, was to make "the practice of civilized nations conform to their peaceful professions."[100] Joseph Choate went one step further, describing the accomplishments of the conference in the grandest terms: "And so at last, after

three centuries, will be realized the dream of Grotius, the founder of international law, that all civilized nations of the earth will submit to its dictates, whether in war or peace."[101] Choate's celebration of the "completion of a century of unbroken peace between ourselves and all of the other great nations of the earth" begs another question. What were the skirmishes with Indians, Mexicans, and Filipinos? Did they simply not count? The movement at the second Hague conference was really one for equity among established powers.

Because the German contingent was unwilling to consent to America's new conception of the international order, they were branded "troublemakers" by American leaders. In a 1909 letter to Andrew Carnegie, Root declared that "the obstacle to the establishment of arbitration agreements, to the prevention of war, to disarmament, to the limitation of armaments, to all attempts to lessen the suspicions and alarm of nations toward each other, is Germany, who stands, and has persistently stood since I have been familiar with foreign affairs, against that kind of progress." Elihu Root considered "Germany, under her present government, is the great disturber of peace in the world."[102]

In 1913, the United States prepared for a third Hague Conference, scheduled for 1914. Joseph Choate wished a "hearty Godspeed to the Conference and all its successors."[103] But the third conference never convened, as hopes for international peace were dashed by a bullet in Sarajevo. Although the American Civil War had provided a preview of twentieth-century military conflict, it had been only a dress rehearsal for the "war to end all wars." The colonial conflicts of the nineteenth century did not prepare European armies for the trench battles of the Western Front, where combat was no longer a matter of killing natives armed with rattan sticks and bolo knives.[104]

Modern democracy profoundly changed the nature and objectives of warfare in the nineteenth and especially the twentieth centuries. Major-General J.F.C. Fuller writes that

> Speaking for their peoples, governments demanded extraordinary rewards for unprecedented national sacrifices. . . . Specifically, they sought either the total defeat and subjugation of the enemy, or a reorganization of the European and world community that would make war impossible—two goals which they proved unable to achieve.[105]

The outbreak of World War I in 1914 demonstrated how vulnerable international law was to the aggressive policies of a nation ready, willing, and able to employ military force. Once national survival was at stake, international law fell victim to military necessity or "*Kriegsraison*." German Chancellor Bethman Hollweg candidly acknowledged this in an address to the Reichstag: "Gentlemen, we are now in a state of necessity, and necessity knows no law. Our troops have already entered Belgian territory. Gentlemen, that is a breach of international law. . . . A French attack on our flank on the lower Rhine would have been disastrous. Thus we were forced to ignore the rightful protests of the Government of Belgium."[106] Once it appeared to the Kaiser and the General Staff that war was inevitable, they launched their much-vaunted Schlieffen Plan, described by historian Andreas Hillgruber as a policy in which "military strategy . . . coerced foreign policy."[107] Germany planned to encircle France with a flanking movement and mount a rear attack in the west before engaging Russia in the east.[108] The problem with the plan was that it required a massive violation of Belgian neutrality (which had been guaranteed by a treaty in 1911 and reassured in 1913),[109] in which the English had taken a special interest. German leaders knew that their strategy would force a confrontation with England.[110]

The Schlieffen Plan failed to produce a quick victory. The Belgian army counterattacked on August 25 and forced their foes back to Louvain, Belgium. Over the next two days, the Germans killed more than two hundred civilians and burned parts of the old medieval city. They did not treat captured civilian combatants as prisoners of war but as "*franc-tireurs*," people waging unlawful war against an occupying army and therefore not protected by the laws of war. The British press told horrendous tales of "Hunish atrocities" in Belgium. However, the "war crimes" were not as clear cut as the British and American press made them out to be.

The German government correctly argued that in order to be protected by the laws of war, armed opponents needed to be members of an identifiable and organized military force. Civilians could not offer armed resistance at one moment and later claim immunity on the ground that they were civilians.[111] The Bryce Report on German atrocities in Belgium gave currency to some of the most exaggerated stories of German atrocities. Five American newspaper correspondents attached to the German armies in Belgium cabled the Associated Press: "In the spirit of fairness

we unite in declaring German atrocities groundless." However, the introduction to the German General Staff's *Manual of Land Warfare* (*Kriegsgebrauchim Landkriege*) contained several telling passages:

> A war energetically carried on cannot be entirely confined to acts against the enemy under arms and his means of defense, but it will tend also to cause the destruction of his materials and moral resources. No consideration can be given to the dictates of humanity, such as consideration for persons and property, unless they are in accordance with the nature and object of the war.[112]

When stories of "Hunish" illegal warfare filtered back to Great Britain, learned legal arguments fell on deaf ears. British Prime Minister Herbert Asquith described the German action as "a shameless holocaust . . . lit up by blind barbarian vengeance."[113] The failure of the Germans to secure a quick victory in Belgium gave England time to send troops to reinforce the French. The Russians also mobilized more quickly than anticipated and when they attacked Germany from the east, von Moltke recalled reinforcements meant for his end run through Belgium. Although the Russians were repelled, by the fall of 1914 the Germans were bogged down in France.

As the Western Front settled down to trench warfare, battalion after battalion manned the ladders and threw themselves "over the top," but infantry charges proved to be no match for the machine gun. During the first day at the Battle of the Somme, Great Britain lost 60,000 men.[114] In five months—July 1 to November 18, 1916—the British lost 419,654 and the French nearly 200,000.[115]

The term "war crimes" was first widely used during and after World War I. More often than not, war crimes accusations were propaganda designed to fuel the moral outrage necessary for modern war. Neither side was quick to prosecute war criminals because they feared reprisals.[116] A number of people in Britain and France began a movement that aimed to try the German Kaiser after World War I. The German government feared war crimes prosecutions for a different reason. The ever-practical General Staff believed that if common soldiers were encouraged to examine orders as international legal questions, military discipline would disintegrate.[117]

The Germans would soon find out that morality has a prudential role

in any foreign policy. Even when their tactics were not clearly wrong, it mattered little.[118] Flagrant violations of the law of nations and insensitivity to the subsequent international outcry doomed the Reich in the now important court of public opinion. The very image of the stiffly formal Kaiser in his spiked helmet invited ridicule. Historian Andreas Hillgruber has observed:

> Public opinion in other European nations slowly came to sense a threat, less because of the goals of German foreign policy per se than the crude, overbearing style Germany projected on the international stage. Without this background, one cannot understand the truly radical hate for Germany and all things German that broke out in the Entente countries with the war of 1914.[119]

This lack of judgment was demonstrated in 1915 when German authorities captured Edith Cavell, the head of a nursing school in Brussels, and charged her with helping 600 British prisoners to escape. Under German military law, aiding and abetting the escape of the enemy was punishable by death.[120] Hours after Cavell confessed and was found guilty by a military court, she was shot by a firing squad.[121] As historian James Willis notes, Cavell's execution was a typical German miscalculation, "an example of a lack of sensitivity to world public opinion. . . . Even those sympathetic described the German action as one characterized by 'incredible stupidity.' "[122]

Technological advances posed vexing new questions for the laws of war. If the small German submarine fleet had observed existing regulations, the sailors would have signed their own death warrants. Maritime law required submarines to surface, warn the targeted ship of its imminent destruction, and allow the crew to lower the lifeboats before sinking the vessel. Although this sounded sporting enough, the early submarines were slow and frail, and the British were not passive victims of submarine aggression. The British Admiralty had issued standing orders for merchant vessels to ram German submarines.[123] Armed British merchantmen "used decoy ships to lure U-boats into traps, flew neutral flags, and rammed whenever possible any submarines that complied with international law by surfacing to warn British merchant vessels of imminent destruction."[124] Once the merchant vessels were armed they technically became warships. The situation was further complicated when the Asso-

ciated Powers invoked the legal doctrines of retaliation and contraband without officially declaring a blockade.[125]

The most famous British war crime occurred in 1915 when a merchant ship, H.M.S *Barlong*, sunk German submarine *U-27* and shot the surviving crew members.[126] The German reprisal was swift and draconic. After a U-boat captured the British steamship *Brussels* on July 27, 1916, German POW authorities determined that British captain Charles Fryatt had attempted to ram a German U-boat a year earlier. Fryatt was tried by a German navy court-martial that declared him a franc-tireur who had committed a "crime against armed German sea forces." Captain Fryatt was tried, sentenced, and executed all on the same day.[127]

In June of 1916, the steamship *Llandovery Castle* was returning to England after having delivered wounded and sick Canadian soldiers to Halifax, Nova Scotia. The *Llandovery Castle* left Halifax for England with 258 crew members aboard. On the night of June 27, the ship was intercepted by German submarine *U-86*, captained by First Lieutenant Helmutt Patzig. The steamer was clearly marked with Red Cross flags and lights according to the Tenth Hague Convention of 1907. At 9:30 P.M., *U-86* fired a torpedo that hit the *Llandovery Castle* squarely, and the steamer sank in only ten minutes, 116 miles southwest of Fastnet, Ireland, in the middle of the deep, black Atlantic.[128]

Of the five lifeboats lowered by Second Officer Chapman, only three managed to escape from being pulled under by the sinking ship. The boat that contained Chapman was pulling survivors from the water when *U-86* surfaced and called for the lifeboats to pull alongside. When they didn't comply, a pistol shot was fired as a warning and the lifeboats pulled alongside the submarine. Captain Sylvester was taken aboard and accused of having eight American airmen on board the *Llandovery Castle*. Two Canadian medical corpsmen were also taken aboard the sub and questioned, but all three men denied that they were airmen and were released by First Lieutenant Patzig. *U-86* submerged, only to reappear and demand that two of the ship's officers come aboard for an interrogation. They were asked to explain why the ship had exploded so violently if it was not carrying munitions. Officers Chapman and Barton were released and the submarine disappeared for a second time. The third time, *U-86* surfaced like a great white shark and headed straight for Captain Sylvester's lifeboat. It veered slightly at the last moment and just managed to avoid the boat. The submarine then circled and made another close pass, and

vanished into the depths. The survivors in the captain's lifeboat were rigging a small sail when they heard firing, and two shells sailed over their boat. Thirty-six hours later, one lifeboat was picked up by the British destroyer *Lysander*. Captain Sylvester and the 23 others in his boat were the only survivors of the *Llandovery Castle*.[129] The day after the sinking of the hospital ship, First Lieutenant Patzig of *U-86* held a meeting and made his crew swear to an oath of silence about the previous night's activities.

In January 1917, Germany accused the Associated Powers of using hospital ships to ferry troops and munitions; British officials claimed that the munitions were defensive.[130] The German government announced that due to what they considered to be a double standard by which its enemies could transport men and arms clandestinely while its submarines were required to surface before attacking, Germany would wage unrestricted submarine warfare; all ships would be sunk without warning. American President Woodrow Wilson claimed that the use of submarines violated the "law and principles of humanity" and that this would not be tolerated by the "civilized world."[131] It is interesting to note that Wilson did not invoke the laws of war but the laws of "humanity." As a result of the German resumption of unrestricted submarine warfare, the United States entered World War I on April 6, 1917. The war was no longer a value-free means of dispute resolution; it was now a contest between civilizations.

At the time, Secretary of State Elihu Root announced: "To be safe, democracy must kill its enemy when it can and where it can. The world cannot be half democratic and half autocratic. It must be all democratic or all Prussian. There can be no compromise. If it is all Prussian, there can be no real international peace."[132] Root advocated a muscular brand of American legalism that was prepared to use force to uphold the new treaties. He believed that if Germany's flagrantly illegal invasion of Belgium and conduct during the war were tolerated, the Hague rules and other advances in international law would be reduced to "mere scraps of paper." The survival of a democracy was dependent on its ability to deal with the problem "by destroying the type of government which has shown itself incapable of maintaining respect for law and justice and resisting the temptation of ambition."[133] By 1918, Root described World War I as nothing less than a battle between "Odin and Christ."[134]

There was much less clamor over massive atrocities committed outside of Europe. This pointed to a duality not only in American foreign policy but also in international law. Rather than expel or resettle Turkey's minority Armenian population, Turkish leaders chose simply to kill them. When Turkey's Ittihad allied with Germany, its "Young Turk" leaders enslaved the Armenians and forced them to build public works projects. By 1915, according to David Kaiser,

> the Young Turks decided . . . to solve the problem of the Armenian minority by exterminating the Armenians. . . . The government disarmed the Armenians of Anatolia in 1915 and announced its decision to deport them to Mesopotamia. But the deportation was only a pretext: the Turks shot Armenian men and marched the Armenian women and children into the mountains and the desert, where they starved to death. Between 1 and 1.5 million Armenians perished.[135]

The U.S. government was divided over its official response. Although the U.S. Ambassador to Turkey, Henry Morgenthau, spoke out against the massacres, the State Department took a different view. In 1915, the governments of France, Great Britain, and Russia declared the Turkish atrocities "crimes against humanity and civilization" and threatened to hold the ringleaders "personally responsible."[136] However, American leaders neither supported nor took actions against the perpetrators of the Armenian genocide. After the German government agreed to an armistice on November 11, 1918, the State Department emerged as the conservative voice on American war crimes policy.

When President Woodrow Wilson unveiled his revolutionary peace plan in 1918, war crimes were a minor detail. His outline for a new international political system was by far the most radical American attempt to dislodge the cornerstone of the old European state system—sovereignty. Wilson's "Fourteen Points" set out to model international relations after a modern constitutional democracy, complete with "consent of the governed, equality of rights, and freedom from aggression." Points 1 through 5 proposed the creation of an international system characterized by "open covenants, openly arrived at, freedom of navigation on the seas, equal trade opportunities and the removal of tariffs, general disarmament and an end to colonialism." Points 6 through 13 intended to spread "democracy" by advocating the self-determination of national minorities

in Europe. Not to be upstaged by the call to end colonialism or disarmament, point 14 called for the construction of an international government, the League of Nations, to guarantee the "political independence and territorial integrity to great and small nations."[137] The League's covenant applied a variation of constitutional democracy to international conflict.

Rather than fight, nations would enter into arbitration and settle differences diplomatically with nonmilitary sanctions. In the event of war, the League was to coerce the parties into arbitration. The terms "just" and "unjust" were changed to the more up-to-date "lawful" and "unlawful." The procedure for a lawful war was laid out in the League's Charter: "The members of the League agree that if there should arise between them any dispute likely to lead to rupture, they will submit the matter either to arbitration or judicial settlement or to Inquiry by the Council, and they agree in no case to resort to war until three months after the award by the arbitration or the judicial decision, or the resort by the Council."[138] The traditional rules of the European state system were further challenged by the introduction of the concept of "war guilt."

When the Paris Peace Conference opened in January 1919, a "Commission on Responsibility of the Authors of War and the Enforcement of Penalties" was assigned to examine the war crimes question. A group of fifteen Allied international law experts was chaired by American Secretary of State Robert Lansing. Although the American President and his Secretary of State had very dissimilar views on international relations, in this instance they were in agreement because Wilson did not want his peace plan tainted by the demands of vengeance. As James Willis points out, "Lansing . . . opposed international punishment of war crimes, believing observance of the laws of war should be left to the military authorities of each state."[139] A few years prior, President Wilson's advisor Edward House wrote tellingly of the Secretary of State's international legal mindset, "He believes that almost any form of atrocity is permissible provided a nation's safety is involved."[140] The American representative used his legal skills—he was America's most successful international lawyer, after all—to frustrate the European efforts to try the Kaiser and in the process broaden the laws of war.

After two months of private meetings, the commission majority issued its "Reservations to the Majority Report" on March 29, 1919. This state-

ment boldly rejected the doctrine of sovereign immunity and proclaimed the Kaiser accountable for: "(a.) Acts which provoked the world war and accompanied its inception. (b.) Violations of the laws of customs of war and the laws of humanity."[141] On April 4, 1919, American representatives Robert Lansing and James Brown Scott issued an extremely conservative dissenting opinion in the form of the American and Japanese "Reservations to the Majority Report." This critique of the proposed expansion of international criminal law would serve as one of the touchstones for war crimes trial critics in the coming century. Ironically, the Americans echoed arguments that had been made by German representatives at the 1899 and 1907 Hague Conferences. Their report argued that it was one thing to try Germans for violations of the laws of war, "a standard certain, to be found in books of authority and the practice of nations," but "the laws of humanity" were a different and entirely unprecedented matter: they "vary with the individual, which, if for no other reason, should exclude them for consideration in a court of justice, especially one charged with the administration of criminal law."[142]

The American "Reservations" endorsed the principle of sovereign immunity with no reservations or qualifications: "the Commission erred in seeking to subject Heads of State to trial and punishment by a tribunal to whose jurisdiction they were not subject when the alleged offenses were committed." According to the American reading, "war was and is by its very nature inhuman, but acts consistent with the laws and customs of war, although these acts are inhuman, are nevertheless not the object of punishment by a court of justice." Most important, Secretary of State Lansing concluded that "The essence of sovereignty was the absence of responsibility. When the people confided it to a monarch or other head of State, it was legally speaking to them only that he was responsible, although there might be a moral obligation to mankind. Legally, however, there was no super-sovereignty."[143]

On May 8, 1919, Lansing pointed out that although Wilson's radical peace plan "aroused public opinion of mankind and to respond to the idealism of the moralist they have surrounded the new alliance with a halo and called it 'The League of Nations,' " the League was a military alliance like any other, and its success or failure would depend on its ability to project force, not justice. "It is useless to close our eyes to the fact that the power to compel obedience by exercise of united strength of 'The Five' is the fundamental principle of the League." Although the

Secretary of State was referring to the American view of international law after World War I, his statement might just as easily apply to twentieth-century American foreign policy: "Justice is secondary. Might is primary."[144]

It was ironic that the Lansing-led American delegation rejected the trial plan with arguments that would have pleased the German Kaiser himself. Robert Lansing invoked the act-of-state doctrine to argue that as a sovereign, the Kaiser bore no legal responsibility. Moreover, Lansing considered the trial plan a blatant implementation of *ex post facto* law.[145] He objected to a trial, writing that "the practical standard of conduct is not moral or humane ideas but the necessity of the act in protecting the national existence or in bringing the war to successful conclusion."[146] The American reading of the laws of war was made with one eye to the East: "We have seen the hideous consequences of Bolshevik rule in Russia, and we know that the doctrine is spreading westward. . . . We must look to the future, even though we forget the immediate demands of justice. Reprisals and reparations are all very well, but will they preserve society from anarchy and give to the world an enduring peace?"[147] With logic and language that resemble that of the post-World War II period, Lansing warned that a punitive policy might also lead to a breakdown of authority that would "hinder the resistance to Bolshevism." He added that President Wilson "approved entirely of my attitude only he is more radically opposed than I am to this folly."[148]

The disparity in the public positions of President Wilson and his Secretary of State says a great deal about the duality of twentieth-century American foreign policy. While Wilson was attempting to rewrite the rules of statecraft, Lansing was unequivocally invoking the rules that the President sought to overturn. This conflict was captured in an amendment to the League of Nations Charter obtained by the United States to legitimize the Monroe Doctrine. While the European powers were restrained by new rules ending colonialism and supporting national self-determination, the United States retained a free hand in North America. Historian James Willis speculates that President Wilson acceded to British demands on the war crimes issue in order to obtain their support for the Monroe Doctrine amendment: "The close conjunction of decisions makes such a thesis not unreasonable. Wilson compromised on the Kaiser's trial on April 8, and on the evening of April 10, the British helped him override French opposition to the amendment."[149]

After much procrastination, the American delegation agreed to a

retributive peace and signed the Treaty of Versailles' infamous "war guilt clause," which held Germany responsible for all of the war's damages.[150] Article 231 of the Treaty of Versailles provided a very specific legal basis for financial reparations: "The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her Allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of a war imposed upon them by the aggression of Germany and her Allies."[151] Originally, President Wilson resisted the effort to brand Germany with war guilt, but French and British leaders forced him to compromise. Naming Germany an "aggressor" introduced the concept into international positive law. These two articles marked the formal end of the traditional European rules of statecraft and the beginning of a shift toward more discriminatory and subjective codes of international law.[152] According to legal theorists Paul Piccone and G. L. Ulmen, "The turn to a discriminatory concept of war and the criminalization of the enemy . . . Art. 227, which indicted the former German Kaiser, and Art. 231, containing the so-called 'war guilt' clause—certainly contributed to the concept of total war. But the most important factor in the transition from enemy to foe was the infusion of ideology into politics."[153] Under the old European state system, war was considered an instrument of policy whose ill-effects should be limited by the self-restraint of the soldiers on the battlefield. Did the American leaders really believe that war was a social wrong that should one day be outlawed?

Germans of all political persuasions were enraged by the war guilt clause and the effort to try the Kaiser. They urged their leaders to reject the *schmachparagraphen* or "shame paragraphs." Conflict over the treaty caused the downfall of one German cabinet and civil unrest. German President Fredrich Ebert signed the treaty only after determining military resistance was not an option.[154] Under Article 227 of the Treaty of Versailles, the Kaiser was threatened with a trial by an international court. He was charged not with specific war crimes but "a supreme offense against international morality and the sanctity of treaties."[155] Articles 228–230 called for trials for men accused of traditional war crimes. Unlike the conflict resolutions of old, the victors did not execute a handful of deserving felons and issue an amnesty for acts committed during wartime. Instead, they attempted to broaden the scope of international

criminal law to hold individuals personally accountable for acts of nations.[156]

However, once again judicial resolution gave way to political considerations that prevented a trial for the Kaiser.[157] European leaders realized that due to domestic weakness, the German government might not be able to endure the humiliation of such a procedure. Even British Prime Minister Lloyd George faced the opposition of his king and began to think in terms of compromise. The Kaiser scoffed at the idea from the relative safety of Denmark: "A court which is impartial does not at present exist in Europe. Against a single person . . . such a proceeding cannot be initiated. It must be directed against all sovereigns and statesmen who partook in the war. . . . The procedure would mean a dishonoring of the principle of monarchy. . . . I do not have any guilt and do not recognize any court having jurisdiction over me."[158] On January 22, 1920, the Dutch government officially refused to extradite the Kaiser.[159]

On February 3, the victors called on the German government to live up to Article 228 of the Treaty of Versailles and hand over 854 men accused of war crimes. Among them were some of Germany's most venerated military leaders: Ludendorff, von Moltke, von Tirpitz, and von Hindenburg.[160] The German government refused and stated firmly, "the extradition of those blacklisted for a trial by an Entente court is a physical and moral impossibility."[161] However, the Germans did agree to try a limited number of men before the German Supreme Court (*Reichsgericht*) in Leipzig. The Associated Powers presented a revised list of 45 defendants.[162] The British had been careful to choose cases where the violations of the laws of war were flagrant; in most, the infractions had been documented by both sides. The British submitted three submarine cases and three prison camp cases. Immediately following World War I, First Lieutenant Helmutt Patzig of U-86 returned home to Danzig and vanished, leaving his subordinates to take the fall.[163] The political justice rendered by the Germans at the Leipzig Trials was similar to the strategic legalism the Americans practiced in the Jacob Smith case—a sympathetic show trial as an appeasement measure to provide symbolic justice and little more.

The Leipzig trials opened on May 23, 1921 in the Reichsgericht with Dr. Schmidt, the presiding judge, and his six colleagues, cloaked in crimson robes and berets, sitting around a horseshoe-shaped table.[164] Ludwig Dithmar and John Boldt, the submarine defendants, were the subordinate

officers of the U-boat that sank the hospital ship *Llandovery Castle*. Both refused to testify on the ground that they had taken an oath of silence concerning the events of the night of June 27, 1916. Even the German court looked sternly upon the two officers' unwillingness to cooperate: "If the firing could be explained in any other way, it cannot be imagined that the agreement of the accused to maintain silence could prevent them from denying firing on the boats, without entering into other matters."[165] The testimony of other submarine crew members made it clear that First Lieutenant Patzig had attempted to cover up his action—not only did he alter the submarine's logs, he also changed the ship's course on the charts.[166]

Based on the testimony of Chapman and the other survivors, the court determined that "the lifeboats of the *Llandovery Castle* were fired on in order to sink them." The court ruled sternly in Patzig's case: "The firing on the boats was an offense against the law of nations. In war the killing of unarmed enemies is not allowed. . . . The killing of enemies in war is in full accordance with the will of the state that makes war . . . only in so far as such killing is in accordance with the conditions and limitations imposed by the Law of Nations."[167] The court determined that neither of the accused had actually fired on the lifeboats and thus the "principle guilt rests with Commander Patzig, under whose orders the accused acted." With some qualifications, the court accepted the defense of superior orders: "They should certainly have refused to obey the order. This would have required a specially high degree of resolution. . . . This justifies the recognition of mitigating circumstances in determining the punishment."[168] The defendants were sentenced to four years imprisonment each.

The decisions in the British cases against Karl Heynen and Emil Müller were equally schizophrenic. Karl Heynen was in charge of British POWs in a Westphalian coal mine. When the prisoners refused to work, he beat some of them. Emil Müller, a German prison camp commandant, was similarly charged with nine instances of personal cruelty. They were sentenced to ten and six months respectively. While the court sternly condemned the defendant's beatings of prisoners as "unworthy of a human being," nonetheless they concluded, "It must be emphasized that the accused has not acted dishonorably, that is to say, his honour both as a citizen and as an officer remains untarnished."[169]

The most uncomfortable moment of the Leipzig trials came when the court heard France's charges against Franz Stenger, a decorated German

officer who had lost a leg to a French artillery shell.[170] The officer was accused of issuing a no quarter order and ordering his men to shoot prisoners in August 1914. Major Benno Cruscius, a German officer who had pointed the finger at Stenger, testified that he had received the order, carried it out, and passed it on. However, Stenger argued that his troops were fighting illegitimate combatants who did not observe the laws of war: "At mid-day, numerous reports had come in of the French method of fighting, feigning to be dead or wounded, or appearing offering to surrender and from the rear shooting with rifles and machine guns at troops that passed by."[171]

In his final statement before the court, Stenger declared: "I did nothing in the war except my duty and obligation to the leaders of the German fatherland, to my Kaiser, the Supreme War Lord, and in the interest of the lives of my fighting German soldiers."[172] The speech was met with wild applause and an acquittal.[173] His German accuser was not so fortunate—Major Crucius was sentenced to two years for "killing through negligence." The French prosecutors were heckled and spat upon by the unruly German spectators. After the defendants in three more of their cases were acquitted, the French withdrew from the trials. In the six British cases, five of the defendants were convicted; the French obtained only one conviction in their five cases.[174] In their one case, the Belgians charged Max Ramdohr, the head of the German secret police in Belgium, with torturing young boys. The court acquitted him and maintained that the stories were merely the products of overactive adolescent imaginations.[175] When Ramdohr was acquitted, the Belgians also withdrew from the trials.

Like the sentences in another trial conducted by a friendly regime, the Jacob Smith case (1902), the sentences in the *Llandovery Castle* case did not match the tone of the judgments. While the two defendants in the *Llandovery Castle* case were sentenced to four years, they were "accompanied to prison by a cheering crowd."[176] Also like the Jacob Smith case, the sentences would be modified with a crude form of strategic legalism—post-trial, nonjudicial sentence modification. Both Boldt and Dithmar "escaped" from prison with the help of their captors (in November 1921 and January 1922 respectively).[177] In 1922, the Associated Powers repudiated the compromise arrangement for the trials and reserved all formal rights under articles 228–230 of the Treaty of Versailles.[178] Their dissatisfaction with Germany's failure to meet the terms of the treaty moved

French leader Raymond Poincaré to occupy the Ruhr Valley with French and Belgian troops.

The traditional European rules of statecraft had been declining steadily since the late nineteenth century, and the Treaty of Versailles marked its end.[179] With the indictment of the former Kaiser and the war guilt clause came the return of a discriminatory conception of war. During the years following World War I, governments redoubled their efforts not merely to limit war but to outlaw it.[180] The effort to criminalize aggression was a secular reinterpretation of the just and unjust war doctrine. Both Grotius and Gentili recognized the necessity of punishing those who initiated unjust wars.[181] Professor Quincy Wright, one of America's leading international legal scholars at the time, considered the Peace of Paris revolutionary because of its juridical view of war. Man had passed through the "Grotian phase" in which war was considered a right, through the "Vattellian phase" in which war was a fact, and into a new phase in which war was a crime.[182]

The interwar period brought a flurry of legal efforts to restrict and even outlaw war.[183] During the 1920s there were several attempts to criminalize aggression. In 1927, the Assembly of the League of Nations declared "That all wars of aggression are, and shall always be illegal." A year later, the Sixth Pan-American Conference even declared war "an international crime against the human species."[184] However, by far the best-known piece of legislation was the Kellogg-Briand Pact or the Pact of Paris. Sixty-three nations signed the treaty on August 27, 1928. Article I stated: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy."[185] Yet the solemn pronouncement contained neither contractual obligations nor a criterion for aggression.[186] With no enforcement mechanism in place and an international unwillingness to back tough words with force, the Kellogg-Briand Pact was violated with impunity throughout the 1930s by Japan in China, the Soviet Union in Finland, Italy in Ethiopia and Spain, and Germany in Czechoslovakia. Some of the signatories were condemned, but none were punished.[187] America's lawyer-statesmen continued to push for a new set of international norms that aimed to one day outlaw war. The most important step on this path was the criminalization of an American definition of "aggression."

Henry Stimson, Elihu Root's heir apparent, had been well groomed

for his assumption of power. Stimson was a second-generation American lawyer-statesman who began his career in Root's Wall Street law firm. Stimson's biographer, Godfrey Hodgson, traces his legal lineage: "Elihu Root was, with Joseph Choate, the acknowledged leader of the New York bar, a man whose life exemplified Stimson's instinct that . . . public service yields true glory. . . . Stimson grew up in admiration of men slightly older than himself—men like Theodore Roosevelt, Elihu Root, Albert Beveridge, and Brooks Adams." Stimson had served as President Taft's Secretary of War and as a colonel in World War I.[188] It is safe to assume that he shared the American lawyer-statesmens' desire to broaden the rules of statecraft. He considered the Treaty of Versailles' war guilt clause a turning point in the history of international relations and in 1932, as Secretary of State, he condemned the Japanese invasion of Manchuria as a violation of the Washington Conference Treaty of 1922 and the Kellogg-Briand Pact.[189] Like Elihu Root, Stimson believed that the new standards of international law needed to be upheld with force if necessary.

Henry Stimson unequivocally declared: "This country was one of the authors of one of the greatest changes in International Law that has ever taken place . . . the initiator of what has been called the 'Pact of Paris' or the Kellogg-Briand Pact."[190] On August 8, 1932, he denounced the Japanese as "lawbreakers." In Stimson's mind, the traditional rules of the European state system had been buried once and for all by the Treaty of Versailles: "Henceforth when two nations engage in armed conflict . . . we no longer draw a circle around them and treat them with the punctilio of the dueler's code. We denounce [the wrongdoers] as lawbreakers."[191] When the Secretary of State personally appealed to British Foreign Secretary John Simon to support the nonaggression treaty, according to *The Manchester Guardian*, Foreign Secretary Simon acted like "a lawyer picking holes in a contract in the interest of a shady client."[192] Appalled by Sir John's "weaseling" and the "mushy cowards" at the League of Nations, Stimson saw "no reason for abandoning the enlightened principles which are embodied in these treaties."[193]

Under Henry Stimson, a new passive-aggressive principle was added to the strategic legalists' arsenal. Now the United States reserved the right to invoke "nonrecognition" for nations that did not come to power through means it judged "legitimate."[194] Stimson attempted to force the Japanese to withdraw from Manchuria by issuing an ultimatum in 1932 that came to be known as the Stimson Doctrine. It was an American

announcement of nonrecognition of "any situation, treaty or agreement which may be brought about by means contrary to the Pact of Paris." Godfrey Hodgson says American statesmen reserved the right to judge the parties in the conflict and to define "legitimate means."[195] Again, the new standards of international conduct were, to borrow a term from contemporary art, "site specific." To German legal theorist Carl Schmitt, the American redefinition of "recognition" was key to what he described as America's "economic imperialism." In Schmitt's estimation, such a doctrine was interventionist by its very nature: "It meant that the United States could effectively control every governmental and constitutional change in every country in the Western Hemisphere."[196] Paul Piccone and G. L. Ulmen wrote, "According to the Tobar Doctrine of 1907, only those governments should be recognized which are 'legal' in the sense of a 'democratic' constitution. In practice, what was meant concretely by 'legal' and 'democratic' was decided by the U.S., which defined, interpreted, and reinterpreted." According to Ulmen, for the United States in the twentieth century, "the source of its power, the secret of its historical actuality—aracanum—lies in international law."[197] Although American leaders supported advances in international law, the American foreign policy duality always loomed in the background and continued to cause conflicts of interest.

Although the Germans signed many of the radical treaties like the Kellogg-Briand Pact, their commitment to the new rules was questionable given the lack of respect the Schlieffen Plan had shown for the nonaggression treaty with Belgium. From the German point of view, after World War I, there was little left to lose.[198] If anything, Germany benefited greatly from the world's unwillingness to confront an aggressive nation. Adolf Hitler took advantage of the uncertain state of European politics and combined mendacious diplomacy with overwhelming force. What he could not browbeat out of world leaders, he took by storm. The Nazi effort was extremely sophisticated and used a number of modern political devices: propaganda, fifth columnists, legalism, military force, and the murder of civilians. In many ways, Nazi Germany was the "criminal nation" or "rogue state" by which all others would be judged. In 1940 and 1941, the *Wehrmacht*'s *blitzkrieg* campaign conquered central and western Europe with a speed, precision, and "frightfulness" that would have pleased their Prussian forefathers. By the end of 1941, Germany controlled most of the European continent. Early in the Second World War,

Allied leaders accused the Germans and the Japanese of atrocities and treaty violations. Initially the charges looked similar to those leveled against the Kaiser during World War I—propaganda intended to rally domestic support. Because the Third Reich's future seemed so promising in the early 1940s, war crimes were not an issue; only victors prosecute war crimes cases. It was not until the Japanese attack on Pearl Harbor on December 7, 1941, that Americans were killed and the United States entered World War II.

In January 1942, representatives of nine Nazi-occupied nations met at the Court of St. James in London and announced their intention to punish Germans who committed crimes against civilians. The St. James Declaration was the first call for something other than traditional vengeance: "international solidarity is necessary to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public."[199] The declaration was also the first mention of trials. In addition to the occupied nations, the United States, Great Britain, and the U.S.S.R. also signed. On October 7, 1942, the Allies established the United Nations War Crimes Commission to collect war crimes evidence. The Commission was based in London and faced the logistical problem of investigating atrocities in occupied nations. Like the threats of World War I, these early pronouncements raised more questions than they answered.[200] In January 1943, at the Casablanca Conference, Roosevelt and Churchill called for the unconditional surrender of the Axis powers. The United States argued that the vanquished should be tried in legitimate courts of law under the antiaggression treaties that came after World War I.[201]

The first specific commitment to a war crimes trial came when the Foreign Secretaries of the United States, the Soviet Union, and Great Britain met in Moscow for a week in late October 1943. The resulting Moscow Declaration threatened "those German officers and men and members of the Nazi party who have been responsible for atrocities, massacres, and executions" with being "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries." There was even a clause for the Axis leaders: "The above declaration is without prejudice to the case of the major war criminals whose offenses have no particular geographic localization and who will be punished by a joint decision of the governments of the Allies."[202]

As the ring tightened around Germany in the summer of 1944, Amer-

ican and British army officials drafted plans for the occupation. The American plan, "The Handbook of Military Government for Germany and the Interim Directive on Occupation Procedures," was not an outline of American occupational policy but merely a loose set of guidelines designed to get the army through the invasion and early occupation.[203] Earlier that year, U.S. Treasury Secretary Henry Morgenthau Jr. read Dean Acheson's "Report on Reparation, Restitution, and Property Rights—Germany," and came away convinced that the State Department was "soft and coddling" toward Germany.[204] This was the beginning of a long-running dispute within the U.S. government between those who favored a punitive peace and those who favored enlisting Germany as an ally against the Soviet Union. Up to this point, American leaders had followed the British, who favored the summary execution of German political and military leaders. They were less interested in elaborate forms of punishment than in postwar strategy. Very early on, the British and some within the U.S. State Department recognized that Germany would play a key strategic role in the postwar world.

The Treasury Secretary was the most forceful advocate of a vindictive peace: he wanted to severely punish Germany for its war crimes.[205] Morgenthau considered the German atrocities more significant than violations of the laws of war; in his mind, the Third Reich had broken more basic codes of human decency.[206] Morgenthau was a political veteran whose father had battled the State Department over the U.S. response to Turkish war crimes in 1915. Morgenthau understood the game and he had an ally in the Oval Office. President Roosevelt had either read or was briefed on the army proposals outlined in the handbook. In a memo to Secretary of War Stimson, Roosevelt described the proposals as "pretty bad" and sided with Morgenthau. FDR believed that the Germans had to understand the magnitude of their crimes: "Too many people here and in England hold to the view that the German people as a whole are not responsible for what has taken place—that only a few Nazi leaders are responsible. This unfortunately is not fact." The President endorsed the concept of collective guilt: "The German people as a whole must have it driven home to them that the whole nation has engaged in a lawless conspiracy against the decencies of modern civilization."[207]

On September 5, 1944, Henry Morgenthau delivered a memo to the President that contained his own ideas for postwar Germany. The Morgenthau Plan recommended that "the cauldron of wars," Germany's

industrial regions of the Ruhr and Saar, be stripped of all mines and industry and be depopulated. The Saar was to go to France, while East Prussia and Silesia were to be surrendered to Poland and Russia, respectively. Morgenthau's larger objective was to transform Germany into a nation "primarily agricultural and pastoral in character."[208] Due process was not to be wasted on Germany's "arch criminals . . . whose obvious guilt has generally been recognized. . . . When identification has been made the person . . . shall be put to death forthwith by firing squad."[209] The military, however, had more traditional ideas about war crimes punishment. Eisenhower felt that a harsh peace was necessary.[210] In the summer of 1944, General Eisenhower suggested executing the entire German General Staff.[211] It is clear that Eisenhower was influenced by wartime passions, and these feelings grew as American forces liberated concentration camps and had a first-hand look at the effects of Nazi depravity.[212]

For a brief moment it seemed that a harsher version of the Treaty of Versailles would be imposed on Germany. The leadership of the U.S. Army, the agency in charge of the European invasion and occupation, was baffled by the Morgenthau Plan. The economic dismantling of Germany would create disorder and chaos, hampering both the invasion and the occupation. There was also something odd about a New York banker preparing orders "for what the American army considered the high point of the whole war—the actual invasion of Nazi Germany."[213] The initial success with which the Morgenthau Plan was greeted forced those who favored a trial to state their case more carefully. Many considered the plan a bureaucratic coup that invaded provinces controlled by the military and State Department. Because Morgenthau was Jewish, some in the War Department and especially the State Department considered his plan a "Judaic act of revenge" committed in the name of the United States.[214] But the debate concerned much more than the fate of German leaders; it was about the shape of the postwar peace. The opponents of the Morgenthau Plan were led in both mind and spirit by second-generation American lawyer-statesman Henry Stimson.[215]

Secretary of War Stimson thought the Morgenthau Plan flawed both morally and strategically, "a Childish folly! . . . a Beautiful Nazi program! This is to laugh!" With world leadership came responsibility—a certain *noblesse oblige*. The Treaty of Versailles seemed mild in comparison to Morgenthau's crude *vae victis*, yet the former had laid the foundations for dictatorship. In a memo to the President, Stimson wrote that "enforced

poverty is even worse, for it destroys the spirit not only of the victim but debases the victor. It would be just such a crime as the Germans themselves hoped to perpetuate upon their victims—it would be a crime against civilization itself."[216] Historian Bradley F. Smith has pointed to the social conflict behind the Stimson-Morgenthau clash:

> The Secretary of War bore certain disdain for the marks of crude aggressiveness and new money that clung to Morgenthau. Stimson was a social anti-Semite, as were the vast majority of old family New York aristocrats in the 1940s. In a number of cases Stimson decried the fact that Morgenthau had taken the lead in advocating harsh peace terms. Specifically, he believed that this could rebound and provide ammunition for those who would attribute all stringent controls on Germany to a mere "Jewish" desire for revenge.[217]

When President Roosevelt left for the Quebec Conference on September 11, 1944, Treasury Secretary Morgenthau was the only high-ranking American representative to accompany him.[218] The main purpose of the conference among American and British leaders was to discuss the terms of American economic aid to Great Britain. When the subject of war criminals came up, the delegates agreed that summary execution was the best solution. On September 15, 1944, Churchill and Roosevelt initialed a draft of the Morgenthau Plan.

Although the British did not deny the existence of profound legal questions, they wanted to avoid the maelstrom where justice, politics, and public policy converged. The spokesman for the British position, Lord John Simon, offered a traditional plan that was more restrained than Morgenthau's. Unlike the Americans, the British candidly admitted that the treatment of the vanquished was and had always been a political question. The British labored under no fictions of due process and reeducation and did not consider an international trial a practical possibility. Lord Simon argued that these questions were inherently political and subjective; "apart from the formidable difficulties of constituting the Court, formulating the charge, and assembling the evidence, the question of their fate is a political and not a judicial question. It could not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy."[219] Although Morgenthau carried the day, this was only the first

exchange in what Bradley F. Smith describes as "the Great German War on the Potomac."[220]

In meetings and memos, Secretary of War Stimson voiced disapproval of the "economic oppression" implicit in the Morgenthau Plan. He argued that vindictive peace treaties "do not prevent war" but "tend to breed war."[221] The Secretary of War favored a more Wilsonian approach and felt that punishment should not be the sole objective of the occupation. Allied treatment of the Nazi leaders should also serve an educational role. In a memo to Henry Morgenthau, Stimson described the benefits of a more judicious approach:

> It is primarily by the thorough apprehension, investigation, and trial of all the Nazi leaders and instruments of the Nazi system of state terrorism such as the Gestapo with punishment delivered as promptly, swiftly and severely as possible that we can demonstrate the abhorrence which the world has for such a system and bring home to the German people our determination to expiate it and all its fruits forever.[222]

President Roosevelt's views on the question of Nazi Germany's "arch-criminals" tended to reflect the ebb and flow of public opinion rather than a deep commitment to any one approach.

Six weeks prior to the 1944 presidential election, a draft of the Morgenthau Plan was leaked to the press. Many attacked it on the ground that it would embolden German resistance. Nazi Minister of Propaganda Joseph Goebbels declared himself the "number one war criminal" and urged his countrymen to fight to the death rather than face vindictive conquerors.[223] After the uproar, President Roosevelt distanced himself from the Morgenthau Plan. Although Stimson's most immediate threat was now gone, there was another fire to put out: Roosevelt had casually agreed with Churchill that Nazi leaders should be identified and executed.[224] When the Secretary of War learned of this vague promise, he set out to devise an alternative. It was out of this bureaucratic struggle that concrete plans for a trial emerged.

Henry Stimson had not lost faith in the rule of law. He felt that America held a unique position in human history. A transition to peace without vengeance would provide a stable foundation for the postwar world.[225] Stimson insisted the victors restrain their vindictive tendencies and try the vanquished because simple revenge would only give rise to a new version

of the "stab in the back" myth. After World War I, German nationalists claimed their political leadership had stabbed the military leadership in the back by negotiating a peace. The Secretary of War's warning proved very prescient given the final outcome of American war crimes policy. He argued that summary justice would "create Nazi martyrs and an opportunity for revisionists and isolationists to claim once more that charges against the German enemy were fabrications."[226]

Stimson believed that a trial would force the German people to face an irrefutable record of Nazi atrocities and as a result they would undergo a national catharsis.[227] Like Civil War reconstruction, America's postwar occupation policies in Germany and Japan would try to meld social work with military occupation policy. "I am disposed to believe that, at least as to the chief Nazi officials, we should participate in an international tribunal constituted to try them."[228] However, the war was not over as long as the Wehrmacht could mount offensives in the West; the treatment of the losers was a premature question.

Although the Nazi crimes were known long before 1944, some recalled the tales of marauding Huns bayoneting babies during World War I and suspected that the stories of Nazi atrocities were similar exaggerations; others questioned reports from Jewish sources.[229] It was clear to Secretary of War Stimson that the Germans had committed singularly horrible acts and that they should be tried publicly. This would present the American lawyer-statesmen with their best opportunity of the twentieth century to translate their ideas into practice. American war crimes prosecutor Colonel Telford Taylor credited a coalition of American lawyer-statesmen and former New Dealers with "the assemblage of all these concepts in a single trial package." Taylor described the backgrounds of the "handful of American lawyers, all but Cutter . . . from New York City. Some of them (Stimson, McCloy) were what today we would call 'moderate' Republicans; several (Rosenman, Chanler, Herbert Weschler) were Democrats. Elitist and generally accustomed to personal prosperity, all had strong feeling of noblesse oblige."[230] These men had no qualms about pushing the army's Judge Advocate General aside, and most shared Stimson's belief that summary execution was only a topical solution. As Stimson later wrote, "we at last reach to the very core of international strife, and we set a penalty not merely for war crimes, but for the very act of war itself."[231]

Stimson's views were not shared by all his colleagues in Washington, but with patrons like President Roosevelt and salesmen like John McCloy,

the American lawyer-statesmen were able to outmaneuver those they could not convert. The War Department intended to replace revenge with something altogether different. Stimson gave his reasoning in a letter to President Roosevelt:

> The method of dealing with these and other criminals requires careful thought and a well-defined procedure. Such a procedure must embody, in my judgment, at least the rudimentary aspects of the Bill of Rights. . . . The very punishment of these men in a manner consistent with the advance of civilization, will have all the greater effect upon posterity. Furthermore, it will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and avoid its recurrence.[232]

The task of planning the first war crimes trial was assigned to Assistant Secretary of War John McCloy, who passed it to Murray Bernays in the War Department's Special Projects Division. Bernays did not consider the laws of war broad enough to cover the scope of the Nazi crimes and stressed the need for legal innovation. He argued that "undoubtedly, the Nazis have been counting on the magnitude and ingenuity of their offenses, the number of offenses, the number of offenders, the law's complexity, and delay and war weariness as major defenses against effective prosecution. Trial on an individual basis, and by old modes and procedures would go far to realize the Nazi hopes in this respect."[233]

Bernays's greatest concern was that individuals could not be charged with the killing of German Jews, which was not by definition a war crime.[234] Civil wars and atrocities against the domestic population fell outside the laws of war. Not content to simply try individuals for recognized violations, Bernays proposed trying Nazi organizations for conspiring to commit aggressive war. He borrowed the thesis of Polish émigré and international legal expert Rafael Lemkin, who argued in *Axis Rule in Occupied Europe* that the SS, Gestapo, and other Nazi organizations were an international version of La Cosa Nostra, "a criminal organization of volunteer gangsters."[235] Legal theorist David Luban makes a similar observation: "The framers of Nuremberg were confronted with a new offense, the bureaucratic crime, and a novel political menace, the criminal state."[236] Under Bernays's broad-reaching proposal, the central crime from which all others sprang was a conspiracy to dominate the world.

Bernays wrote: "This conspiracy, based on the Nazi doctrine of racism and totalitarianism, involved murder, terrorism, and the destruction of peaceful populations in violation of the laws of war."[237] The concept of conspiracy would also close legal loopholes that might allow guilty men to escape punishment.[238]

There was nothing basic about the "Basic Objectives" of the Bernays Plan; they were in fact revolutionary. In a three-page memo, the second-string War Department lawyer challenged long-standing maxims of international relations. The first stated objective rejected the concept of sovereign immunity: "Alleged high interests of state are not acceptable as justification for national crimes of violence, terrorism and the destruction of peaceful populations."[239] Objectives two and three broadened the laws of war and issued a statement of collective German war guilt, "bringing home to the world the realities and menace of racism and totalitarianism; and . . . arousing the German people to a sense of their guilt, and to a realization of their responsibility for the crimes committed by their government."[240]

Murray Bernays shared Stimson's hope that a sober presentation of irrefutable evidence would serve an educational role. Again, social work would be wedded to jurisprudence. The War Department did not seek only to punish but also to reform and reeducate: "If these objectives are not achieved, Germany will simply have lost another war. The German people will not know the barbarians they have supported, nor will they have any understanding of the criminal character of their conduct and the world's judgment upon it."[241] Under the conspiracy plan, law was tailored to fit the unique crimes of the Germans. Although simple in theory, the plan was fraught with legal and political difficulties. Perhaps the greatest problem was that conspiracy was an unfamiliar concept in international and German constitutional law.[242] According to the Anglo-American definition, members and leaders of a group were responsible for the crimes of that group even if they did not actively participate in them. But even in American courts, where the concept was familiar, judges tended to narrow their interpretation. Murray Bernays advocated just the opposite.[243]

Criminal accessory, the Continental system's closest approximation to conspiracy, was far narrower than the American definition.[244] The conspiracy charge allowed the Allies to move up the chain of command, past triggermen who personally violated the rules of war. Theoretically, a con-

spiracy charge would open the way for a blanket conviction of hundreds of thousands of members of the SS and other Nazi organizations without trials. Although the severity of the penalty depended on the individual's crimes and the body of evidence against him, many were troubled by the notion that voluntary membership in one of the "criminal" organizations alone provided sufficient evidence for a guilty verdict. It looked to the naked eye as if a massive charge of collective guilt was being prepared in the name of the United States. Although the Allies warned Axis leaders of war crimes prosecutions, there was no mention of a criminal conspiracy.

On November 11, the Secretaries of State, War, and the Navy signed and delivered a memo to President Roosevelt that affirmed the conspiracy plan and suggested establishing a court by international treaty. In stark contrast to the British position, the American Secretaries favored a solution that separated the judicial from the political and were unwilling to agree that the two were inherently connected.[245] Henry Stimson viewed the trial as an educational device, arguing that

> Not only will the guilty of this generation be brought to justice according to due process of law, but in addition, the conduct of the Axis will have been solemnly condemned by an international adjudication of guilt that cannot fail to impress generations to come. The Germans will not again be able to claim, as they have been claiming with regards to the Versailles Treaty, that an admission of war guilt was exacted under duress.[246]

The Secretary of War attempted to combine the Bernays Plan with his own pet project.[247] During the war, several of the smaller, weaker Allied nations resurrected the idea of criminalizing "aggressive war." Now that it jibed with the Bernays additions, Stimson seized the opportunity to deem aggression the Nazi's "supreme crime."[248] Assistant Secretary McCloy concurred, declaring, "if all the main United Nations participated, it would give a serious precedent that might operate as an added deterrent to waging aggressive war in the future."[249]

The most significant criticism of the War Department plan came from President Roosevelt's trusted advisor, Assistant Attorney General Herbert Weschler. In two memos (December 29, 1944 and January 5, 1945), he recommended more conventional proceedings based on traditional war

crimes charges. Weschler also criticized the revolutionary aspects of the Bernays Plan: "I doubt whether such a conspiracy is criminal under international law . . . the theory would involve that any overt act is criminal—in other words any soldier fighting to carry out the conspiracy becomes a criminal by reason of the conspiracy being made criminal. This would entail hopeless confusion."[250] Attorney General Francis Biddle also felt that the traditional war crimes case was sound; why risk turning the trials into a forum in which to debate vanguard issues of international law?[251] However, these points soon became moot; a military event and its political repercussions would force Franklin Roosevelt's position on war crimes policy and demonstrate the significant and incalculable role that domestic politics played in the development of American war crimes policy.

In the predawn hours of December 16, 1944, Germany's Sixth Panzer Army mounted a final offensive. The spearhead was led by Sepp Dietrich and Joachim Peiper. The forces were not only the battlefield component of the Waffen SS but Hitler's former SS bodyguards; these were Nazi Germany's black knights, who had proven themselves "red in tooth and claw" in the Soviet Union.[252] The German forces were attempting to traverse the Ardennes mountains and then advance to the Meuse River in order to split the Allied forces in the low countries and northern France. On December 18, after two days of slow going and sporadic combat, the commander of one of the battle group's tanks informed Peiper that a "mix-up" had occurred near Ligneauville; a tank gunner had "spontaneously" opened fire on a group of prisoners.[253] That same day a message was received by the U.S. First Army: "SS troops vicinity L8199 captured U.S. soldier, traffic M.P. with about two hundred other U.S. soldiers. American soldiers searched. When finished, Germans lined up Americans and shot them with machine pistols and machine guns. Wounded informant who escaped and more details to follow later."[254]

The U.S. Army recovered seventy-two frozen, bullet-riddled bodies. Compared to atrocities committed against Russians, Poles, and Jews, the shooting of seventy-two soldiers in the heat of battle does not seem as horrendous.[255] But these victims of the SS were American, and as historian James Weingartner notes, "the 'Malmedy Massacre' had entered the consciousness of the American people as an example of Axis barbarity alongside the bombing of Pearl Harbor and the Bataan 'death march.' . . . The symbolic significance was enhanced by the fact that not only were the criminals SS men but members of the First Panzer Division 'Leibstan-

darte SS Adolf Hitler,' the fuehrer's 'own.' "[256] The Malmedy Massacre convinced high-ranking American officials, including Attorney General Weschler that the Nazis were involved in a "conspiracy to achieve domination of other nations" with the help of criminal organizations like the Gestapo.[257] By January 1945, the tide had turned once and for all in favor of the War Department. President Roosevelt informed Secretary of State Cordell Hull that "The charges should include an indictment for waging aggressive warfare, in violation of the Kellogg-Briand Pact. Perhaps these and other charges might be joined in a conspiracy indictment."[258]

By 1945, a once civil discourse among various government agencies had turned into a no-holds-barred battle for control of war crimes policy. In January, the War Department was targeted for one final salvo from the conservatives of the Judge Advocate General and the State Department. After having his well-considered criticism unceremoniously brushed aside, Major General John Weir called on Harvard Law School Dean Edmund Morgan to assess the conspiracy and aggressive war charges. Morgan echoed Herbert Weschler in arguing that charging the Germans with conspiracy went far beyond the traditional laws of war and applied retroactive law in violation of the principle *nullum crimen sine lege* (no crime without prior law).[259] Morgan took a dim view of the plan:

> If the international crime of conspiracy to dominate by acts violative of the rules of war is created, could these acts by Germany against her own nationals be rationally considered as themselves punishable? A negative answer seems imperative. The conspiracy theory is too thin a veneer to hide the real purpose, namely, the creation of a hitherto unknown international offense by individuals, *ex post facto*.[260]

Weir and Morgan made strong cases for a more conservative approach, but they could not stem the surging political tide.

On January 22, 1945, the Secretaries of State and War and the Attorney General signed a memo proposing a war crimes plan that included the Bernays additions. On January 25, Secretary of War Stimson and President Roosevelt discussed the fate of the Axis leaders. Stimson held firm to his belief that the proceedings should do more than simply render justice: the trials would make an example of the Nazi leaders. Stimson wrote in his diary, "I told him [FDR] of my own view of the importance

as a matter of record of having a state trial with records." President Roosevelt hedged throughout the discussions of war crimes policy. Stimson's inability to get a straight answer is apparent in his January 19 diary entry: "He [FDR] assented to what I said, but in the hurry of the situation I am not sure whether it registered."[261]

The Secretaries of State, War, and Treasury prepared another memo for the President to take to Yalta, in the hope that the Big Three would commit to joint proceedings against the Axis leaders. But the issue never made the agenda; the Third Reich was collapsing nearly as fast as the tripartite alliance and questions about the fate of the Axis leaders were eclipsed by larger issues—namely, the fate of Europe.[262] With the end of the war in sight, Stimson now had to sell the War Department plan to the Allies. The Americans had a strong bargaining position, and as long as reconstruction aid was forthcoming, France and England would surely indulge them.[263]

On April 4, 1945, Americans Samuel Rosenman, Ami Cutter, and the recently converted John Weir traveled to London to confer with the British about war crimes policy. Lord Simon, the British foreign secretary, attempted to force the Americans into accepting a more traditional arraignment plan with summary trials and executions for Hitler and his cohorts. The two delegations failed to agree, so the British submitted a plan to the War Cabinet and the United States submitted another to the President. On April 15, the War Cabinet issued a scathing response to Simon's proposal, claiming that it was not conservative enough and insisted on executions. Lord Chancellor Simon conveyed these sentiments to the Americans in an April 16 memo: "H.M.G. assume that it is beyond question that Hitler and a number of arch-criminals associated with him (including Mussolini) must, so far as they fall into Allied hands, suffer the penalty of death for their conduct leading up to the war and for the wickedness which they have either themselves perpetuated or have authorized in the conduct of the war."[264]

After President Roosevelt's death on April 12, Henry Stimson returned to the United States, where he met with President Harry Truman. Among other things (the atom bomb), they discussed war crimes policy. With none of the guile of his predecessor, the President told the Secretary of War that he approved of Stimson's plans for a trial.[265] Buoyed by this unequivocal support, Stimson moved forward at full speed. An American delegation (McCloy, Weschler, Cutter, and Weir)

returned to London in late April. The British, led by Lord Simon, continued to push for a traditional plan.

Assistant Secretary of War John McCloy brushed the British resistance aside and called it "retrogressive." Instead, he urged them to seize the opportunity "to move forward" as part of a larger effort to bring "international law into action against the whole vicious broad Nazi enterprise."[266] McCloy felt that "Hitler and his gang had offended against the laws of humanity," and that the time had arrived to make an example of them.[267] According to British historians John and Ann Tusa, "McCloy's certainty and energy was hard to resist."[268] By the end of April, the Assistant Secretary had gained the support of French Premier Charles de Gaulle and Soviet Premier Josef Stalin. Faced with this *fait accompli*, the British gracefully conceded, announcing that "the United States has gone a long way to answer cabinet objections and [we have] signed on to the international trial."[269] What the American delegation lacked in precedent it compensated for in bargaining power. Although the protrial faction had outgunned their opponents, they had not gone very far in addressing their substantive criticisms.

President Harry Truman searched for someone to head the American delegation at the international trial. The President read a speech given by U.S. Supreme Court Justice Robert Jackson to the American Society of International Law on the day of Roosevelt's death. Jackson warned the United States of the implications of their words: "You must put no man on trial before anything that is called a court . . . under forms of judicial proceeding, if you are not willing to see him freed if not proved guilty. If you are determined to execute a man in any case, there is no occasion for a trial, the world yields no respect to courts that are merely organized to convict."[270] Truman appointed Justice Jackson to head the prosecution team. British war crimes prosecutor Sir David Maxwell Fyfe described Jackson as "a romantic of the law" who embraced "the traditions of natural justice, reason and human rights."[271] Although he was a New Yorker, Jackson came from a different background than the American lawyer-statesmen. In 1941, Jackson had addressed the Inter-American Bar Association in Havana on the subject of the laws of war. As U.S. Attorney General, he had argued that war could no longer be considered a right of states. Jackson explicitly rejected the traditional rules of the European state system and argued that they had been replaced by new concepts: "It does not appear necessary

to treat all wars as legal and just simply because we have no courts to try the accused."[272]

Jackson looked toward an era governed by an American redefinition of international law.[273] Jackson not only rejected the doctrine of sovereign immunity and *raison d'etat*, he took the criminalization of aggression to its ultimate conclusion: "A system of international law which can impose no penalty on a law breaker and also forbids other states to aid the victim would be self-defeating and would not help . . . to realize man's hope for eternal peace."[274] Justice Jackson was a fitting leader for the Americans and would passionately advocate their revolutionary plan. Like Henry Stimson, he was intent on reforming international relations by criminalizing aggression.[275] He believed that a grand trial would set the tone for the postwar period and give greater meaning to the war. The vanquished would not be wantonly slaughtered. The fate of the Germans was contained in a telling euphemism that was part America and part Orwell: the Germans were to be "reeducated."[276]