

## Notes



### Introduction

1. U.S. District Court for the District of Oregon, “In the Matter of the Memorial to Messrs. Robert F. Maguire and Charles A. Hart, May 17, 1976” (Portland: Federal Court Reporters), 2.

2. *Ibid.*, 13.

3. Telford Taylor, interview by author, tape recording, New York City, 8 April 1987.

4. The Thirty Years War was to the sixteenth century what World War II was to the twentieth; both wrought destruction on an unprecedented scale. It is estimated that half of Europe’s German-speaking population was killed by either war or famine during the Thirty Years War. J.F.C. Fuller wrote: “The age of the absolute kings arose from the ashes of the Wars of Religion, which culminated in the Thirty Years War (1648–1648), the latter half of which was a hideous conflict of hastily enrolled mercenaries, as often as not accompanied by hordes of starving people. When, in 1648, the Peace of Westphalia put an end to the anarchy, Central Europe lay in ruins; 8,000,000 people are said to have perished, not counting some 350,000 killed in battle” (*The Conduct of War 1781–1961* [New York: Da Capo, 1961], 15). David Kaiser offers this analysis: “The Thirty Years War, however, was not merely another case of a European monarch trying and failing to increase his authority. No conflict shows more clearly

the continuing power of the European aristocracy and, above all, the ways in which early modern armies served themselves, rather than than their legal sovereigns" (*Politics and War: European Conflict from Philip II to Hitler* [Cambridge: Harvard University Press, 1990], 83). See also Theodore Rabb, *The Thirty Years War: Problems of Motive, Extent and Effect* (Washington, D.C.: University Press of America, 1981).

The Thirty Years War was the result of the Renaissance and the Reformation; both challenged the supreme authority claimed by the Pope and the Holy Roman Emperor. With the modern nation-state came the recognition that war was a constant in human affairs. A good concise account of the changes in warfare is Michael Mann's *States, War, and Capitalism* (Oxford: Basil Blackwell, 1991). Mann breaks the changes in warfare into three "phases." During Phase II, pre-1780, "Making war was formally the private prerogative of the medieval prince. . . . Moreover, wars were not devastating, did not involve the mass of the population, and were profitable to most surviving states" (157). Phase II (1780–1945) was something completely different: "The cost of war 'success' also rose phenomenally. Perceptive observers could see the escalation of costs and casualties of war, from the Napoleonic Wars, through the American Civil War" (157). Mann credits democracy and the industrial revolution with bringing about these changes. For a more thorough account see Kaiser, *Politics and War*. See also Hans Delbrück, *The Dawn of Modern Warfare* (Lincoln: University of Nebraska Press, 1990); Fuller, *The Conduct of War 1781–1961*; and Jeremy Black, *The Rise of the European Powers 1679–1793* (London: Edward Arnold, 1990). See Friedrich Meinecke (*Machiavellianism: The Doctrine of Raison d'Etat and Its Place in Modern History* [Boulder: Westview, 1984], 31). The five states of fifteenth-century Italy (Naples, the Papal States, Florence, Milan, and Venice), each with a permanent embassy and diplomats, provided a preview of the state system that emerged in the aftermath of the Thirty Years War. Statesmen followed fixed rules; everything was considered with a view to its usefulness, above religion or morality. Machiavelli wrote in *The Prince*: "It seemed more suitable to search after the effectual truth of the matter rather than its imagined one . . . for there is such a gap between how one lives and how one ought to live that anyone who abandons what is done for what ought to be done learns his ruin rather than his preservation" (Niccolo Machiavelli, *The Prince* [New York: Oxford University Press, 1984], x). What made the Florentinian unique was his candid acknowledgment of state's reason or *raison d'etat*. Acts considered violent or immoral by Christian standards were justifiable if they furthered the stability and self-sufficiency of the state (xiii). Meinecke writes: "In spite of his outward respect for the Church and Christianity . . . Machiavelli was at heart a heathen, who leveled at Christianity the familiar and serious reproach of having made men humble, unmanly and feeble" (31).

For a dissenting view on the rise of the modern nation-state see Kaiser, who argues that the transition to the modern nation-state was slow and uncertain: "Tilly's argument reflects one of the most common tendencies of modern historians, the tendency to exaggerate the pace of political change, particularly with respect to the growth of central authority" (*Politics and War*, 135). See also Michael Howard, "Can War Be Controlled?" in Jean Bethke Elshtain, ed., *Just War Theory* (New York: New York Uni-

versity Press, 1992), 26. Howard describes the departure from the Christian, just war tradition: "The first of these criteria dominated thinking about war during the era of ecclesiastical dominance which lasted in Europe until the sixteenth century, as clerical apologists, attempting to accommodate the necessities of warfare to the ethical imperatives of the Christian religion, refined the concept of the 'just war.' The second became dominant from the seventeenth to the nineteenth centuries, the age of Grotius, when it was assumed, in the words of Montesquieu, that, 'the law of nations is naturally founded on the principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little injury as possible without prejudicing their real interests'" (26).

5. During the fifteenth and sixteenth centuries the Catholic doctrine was called into question by lay scholars and jurists (Vittoria, Gentili, and Suarez) who challenged the hegemony of both the Pope and the Holy Roman Emperor. All three men denied the Emperor's claim to jurisdiction over princes, citing "the existence of an international community governed by international law." Leo Gross, "The Peace of Westphalia, 1648–1948" *American Journal of International Law* 42(1948): 38. These early scholars shifted the focus of international law away from the just/unjust distinction and prepared the ground for the era of the sovereign nation-state. Vittoria, Gentili, and Suarez shared the belief that "the whole world formed one state, and that all men were fellow citizens and fellow townsmen, like a single herd feeding in a single pasture" ("The Peace of Westphalia," 32). For an excellent modern analysis of sovereignty see George F. Kennan, *Around the Cragged Hill* (New York: Norton, 1993). "Sovereignty was originally a quality attached to the person of a great ruler, normally an emperor or someone equivalent. It was his person, not the country or the people over whom he ruled, who was 'sovereign.' He alone was unlimited in his powers, in the sense that no one else's word could rival his authority. All of his subjects owed him submission and obedience. It was this that made him sovereign" (87). Kennan traces the development of the principle of sovereignty: "In ancient times, and in part down into the modern era, this concept of sovereignty, the supremacy of a single ruler, was often conceived to have universal significance—to be applicable, that is, to all of the known civilized world. . . . In the course of time, these pretensions lost their reality, and it came gradually to be accepted that a ruler, while still being 'sovereign,' would be sovereign only in the territory traditionally accepted as being under his rule, even if it did not include the entire world" (87). See also David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), 337–338 for an interesting discussion of sovereignty's relationship to legal positivism.

6. According to Paul Piccone and G. L. Ulmen, under the traditional rules of European statecraft during the era of the nation-state, "Every recognition in international law was fundamentally an expression of the fact that the state in question had a legitimate spatial dimension and belonged to a recognized spatial order" ("American Imperialism and International Law," *Telos* 72 (Summer 1987). Under the act-of-state doctrine during the era of the nation-state, the leader of a sovereign nation was immune from legal prosecution. There were exceptions: for example, rogues like

Napoleon who refused to play by the rules were punished. Carl Schmitt argued that the removal of the messianic impulse of the just war rationalized and even “humanized” war. See also John Appleman, *Military Tribunals and International Crimes*, 54–59.

Reinhard Koselleck makes a similar observation in *Critique and Crisis* (New York: Berg, 1988): “The termination of religious civil war and the confining of war to an affair between States were two corresponding phenomena rooted in the separation of morality and politics, implicit in one case, explicit in the other. What expressed this separation in terms of international law was that states at war—like men in the state of nature—faced each other as equals with the same rights, beyond any question of the moral *justa causa*, and that regardless of the moral grounds of war, solely by virtue of its statehood, each one understood the other as well as itself as *justus hostis*, a rightful enemy” (43). Koselleck describes international relations in the era of the European nation-state: “The conscience of the sovereign became absolutely free, but his jurisdiction was confined to the inner space of the State he represented. . . . This delimitation of an independent inner space, a space whose moral integrity was shown by Hobbes to lie solely in its character as a State—this was what it took to effectuate the outward evolution of an inter-state, supra-individual commitment” (43–44). Koselleck considers the shift significant: “The *jus publicum Europeum* was based on strict separation of a State’s morally inviolate interior from the mutual external and political relations between States. States were absolutely free, and their sovereigns, like Hobbes’s men *qua* human beings, were subject to their consciences alone, without submitting like men *qua* citizens to any common, institutionalized higher authority. . . . Each sovereign had the *jus ad bellum*, the same right to make war, and war became a means of princely politics, guided by *raison d’état* and reduced to the common formula of a ‘European balance of power’ ” (43–44). Major-General J.F.C. Fuller offers this assessment of military conflict during the nation state period: “Monarchs generally fought wars for limited aims. Publicists frequently accused rival monarchs of seeking total victory over their enemies, and one or two of them briefly dreamed of it, but opportunities for complete victory repeatedly proved illusory, and the peace treaties arrived at reflected an explicit conception of a balance of power” (*The Conduct of War 1781–1961*, 141).

### 1. The End of Limited War

1. Michael Howard, *War in European History* (New York: Oxford University Press, 1976), 5. On the Battle of Agincourt see John Keegan, *The Face of Battle* (New York: Penguin, 1976). A particularly good example of this tendency are recent journalistic accounts of the Battle of Agincourt. One journalist went so far as to describe it as “an atrocity on a scale and of a horror almost unimaginable, even by contemporary standards.” Another journalist called Henry V’s order to execute the French prisoners “a violation of the laws of war.” Historian John Keegan offers a more complete and satisfactory discussion in *The Face of Battle*, 109–110. Howard and Keegan both agree that greed played a more important role than honor in early European warfare. Howard writes, “But the increasing codification of the laws of war was due less to any search-

ing of Christian, legal, or Knightly consciences than to a different development indeed: the growing commercialism of war. Ransom and booty were no longer agreeable bonuses, but, for a growing number of belligerents, the major object of their activity" (7). Michael Ignatieff describes the restraining role of "warrior's honor" in his book of the same title: "Warrior's honor was both a code of belonging and an ethic of responsibility. Wherever the art of war was practiced, warriors distinguished between combatants and noncombatants, legitimate and illegitimate targets, moral and immoral weaponry, civilized and barbarous usage in the treatment of prisoners and of the wounded" (*Warrior's Honor* [New York: Holt, 1997], 117).

Howard Levie leaves few doubts about the brutality of early European warfare in his encyclopedic study, *Terrorism in War: The Law of War Crimes* (Dobbs Ferry, N.Y.: Oceana, 1993): "In a city taken by storm almost any licence was condoned by the law. Only churches and churchmen were technically secure, but even they were not often spared. Women could be raped, and men killed out of hand. All the goods of the inhabitants were regarded as forfeit. If lives were spared, it was only through clemency of the victorious captain; and spoilation was systematic" (9–10). Levie describes the roles played by ransom and booty in early European warfare: "The prospect of this free run of his lust for blood, spoil and women was a major incentive to a soldier to persevere in the rigors which were likely to attend a protracted siege" (10). Levie also points out that many early European wars ended with an amnesty on war crimes: "In the peace treaties ending the wars of the seventeenth century and thereafter, it became the custom to include in each one an amnesty (or 'oblivion') provision which, in effect, forgave, among other things, any war crimes committed during the course of hostilities which the treaty was intended to bring to an end." Levie cites Article II of the Treaty of Westphalia; Article III of the 1713 Treaty of Utrecht; 1763 Treaty of Paris" as examples of "oblivion provisions" (12).

2. Telford Taylor, *Nuremberg and Vietnam* (New York: Bantam, 1971), 59. Taylor comments on the original paradox of Christianity and organized violence: "During the first three centuries after Christ's death there grew up among his followers a strong school of religious pacifism. Moreover, the early Christians were a religious minority in a pagan state. For this reason the early church leaders condemned all military service as incompatible with Christian life."

3. Howard, *War in European History*, 5. Howard describes war against the heathens as "*guerre mortale* in which not only the property but the lives of the vanquished were at the mercy of their conquerer." Moreover, when Christian knights were fighting pagans, "no holds were barred, and knights indeed could gain remission from their sins by waging it." As Michael Ignatieff points out in *Warrior's Honor*, "Warrior codes were sharply particularist: that is, they applied only to certain people, not to others. The protections afforded by the chivalric code applied only to Christians. Toward infidels, a warrior could behave without restraint" (117).

4. Dee Brown, *Bury My Heart at Wounded Knee* (New York: Holt, 1970), 9. Brown wrote: "About five million of the indigenous American population lived in what is now the United States. At the beginning of the nineteenth century, half a million

remained. In 1891, at the time of Wounded Knee—the last great massacre of Indians in the United States—the native population reached rock bottom: a quarter of a million, or 5 percent of the original number of Indians” (114). For more on American Indian numbers see Colin Galloway’s *New Worlds for All: Indians, Europeans, and the Remaking of Early America* (Baltimore: Johns Hopkins University Press, 1998). Some estimates run much higher than five million.

5. Richard Drinnon, *Facing West: The Metaphysics of Indian-Hating and Empire-Building* (Norman: University of Oklahoma Press, 1980), xiii. “The basic feature of the white policies is the assault of the strong on the weak, the intention to take their land from them. This phenomenon has taken its most grandiose form in North America. Land-hungry whites crowd in between the weak and partly decayed settlements of the Indians” (Sven Lindqvist, *Exterminate All the Brutes*, trans. Joan Tate [New York: New Press, 1996], 144).

6. Walter McDougall, *Promised Land, Crusader State* (Boston: Houghton Mifflin, 1997), 17. McDougall writes that there are so many references to early America’s sense of moral superiority that it is “trite.”

7. Edmund Morgan, *American Slavery, American Freedom* (New York: Norton, 1975), 4. See Anders Stephanson, *Manifest Destiny: American Expansionism and the Empire of Right* (New York: Hill and Wang, 1995), 24. For a differing point of view see McDougall, *Promised Land, Crusader State*.

8. Drinnon, *Facing West*, 70.

9. Hugh Brogan, *The Pelican History of the United States of America* (London: Penguin, 1986), 64n17.

10. John Keegan, *Fields of Battle: The Wars for North America* (New York: Knopf, 1996), 270. According to Keegan, war played an important part in the day-to-day life of many American tribes before contact with early settlers: “North America, moreover, already had its own bitter military history. Intertribal warfare was a fact of American Indian life long before the coming of the Europeans, as in so many ‘hard primitive’ societies; Indians fought for honour, revenge, excitement, and in order to replace the casualties of war by seizing and ‘adopting’ captives from the enemy” (103).

11. Stephen Longstreet, *Indian Wars of the Great Plains* (New York: Indian Head Books, 1970), 113.

12. Keegan, *Fields of Battle*, 273, 283. Carol Chomsky makes the point that women and children had always been fair game in American Indian warfare in “The United States–Dakota War Trials: A Study in Military Injustice,” *Stanford Law Review* 43(1)(Nov. 1990): 88.

13. Paul Wellman, *The Indian Wars of the West* (New York: Indian Head Books, 1992), 28n4.

14. Jill Lepore, *The Name of War: King Philip’s War and the Origins of American Identity* (New York: Knopf, 1998), xiv. “English colonists in New England defined themselves against both the Indians’ savagery and the Spaniards’ cruelty: between these two similar yet distinct ‘others,’ one considered inhuman and one human, the English in New

England attempted to carve out for themselves a narrow path of virtue, piety, and mercy.”

15. Ibid.
16. Drinnon, *Facing West*, 331.
17. Ibid.
18. Anthony Wallace, *Jefferson and the Indians: The Tragic Fate of the First Americans* (Cambridge: Harvard University Press, 1999), 175. See also Drinnon, *Facing West*, 81.
19. Drinnon, 87.
20. Ibid.
21. Ibid., 82 and Peter Parish, *Slavery: History and Historians* (New York: Harper and Row, 1989), 12–13, 26–28. According to Parish, America’s slave population grew from 26,000 in 1700 to 2 million by 1830.
22. McDougall, *Promised Land, Crusader State*, 56.
23. Drinnon, *Facing West*, 76.
24. Stephanson, *Manifest Destiny*, 27.
25. Drinnon, *Facing West*, 99.
26. Elihu Root, *The Military and Colonial Policy of the United States* (New York: AMS Press, 1970), 320–321.
27. Vine Deloria Jr. and Clifford Lytle, *American Indians, American Justice* (Austin: University of Texas Press, 1983), 4.
28. Chomsky, “The United States–Dakota War Trials,” 16–17.
29. Ibid., 16. The Minnesota Indian War of 1862 and the trial that followed were brought to my attention by historian John Willand of North Hennepin Community College in Minnesota. He was also kind enough to send me Carol Chomsky’s authoritative *Stanford Law Journal* article on the Minnesota Indian War and the ensuing trials. I agree with Chomsky’s analysis of President Lincoln’s action and his final judgment. I supplemented this with local histories written by Minnesota residents who lived through the period. Most notable of these is the late Marion Satterlee, who spent the better part of a lifetime documenting the history of the massacre. Dee Brown really brought Santee leader Little Crow to life in her classic *Bury My Heart at Wounded Knee*. Bob Primeaux, a Sioux chief and a member of the Hunkpapa Treaty Council, also helped me a great deal in the final stages of the book.
30. Brown, *Bury My Heart at Wounded Knee*, 38. See also Chomsky, “The United States–Dakota War Trials,” 16.
31. Brown, *Bury My Heart at Wounded Knee*, 39.
32. Ibid.
33. Ibid.
34. Ibid., 40.
35. Ibid.
36. Ibid.
37. Charles Bryant and Abel Murch, *A History of the Great Massacre by the Sioux Indians in Minnesota* (Millwood, N.Y.: Kraus Reprint, 1977), 315.
38. Brown, *Bury My Heart at Wounded Knee*, 43.

39. Ibid., 44.
40. Ibid.
41. Ibid., 43.
42. Ibid., 44.
43. Marion Satterlee, "A Description of the MASSACRE BY SIOUX INDIANS. In Renville County, Minnesota, August 18-19" (Minneapolis: Fisher Paper Co., 1916). This quote came from the section entitled "The Massacre at Redwood Agency," 4.
44. Brown, *Bury My Heart at Wounded Knee*, 45.
45. Kenneth Carley, *The Sioux Uprising* (Minneapolis: The Sioux Uprising Committee of the Minnesota State Historical Society, n.d.), 4.
46. Ibid., 5.
47. Ibid., 4.
48. Wellman, *The Indian Wars of the West*, 28n4.
49. Satterlee, "A Description of the MASSACRE BY SIOUX INDIANS," 4.
50. Ibid., 5.
51. Ibid. The brave ferry boat operator Herbert Millier is called Jacob Mauley in other accounts. Satterlee and others credit him with saving at least forty lives before he was butchered alive.
52. Brown, *Bury My Heart at Wounded Knee*, 45.
53. Ibid., 46.
54. *The New York Times*, August 22, 1862, 1. See also Robert Hays, *A Race at Bay* (Carbondale: Southern Illinois University Press, 1997). This entire book is devoted to *New York Times* editorials on America's "Indian Problem."
55. Brown, *Bury My Heart at Wounded Knee*, 50.
56. Carley, *The Sioux Uprising*, 2-3.
57. Ibid., 4.
58. *The New York Times*, August 24, 1862.
59. Richard Ellis, *General Pope and U.S. Indian Policy* (Albuquerque: University of New Mexico Press, 1970), 6.
60. Chomsky, "The United States-Dakota War Trials," 23.
61. Ellis, *General Pope and U.S. Indian Policy*, 8.
62. Brown, *Bury My Heart at Wounded Knee*, 52.
63. Ibid., 56-57. After the final battle, Little Crow announced that he was embarrassed to call himself a Sioux and believed that the Americans fought "like cowardly women" (58).
64. Wellman, *The Indian Wars of the West*, 39n3.
65. Brown, *Bury My Heart at Wounded Knee*, 54.
66. Chomsky, "The United States-Dakota War Trials," 21n44.
67. Brown, *Bury My Heart at Wounded Knee*, 55.
68. Ibid., 55.
69. Chomsky, "The United States-Dakota War Trials," 22.
70. Ibid., 23.



71. Ibid. 24.
72. Ibid., 50–51. Godfrey was married to an Indian woman. He was reported to have killed seven at New Ulm and the Santee dubbed him “he who kills many.” According to Carol Chomsky, he traded his testimony for his life. He testified in fifty-five cases; of those, eleven ended with death penalties.
73. Ibid., 27. On the first day, the Commission sentenced ten to death.
74. Ibid., 23.
75. Brown, *Bury My Heart at Wounded Knee*, 54.
76. *The New York Times*, November 9, 1862, 2.
77. Ibid. On November 23, 1862, *The New York Times* reported an account of the trial written by a reporter from the *St. Paul Press*.
78. *The New York Times*, November 6, 1862.
79. Chomsky, “The United States–Dakota War Trials,” 29.
80. Ibid.
81. Ibid., 31.
82. Ibid., 30.
83. Ibid., 32n118.
84. Ibid. *The New York Times*, December 12, 1862, reported President Lincoln’s reductions: “We have this morning a message from President Lincoln to the Senate in retaliation to the thirty-nine Minnesota Indians whom he has ordered to be executed one week from today. The President was anxious not to act with so much clemency as to encourage another outbreak of the savages, nor with a degree of severity which should be real cruelty, and therefore at first ordered only the execution of such Indians as ‘had proved guilty of violating females.’ ”
85. Ibid., 33.
86. Ibid.
87. Ibid., 34.
88. *The New York Times*, November 24, 1862.
89. Chomsky, “The United States–Dakota War Trials,” 36–37.
90. Michel Foucault, *Discipline and Punish* (New York: Vintage, 1977), 7–8. Foucault points to the disappearance of torture as a public spectacle: “By the end of the eighteenth and the beginning of the nineteenth century, the gloomy festival of punishment was dying out, though here and there it flickered momentarily into life. In this transformation, two processes were at work. They did not have the same chronology or the same *raison d’être*. The first was the disappearance of punishment as a spectacle. The ceremony of punishment tended to decline; it survived only as a new legal or administrative practice.”
91. Chomsky, “The United States–Dakota War Trials,” 36–37.
92. Carley, *The Sioux Uprising*, 66.
93. Longstreet, *Indian Wars of the Great Plains*, 125.
94. Brown, *Bury My Heart at Wounded Knee*, 63–64.
95. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), 260.

96. Francis Lieber, *Lieber's Code and the Law of War*, ed. Richard Hartigan (Chicago: Precedent, 1983), 2. See also Taylor, *Nuremberg and Vietnam*, 21. Lieber had three sons fighting in the Civil War, two Union and one Confederate. Early in the Civil War, Lieber and General Halleck met at Fort Donaldson, where the professor was visiting a son (the Confederate) whose arm had just been amputated.

97. Levie, *Terrorism in War*, 13; Geoffrey Best, *War and Law Since 1945* (Oxford: Clarendon, 1994), 41.

98. Lieber, *Lieber's Code and the Laws of War*, 14.

99. Ibid., 21. See also Taylor, *Nuremberg and Viet-Nam*, 21.

100. Lieber, *Lieber's Code and the Laws of War*, 22. Hartigan describes its lasting impact: "By the time peace returned, appreciation was growing for Lieber's Code." Lieber's own prediction to Halleck that "It will be adopted as a basis for similar works by the English, French, and Germans' soon proved true." The first three chapters provide a concise overview of the early laws of war. The Prussians modeled their own code after it in 1870. For a more comprehensive account see Leon Friedman, ed., *The Laws of War* (New York: Random House, 1972), 1:6.

101. Lieber, *Lieber's Code and the Laws of War*, 49.

102. Ibid., 50.

103. James McPherson, *Battle Cry of Freedom* (New York: Ballantine, 1989), 854. According to the author, 360,000 Union and 260,000 Confederate soldiers were killed in America's bloodiest war.

104. From Charles Royster, *The Destructive War* (New York: Knopf, 1991), 254. Originally in John William DeForest, *Miss Ravenel's Conversion from Secession to Loyalty*, first published in 1867. Martin van Crevald in *The Transformation of War* (New York: Free Press, 1991) dates the period in which a new form of war emerged as between 1793 and 1815. He describes the shift as "smashing the ancien regime to smithereens. In the process, the origin of armed conflict, its strategy and command, not to mention but a few features, were all transformed beyond recognition. More important still, the scale on which war was waged also increased dramatically, and, above all, so did the sheer power with which it was waged" (36).

105. J.F.C. Fuller, *The Conduct of War 1789-1961* (New York: Da Capo, 1961), 111. Fuller has extreme views on many things, including President Lincoln, calling him "none other than a dictator" (99).

106. Ibid., 31. Fuller considers the movement toward "people's wars" a return to tribal warfare. David Kaiser believes that the Enlightenment and revolutionary political ideologies were responsible for the change. However, he argues that: "An intellectual consensus prevailed at the upper reaches of European society from London to St. Petersburg, but the practicality of the new ideas remained questionable. . . . The seductive power of the new ideas tempted the rulers of Europe to new heights of ambition, but the resources of European society could not in the long run satisfy them. In the end the revolutionary and Napoleonic era simply continued the consolidation of European states, while bequeathing the new political and intellectual problems to subsequent generations" (*Politics and War* [Cambridge: Harvard

University Press, 1990], 211–212). See also Quincy Wright, *A Study of War* (Chicago: University of Chicago Press, 1969), I:152; Wright also marks the ideological shifts: “The idea of totalitarian war was developed in the writings of Clausewitz, rationalizing Napoleonic methods. . . . The rise of nationalism, democracy and industrialism and the mechanization of war in the mid-century re-established the trend toward the nation in arms and totalitarian war” (*A Study of War* 297). Bernard and Fawn Brodie, *From the Crossbow to the H-Bomb* (Bloomington: Indiana University Press, 1972), 125. Rifles and breechloading weapons made armed conflict more destructive than ever.

107. Fuller, *The Conduct of War 1789–1961*, 109. The author sees America’s tactics as unique to the nineteenth century and a harbinger of things to come: “For the nineteenth century this was a new conception, because it meant that the deciding factor in war—the power to sue for peace—was transferred from the government to the people, and that peace making was the product of revolution. This was to carry the principle of democracy to its ultimate stage and with it introduce the theory of the psychological attack—in essence Marxist warfare. Of Sherman, Major George Nichols, one of his aides-de-camp, says: ‘He is a Democrat in the best sense of the word. There is nothing European about him’ ” (108). See also Henry Hitchcock, *Marching with Sherman: Passages from the Letters and Campaign Diaries of Henry Hitchcock* (New Haven: Yale University Press, 1927). Royster dissents from this view of Sherman and believes that contemporary scholars have attached too much importance to his harsh and frank words (*The Destructive War* 358). Royster also does an excellent job of summarizing much of the contemporary historiography, 352–356.

108. Michael Walzer, *Just and Unjust Wars* (New York: Basic, 1977), 32.

109. *Ibid.*, 126–128. General Sherman’s wartime memoirs are extremely candid and provide a window into an extremely complex and often brutally honest man. “Until we can repopulate Georgia, it is useless to occupy it; but the utter destruction of the roads, houses and people will cripple their military resources. . . . I can make the march and make Georgia howl. . . . Should I be forced to assault . . . I shall feel justified in resorting to the harshest measures, and shall make little effort to restrain my army. . . . I knew, of course, that such a measure would be strongly criticized, but made up my mind to do it, with absolute certainty of its justice, and that time would sanction its wisdom” (William T. Sherman, *Personal Memoirs of William Tecumseh Sherman* [New York: Library of America, 1990], 2:111).

110. Fuller, *The Conduct of War 1789–1961*, 99.

111. J.F.C. Fuller, *Decisive Battle of the U.S.A* (New York: Da Capo, 1993), 305–308. The British military historian offers an extreme view of Sherman’s tactics. See Best, *War and Law Since 1945*, 51 on Sherman’s march as precedent setting.

112. Sherman, *Personal Memoirs*, 2: 127.

113. For more on Reconstruction see Eric Foner, *Reconstruction: America’s Unfinished Revolution 1863–1877* (New York: Harper and Row, 1988), 603. Foner actually used the expression “limits of the possible” in a lecture in his Columbia University seminar on Reconstruction in 1991.

114. Friedman, ed., *The Laws of War*, 783.
115. The biographical information comes from a sympathetic Southern account by James Madison Page, *The True Story of Andersonville* (New York: Neale Publications, 1908), 183.
116. Royster, *The Destructive War*, 26, 325–327; Geoffrey Ward, *The Civil War* (New York: Knopf, 1990), 338.
117. Ibid. For the indictment in the Wirz case see Friedman, ed., *The Laws of War*, 788.
118. McPherson, *Battle Cry of Freedom*, 797. In a letter to the head of the St. Louis Sanitary Commission, General Sherman pointed to lack of medical supplies in the war-torn Confederacy: “These Confederates are proud as the Devil, and hate to confess poverty, but I know they are really unable to supply socks, drawers, undershirts, scissors, combo, soap, etc., which our men in prison need more than anything else to preserve cleanliness and health” (135).
119. Friedman, ed., *The Laws of War*, 788. This collection provides trial transcripts from the Wirz case. I was also fortunate to study this case in Telford Taylor’s “Laws of War” seminar at Columbia University Law School in 1992. My analysis also draws on Taylor’s lectures and my discussions with him about the case.
120. Ibid., 787.
121. Ibid., 788.
122. Ibid., 789.
123. Ibid., 790.
124. Ibid., 793.
125. Ibid., 786.
126. Ibid.
127. Ibid.
128. Ibid.
129. Levie, *Terrorism in War*, 513.
130. Ibid.
131. Friedman, ed., *The Laws of War*, 798. This unconfirmed rumor comes from Page, *The True Story of Andersonville*, 220.
132. Ibid.
133. McPherson, *Battle Cry of Freedom*, 802. McPherson offers this analysis of the Wirz case: “Whether Wirz was guilty of anything worse than bad temper and inefficiency remains controversial today. In any case, he served as a scapegoat for the purported sins of the South” (797).
134. *Lieber’s Code and the Laws of War*, 22.
135. Ibid.
136. Brown, *Bury My Heart at Wounded Knee*, 86.
137. Ibid.
138. Ibid.
139. Wellman, *The Indian Wars of the West*, 70; Brown, *Bury My Heart at Wounded Knee*, 86; Brogan, *The Pelican History of the United States of America*, 63.

140. Brown, *Bury My Heart at Wounded Knee*, 86.
141. Ibid., 86.
142. Ibid.
143. Wellman, *The Indian Wars of the West*, 71n1 and Brogan, *The Pelican History of the United States of America*, 63.
144. Brown, *Bury My Heart at Wounded Knee*, 86.
145. Ibid., 89.
146. Ibid.
147. Ibid.
148. Ibid., 88 and Wellman, *The Indian Wars of the West*, 72–73. My accounts of the Sand Creek and Wounded Knee massacres owe a great deal to my conversations with Bob Primeaux.
149. Brown, *Bury My Heart at Wounded Knee*, 90.
150. Ibid.
151. Ibid.
152. Ibid., 91.
153. Brogan, *The Pelican History of the United States*, 62.
154. Ibid., 69.
155. Wellman, *The Indian Wars of the West*, 56–57.
156. Drinnon, *Facing West*, 329.
157. Brown, *Bury My Heart at Wounded Knee*, 297.
158. Ibid., 298.
159. Ibid., 299.
160. Ibid.
161. Ibid., 300.
162. Ibid.
163. Hermann Hagedorn, *Roosevelt in the Badlands* (Boston: Houghton Mifflin, 1921), 352.
164. Ibid., 355.
165. Brown, *Bury My Heart at Wounded Knee*, 299.
166. Ibid., 446.
167. Phone interview with Bob Primeaux, 16 August 1999.

## 2. The Changing Rules of War and Peace

1. Richard Hartigan makes this point in *Lieber's Code and the Laws of War* (Chicago: Precedent, 1983).
2. Ibid., 21. Cynics saw the Russians as using humanitarianism to cloak their desire to avoid costly artillery and other expensive military upgrades. George Kennan is quite dismissive of the Czar's humanitarian claims: "This movement [the peace movement] was given a significant filip when Tsar Nicholas II of Russia in 1899 issued a call for an international conference on disarmament. The curious initiative largely the product of the immature dilettantism of the Tsar himself and elaborated by the characteristic confusions of the Russian governmental establishment at the time, was

not a serious one" ("The Balkan Crisis, 1913 and 1993," *The New York Review of Books* 60[13] [July 15, 1993]: 3). See also Calvin DeHormond Davis, *The United States and the Second Hague Peace Convention* (Durham: Duke University Press, 1975), 4–5. Rudyard Kipling mocked the idea of Russians coming as bearers of peace and humanitarianism. His poem entitled "The Bear That Walks Like a Man" tells of a wounded bear and a hunter who cannot bring himself to take the final shot: "When he stands up as pleading, in wavering, man-brute guise: / When he veils the hate and cunning of his little swinish eyes, / When he shows as seeking quarter with paws like hands in prayer, / That is the time of peril—the time of the Truce of the Bear!" The hunter feels a twinge of pity and lowers his rifle. The bear rewards the hunter's humanitarianism with a "steel shod" backhand to the head (*The United States and the Second Hague Peace Convention* 7). British Admiral Sir John Fisher was equally cynical; he wrote at the time, "The humanising of war! You might as well talk of humanising hell!" (in Michael Howard, *Restraints on War* [New York: Oxford University Press, 1979], 54). For an American participant's account see Joseph Choate, *The Two Hague Conferences* (Princeton: Princeton University Press, 1913), 5–6 in the 1969 Kraus reprint. The only stated objective of the conference was to limit new armaments systems and thus preserve the nation's "physical and intellectual" strength for more positive enterprises.

3. See Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford: Clarendon, 1989), 35–109 for the texts of both the 1899 and 1907 conventions. For a summary see Leon Friedman, ed., *The Laws of War* (New York: Random House, 1972), 152–153. Even George Kennan recognized the significance of the Hague Conventions: "But it was seized upon with enthusiasm by adherents of the peace movements and had consequences the Czar himself had not anticipated. Of those, the most important were the two Hague Peace Conferences of 1899 and 1907, resulting in a modernization and renewed codification of international law and a significant elaboration, in particular, of the laws of war" ("The Balkan Crisis, 1913 and 1933" 3).

4. William Hull, *The Two Hague Conferences and Their Contribution to International Law* (Boston: Gwin, 1928), 503. Hull says the conferences justified "the belief that the world has entered upon a more orderly process through which, step by step, in successive conferences, each taking the work of its predecessor as a point of departure, there may be continual progress toward making the practice of civilized nations conform to their peaceful professions" (503).

5. Davis, *The United States and the Second Hague Peace Convention*, 15–16. See also Stanley Hoffman, "The Delusion of World Order," *New York Review of Books* 39(7)(1992): 37; Friedman, ed., *The Laws of War*, 14. See also Ann and A. J. Thomas, *The Concept of Aggression* (Dallas: Southern Methodist University Press, 1972) and Julius Stone, *Aggression and World Order* (London: Stevens and Sons, 1958).

6. Hoffman best describes the structural weaknesses of international courts in "The Delusion of World Order": "International society has neither the centralized government, judicial system, and police that characterize a well-ordered state nor the consensus on what constitutes a crime that exists in domestic affairs" (38). See also

Friedman, ed., *The Laws of War*, 14; Thomas, *The Concept of Aggression*; Stone, *Aggression and World Order*. Hull describes his ideal international court: "not only will the idea of such a court henceforth stand behind the wrong of warfare, but it will inevitably rule the future" (*The Two Hague Conferences* 493).

7. Davis, *The United States and the Second Hague Peace Convention*, 25.

8. Ibid.

9. John Keegan, *The First World War* (New York: Knopf, 1998), 17. Keegan, *The First World War*, on the international court at the First Hague Convention: "Some effort had been made to supply the deficiency through the establishment of a code of international law. It remained a weak concept, for its most important principle, established during the Treaty of Westphalia in 1648, was that of sovereignty of states, which left each in effect unfettered by anything but . . . self-interest" (17). "The flaw in the provision for an International Court was that its convening was to be voluntary. 'The greatest thing,' wrote the American delegate about the conference, 'is that the Court of Arbitration . . . shall be seen by all nations [to] indicate a sincere desire to promote peace [and to] relieve the various peoples of the fear which so heavily oppresses all, the dread of a sudden outburst of war at any moment'" (18).

10. Choate, *The Two Hague Conferences*, 44. For more on Elihu Root see Richard Leopold, *Elihu Root and the Conservative Tradition* (Boston: Little, Brown, 1954).

11. Richard Drinnon, *Facing West: The Metaphysics of Indian-Hating and Empire-Building* (Norman: University of Oklahoma Press, 1980), xiii.

12. Ibid., 240.

13. Ibid., 238.

14. Anders Stephanson, *Manifest Destiny* (New York: Hill and Wang, 1995), 80.

15. Sven Lindqvist (*Exterminate All the Brutes*, trans. Joan Tate [New York: New Press, 1996]) described the changing justifications for colonial wars: "During the nineteenth century, religious explanations were replaced by biological ones. The exterminated peoples were colored, the exterminators were white." Darwin had seen "the struggle for life" in Argentina in 1832: "The Argentine government had just decided to exterminate the Indians who still ruled the Pampas" (115). Darwin interviewed the Spanish commander in charge: "Everyone here is fully convinced that this is the most just war, because it is against barbarians. Who would believe in this age such atrocities could be committed in a Christian civilised country?" Darwin also visited Tasmania in 1836 and watched Australians wipe out native aborigines (115–116). Drinnon, *Facing West*, 236, 157.

16. Drinnon, *Facing West*, 239–240.

17. Ibid., 238.

18. *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge 1884–1901* (New York: Scribners, 1925), 313. Captain Alfred Thayer Mahan's *The Influence of Sea Power upon History* was published in 1890 and would have a profound impact on American foreign policy in the coming decade. Thomas Paterson, J. Garry Clifford, and Kenneth Hagan wrote in *American Foreign Policy: A History—1900 to Present*, vol. 2

(Lexington: D. C. Heath, 1988), "It became a treasured volume in the libraries of American imperialists like Henry Cabot Lodge and Theodore Roosevelt. Mahan's thesis was direct: a nation's greatness depended upon its sea power. . . . Ships of war, in turn, required fueling stations or 'resting places' and colonies, which would further enhance foreign commerce and national power. The loop was closed: a great nation required colonies" (163).

19. Ibid., 205.

20. Leon Wolff, *Little Brown Brother* (London: Longman, 1961), 29.

21. Stephanson, *Manifest Destiny*, 88.

22. Lindqvist, *Exterminate All the Brutes*, 140. Wolff, *Little Brown Brother*, 346, 46, 140. This commentator was especially unimpressed by the use of Manifest Destiny as a justification for expansion: "It is nearly three years since the Americans have gone to war with Spain . . . for Cuba, decided that it was their Manifest Destiny to deprive the Philippines of their liberty." For more on European colonialism in Africa see Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (New York: Houghton Mifflin, 1999).

23. Judith Shklar, *Legalism: Laws, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 1. Leopold, *Elihu Root and the Conservative Tradition*, 18. In a letter dated August 10, 1899, Theodore Roosevelt described Root as "a great corporation lawyer and retained by Whitney and the street railway men"; *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge*, 415.

24. Ibid., viii.

25. Ibid.

26. Shklar, *Legalism*, viii. While Shklar rejects the completely politicized view of the law advocated by critical legal scholars, she points to the equally wrongheaded tendency of lawyers to view law as somehow above politics: "The tendency to dismiss both the political provenance and the impact of judicial decisions especially, and of legal practices generally, remains very common in legal theory. This is what I meant by saying that legalism tends to treat law as just 'there,' and that legal formalism has always been the most articulate defense of this stance" (x).

27. Wolff, *Little Brown Brother*, 266.

28. *Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge*, 415.

29. Elihu Root, *The Military and Colonial Policy of the United States* (New York: AMS Press, 1970), 9. For more on Root see Philip Jessup's two-volume biography, *Elihu Root* (Hamden, Conn.: Archon, 1964), and Leopold, *Elihu Root and the Conservative Tradition*.

30. Elihu Root, *The Military and Colonial Policy of the United States*, 9.

31. Ibid., 10. Root dismissed Aguinaldo's claim to Philippine independence and compared Filipinos to the American Indians: "Nothing can be more preposterous than the proposition that these men were entitled to receive from us sovereignty over the entire country which we were invading. As well the friendly Indians, who have helped us in our Indian wars, might have claimed the sovereignty of the West. They knew that we were incurring no such obligation, and they expected no such reward" (39).



32. Elihu Root, "The American Soldier," in *Miscellaneous Addresses* (Cambridge: Harvard University Press, 1916), 12.
33. Wolff, *Little Brown Brother*, 290.
34. Ibid.
35. Charles Burke Elliott, *The Philippines To the End of the Military Regime* (Indianapolis: Bobbs and Merrill, 1917), 118.
36. Wolff, *Little Brown Brother*, 207.
37. Ibid.
38. Ibid.
39. Jessup, *Elihu Root*, 338.
40. Wolff, *Little Brown Brother*, 237.
41. Ibid.
42. Ibid., 253.
43. Herbert Welsh, *The Other Man's Country* (Philadelphia: J. P. Lippincott, 1900), 210.
44. Ibid.
45. Ibid. See also Wolff, *Little Brown Brother*, 237.
46. Brian McAllister Linn, *The U.S. Army and Counterinsurgency in the Philippines War, 1899-1902* (Chapel Hill: University of North Carolina Press, 1989), 23.
47. Henry Graff, ed., *American Imperialism: The Philippine Insurrection* (Boston: Little, Brown, 1969), 76.
48. Wolff, *Little Brown Brother*, 262.
49. Jessup, *Elihu Root*, 333.
50. Drinnon, *Facing West*, 299. Roosevelt compared the Philippine situation to the American Indians several times: "The reasoning which justifies our having made war against Sitting Bull also justifies our having checked the outbreaks of Aguinaldo and his followers." For other comparisons to the Indian Wars see Wolff, *Little Brown Brother*, 331 and Root, *Military and Colonial Policy*, 75.
51. Wolff, *Little Brown Brother*, 303.
52. Ibid., 331.
53. Ibid.
54. Drinnon, *Facing West*, 321.
55. Stuart Creighton Miller, *Benevolent Assimilation: The American Conquest of the Philippines* (New Haven: Yale University Press, 1982), 200; Drinnon, *Facing West*, 322.
56. Ibid.
57. Miller, *Benevolent Assimilation*, 94-95; see also Wolff, *Little Brown Brother*, 200.
58. Miller, *Benevolent Assimilation*, 204; Wolff, *Little Brown Brother*, 203-204.
59. Miller, *Benevolent Assimilation*, 94-95. See also Drinnon, *Facing West*, 324. General Chafee commented on General Smith's appointment, "I am told, is an energetic officer, and I hope he will prove so in command of that brigade."
60. Miller, *Benevolent Assimilation*, 220. Wolff, *Little Brown Brother*, 356 and Friedman, ed., *The Laws of War*, 803-804.
61. Friedman, ed., 803-804.

62. Ibid., 804.
63. Miller, *Benevolent Assimilation*, 220.
64. Friedman, ed., *The Laws of War*, 804.
65. Drinnon, *Facing West*, 325. After receiving news of the executions, Adna Chaffee cabled General Smith, "Smith, have you been having any promiscuous killing in Samar for fun" (Miller, *Benevolent Assimilation*, 227).
66. Drinnon, *Facing West*, 315.
67. Ibid., 326–327. Major Littleton "Tony" Waller had served in Egypt during the Arabian pasha's rebellion against Khedive and in China.
68. Miller, *Benevolent Assimilation*, 207. Bell "followed the disclaimer with a long list of Filipino transgressions against the laws of civilized warfare which reads much like a lawyers brief and related each alleged violation to specific sections of 'the well known law and usage of war as announced in General Order No. 100 (signed by Lincoln),' as though the Filipinos could possibly have known of this document" (207).
69. Graff, ed., *American Imperialism*, 97. This was the testimony of Army Private Leroy Hallock from Boston. After a member of Private Hallock's company named O'Hearn was found hacked and burned to death, the American soldiers tortured twelve suspects until one, according to Hallock, confessed to the crime (97–98).
70. Ibid., 95.
71. Ibid.
72. Ibid., 114.
73. Ibid., 115.
74. Drinnon, *Facing West*, 327.
75. Ibid.
76. Jessup, *Elihu Root*, 342.
77. Miller, *Benevolent Assimilation*, 230. Drinnon, *Facing West*, 327. Waller did not deny the killings; instead he argued that they fell within the scope of Jacob Smith's orders.
78. Miller, *Benevolent Assimilation*, 230; Friedman, ed., *The Laws of War*, 803–804.
79. Friedman, ed., 804.
80. Ibid., 801.
81. Ibid., 804.
82. Ibid.
83. Ibid.
84. Ibid.
85. Friedman, ed., 799–800.
86. Ibid.
87. Jessup, *Elihu Root*, 341–342. Morefield Story, Julian Cadman, and Carl Schurz were the most outspoken critics of America's Philippine policy. The most embarrassing of the antiwar pamphlets was "Mr. Root's Record" by Story and Cadman.
88. Ibid., 342. According to Jessup, the Secretary of War did not take a close look at the atrocities in the Philippines until 1902. On February 18, 1902, Root wrote a memo, "How does it happen that we have no orders on the treatment of natives since

1900, a year and a half ago?" (342). Root was also attacked by old friends like General Grenville Dodge for yielding to squeamish elements who did not understand war. On July 21, 1902, Root wrote Dodge, "I think if you could read the testimony in the Waller case you would change your views. I had very much the same view of the case that you express, but a careful examination of the entire record and evidence was extremely distressing to me" (341).

89. Ibid.

90. Drinnon, *Facing West*, 329.

91. Ibid., 522.

92. Ibid.; Telford Taylor lecture at Columbia Law School, February 3, 1993.

93. Godfrey Hodgson, *The Colonel: The Life and Wars of Henry Stimson* (New York: Knopf, 1990), 50.

94. Wolff, *Little Brown Brother*, 360. Wolff estimates the United States killed approximately 20,000 on the battlefield. However, the Philippine civilians were the real victims in this conflict. It is estimated that out of a prewar population of 8,000,000, approximately 200,000 died of diseases like typhus and dysentery. See also Paterson, Clifford, and Hagan, *American Foreign Policy 1900 to Present*, 2:205.

95. Daniel Patrick Moynihan, *On the Law of Nations* (Cambridge: Harvard University Press, 1990), 23. In 1905, President Theodore Roosevelt negotiated an end to the Russo-Japanese War. Not only did a New York lawyer mediate the dispute, but the meetings were held on Fifth Avenue at the Lotos Club. A club history recalled the event: "Then President Theodore Roosevelt assembled Japanese and Russian arbitrators in America for the purpose of ending the bitter Russo-Japanese war, these dignitaries left a deadlocked conference one afternoon to retire to the Lotos bar where they miraculously found themselves talking the same language. Shortly afterwards, points of agreement reached in the clubhouse were incorporated in the Treaty of Portsmouth, which ended the war" (23).

96. Jessup, *Elihu Root*, 470. In 1915, Elihu Root, then President of the American Society of International Law, referred to a forthcoming American effort to criminalize aggression: "To give international law binding force, a radical change in the attitude of nations towards violations of law is necessary. Up to the present time breaches of international law have been treated as we treat wrongs under civil procedure, as if they concerned nobody except the particular nation upon which the injustice was inflicted and the nation inflicting it. . . . There must be a change in theory, and violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed a violation of the right of every civilized nation to have the law maintained and a legal injury to every nation" (George Finch, "The Progressive Development of International Law," *American Journal of International Law* 41[1947]: 613). American Joseph Choate made this observation about the German resistance to new codes of international law in *The Two Hague Conferences*: "he sees as in a dream a celestial apparition which excites his ardent devotion, but when he wakes and finds her by his side he turns to the wall, and will have nothing to do with her" (63). The German representative was not moved by the American's histrionics. He

pointed to the chasm between the two nations' views of international relations: "To-day, as then I am not a partisan of abstract obligatory arbitration, but a partisan of real obligatory arbitration which can be realized only in the individual system and which I regard as impossible in the world system" (63).

97. Davis, *The United States and the Second Hague Peace Convention*, 282–283. See Roberts and Guelff, eds., *Documents on the Laws of War*, 35–109 for the full texts of both the 1899 and 1907 conventions. For a summary see Friedman, ed., *The Laws of War*, 152–153; Davis, *The United States and the Second Hague Peace Convention*, 15–16. See also Hoffman, "The Delusion of World Order," 37 and Choate, *The Two Hague Conferences*, 44.

98. Davis, *The United States and the Second Hague Peace Convention*, 25, 282. According to Fritz Dickman, such schemes robbed Germany of the most important element of national survival: "Her superior military organization, which affords her a headstart in any general mobilization and which may well prove decisive" (Andreas Hillgruber, *Germany and the Two World Wars*, trans. William C. Kirby [Cambridge: Harvard University Press, 1981], 35).

99. Hull, *The Two Hague Conferences*, 92.

100. Davis, *The United States and the Second Hague Peace Convention*, 11.

101. Hull, *The Two Hague Conferences*, 87. He believed the conferences justified "the belief that the world has entered upon a more orderly process through which, step by step, in successive conferences, each taking the work of its predecessor as a point of departure, there may be continual progress toward making the practice of civilized nations conform to their peaceful professions" (503).

102. Jessup, *Elihu Root*, 310.

103. Hull, *The Two Hague Conferences*, 92.

104. Marc Trachtenberg, *History and Strategy* (Princeton: Princeton University Press, 1991), 77–78. See also Howard, *Restraints on War*, 9. For many years, it was argued that mobilization and blind, almost mechanical forces led to the outbreak of World War I. Progressive historians shifted the onus of guilt to "armament manufacturers" and "big business." Trachtenberg made a strong case that the nations of Europe moved from diplomacy to war, both "consciously and willingly" (*History and Strategy* 11). But by stating the obvious, Howard puts the great debate over the war's origins into perspective: "None of them . . . was prepared to say courageously, 'We only acted as statesmen always have in the past. In the circumstances prevailing, war seemed to be the best way of forwarding or protecting the national interests for which we were responsible. . . . Our guilt does not lie in the fact that we started the war. It lies in our mistaken belief that we could win it' " (*Restraints on War* 9). Sigmund Freud was shocked that "the great ruling powers among the white nations" could not "succeed in discovering another way of settling misunderstandings and conflicts of interest" (from Arno Mayer, *Wilson v. Lenin: The Political Origins of the New Diplomacy, 1917–1918* [Cleveland: World Publications, 1964], 27). Fuller describes the new problems brought on by "people's wars" in *The Conduct of War*: "The experience of 1914–18 . . . showed that war posed new, virtually impossible problems for the modern governments, leading in central and eastern Europe to revolution, the collapse of

traditional political and social arrangements, and eventually to the emergence of totalitarian regimes" (280). Keegan, *The First World War*, 8. Keegan takes a different view. He described World War I as "the Last Civilized War," contending that "it was, despite the efforts by state propaganda machines to prove otherwise, and the cruelties of the battlefield apart, a curiously civilized war." See also Best, *Law and War Since 1945*.

105. J.F.C. Fuller describes the impact of "people's wars" on the governments of the nation states in *ibid.* David Kaiser makes a similar point in *Politics and War*: "By the twentieth century . . . war had become an aberration, and one which imposed new, unique demands upon the whole society" (280).

106. Martin Kitchen, *Europe Between Wars* (London: Longman, 1988), 67. Herr von Jagow, German Secretary of Foreign Affairs, announced on April 29, 1913 that "Belgian neutrality is provided for by International Conventions and Germany is determined to respect those Conventions." At the same meeting of the Reichstag, Herr von Heeringen, Minister of War, announced, "Germany will not lose sight of the fact that the neutrality of Belgium is guaranteed by International Treaty." Henri Davignon, ed., *Belgium and Germany: Texts and Documents* (Brussels: Belgian Govt. Publication, 1921), 7. Walzer, *Just and Unjust Wars*, 240. See also Hillgruber, *Germany and the Two World Wars*, 231. Alwyn Freeman defines *Kriegsraison* as "the German doctrine of military necessity whose logic conduces inevitably to the abrogation of all restraints upon belligerent activity" ("War Crimes by Enemy Nationals Administering Justice in Occupied Territories," *American Journal of International Law* 41[1947]: 584).

107. Hillgruber, *Germany and the Two World Wars*, 8. See also David Calleo, *The German Problem Reconsidered* (New York: Cambridge University Press, 1978), 8. Hillgruber characterizes the German foreign policy style as "crude and overbearing" (8). James Willis comments on the strategic thinking of the German leadership: "The Germans arrogantly placed too much faith in the potency of sheer military force, failing to recognize that such power necessarily had limits" (*Prologue to Nuremberg* [Westport, Conn.: Greenwood, 1982], 9).

108. Martin van Crevald, *The Transformation of War* (New York: Free Press, 1991), 42. The utilization of national resources like the railroad and the telegraph provided a decisive advantage in 1864, 1866, and 1870–71. In 1871, General Helmuth von Moltke devised the first plan for a war with Russia and France. In 1892, Chief of Staff Alfred von Schlieffen calculated that Germany's adversaries had twice the troops and thus began to develop a strategic plan that would help overcome these odds. See also Manuel DeLanda, *War in the Age of Intelligent Machines* (New York: Swerve Editions, 1991), 91 for a comparison to the Battle Cannae.

109. Kitchen, *Europe Between Wars*, 67.

110. Hillgruber, *Germany and the Two World Wars*, 8.

111. Willis, *Prologue to Nuremberg*, 9. This excellent and comprehensive study of the war crimes issue during World War I helped me a great deal, especially in my analysis of the Leipzig trials.

112. For complete documentation of the Belgian charges see Fernand Passelecq, *Truth and Travesty: An Analytical Study of the Belgian Government to the German White Book*

(London: Sir Joseph Causton and Sons, 1916), 9. For the German response see the German Imperial Foreign Office, *The Belgian People's War: A Violation of International Law* (New York: Press of John C. Rankin, 1915). For more on the Bryce Report see Niall Ferguson, *The Pity of War* (New York: Basic, 1998), 232, 494.

113. Committee on Alleged German Outrages, *Report on Alleged German Outrages* (New York: Macmillan, 1964), 21–22. J.F.C. Fuller offers this view of the role of propaganda in World War I: “The stranglehold of the blockade created a fertile soil for sowing the seeds of propaganda, and—not excepting the American Civil War—in no previous war was it so virulent and vile. . . . War by propaganda is pre-eminently a democratic instrument, fashioned to dominate the mass mind—Rousseau’s ‘general will.’ Its purposes are: (1) to stimulate the mass mind on the home front; (2) to win to one’s support the mass minds of neutral nations; and (3) to subvert the mass mind on the enemy’s inner front. The first is accomplished by awakening the tribal instincts latent in man, and, in order to focus these instincts, to transform the enemy into the devil” (*The Conduct of War* 179). See Willis, *Prologue to Nuremberg*, 10, quoting from the 5 September 1914 *London Times*. Asquith described the destruction of Louvain as “the greatest crime against civilization and culture since the Thirty Years’ War—the sack of Louvain . . . a shameless holocaust.” David Kaiser describes the role of public opinion in *Politics and War*: “Because of the spread of literacy, political success also depended to a great extent upon the careful management of public opinion and the press” (273). See also Paul Kennedy, *The Rise of German-Anglo Antagonism, 1860–1914* (London: Allen and Unwin, 1980).

114. John Keegan, *The Face of Battle* (New York: Penguin, 1976), 260. Of the 60,000 casualties, 21,000 died.

115. *Ibid.*, 285. In his recent book *The First World War*, Keegan writes that in the first four months of World War I, 300,000 French were killed and another 600,000 were wounded (6–7). In *Law and War Since 1945*, Best writes, “The First World War very much changed the total context in which the law of war operated and in which alone it can be properly understood. 1919 marks as much of a shock in its history as 1945” (53).

116. Willis, *Prologue to Nuremberg*, 13. The French tried and imprisoned three men for pillaging in 1914; the German government countered by imprisoning six French officers. Their release was pending the release of the Germans convicted of war crimes.

117. Hillgruber, *Germany and the Two World Wars*, 12. Assaults by hot air balloons were a violation of the second Hague Convention, but by war’s end each side was attacking cities. This highlighted the dilemma of the laws of war during a time of actual conflict: can a nation be expected to place itself at a strategic disadvantage by unilaterally observing international law?

118. *Ibid.*

119. Hillgruber, *Germany and the Two World Wars*, 12. See also Willis, *Prologue to Nuremberg*, 8. Again the Germans were largely responsible for their own image. David Calleo agrees, arguing that the German problem was essentially one of appearances: “A

good deal of Germany's reputation for aggressiveness must probably be laid to the prevalent German style—a traditional military stiffness caricatured by middle class imitators" (*The German Problem Reconsidered* 28).

120. Freeman, "War Crimes by Enemy Nationals Administering Justice in Occupied Territories," 591. Freeman notes: "more objectionable would seem to have been the execution of Miss Cavell within a few hours after the trial, to forestall an appeal." She first met her lawyer in the courtroom and did not know of the charges against her until the arraignment. Willis, *Prologue to Nuremberg*, 28. Telford Taylor, lecture at Columbia University Law School, February 11, 1993. Howard Levie, *Terrorism in War*, 225.

121. Willis, *Prologue to Nuremberg*, 27.

122. Ibid. See also Walter Gorlitz, ed., *The Kaiser and His Court: The Diaries, Note Books and Letters of Admiral Georg Alexander von Muller, Chief of the Naval Cabinet 1914–1918* (London: MacDonald and Co., 1961), 115 and Hillgruber, *Germany and the Two World Wars*, 12.

123. Paterson, Clifford, and Hagan, *American Foreign Policy: A History—1900 to Present*, 2:268. See also Willis, *Prologue to Nuremberg*, 17 and Levie, *Terrorism in War*, 21–22, 66–67, 105–107 on submarines and the laws of war.

124. Paterson, Clifford, and Hagan, *American Foreign Policy: A History—1900 to Present*, 2:268; Gray, *The U-Boat War*, 81–83.

125. Ibid., 267–268. The British also mined the North Sea and cut off German imports (food and cotton).

126. Willis, *Prologue to Nuremberg*, 29.

127. Ibid., 30. See also Levie, *Terrorism in War*, 145n20.

128. Edwyn Gray, *The U-Boat War* (London: Leo Cooper, 1973), 243.

129. Ibid.

130. Willis, *Prologue to Nuremberg*, 35.

131. Ibid., 37, 39. Many American clergymen saw the war as "Armageddon and Wilhelm II as the biblical beast of the last days" (272).

132. Elihu Root, *Miscellaneous Addresses*, 293.

133. Root, *Miscellaneous Addresses*, 288.

134. Leopold, *Elihu Root and the Conservative Tradition*, 121.

135. Kaiser, *Politics and War*, 351; Christopher Simpson, *The Splendid Blond Beast: Money, Law, and Genocide in the Twentieth Century* (New York: Grove, 1993), 28. See also Jon Kirakosyan, *The Armenian Genocide* (Madison: Sphinx, 1992); Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992), 13, 18; Ulrich Trumpner, *Germany and the Ottoman Empire* (Princeton: Princeton University Press, 1968).

David Kaiser attempts to fit the Armenian genocide within the context of nationalism, more specifically tribal war. According to Kaiser, this provided the precedent for both Stalin and Hitler: "Curiously enough, the nationalist impulse which finally upset the post-1885 territorial status quo came not from any of the Balkan states but from the Turkish officers of the Turkish Army in Macedonia who staged the Young

Turk Revolt in 1908. Hoping to maintain Turkish preeminence within a newly democratic empire, they announced constitutional rule and called elections to a Parliament throughout the Ottoman Empire" (316). However, "By the time of the Balkan Wars . . . they had abandoned this principle and determined instead to rebuild the empire upon a basis of ethnic Turkish nationalism . . . and to solve the problem of the Armenian minority by exterminating the Armenians. . . . Here the nationalist question entered a new phase" (351). While John Keegan in *The First World War* concedes that the Turkish forced marches of Armenians were acts of genocide, he argues that "the forced marches organized to do them to death belong more properly to the history of Ottoman imperial policy than to that of war itself" (8).

136. Karl Schwabe, *World War, Revolution, Germany, and Peacemaking* (Chapel Hill: University of North Carolina Press, 1985), 164.

137. Willis, *Prologue to Nuremberg*, 72, 117. See also Hoffman, "The Delusion of World Order," 37: "Wilsonian liberalism proposed a third principle." According to Hoffman, "World order would emerge if the world of nation-states was also a world of constitutional governments" ("The Delusion of World Order" 37). Wilson felt the United States provided the "unique moral force" that would lead the world into greener pastures where reason would prevail over brute force (Robert Tucker, "Brave New World Order," *The New Republic* [Feb. 24, 1992]:24). On the eve of his departure to the Paris Peace Conference in 1919, Wilson was most optimistic: "It has come about by no plan of our own conceiving, but by the hand of God who led us into this way. We cannot turn back, we can only go forward, with lifted eyes and freshened spirit, to follow the vision. It was of this that we dreamed at birth. America shall in truth show the way" (Lloyd Ambrosius, *Wilsonian Statecraft* [Wilmington, Del.: Scholarly Resources, 1991], 134). The League of Nations was the institution and collective security was the mechanism that would guarantee the sovereignty and territorial integrity of nations (130). Wilson's problems with skeptical European leaders like Georges Clemenceau of France and domestic critics like Henry Cabot Lodge had less to do with specifics and more to do with Wilson's vision of collective security. The Europeans did not believe that a balance of power could be replaced with a balance of opinion. Sally Marks describes the failure of the Treaty of Versailles in *The Illusion of Peace* (New York: St. Martin's, 1976): "On the whole the peacemakers at Paris did not recognize the danger inherent in a situation where Germany was no longer surrounded and checked by great empires. They assumed erroneously that Germany would abide by their decisions and accept her new neighbors" (16). According to international relations theorist Stanley Hoffman, "Harmony thus was ultimately dependent on the triumph of democracy, because it has been assumed, ever since Kant, that democratically elected governments that respect the rights of citizens would not make war against other democracies" ("The Delusion of World Order," *New York Review of Books* xxxix [7]: 37).

138. Willis, *Prologue to Nuremberg*, 80. See also Schwabe, *World War, Revolution, Germany, and Peacemaking*, 164.

139. Willis, *Prologue to Nuremberg*, 70.



140. Simpson, *The Splendid Blond Beast*, 23.
141. Michael Marrus, *The Nuremberg War Crimes Trials 1945–1946* (New York: Bedford, 1997), 8–10. Although this is a slim volume, it contains some of the key war crimes documents of the twentieth century. Marrus wisely begins by including sections from the Treaty of Versailles and the Kellogg-Briand Pact before turning his full attention to Nuremberg's IMT.
142. Ibid. Even as late as 1919, Lloyd George pressed for the trial. The Kaiser scoffed at the idea from the relative safety of Denmark (Willis, *Prologue to Nuremberg*, 174).
143. Ibid., 8. See also Levie, *Terrorism in War*, 24–25.
144. *The Foreign Relations of the United States: Paris Peace Conference 1919* (Washington: U.S. Government Printing Office, 1945), 568–569. See also Paterson, Clifford, and Hagan, *American Foreign Policy: A History—1900 to Present*, 2:285. American lawyer Paul Cravath took up the issue of Germany's "war indemnity." In a memorandum to the President, he argued that Germany should pay for the destruction they had wrought. The European powers later transformed the peace treaty into something more Carthaginian by charging the Germans with the cost of the entire war (Marks, *The Illusion of Peace*, 13).
145. Ibid.
146. Willis, *Prologue to Nuremberg*, 41, 76.
147. Ibid. See also Schwabe, *World War, Revolution, Germany and Peacemaking*, 163–166.
148. Simpson, *The Splendid Blond Beast*, 24. McDougall, *Promised Land, Crusader State*, says Robert Lansing described the Treaty of Versailles as "thoroughly bad" and the League of Nations as "thoroughly useless" (142). Secretary of State Lansing asked critics: "Had you rather have the Kaiser or the Bolsheviks?" Wilson believed that what Germany needed someone to face the growing socialist movement, someone who "could put it down." According to Schwabe, *World War, Revolution, Germany, and Peacemaking*, "In short, the American legal experts were not willing to abandon the framework of existing international law. That does not mean, however, that they were not convinced of Germany's guilt in starting the war. Miller even spoke of Germany's collective guilt, but he did not think the issue fell under the jurisdiction of the tribunals which would try individual Germans" (164).
149. Willis, *Prologue to Nuremberg*, 24.
150. Marrus, *The Nuremberg War Crimes Trials*, 10.
151. Ibid.
152. See Paul Piccone and G. L. Ulmen, "American Imperialism and International Law," *Telos* 72 (Summer 1987): 60.
153. Ibid.
154. Willis, *Prologue to Nuremberg*, 177
155. Ibid., 60. The most famous and pernicious myths were that the General Staff had been stabbed in the back by weak-kneed politicians and that the war crimes accusations were all false. See also 72, 117. Even as late as 1919, Lloyd George pressed for the trial.

156. Ibid., 60.
157. Taylor, *The Anatomy of the Nuremberg Trials*, 16.
158. Willis, *Prologue to Nuremberg*, 100.
159. Levie, *Terrorism in War*, 27.
160. Ibid., 28.
161. Ibid.
162. John Appleman, *Military Tribunals and International Crimes* (Westport, Conn.: Greenwood, 1971), 54–57. Bismarck offered very pragmatic advice on the treatment of the vanquished. In the Chancellor's eyes, strategy and necessity overruled popular passions and/or morality: "People insist that, in conflicts between states, the conqueror should sit in judgment upon the conquered, moral code in hand, and inflict punishment upon him for what he has done. . . . This is an altogether unreasonable demand. Punishment and revenge have nothing to do with policy. Policy must not meddle with the calling of the Nemesis, or aspire to exercise the judge's office. . . . In such a case as the one referred to, the question would be, 'which of the two will be more useful to us—a badly-used Napoleon or a well-used Napoleon?' " Mortiz Busch, *Our Chancellor* (New York: Scribners, 1884), 1:99; from Fuller, *The Conduct of War*, 305.
163. Claud Mullins, *The Leipzig Trials* (London: H.F.G Witherby, 1921), 99.
164. Ibid., 42.
165. Ibid., 12. The tribunal sternly admonished the defendants, "Don't imagine that you are going to get rid of this terrible affair by trying to put the blame upon a dead man: that won't do."
166. Friedman, ed., *The Laws of War*, 876.
167. Ibid., 880. The judgment read sternly: "The rule of International Law, which is here involved, is simple and is universally known. No possible doubt can exist with regard to the question of its applicability. The Court must in this instance affirm Patzig's guilt of killing contrary to International Law."
168. Ibid., 868.
169. Mullins, *The Leipzig Trials*, 66–67; Levie, *Terrorism in War*, 31.
170. Friedman, ed., *The Laws of War*, 882. See also Willis, *Prologue to Nuremberg*, 135.
171. Mullins, *The Leipzig Trials*, 162.
172. Willis, *Prologue to Nuremberg*, 135.
173. Levie, *Terrorism in War*, 32.
174. Mullins, *The Leipzig Trials*, 162. Taylor, *The Anatomy of the Nuremberg Trials*, 12,
17. 175. Levie, *Terrorism in War*, 32.
176. Ibid., 516n246.
177. "However, with official connivance, and wholehearted public approval, Boldt escaped in November 1921 and Dithmar in January 1922" Levie, *Terrorism in War*, 33.
178. Willis, *Prologue to Nuremberg*, 135.
179. Ibid., 23.
180. Piccone and Ulmen, "American Imperialism and International Law," 62.

181. Quincy Wright, *A Study of War* (Chicago: University of Chicago Press, 1969), 342.

182. Ibid.

183. Ibid.

184. Howard, *Restraints on War*, 11. Howard describes their effort to create not simply laws of war, but laws against war. This was one in a series of treaties written in the late 1920s all aimed at outlawing "aggression."

185. Marrus, *The Nuremberg War Crimes Trials*, 14. See also Finch, "The Progressive Development of International Law," 613.

186. For nearly three hundred years of international relations, war was considered a legally admissible instrument of policy independent of its justness or unjustness (Ulmen, "American Imperialism and International Law," 49). Sally Thomas has argued that the lawful/unlawful distinction was a departure from the concept of just and unjust war. The illegality of resort to war was not a judgment based on "the intrinsic injustice of the cause of war, but of a breach of a formal procedural requirement" (17). Quincy Wright, "International Law and Guilt by Association," *The American Journal of International Law* 43(1949): 753.

Fuller described what he believed to be the intellectual underpinnings of the anti-war movement in *The Conduct of War*: "The same determination to establish a new basis for peace lay behind an entirely different war aim. As the war went on, socialists and liberals increasingly voiced the hope that peace would lead to a more just and peaceful international order based on general disarmament, an end to trade barriers, and perhaps a new world organization. Although many Europeans adopted these views, only the American government based its program of war aims upon them, and President Wilson, of course, became the symbol of the proposed new order during 1918. Wilson's ideas, however, did not command universal support, even in the United States where the Republican opposition, like the other Allied governments, stood for total victory and a harsh peace" (332). George Kennan remarks on the American interest in the peace movement: "There was especially in the United States, a marked surge of interest in and enthusiasm for the negotiation and adoption of treaties of arbitration and conciliation. And the government efforts were supported by a number of private institutional initiatives" ("The Balkan Crisis, 1913, 1993" 3).

187. Hodgson, *The Colonel*, 164.

188. Ibid., 20, 49.

189. Ibid., 164.

190. Ibid.

191. Ibid., 164.

192. Ibid., 158. The Manchurian crisis was "an issue between the two great theories of civilization and economic methods." The Pact's august pronouncements proved hollow when Stimson called on Britain and France "to repair to the standard," joining in the nonrecognition of the Japanese conquest. See also *The New York Times*, August 9, 1932.

193. Ibid., 162. Paterson, Clifford, and Hagan, *American Foreign Policy: A History—1900 to Present*, 1:339. Stimson was less concerned about the fate of China than “the specter of great powers seizing new empires to rescue themselves from economic depression” (339).

194. Hodgson, *The Colonel*, 158; Paterson, Clifford, and Hagan, *American Foreign Policy*, 2:280. Accordingly, Wilson’s *raison d’état* was “the expansion of freedom.” However, “freedom” was defined by the Americans. Although the Treaty of Versailles abolished colonialism, the Americans refused to abandon the Monroe Doctrine. Originally written to keep the American continent free from European influence, it became a means by which the United States could retain a free hand in the region. Ambrosius, *Wilsonian Statecraft*, 56. Tucker, “Brave New World Order,” 26.

195. Piccone and Ulmen, “American Imperialism and International Law,” 63. See also Hodgson, *The Colonel*, 158.

196. Piccone and Ulmen, “American Imperialism and International Law,” 63.

197. Ibid., 51. To Schmitt, the American redefinition of “recognition” was of vital importance. “In Schmitt’s estimation, such a doctrine had a clearly interventionist character. It meant that the United States could effectively control every governmental and constitutional change in every country in the Western Hemisphere” (63). Although the American delegation pressed for arbitration, there was a conflict of interest: they also wanted their Monroe Doctrine. To Carl Schmitt this was telling: “‘This is the core of the great original Monroe Doctrine, a genuine Grossraum principle, namely the union of a politically awakened people, a political idea and on the basis of this idea, a politically—dominant Grossraum excluding foreign intervention’” (Schmitt quoted in *ibid.*, 51).

198. Paterson, Clifford, and Hagan, *American Foreign Policy: A History—1900 to Present*, 2:375. See also International Military Tribunal, *Trial of the Major War Criminals* (Nuremberg: International Military Tribunal, 1947), 5:322; Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 21. The conferees felt that the Germans had violated the laws of war so egregiously that drumhead justice would not suffice.

199. Whitney Harris, *Tyranny on Trial* (Dallas: Southern Methodist University Press, 1954), 4.

200. Ibid. See also Robert Conot, *Justice at Nuremberg* (New York: Carol and Graf, 1983), 9.

201. John Lewis Gaddis, *The United States, Russia, and the Origins of the Cold War* (New York: Columbia University Press, 1972), 8.

202. The entire text of the Moscow Declaration can be found in the Trials of the German War Criminals (Washington, D.C.: U.S. Government Printing Office, 1949).

Bradley F. Smith, *The Road to Nuremberg* (New York: Basic, 1981), 8–9. President Roosevelt’s style was to deemphasize political questions to prevent divisions in the wartime alliance (39). According to Smith, the Roosevelt administration effectively sidestepped contentious issues by adopting a policy that sought to bring quick victory for the least amount of American lives. See also Tusa, *The Nuremberg Trial*, 50–51 and

Taylor, *The Anatomy of the Nuremberg Trials*, 34. Bradley F. Smith offers the most comprehensive account of the pretrial debates in *The American Road to Nuremberg: The Documentary Record* (Stanford: Hoover Institution Press, 1982). Smith is without question one of the world's foremost experts on the creation of the IMT and the international trial. His trilogy was extremely helpful.

203. Frank Buscher, *The U.S. War Crimes Program in Germany, 1946–1955* (Westport, Conn.: Greenwood, 1989), 8. Buscher ably summarizes the historiography of the occupation period. See also John Gimbel, *The American Occupation of Germany* (Palo Alto: Stanford University Press, 1968); John Montgomery, *Forced to Be Free: The Artificial Revolution in Germany and Japan* (Chicago: University of Chicago Press, 1967); and Paul Hammond, "Directives for the Occupation of Germany: The Washington Controversy," in Harold Stein, ed., *American Civil-Military Decisions* (Birmingham: University of Alabama Press, 1963). For German views see Walter Dorn, "Die Debatte über die amerikanische Besatzungspolitik für Deutschland (1944–1945)" *Vierteljahrshefte für Zeitgeschichte* 20(1972): 39–62; and Gunter Moltmann, "Zur Formulierung der amerikanischen Besatzungspolitik in Deutschland am Ende des Zweiten Weltkrieges," *Vierteljahrshefte für Zeitgeschichte* 15(1967): 299–322.

204. Hans Morgenthau Jr., *Morgenthau Diaries* (New York: Da Capo, 1974), 2:443–444. The American Jewish Conference expressed a similar view in a letter to Secretary of State Cordell Hull: "This campaign of terror and annihilation has been carried out with unexampled bestiality in consort with Axis allies. . . . These crimes cannot go unpunished without destroying the legal and moral foundations upon which our civilization rests." (For the original text see 30–44 and the introduction to the memo from Henry Morgenthau to President Roosevelt, 5 September 1944, in Smith, ed., *The American Road to Nuremberg*, 27–29.)

205. Smith, *The American Road to Nuremberg*, 8. "On August 28, an additional push was applied in the same direction by John Pehle, a Morgenthau associate and director of the war refugee board." Christopher Simpson offers a more conspiratorial account of the State Department's inaction in *The Splendid Blond Beast*. Presidential Memorandum for the Secretary of War, 26 August 1944, in Smith, ed., *The American Road to Nuremberg*, 20–21. It would be generous to say that FDR waffled on war crimes policy; it had been a detail in a two-theater war. The real focus of American wartime enmity was Japan.

206. Ibid.

207. Ibid., 20–21.

208. From Henry Morgenthau Jr. to President Roosevelt (The Morgenthau Plan), 5 September 1944, in Smith, ed., *The American Road to Nuremberg*, 27–29.

209. Ibid., 28.

210. Taylor, *The Anatomy of the Nuremberg Trials*, 107–111.

211. Ibid.

212. Robert Abzug, *Inside the Vicious Heart* (New York: Oxford University Press, 1985), 44. One veteran recalled how the American soldiers reacted to finding the camp: "Control was gone after the sights we saw, and the men were deliberately

wounding guards that were available and then turned them over to the prisoners and allowing them to take their revenge on them.”

213. Smith, ed., *The American Road to Nuremberg*, 6–8. *The Road to Nuremberg* and *The American Road to Nuremberg* are two different books, both by B. F. Smith.

214. Conot, *Justice at Nuremberg*, 11.

215. *Ibid.*, 13.

216. Secretary of War Henry Stimson to President Roosevelt, 9 September 1944, in Smith, ed., *The American Road to Nuremberg*, 30–31.

217. Smith, ed., *The Road to Nuremberg*, 31.

218. Tusa, *The Nuremberg Trial*, 60.

219. Memorandum, “Major War Criminals” by British Lord Chancellor Sir John Simon, 4 September 1944, in Smith, ed., *The American Road to Nuremberg*, 33–37. Churchill advocated a similar plan (46). The British were adamant about not redefining war crimes in order to punish war criminals. But as victory neared, this conservative approach fell by the wayside (18). In the spring of 1944, Stimson described his plans: “the method of dealing with these and other criminals requires careful thought and a well-defined procedure. Such procedure must embody . . . at least the rudimentary aspects of the Bill of Rights, namely notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defense. The Nazi crimes were profound and widespread and they demanded trial and punishment as all *crimes*, no matter how clear, do” (Tusa, *The Nuremberg Trial*, 54).

220. *Ibid.*, 1. The title of the first chapter is “The Great German War on the Potomac.” The Tusas describe the idea for a trial as having “originated in an interdepartmental row in Washington over plans for the future of conquered Germany” (50). Smith describes Roosevelt’s treatment of the war crimes question: “The reason for this lack of preparation was simple: Nothing definitive had come down from the White House indicating what Franklin Roosevelt thought should be done with the remains of central Europe once Nazism had been destroyed. The President was still stalling on the question, as he had been stalling since the U.S. entered the war in 1941” (*The Road to Nuremberg* 13).

221. Henry Stimson to Henry Morgenthau, 9 September 1944, in Smith, ed., *The American Road to Nuremberg*, 30. Stimson wrote: “My basic objection to the proposed methods of treating Germany which were discussed this morning was that in addition to a system of preventative and educative punishment they would add the dangerous weapon of complete economic oppression.”

222. *Ibid.*

223. Tusa, *The Nuremberg Trial*, 61.

224. Kai Bird, *The Chairman: John McCloy, the Making of the American Establishment* (New York: Simon and Schuster, 1991), 258.

225. Tusa, *The Nuremberg Trial*, 50.

226. William Bosch, *Judgment on Nuremberg* (Chapel Hill: University of North Carolina Press, 1970), 9. Many believed that the vindictive tenor of the Treaty of Ver-

sailles had fostered a political atmosphere that allowed the seed of National Socialism to germinate and flourish. The twin debacles of the Versailles and the Leipzig trials contained practical lessons for the victors of World War II. At the time, German nationalists described the Treaty of Versailles as the Allies' "hour of reckoning." The final outcome was a "Carthaginian peace par excellence" that culminated with the "crucifixion" of Germany. This view would later play into the hands of post-World War II German nationalists who had long argued after World War I: "The old Germany was suffering on the cross while the terrible punishment of Bolshevism hovered over the world as the Divine vengeance for the Victors. Here was an added feature to the myth—the initial suggestion that the Allies never understood that Germany was the vital bulwark against Bolshevik expansion" (Louis Snyder, *The Roots of German Nationalism* [Bloomington: University of Indiana Press, 1978], 175). Karl-Heinz Janssen makes a similar point in "*Versailles und Nürnberg: Zur Psychologie der Kriegsschuldfrage in Deutschland*"; to Janssen, both Nuremberg and Versailles "refers to a continuity, to a link between World War I and World War II—both have negative connotations despite five years of 're-education' and thirty-eight years of political education. . . . Thus the greater part of Germans have not learned to deal with historical guilt or to recognize the 'continuity of error' " (in *Licht und Schatten der Vergangenheit*, eds. Jörg Friedrich and Jörg Wollenberg, Frankfurt/Main: Ullstein Zeitgeschichte, 1987), 26.

227. The Secretary of War to the Secretary of State, 27 October 1944, in Smith, ed., *The American Road to Nuremberg*, 40–41.

228. Tusa, *The Nuremberg Trial*, 52. They describe the Secretary of War's thinking: "He was unwilling to criminalize the entire German nation, but saw a therapeutic value in punishing internationally recognized war criminals" (52).

229. Bird, *The Chairman*, 205. David Wyman, *The Abandonment of the Jews* (New York: Pantheon, 1984), 14. Martin Gilbert, *Auschwitz and the Allies* (New York: Holt, 1981), 94. In 1942 former member of the Polish Foreign Ministry and Warsaw underground leader Jan Karski disguised himself as a concentration camp guard and entered the Belzec concentration camp. Karski wrote a report of what he had seen and traveled to London and Washington in an attempt to impress upon world leaders the magnitude of the atrocities (from Bird, *The Chairman*, 205–206).

In the summer of 1943 Karski traveled to Washington and presented his first-hand account to President Roosevelt, Secretary Stimson, and OSS Chief William Donovan. He also met with Felix Frankfurter, whom he hoped would be a natural ally; the Supreme Court Justice was an active Zionist. But after meeting at the Polish embassy and hearing his account of the atrocities, Frankfurter told the Polish ambassador that he could not believe the stories: "Mr. Ambassador, I did not say that this young man is lying. I said that I am unable to believe him." Frankfurter was not alone; Walter Lippman also met with Karski "but, unlike other columnists who heard Karski's story, he—the only Jew among them—decided not to write about it" (206–207). This letter to Congress, objecting to Jewish immigration, captured the mood in some of the American heartland: "I am writing to you to protest against the entry of Jewish refugees into this country. . . . Their lack of common decency, gross ignorance and

unbelievable gall stamps them as undesirables even if they could be assimilated into a common society, which they can't. I see from the papers that 200,000 Refugee Jews in Hungary will not live through the next few weeks. That's too dam bad; what in the hell do we care about the Jews in Hungary" (Buscher, *The U.S. War Crimes Program*, 12). See also "Nazi Mass Killing Laid Bare in Camp," *New York Times*, August 30, 1944.

230. Taylor, *The Anatomy of the Nuremberg Trials*, 42.

231. *Ibid.*

232. *The Foreign Relations of the United States: The Conference at Quebec, 1944* (Washington, D.C.: U.S. Government Printing Office, 1972), 124–125.

233. *The Foreign Relations of the United States 1945* (Washington, D.C.: U.S. Government Printing Office, 1968), 3:1162–1164. Bernays hoped to try "Nazi organizations themselves rather than individuals and to convict them and all their members of engaging in a criminal conspiracy to control the world, to persecute minorities, to break treaties, to invade other countries and to commit war" (1163).

234. Conot, *Justice at Nuremberg*, 12. As Geoffrey Best observes, the worst atrocities of World War II were not war crimes under the traditional laws of war: "International law at that date held it no crime for a government to murder its own subjects. Civilians had, within the past decade, been killed on so many occasions, in such varied circumstances, and under so many pretexts, that there could be real difficulty in distinguishing the more justiciable instances from the less" (*War and Law Since 1945*, 64).

235. "Trial of European War Criminals," Colonel Murray Bernays, 15 September 1944, in Smith, ed., *The American Road to Nuremberg*, 33–34.

236. David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), 335.

237. Smith, ed., *The American Road to Nuremberg*, 34. The notion that Germans could not be punished for crimes against German Jews highlighted the obsolescence of the laws of war. The bombing of cities was not a war crime; neither the United States nor Germany signed 1925 Geneva accords. There was a sense that executions and court-martials would not reach the root of the problem: "the Bernays plan sought to solve the need to purge German society by means other than the Morgenthau Plan" (55). These acts would not go unpunished under the Bernays plan: "Therefore, such technicalities as the question whether the extermination of fellow Germans by Nazi Germans was unlawful, or whether this could be a 'war crime' if it was perpetrated before there was a state of war, would be unimportant, if you recognize as the basic crime the Nazi conspiracy" (33).

238. *Ibid.*, 35. According to international legal theorists Oppenheim and Lauterpacht, traditional war crimes consisted of: violations of the recognized rules of war, hostilities committed by individuals who are not members of armed forces, espionage, treason, and marauding acts. According to critics, the Allies had no precedent or positive statute to justify trying statesmen and industrialists. (Nuremberg defense attorney Otto Kranzbühler in Wilbourn Benton, ed., *Nuremberg: German Views of the War Trials* [Dallas: Southern Methodist University Press, 1955], 111).



239. Ibid., 35. "Trial of the German War Criminals by Col. Murray Bernays," September 15, 1944, in Smith, ed., *The American Road to Nuremberg*, 33.

240. Ibid., 36.

241. Ibid.

242. Hans Ehard, "The Nuremberg Trial Against the Major War Criminals and International Law," *The American Journal of International Law* 43(1949): 225. Ehard commented on the concept of conspiracy in Continental law: "the concept is not one familiar to continental law. It has developed in Anglo-Saxon customary law" (227).

243. Ibid. See also Tusa, *The Nuremberg Trial*, 57; Taylor, *The Anatomy of the Nuremberg Trials*, 36–37. Telford Taylor described the plan's major deviation as "the Bernays additions."

244. Ibid., 55. Historians John and Ann Tusa point out that it was ironic the trial planners chose to build their case around such a novel and contentious charge when a large body of evidence existed. See also "Memo from Colonel Ami Cutter for Mr. McCloy," October 1, 1944, in Smith, ed., *The American Road to Nuremberg*, 38.

245. "Memo for the President from the Secretaries of State, War and Navy," November 11, 1944, in Smith, ed., *The American Road to Nuremberg*, 41–44.

246. Ibid., 43.

247. Smith, ed., *The American Road to Nuremberg*, 33–35.

248. Ibid. Legal theorist Otto Kirchheimer shared William Chanler's view that the criminal state forfeited the right to be protected by rules it had so egregiously violated: "On the basis of its attitude toward and treatment of the human material under its domination, such a state could not ask that credence be given to its acts and not expect the actions of its servants to be clothed with the presumption of legality" (*Political Justice: The Use of Legal Procedure for Political Ends* [Princeton: Princeton University Press, 1961], viii, 19). According to Chanler, the Germans forfeited protection typically reserved for "a lawful belligerent under international law" (51). Kirchheimer attempted to put the crimes of the criminal state into a larger context. According to him, the extreme nature of the crimes allowed the successor regime great liberties. He considered political justice the most tenuous type, because it could so easily turn to farce: "By utilizing the devices of justice, politics contracts some ill-defined and spurious obligations. Circumstantial and contradictory, the linkage of politics and justice is characterized by both promise and blasphemy" (9). Henry Stimson diary entry, January 19, 1945, in Smith, ed., *The American Road to Nuremberg*, 130.

249. Tusa, *The Nuremberg Trial*, 58. Much of the discussion was stimulated by "Memo on Aggressive War by Colonel William Chanler," November 28–30, 1944, in Smith, ed., *The American Road to Nuremberg*, 69–74. "Willi" Chandler was a neighbor and law partner of Henry Stimson. See also "Memo from General Kenneth C. Royall for the Assistant Secretary of War," December 14, 1944, in Smith, ed., *The American Road to Nuremberg*, 78.

250. Smith, ed., 76–77.

251. "Attorney General's Memo on the Punishment of Criminals," January 5,

1945, in Smith, ed., *The American Road to Nuremberg*, 91. See also Weschler's critique of the aggression charge, 84–90.

252. James Weingartner, *Crossroads of Death: The Story of the Malmedy Massacre and Trial* (Berkeley: University of California Press, 1979), 10. Also see Michael Reynolds, *The Devil's Adjutant: Jochen Peiper, Panzer Leader* (New York: Sarpedon, 1995); Lothar Greil, *Oberst der Waffen SS Joachim Peiper und der Malmedy Process* (München: Schild-Verlag, 1977) and Leo Kessler, *SS Peiper* (London: Leo Cooper, 1986). The exploits of Kampfgruppe Peiper (1941–43) won their leader the Knight's Cross of the Iron Cross. Historian James Weingartner offers this observation of the German commander: "Peiper also provided an example of personal daring which goes far to explain his success as a combat leader; he expected much of his men and more of himself and displayed sangfroid which excited the admiration of his youthful troopers. One of many anecdotes that has survived describes Peiper's destruction of an onrushing T-34 tank with a rifle grenade at a few meters' range. Peiper grinned, observing, 'That should suffice for the close-combat badge, boys' " (Weingartner, *Crossroads of Death*, 118). Originally recorded by Ernst Gunther Kratschmer in "Der Soldat: Jochen Peipers militärischer Werdegang," *Der Freiwillige* (Sept. 1976):5.

253. *Ibid.*, 10.

254. *Ibid.*, 65.

255. Tusa, *The Nuremberg Trial*, 30. There is a consensus among Nuremberg historians that the Malmedy Massacre marked a turning point in the debate over America's war crimes policy: "America, thanks to geography, had been insulated against the horrors of the War. Only in December 1944 did the American public have its first direct experience of Nazi brutality. . . . The question of war crimes could be seen as remote and rather abstract; now it was painfully real."

256. Weingartner, *Crossroads of Death*, 12.

257. Smith, ed., *The American Road to Nuremberg*, 89. "Memo from Assistant Attorney General Herbert Weschler to Attorney General Francis Biddle," December 29, 1944, in Smith, ed., *The American Road to Nuremberg*, 84–90.

258. "Presidential Memo for the Secretary of State," January 3, 1945, in Smith, ed., *The American Road to Nuremberg*, 92.

259. "Questions posed by Major General John Weir to Edmund Morgan, January 12, 1945," in Smith, ed., *The American Road to Nuremberg*, 107. Morgan was assigned the following questions: "1. May you rationally use a conspiracy theory of prosecution of the principal leaders of Germany to dominate other peoples by acts violative of the laws and customs of war? 2. If that premise is sound, may you prove as part of the chain of the conspiracy the persecutions of dissident groups of their own nationals committed prior to the beginning of the war on racial, political, and religious grounds?" Morgan wholeheartedly disapproved of the Bernays plan; he found the conspiracy charge "so highly questionable and so novel to international law that it should be entertained only in the most necessitous circumstances." He wrote: "The conspiracy theory is too thin a veneer to hide the real purpose, namely, the creation of a hereto unknown international offense by individuals, *ex post facto*."

260. Ibid.

261. "Diary Entry of Henry L. Stimson," January 19, 1945, in Smith, ed., *The American Road to Nuremberg*, 130.

262. Ibid., 52–53.

263. Tusa, *The Nuremberg Trial*, 18, 19, 66–67. Ironically, this was a reverse of the situation after World War I, when the Americans were clinging to the conservative position as part of a larger effort to thwart the war crimes prosecutions sought by the British, the French, and the Belgians.

264. "The argument for summary process against Hitler and co., Prepared by Lord Simon," in Smith, ed., *The American Road to Nuremberg*, 155–157.

265. Tusa, *The Nuremberg Trial*, 66; Smith, ed., *The American Road to Nuremberg*, 139. Cutter and Rosenman hoped to redraft the proposal to make the proceedings appear more like a trial.

266. Tusa, *The Nuremberg Trial*, 66. See also Smith, ed., *The Road to Nuremberg*, 170–173.

267. Ibid., 66. I left names recognizable to English readers—Goering (Göring), Hoess (Höss), Doenitz (Dönitz)—in their anglicized forms. In the cases of Richard and Ernst von Weizsäcker, I used the German spelling. It became difficult to use the German spellings because so many of the names were anglicized in the American trial records (Waldemar Klingelhöfer and Otto Kranzbühler became Waldemar Klingelhoefer and Otto Kranzbuehler). In the cases of Japanese leaders, I did not use the correct Tojo Hideki, Yamashita Tomoyuki, Homma Masaharu, but the more recognizable Tojo, Yamashita, and Homma.

268. Ibid., 66.

269. Ibid., 67. See also "Memo on Proposals for the Prosecution and Punishment of Certain War Criminals and other Offenders," April 25–30, 1945, in Smith, ed., *The American Road to Nuremberg*, 162–172.

270. Tusa, *The Nuremberg Trial*, 69. Jackson did not hesitate to trade his moralist hat for a legalist one if American interests were imperiled. In 1940, then Attorney General Jackson reinterpreted the Neutrality Act of 1917, to help President Roosevelt consummate the destroyer-naval base arrangement with the British. According to Daniel Patrick Moynihan, "Attorney General Jackson gave out a legal opinion that found everything in order. He cited the relevant statute, the Neutrality Act of 1917. In his version of the text, however, a comma was inserted that completely changed the effect of the statute" (*On the Law of Nations* 144).

271. Tusa, *The Nuremberg Trial*, 68.

272. Ibid. 68. In 1941, in a speech before the American Bar Association, Jackson claimed: "We may be certain that we do less injustice by the worst process of the law than would be done by the best use of violence. We cannot await the perfect court before stopping men from settling their differences with brass knuckles. . . . I do not deny that in the 19th century certain rules of neutrality were developed, based on the idea of neutrality, and that these rules have been supplanted by various Hague conventions. The application of these rules has become obsolete. Experiences since the

world war have demonstrated their invalidity. The fundamental principles of the 19th century, according to which all warring parties must be handled equally, have been swept away by the League of Nations to the principal sanctions against aggressors, through the Kellogg-Briand Pact and the Argentina Declaration outlawing war. We must return to earlier and healthier conceptions.”

273. Ibid., 69.

274. Taylor describes Jackson’s view of the court’s legal basis: “Jackson not only invoked the Kellogg-Briand Pact but, more compellingly, the history of the English common law, which developed not primarily by act of parliament but by ‘decisions reached from time to time in adapting settled principles to new situations’ ” (*The Anatomy of the Nuremberg Trials* 55).

275. Ibid.

276. Ibid. Telford Taylor was more of a realist than Justice Jackson. In June 1945, when, according to Bradley Smith, “American idealistic fervor was burning at white heat,” Taylor candidly admitted that many of these decisions were political and recognized the necessity of acknowledging this basic fact. He maintained that the *ex post facto* argument was “Not, I believe, a bothersome question if we keep in mind that this is a *political* decision to declare and apply a principle of international law.” See also “An Approach to the Preparation of the Prosecution of Axis Criminality by Telford Taylor, early June 1945,” in Bradley F. Smith, ed., *The American Road to Nuremberg: The Documentary Record 1944–1945* (Stanford: Hoover Institution Press, 1982), 209. During the pretrial period Taylor wrote a memo arguing that a trial for the German leaders would “give meaning to the war. To validate the casualties we have caused. . . . The conviction and punishment of the Axis war criminals are desirable objectives in themselves, but in order to accomplish the larger objectives the conviction and punishment must be obtained by procedures and for reasons which will help to make the war meaningful and valid for the people of the Allied Nations, and it is not beyond hope for at least some people of the Axis nations” (209).

### 3. The American War Crimes Program

1. Conrad Crane, *Bombs, Cities, and Civilians* (Lawrence: University of Kansas Press, 1993), 1, 143. This is without a doubt one of the best studies on American bombing during World War II.

2. Ibid., 143. Geoffrey Best on the legality of bombing: “Assessment of the legality of bombardment . . . and bombing . . . can be a delicate undertaking. It requires in effect that each particular event be placed on a graduated scale, of which only the opposite extremities from a permanent affliction of fog. The extreme point at the lawful end is, of course, where the object of attack is beyond reach of dispute. . . . But not all objectives in battle, and rather few in economic warfare, are as simple as that” (*War and Law Since 1945* [Oxford: Clarendon, 1994], 51). On total war and the role of civilians: “the civilian’s probable participation in the workings of an economy perhaps totally mobilized for national struggle made it difficult to distinguish him as clearly as the principle of non-combatant immunity required” (51).

3. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), 336–337. This was really an accusation of hypocrisy and it would be heard more in the coming years. The philosophers (Kirchheimer and Arendt) tend to be more dismissive of *tu quoque* charges than the lawyers. Kirchheimer describes the use of the argument at Nuremberg: “Against the inherent assertion of moral superiority, of the radical difference between the contemptible doings of those in the dock and the visions, intentions, and record of the new master, the defendants will resort to *tu quoque* tactics . . . the argument raises the objection that the new regime is guilty of the same practices with which it now tries to besmirch its predecessor’s record. Critics employed this tactic when assailing Nuremberg due to Soviet participation” (336). Kirchheimer finds this argument extremely weak: “In a wider sense, the *tu quoque* argument could be leveled against any type of terrestrial justice. Only the archangel descending on judgment day would be exempt from the reproach that blame and praise have not been distributed according to everyone’s due desert” (337). Howard Levie, *Terrorism in War: The Law of War Crimes* (Dobbs Ferry, N.Y.: Oceana, 1993), notes an obvious but often overlooked fact that *tu quoque* was not even a legal principle.

4. Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 72. The British Foreign Office and the U.S. State Department made similar arguments. George Kennan was another important official who criticized Soviet participation in any trial.

5. Allen Paul, *Katyn: The Untold Story of Stalin’s Polish Massacre* (New York: Scribners, 1991), 58. See also Ronald Hingley, *The Russian Secret Police* (New York: Simon and Schuster, 1970), 168–171. On the NKVD under Beria and the first mobile killing squads see Lennard Gerson, *The Secret Police in Lenin’s Russia* (Philadelphia: Temple University Press, 1976). For literary accounts see Aleksandr Solzhenitsyn, *The Gulag Archipelago* (New York: Harper and Row, 1985). Both Alan Bullock (*Hitler and Stalin* [New York: Knopf, 1992]) and Conquest claim that between thirteen million and fifteen million died during collectivization (*The Great Terror* 277). Walter Lacquer has described Stalin’s actions as “without precedence in peacetime in modern history” (*Stalin* [London: Undwin and Hyman, 1990], 125). He draws on recent Soviet research to reach much higher numbers: “According to an author writing in *Neva* (October 1988), the Leninist periodical, at least 16 million were arrested under Stalin of which some 8–10 million died in camps. If one adds the number of peasants who died as a result of collectivization, one reaches a figure of no less than 20 million.” Although these estimates are on the high side of the spectrum, they give a sense of the magnitude of the Stalinist purges.

6. Paul, *Katyn*, 72. According to Troutbeck, the hypocrisy of allowing the Soviets to sit in high judgment would invalidate any precedent set by the International Court: “Surely the Russians had ‘entered into a common plan or enterprise aimed at domination over other nations’ which involved ‘atrocities, persecutions and deportations’ on a colossal scale. ‘Is not the Soviet government not employed today in the very same thing in Poland, the Baltic States, the Balkan States, Turkey and Persia? (Someone added in the margin: ‘And what about Finland?’) ‘All this,’ seethed Troutbeck, ‘cannot

be excused on the principle of the housemaid's baby. There have been two criminal enterprises this century—by Germans and Russians. To set up one lot of conspirators as judges of the other robs the whole procedure of the basis of morality.' ” For more on Stalin's massacre of Soviet nationals see Lacquer, *Stalin* and Robert Conquest, *The Harvest of Sorrow* (New York: Oxford University Press, 1986). For a comparison to Hitler see Bullock, *Hitler and Stalin*. See also Peter Baldwin, *Reworking the Past: Hitler, the Holocaust, and the Historians' Debate* (Boston: Beacon, 1991), 14 and Sven Lindqvist, *Exterminate All the Brutes*, trans. Joan Tate (New York: New Press, 1996). Lindqvist offers a novel argument about the *Historikerstreit*: “All German historians participating in this debate seem to look in the same direction. None looks to the west. But Hitler did. What Hitler wished to create when he sought *Lebensraum* in the east was a continental equivalent of the British Empire. It was in the British and other western European peoples that he found the models, of which the extermination of the Jews is, in Nolte's words, ‘a distorted copy’ ” (10).

7. Bullock, *Hitler and Stalin*, 497.

8. Richard Lukas, *The Forgotten Holocaust* (Lexington: University of Kentucky Press, 1986), 21.

9. Paul, *Katyn*, 111, x, 58. Wishing to avoid the bloody aftermath with half-dead victims writhing on the floor, the Cheka perfected what the Germans later called *Nackenschuss*, or a shot in the nape of the neck. By the 1930s it had become the standard method used by the NKVD to kill Stalin's purge victims and others.

10. Ibid.

11. Lukas, *The Forgotten Holocaust*, 232. It was difficult for the Allies to denounce Stalin; they had gone to great lengths to reinvent him. In 1943, Allied disinformation reached all-time heights when Stalin was named *Time* magazine's man of the year. *Time* wrote: “We respect the mighty Russian people and admire them. . . . They live under a system of tight, state-controlled information. But probably the attitude to take toward this is not to get too excited about it. When we take account of what the [USSR] has accomplished in the 20 years of its existence we can make allowances for certain shortcomings however deplorable” (Paul, *Katyn*, xi). Paterson, Clifford, and Hagan, *American Foreign Policy: A History—1900 to Present*, 2:372–375.

12. Ibid.

13. Ibid., x. The Allies faced a conflict of moral and strategic interests, and strategic interests clearly prevailed.

14. Robert Abzug, *Inside the Vicious Heart* (New York: Oxford University Press, 1985), 30.

15. Ibid., 52.

16. Ibid., 90.

17. Abzug, *Inside the Vicious Heart*, 90.

18. Ibid., 94.

19. Ibid., 93. David Irving published the photograph in *Nuremberg: The Last Battle*. (London: Focal Point, 1999), 36. According to David Irving, of the 560 Germans captured, all but 40 were killed.

20. Paul Fussell, *Doing Battle: The Making of a Skeptic* (Boston: Little, Brown, 1996), 291.
21. Ibid.
22. Ibid.
23. Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992).
24. Ibid., 63.
25. Tusa, *The Nuremberg Trial*, 76–77.
26. Ibid., 75.
27. Ibid., 77.
28. Tusa, *The Nuremberg Trial*, 78. The Tusas described the Soviet judge's action as "so untypical . . . one wonders if he had been ordered by Moscow to trail a coat."
29. Tusa, *The Nuremberg Trial*, 78. "An Approach to the Preparation of the Prosecution of Axis Criminality" in Smith, ed., *The American Road to Nuremberg*, 211.
30. Taylor, *The Anatomy of the Nuremberg Trials*, 62–63.
31. Ibid., 61.
32. Ibid., 63. According to Taylor, "In all probability Jackson was making a 'show of force,' and in fact he had a lot of force to show" (62–63).
33. Ibid., 81 and Taylor, *The Anatomy of the Nuremberg Trials*, 67. Tusa, *The Nuremberg Trial*, 76–77. Gros rejected the notion that "The prosecutor could come out of the blue with evidences which were completely unknown until the moment of the trial, opening a Pandora's box of unhappy surprises" (77).
34. Taylor, *The Anatomy of the Nuremberg Trials*, 67. In *Aggression and World Order: A Critique of United Nations Theories on Aggression* (Berkeley: University of California Press, 1958), Julius Stone wrote: "What is in debate is not the value of definition in general, but the value of definition of this particular notion in the present state of the international community" (19). He considered the comparison between international and domestic societies to be erroneous: "But in international society no means exist even of collective redress of the gravest wrongs, whether judicial or private, legal or moral, much less of collective adjustment of law to minimum standards of justice. In such a society, this single notion of 'aggression' is being asked to perform within the monstrously wide ambit of all inter-State relations, most of the major tasks of criminal and constitutional law, not to speak of much of the law of property, torts and procedure" (130).
35. Ibid., 66.
36. Ibid.
37. Ibid., 67. See also Tusa, *The Nuremberg Trial*, 73. Jackson argued that "the idea of separate trials for each nation . . . might be the easiest and most satisfactory way of reconciling it."
38. Taylor, *The Anatomy of the Nuremberg Trials*, 70. Dean believed the source of friction was William Donovan, who "clearly does not like the Russians much." Dean believed the Americans were trying "to magnify the differences between their views" and those of the Russians.

39. Taylor, *The Anatomy of the Nuremberg Trials*, 70; Tusa, *The Nuremberg Trial*, 103; Robert Conot, *Justice at Nuremberg* (New York: Carroll and Graf, 1983), 482–485. B. F. Smith also agreed that by the end of the London Conference, Justice Jackson hoped to exclude the Soviets from the proceedings.

40. Taylor, *The Anatomy of the Nuremberg Trials*, 68.

41. *Ibid.*, 70–71. Article VII reads: “The Three Governments have taken note of the discussions which have been proceeding in recent weeks in London . . . with a view to reaching agreement on the methods of trial of those major war criminals. . . . They hope that the negotiations in London will result in speedy agreement reached for this purpose, and they regard it as a matter of great importance that the trial of those major criminals should begin at the earliest date.” Whitney Harris, *Tyranny on Trial* (Dallas: Southern Methodist University Press, 1954), 21.

42. Tusa, *The Nuremberg Trial*, 79–80.

43. Jay Baird, ed., *From Nuremberg to My Lai* (Lexington, Ky.: D. C. Heath, 1972), 3–8. This very interesting collection includes both the London Agreement and the Charter.

44. David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), 335<sup>n</sup>.

45. *Ibid.*

46. Taylor, *The Anatomy of the Nuremberg Trials*, 648.

47. *Ibid.*

48. Jörg Friedrich, “Nuremberg and the Germans,” in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), 87.

49. *Ibid.* Historian John Teschke makes a similar point in *Hitler's Legacy: West Germany Confronts the Aftermath of the Third Reich* (New York: Peter Lang, 1999): “After the treatment the Soviet Union had received at the hands of Nazi armies, the Russian soldiers exercised all of the traditional perquisites of conquerors as a way of settling a few scores” (15).

50. *Ibid.*, 87.

51. Irving, *Nuremberg: The Last Battle*, 161. See also Solzhenitsyn, *The Gulag Archipelago* (New York: Harper & Row, 1978) and Robert Conquest, *The Great Terror* (New York: Oxford University Press, 1990).

52. *Ibid.*, 157.

53. *Ibid.*, 161.

54. *Ibid.*, 161–162.

55. Tusa, *The Nuremberg Trial*, 86.

56. Smith, *Reaching Judgment at Nuremberg*, 303.

57. Wilbourn Benton, ed., *Nuremberg: German Views of the War Trials* (Dallas: Southern Methodist University Press, 1953), 228–230.

58. *Ibid.*

59. Originally published in the December 1945 edition of *Life* magazine, these articles were also reprinted in Baird, ed., *From Nuremberg to My Lai*, 47–52. American novelist John Dos Passos recounted Jackson's opening statement: “Robert Jackson



steps quietly to the microphone to open the case for the prosecution. He has a broad forehead and an expression of good humor about his mouth. He wears round spectacles. . . . He talks slowly in an even, explanatory tone without betraying a trace of self-importance in his voice: 'The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility.' . . . With the calm, explanatory voice of a man delivering a lecture in a history course, Jackson begins his exposition of the assault on Europe. . . . His voice firmer and louder, Jackson has launched into the theory, which he is laying down in behalf of the U.S., that aggressive war is in itself a crime under the law of nations. . . . Robert Jackson has finished speaking. The court rises. People move slowly and thoughtfully from their seats. I doubt if there is a man or a woman in the courtroom who does not feel that great and courageous words have been spoken. We Americans rise to our feet with a feeling of pride because it was a countryman of ours who spoke them" (47-52).

60. International Military Tribunal, *Trial of the Major War Criminals Before the International Military Tribunal* (Washington, D.C.: U.S. Government Printing Office, 1949), 2:99. John Alan Appleman, *Military Tribunals and International Crimes* (Westport, Conn.: Greenwood, 1971), 15. See also IMT, *Trial of the Major War Criminals*, 14:462-463. The German attorneys were quick to recognize the revolutionary implications of the Nuremberg trials. Defense counsel Carl Haensel wrote: "The Nuremberg Tribunals place us anew before the problems of whether positivism really represents the final conclusion of wisdom and coronation of jurisprudence, or whether we have entered a new cultural period and thus, also a new period to be comprehended in legal history, in which . . . an argument emerges which is not based solely on positive norms and their interpretation according to the opinion of the lawmaker" (Benton, ed., *Nuremberg: German Views of the War Trials*, 123). The revolutionary implications of Nuremberg were conceded by German attorney Otto Kranzbühler: "In a revolution one will always have to accept violence and injustice. . . . Its worth or worthlessness is determined by what it contains for the future" (107). See also Werner Maser, *Nuremberg Trial: A Nation on Trial* (New York: Scribner, 1979), 287.

61. IMT, *Trial of the Major War Criminals*, 2:99.

62. Ibid.

63. Ibid., 2:101.

64. Ibid.

65. Ibid., 2:102.

66. Ibid., 2:104.

67. Otto Kranzbühler in *Nuremberg: A Courtroom Drama*, a film produced by Michael Kloft for Chronos Films. It first aired in Germany and France in November 1995 on Arte Television. It is a remarkable film because Kloft was able to interview numerous German, American, Russian, and French participants who have since died.

68. Levie, *Terrorism in War*, 55n66.

69. Gustav Gilbert, *Nuremberg Diary* (New York: Farrar, Straus, 1947), 45-46.

70. IMT, *Trial of the Major War Criminals*, 3:99.

71. Ibid., 3:97.

72. Ibid., 3:144.
73. Ibid., 9:307.
74. Gilbert, *Nuremberg Diary*, 66.
75. Telford Taylor in Kloft, *Nuremberg: A Courtroom Drama*. Telford Taylor, *The Anatomy of the Nuremberg Trials*, 247–248.
76. Telford Taylor in Kloft, *Nuremberg: A Courtroom Drama*.
77. Ibid.
78. Marrus, ed., *The Nuremberg War Crimes Trial 1945–1946*, 165.
79. IMT, *Trial of the Major War Criminals*, 4:478–479.
80. Ibid., 4:485.
81. Gilbert, *Nuremberg Diary*, 102–103.
82. Marrus, ed., *The Nuremberg War Crimes Trial 1945–1946*, 93.
83. Ibid., 92.
84. IMT, *Trial of the Major War Criminals*, 7:169.
85. Ibid.
86. Ibid., 7:170.
87. Ibid., 7:190.
88. Ibid. 679,000 million was the odd number offered by the Soviets.
89. Ibid., 8:302.
90. Ibid., 8:307.
91. Ibid., 8:308.
92. Gilbert, *Nuremberg Diary*, 161–163.
93. Marrus, ed., *The Nuremberg War Crimes Trial 1945–1946*, 180.
94. Ibid., 181.
95. Ibid., 182. For the statistics on Goering's weight, see Irving, *Nuremberg: The Last Battle*, 208.
96. Marrus, ed., *The Nuremberg War Crimes Trial 1945–1946*, 98. See also Conot, *Justice at Nuremberg*, 337. According to Goering, the practices of contemporary total war had developed along three lines that left the old laws far behind: "the war of weapons on land, at sea, and in the air; and . . . the propaganda war, which is also an essential part of this warfare."
97. Marrus, ed., *The Nuremberg War Crimes Trial 1945–1946*, 98.
98. Ibid.
99. IMT, *Trial of the Major War Criminals*, 9:311, 364.
100. Ibid., 9:272–273.
101. Ibid., 9:274–275. See also Baird, *From Nuremberg to My Lai*, 57.
102. Ibid.
103. IMT, *Trial of the Major War Criminals*, 9:49.
104. Ibid., 9:507.
105. Ibid., 9:508.
106. Ibid., 9:509–510.
107. Conot, *Justice at Nuremberg*, 412.

108. Kranzbühler interview in Kloft, *Nuremberg: A Courtroom Drama*.
109. Conot, *Justice at Nuremberg*, 417.
110. Ibid.
111. IMT, *Trial of the Major War Criminals*, 11:400.
112. Ibid., 11:398.
113. Conot, *Justice at Nuremberg*, 452.
114. Paul, *Katyn*, 229.
115. Friedrich, "Nuremberg and the Germans," 87.
116. IMT, *Trial of the Major War Criminals*, 10:313.
117. Ibid., 14:283.
118. Ibid., 14: 284–285.
119. Irving, *Nuremberg: The Last Battle*, 229–230. See also Conot, *Justice at Nuremberg*, 420; Taylor, *Anatomy of the Nuremberg Trials*, 417.
120. Ibid., 231. For a more complete refutation of Speer's claims see Matthias Schmidt, *Albert Speer: The End of a Myth*, trans. Joachim Neugroschel (London: Harrap Limited, 1985). See also Gitta Sereny, *Albert Speer: His Battle with Truth* (New York: Knopf, 1995) and Dan van der Vat, *The Good Nazi: The Life and Times of Albert Speer* (New York: Houghton Mifflin, 1997).
121. Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic, 1977), 218–219.
122. Ibid., 171.
123. Gerald Reitlinger, *The SS: Alibi of a Nation* (New York: Viking, 1957), 266.
124. Marrus, ed., *The Nuremberg War Crimes Trial 1945–1946*, 98.
125. Ibid.
126. Gilbert, *Nuremberg Diary*, 103.
127. Taylor, *The Anatomy of the Nuremberg Trials*, 228.
128. Gilbert, *Nuremberg Diary*, 45–46.
129. Smith, *Reaching Judgment at Nuremberg*, 304–305. Smith considers the court's conservative opinion their greatest achievement: "It should ever live to the glory of the Nuremberg judges that they took a major step toward dissipating this danger. By advancing a conservative and cautious interpretation of the law of the London Charter, the Court sharply limited the utility of such concepts as 'aggressive war' and 'crimes against humanity' in any future victors' trials. Of even greater importance was the Tribunal's achievement in virtually eliminating the collective guilt features by emasculating the conspiracy-common plan charge and the system for prosecuting members of organizations."
130. Ibid., 305.
131. Ibid., 304.
132. David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), 350.
133. Levie, *Terrorism in War*, 417n131.
134. Kranzbühler in Kloft, *Nuremberg: A Courtroom Drama*.

135. Levie, *Terrorism in War*, 57.

136. Irving, *Nuremberg: The Last Battle*, 182. See also Ben Swearington, *The Mystery of Hermann Goering's Suicide* (New York: Harcourt Brace Jovanovich, 1985).

137. Friedrich, "Nuremberg and the Germans," 87.

138. Tusa, *The Nuremberg Trial*, 465. According to the Tusas, the Soviet judges were ordered to dissent: "He [Nikitchenko] confessed to Biddle that he had consulted Moscow about his problems and received orders to dissent—to object to the acquittals, state that Hess should have been hanged and insist that declarations of criminality should have been made against the Reich Cabinet, General Staff and High Command" (465–466). Otto Kranzbühler on the Russians: "The presence of the Russians was a shame by itself. The whole case of aggressive war, the real undisputable aggressive war was the Polish war. They had instigated it. If you apply the *tu quoque* principle there should be no sentences whatsoever" (interview with the author).

139. Friedrich, "Nuremberg and the Germans," 88. Quincy Wright made a very important point about the Nuremberg debates that is still relevant today: "the favorable or unfavorable character of comments upon events related to the theory of international law often depend less upon events related to the theory of international law assumed by the commentator" (William Bosch, *Nuremberg: American Attitudes Towards the Major German War Crimes Trials* [Chapel Hill: University of North Carolina Press, 1970], 41). International relations theorist Hans Morgenthau placed little faith in international law: "The rule of law has come to be regarded as a kind of miraculous panacea which, whenever applied, would heal, by virtue of its intrinsic reasonableness and justice, the ills of the body politic, transform insecurity and disorder into the calculability of a well-ordered society, and put in place of violence and bloodshed the peaceful and reasonable settlement of social conflicts" (149). Kirchheimer was more approving: "The Greek ideal grows sharper in profile precisely because justice in political matters is more tenuous than in any other field of jurisprudence, because it can so easily become a mere farce. By utilizing the devices of justice, politics contracts some ill-defined and spurious obligations. Circumstantial and contradictory, the linkage between politics and justice is characterized by both promise and blasphemy" (vii). On the first Nuremberg trial: "the Nuremberg trial, with all its hypocrisy and grotesqueness deriving from its very subject, does not belong very profoundly in the category of a morally and historically necessary operation" (423).

140. Howard Levie raises important questions about using trials for "reeducation" in *Terrorism in War*: "How much the trials themselves had to do with this transformation from deadly enemies to close friends and partners can only be a matter of conjecture" (8). Best, *War and Law Since 1945*, comments that "The second lesson is that not much effect is to be expected from the prospect of trial and punishment, which the aftermath of the Second World War suddenly made loom so large" (63). See also Robert Wolfe, ed., *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944–1952* (Washington, D.C.: U.S. Government Printing Office, 1978), 246. Many Germans were cynical about the war crimes trials. Nuremberg prosecutor Morris Amchan recalled: "Finally, when the IMT Nuremberg verdict was announced, I walked out of my office

shortly after hearing it on the radio, headed for an elevator and met one of the German publishers we had recently licensed . . . he had just heard the announcement, he had not been down in the street yet or talked to anyone, but he already told me what the Volksmund (public opinion) was saying about the Nuremberg verdict: the three people were acquitted for the reason that Papen was going to forge the alliance for the war against the Russians, Fritsche was going to conduct the propaganda, and Schacht was going to organize the financing" (246). This essay by "Genet" was originally published in *The New Yorker* magazine. Janet Flanner picked up on the German resentment of the proceedings: "While the war was going on, the Allies had a threefold declared aim: to defeat the German Army, to bring the Nazi leaders to trial, and to re-educate the German mind. What the opening Nuremberg defense counsel have just offered is more than a mere display of Grade-B legal talent; it is an absolute first-rate demonstration of the still unreconstructed prewar German mind. The mental qualities the German defense has shown so far sound comical but are no laughing matter; egomania, mythomania, paranoia, superiority complex, and a general falling flat in those areas in which, in civilized men's minds, logic and morality have always been supreme" (57).

141. Although he praises the court's final decision, Bradley F. Smith charges the Americans with gross hypocrisy. The author's reaction to the prosecution's tone is not atypical. Smith concludes: "So the Allies lost the moral triumph over Nazism with a double-edged quid pro quo of saturation bombing and a trial. Nevertheless, the decision to have a judicial proceeding was a boon to both" (*Reaching Judgment at Nuremberg* 305). These criticisms aside, Smith concludes that the proceedings were unique and a departure from the tradition of primitive political justice: "As it was, the Allied governments and the prosecutors prevented an anarchic bloodbath, though had they been able to work their will, Nuremberg might well have been a trial pro forma. The top leaders would have been quickly condemned and the declarations of criminality against the six organizations would have been confirmed, establishing a procedure whereby hundreds of thousands of people might have been punished. This precedent of wartime leaders being punished through mass purge trials would surely have become a major obstacle to ending war once it broke out. . . . The Nuremberg court performed its real service by remedying the most dangerous defects of the Allied war crimes policy" (305). The Tusas argue that the cooperation of the IMT was impressive, despite the Soviet dissent. According to Smith, "Repeatedly, the judges emphasized to each other the vital importance of compromise in order to avoid the unpleasant appearance that would result if a judge wrote a public dissenting opinion. . . . Again, this was especially difficult for the Soviet Tribunal members . . . when a Western judge failed to win a point, it was merely a defeat for his personal interpretation, while a Russian failure may have meant that the judge had not achieved the result desired by the Soviet government. By the end of the trial, but even after a string of defeats on the organization question, he still indicated that he would not make a public dissent. The Court's actions on organizations goaded the Moscow government, though, and shamefacedly, Nikitchenko had to inform the other judges that the Soviet members would write dissenting opinions and make them public, after all" (169).

142. Friedrich, "Nuremberg and the Germans," 88. "At the conclusion of the trial of the major defendants in October 1946, OMGUS surveys indicated that 55 percent of the German population found the guilty verdicts to be just, 21 percent thought them too mild, and only nine percent found them to be harsh. Overall, 78 percent regarded the proceedings as fair" (Herf, Jeffrey. *Divided Memory: The Nazi Past in the Two Germanys*. Cambridge: Harvard University Press, 1997], 206).

143. The Tokyo Charter had not prohibited attacks against the court's legal legitimacy. Like the German lawyers at Nuremberg, "prominent Japanese lawyers, Takayanagi Kenzo and Kiyose Ichiro . . . questioned the very legitimacy of the tribunal" (Dower, *Embracing Defeat*, 462). For an overview of American war crimes policy in the Far East see Philip Piccigallo, *The Japanese on Trial* (Austin: University of Texas Press, 1979), 49–68; Appleman, *Military Tribunals and International Crimes*, 237–267. For critical views of Far Eastern policy see Richard Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1972); Richard Lael, *The Yamashita Precedent* (Wilmington, Del.: Scholarly Resources, 1982). Lael offers the most comprehensive examination of the Yamashita case and the novel doctrine of command responsibility. Yamashita's lawyer, Frank Reel, wrote a book entitled *The Case of General Yamashita* (Chicago: University of Chicago Press, 1949); John Dower's recent book, *Embracing Defeat: Japan in the Wake of World War II* (New York: Norton, 1999), provides excellent analysis of U.S. policy in postwar Japan.

The postwar treatment of the Japanese was mentioned in the Potsdam Agreement: "We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation, but stern justice shall be meted out to all war criminals, including those who have visited cruelties on our prisoners" (Dower, *Embracing Defeat*, 445). The Tokyo Charter was a series of laws modeled after the London Agreement by an executive decree of General Douglas MacArthur.

144. William Manchester, *American Caesar: Douglas MacArthur* (Boston: Little, Brown, 1978), 484.

145. Judith Shklar, *Legalism: Law, Morals and Political Trials* (Cambridge: Harvard University Press, 1964), 184. The American prosecutor seemed oblivious to the fact that the natural law tradition had no relevance for the Japanese. Keenan claimed the aggressive war charges were valid on the grounds of "the Christian-Judaic absolutes of good and evil" (184). Shklar observes: "Natural law . . . was a Western notion, meaningless to the men being tried and their fellow citizens. In any case, it cannot serve as the enforceable law of the world community because there is no world community. To enforce the 'common good' internationally is impossible, because no one, certainly not one set of nations, can be the custodian of that good" (186).

146. Nisuki Ando, Chihiro Hosoya, Richard Minear, and Yasuaki Onuma, eds., *The Tokyo War Crimes Trial: An International Symposium* (Tokyo: Kodansha, 1986), 17. Röling described Webb as "Quarrelsome at times, he embarrassed some of the judges with his court behavior" (19).

147. Appelman, *Military Tribunals and International Crimes*, 197. "The attitude of the president of the Tribunal throughout toward defense counsel was one not consistent with standards commonly observed in courts of the United States" (197).

148. Levie, *Terrorism in War*, 386.

149. Ibid., 39. See also Piccigallo, *The Japanese on Trial*, 14. The indictment in the IMTFE was hopelessly complicated. There were twenty different conspiracy counts that stretched back nearly eighteen years. For more on the IMTFE indictment, see Levie, *Terrorism in War*, 389–390.

150. Minear, *Victors' Justice*, 67.

151. Levie, *Terrorism in War*, 289.

152. Ibid., 46.

153. Piccigallo, *The Japanese on Trial*, 21–23.

154. Ibid. See also Minear, *Victors' Justice*, 50–53. If one considered the attack on Pearl Harbor a preventative war, this was consistent with Frank Briand's reading of his own treaty. Briand told Congress in 1928, "I knew that this government, at least, would never agree to submit to any tribunal the question of self-defense, and I do not think any of them [the Allied governments] would" (53).

155. Ibid., 23. See also diplomatic historian Waldo Heinrichs on U.S.-Japanese relations and the events leading up to Pearl Harbor in *Threshold of War: Franklin D. Roosevelt and American Entry into World War II* (New York: Oxford University Press, 1988).

156. Kurt Tauber, *Beyond Eagle and Swastika: German Nationalism Since 1945* (Middletown: Wesleyan University Press, 1967), 1:26. Tauber writes: "The difficulty with these agreements was that there was no vivid understanding of the tacit assumptions underlying them. The agreements clearly meant that Germans had to be punished. But was it merely, negatively, to prevent a recurrence of so tragic a chapter in Western history; or was it rather, positively, to effect *inner* changes, to re-educate the Germans to the ways of peaceful neighborliness and democratic tolerance?"

157. Levie, *Terrorism in War*, 133.

158. Ibid., 179–180.

159. Lael, *The Yamashita Precedent*, 79–95. Lael offers the most comprehensive examination of the Yamashita case and the novel doctrine of command responsibility. For a less temperate view see Manchester, *American Caesar*, 486.

160. Ibid.

161. Lawrence Taylor, *A Trial of Generals: Homma, Yamashita, MacArthur* (South Bend, Ind.: Icarus, 1981), 163.

162. Manchester, *American Caesar*, 487. George Marshall warned MacArthur and his staff "that there was no precedent here for charging a Field Commander with the negligence of duty in controlling his troops" (Manchester, *American Caesar*, 487). See also Levie, *Terrorism in War*, 157.

163. Reel, *The Case of General Yamashita*, 27. See also Levie, *Terrorism in War* for a significantly less sympathetic account.

164. Reel, *The Case of General Yamashita*, 157.
165. Taylor, *A Trial of Generals*, 137. General MacArthur considered the rules of evidence "obstructionist." Article 13 of his "Special Proclamation" stated: "The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value" (137).
166. Ibid.
167. Manchester, *American Caesar*, 487.
168. Reel, *The Case of General Yamashita*, 142.
169. Piccigallo, *The Japanese on Trial*, 53–54. See also Taylor, *A Trial of Generals*, 168.
170. Piccigallo, *The Japanese on Trial*, 53–54; see also Taylor, *A Trial of Generals*, 168.
171. Ibid., 162–163.
172. Reel, *The Case of General Yamashita*, 173.
173. Howard Levie describes the professional military's continuing reluctance to reject the doctrine of superior orders in *Terrorism in War*. Over the last fifteen years, Levie has taught the laws of war to approximately 750 officers at the U.S. Naval War College in Newport, Rhode Island; according to Levie, "it would be a liberal estimate to say that half a dozen have supported the idea of denying the validity of the defense of superior orders" (521). General Lucius Clay made a similar point in his oral history at Columbia University: "I've spent most of my life as a soldier, and I could not honestly tell you today, in my own mind, when I could make a distinction between refusing to obey an order because I decided it was not a legal order and, or obeying it because I was a soldier" (568).
174. Manchester, *American Caesar*, 488. Manchester traces MacArthur's view of war back to more chivalrous times: "To him warfare would always be tinged with the romantic tones of Arthurian legend with the magic nimbus of the round table, and he believed that Shinto, Bushido, and the samurai code were extensions of it. In his view, therefore, these two Japanese commanders had betrayed, not just Dai Nippon, nor even Manila's violated Filipinos, but MacArthur's own profession" (488). See also Piccigallo, *The Japanese on Trial*, 53–54; Taylor, *Trial of the Generals*, 168.
175. MacArthur was ordered by the Secretary of War to issue a stay of execution while the Supreme Court reviewed the case.
176. Lael, *The Yamashita Precedent*, 105. According to Chief Justice Stone, the Quirin decision "demonstrated that Congress by passing the articles of war, had recognized and sanctioned the use of military tribunals to try war criminals." Stone went on to claim that the military tribunals were "not courts whose rulings and judgments are subject to review by this court." This limited the Supreme Court to two questions: "Did the government have the right to detain Yamashita for trial? Did the military tribunals have lawful authority in this instance to try to condemn him?" Although Stone privately opposed the war crimes proceedings, he was an advocate of judicial restraint and feared that meddling in the Yamashita case might lead to "unnecessary and unwise judicial interference with the other branches of government" (105). He was



bolstered by Justice Frankfurter. For more on Stone's philosophy see Alpheus Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: Viking, 1956) and C. Herman Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (New York: Macmillan, 1948).

177. Lael, *The Yamashita Precedent*, 105.

178. Ibid. Both dissenters were outraged by the military commission's inability "to demonstrate that Yamashita had committed or ordered the commission of war crimes." Rutledge pointed out: "It is not in our tradition for anyone to be charged with crime which is defined after his conduct . . . has taken place. . . . Mass guilt we do not impute to individuals, perhaps in any case but certainly in none where the person is not charged or shown actively to have participated in or knowingly to have failed in taking action to prevent the wrongs done by others, having both the duty and power to do so" (105).

179. Ibid. Richard Lael claims, "Murphy's jabs at the military may have been influenced to some small degree by his dislike for MacArthur. When Murphy became high commissioner for the Philippines in the 1930s, he and MacArthur frequently clashed" (*The Yamashita Precedent* [Wilmington, Del.: Scholarly Resources, 1982], 130). For more on Murphy see J. Woodford Howard Jr., *Mr. Justice Murphy: A Political Biography* (Princeton: Princeton University Press, 1968).

180. Manchester, *American Caesar*, 487. For a differing view on the Yamashita case see Gary Solis, "Yamashita Had It Coming," *Proceedings of "Accounting for Atrocities: Prosecuting War Crimes Fifty Years After Nuremberg," October 5-6, 1998* (Annandale-on-Hudson, N.Y.: Bard College Publications, 2000), 37-49.

181. Dower, *Embracing Defeat*, 516; Levie, *Terrorism in War*, 164.

182. Robert Edgerton, *Warriors of the Rising Sun* (New York: Norton, 1997), 14. See also John Dower, *War Without Mercy* (New York: Pantheon, 1986); Yuki Tanaka, *Hidden Horrors: Japanese War Crimes in World War II* (Boulder: Westview, 1996); Iris Chang, *The Rape of Nanking* (New York: Basic, 1997); for a prisoner's account see Gavan Daws, *Prisoners of the Japanese* (New York: Morrow, 1994).

183. Chang, *The Rape of Nanking*, 4-5. Chang estimates the numbers killed in Nanking in the late months of 1937 and into early 1938 ranging between 260,000 and 350,000. This was more civilians than Britain (61,000), France (108,000), and the Netherlands (242,000) lost during the entire war. See also Howard French, "Japanese Call '37 Massacre a War Myth, Stirring Storm," *New York Times*, January 23, 2000.

184. Sheldon Harris, *Factories of Death: Japanese Biological Warfare 1932-45 and the American Cover-Up* (London: Routledge, 1994), 149, 205.

185. Piccigallo, *The Japanese on Trial*, 16; Dower, *Embracing Defeat*, 465; Hal Gold, *Unit 731: Testimony* (Tokyo: Yen Books, 1996), 96.

According to Hal Gold, the men of Unit 731 did their best to destroy their facilities and were able to return to Japan before the Russians could capture them (92-93). When the ship carrying the American biological warfare expert landed in Japan, he was greeted by Naito Ryoichi, a high-ranking member of Unit 731. He offered to bro-

ker a trade: Unit 731's research data for immunity from war crimes prosecution. Murray Sanders described meeting Dr. Naito: "My mission was biological warfare. I was to find what the Japanese had done, and when the *Sturgess* docked in Yokohama, there was Dr. Naito. He came straight toward me. . . . I didn't even know what 731 was" (95). Sanders described his first impression of research data provided by Dr. Naito: "It was fundamentally dynamite. The manuscript said, in essence, that the Japanese were involved in biological warfare" (96).

Lieutenant Colonel Sanders took the material to General Douglas MacArthur, the Supreme Commander for Allied Powers. General MacArthur granted Sanders permission to offer the men of Unit 731 a deal—if they surrendered all of their research data, they would be immune from war crimes prosecution. According to Sanders, "This made a deep impression, and the data came in waves after that . . . we could hardly keep up with it" (97). According to Hal Gold and new documents published in a spring 1995 Japanese magazine article entitled, "The Report on Japan's War Responsibility," "This shows that the proposal—made with the involvement of the American president—to grant immunity from war crimes was already on the table less than two months after the war's end" (99).

However, Germany was not the only place where the Cold War caused dramatic changes in the American treatment of fallen foes. In 1948, America shifted away from a punitive policy and adopted one that sought to ally Japan with the West. Just as with Germany, George Kennan was pushing for normalization of relations. The new policy, NSC-13/2, was written by Kennan. According to Awaya Kentaro, professor of history at Rikkyo University, morality proved to be no match for strategy. Kentaro writes: "At the time of the Tokyo trial, the Soviet Union vigorously demanded the investigation of Ishii [commander] and his staff. GHQ did not respond to these demands. It is said that Ishii and others escaped prosecution by turning over to the United States the data on their experiments and their use of germ and chemical warfare in the field. . . . Moreover, behind the immunity granted Unit 731, I detect the national self-interest of the United States, which was willing to grant immunity to criminals in order to secure a monopoly on the most up-to-date information concerning techniques of warfare" (Richard H. Minear, *Victor's Justice: The Tokyo War Crimes Trial* [Princeton: Princeton University Press, 1971], 85–86).

Levie, *Terrorism in War*, 155. Howard Levie rejects the contention that the IMTFE purposely excluded the Japanese biological warfare specialists from prosecution. However, a great deal of new material has been recently published proving otherwise. Years after the trial, Judge Röling charged: "The American military authorities wanted to avail themselves of the results of the experiments, criminally obtained in Japan, and at the same time prevent them from falling into the hands of the Soviet Union" (4). See also John Dower, *Embracing Defeat* and Hal Gold, *Unit 731*.

186. Manchester, *American Caesar*, 488.

187. *Ibid.*, 488. MacArthur's commission was closer to military custom than either of the international tribunals, or as the prosecution described it, "retail justice for wholesale slaughter" (101).

188. Weingartner, *Crossroads of Death*, 75. Weingartner describes the stories: "Again results were meager, a suspiciously large number of men claimed the killings had been ordered by SS Sturmbannführer Walter Pringel, commander of the First Battalion, First Panzer Regiment, who had not survived the war" (75).

189. Ibid.

190. Army Command War Crimes Branch, Cases Tried, General Administration Files, RG 338. National Archives Modern Military Branch, Suitland, Maryland).

191. Ibid.

192. Weingartner, *Crossroads of Death*, 118.

193. Ibid., 104. According to one of Peiper's men, the commander said: "We will fight in the same manner as we did in Russia in the action which will follow" (84). The commander's next statement supports the contention that the rules of war only applied in the West: "The certain rules which have applied in the West until now will be omitted" (84). In his company's prebattle pep talk, Pringel gave similar orders, urging his men to "fight in the old SS spirit . . . I am not giving you any orders to shoot prisoners of war, but you are well-trained SS soldiers. You know what you should do with prisoners without my telling you that" (84). Telford Taylor and many others also make the point that the Wehrmacht fought a more restrained war in the West and disregarded the laws of war in the East (interview by author, 1993).

194. Weingartner, *Crossroads of Death*, 81.

195. Ibid., 89. These were Pringel's orders to Peiper.

196. Weingartner, *Crossroads of Death*, 95–96.

197. Ibid., 98. In regard to evidence, the court was very much like MacArthur's military commission: "no evidence no matter how tenuous was to be excluded if in the opinion of the bench, it had a bearing on the case. The bench was also free to exclude any evidence it considered to be irrelevant" (98).

198. Senate Subcommittee of the Committee on Armed Services, *Investigation of Army Action with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, the Battle of the Bulge, near Malmedy, Belgium, December, 1944* (Washington, D.C.: U.S. Government Printing Office), 1012.

199. Ibid.

200. Weingartner, *Crossroads of Death*, 116. Many of these interrogations were conducted by Austrian-born Jewish lawyer Lieutenant William Perl. It should be mentioned that this trial occurred in 1945, when wartime passions had not yet cooled. The prosecution employed various psychological ploys to get confessions. One German soldier committed suicide, and Perl admitted having threatened to turn him over to the Belgians. Once this became known to the German public, many turned against any and all war crimes proceedings, in the name of upholding the violated civil rights of the German war criminals.

201. Ibid.

202. Ibid.

203. Ibid.

204. Ibid., 130.

205. Ibid., 137.

206. Ibid., 133. A number of the American military men respected and sympathized with Peiper. McCowan claimed, "I have met few men who impressed me in as short a space of time as the German officer" (127).

207. Ibid., 185–187.

208. Ibid., 187.

#### 4. A Shift in Priorities

1. John McCloy, "From Military Government to Self-Government," in Robert Wolfe, ed., *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944–1952* (Carbondale: Southern Illinois University Press, 1984). Assistant Secretary of War McCloy described JCS 1067 as "rather Draconian . . . not as bad as the Morgenthau Plan—but it was pretty negative" (119). The always extreme J.F.C. Fuller on JCS 1067 in *The Conduct of War*: "No steps were taken toward the economic rehabilitation of Germany. And no action that would tend to support the basic living standard in Germany on a higher level than that existing in any one of the neighboring countries was to be taken. In short, Germany was to be converted into a super concentration camp" (306). John Montgomery called the reeducation program an "artificial revolution" because it was not a German initiative. Buscher convincingly argues that the German objection to the program had roots stretching back to the war guilt clause in the Treaty of Versailles: "The historian Hajo Holborn was sent to Germany in 1947, and reported that some Germans he encountered—according to Holborn, predominantly simple and non-intellectual people—were ashamed of their country's wartime deeds. Almost everyone rejected the concept of collective guilt" (109).

2. John Mendelson, "War Crimes Trials and Clemency in Japan and Germany," in Wolfe, ed., *Americans as Proconsuls*, 261. The most comprehensive monograph on America's war crimes policy is Frank Buscher's *The U.S. War Crimes Trial Program in Germany* (Westport, Conn.: Greenwood, 1989) (see 31). Carl Anthony, "Reeducation for Democracy," in Wolfe, ed., *Americans as Proconsuls*, 262. Even Friedrich Meinecke wrote of the need for German reeducation: "So far as the victors try to eradicate National Socialist influences and thereby provide the atmosphere for Christian Occidental sound morals, we must not only recognize that they are fundamentally right but must ourselves help them and try to prevent them only from schematic exaggerations and mistakes" (*The German Catastrophe* [Boston: Beacon, 1950], 104).

3. Buscher, *The U.S. War Crimes Trial Program*, 8–9. For a more comprehensive account of the trial's objectives, see Bradley F. Smith, *The Road to Nuremberg* (New York: Basic, 1981).

4. Howard Levie, *Terrorism in War: The Law of War Crimes* (Dobbs Ferry, N.Y.: Oceana, 1993), 126.

5. Elmer Plischke, "Denazification in Germany," in Wolfe, ed., *Americans as Proconsuls*, 199.

According to Kurt Tauber, "Most serious of all, the very excesses of de-nazification procedure not only unjustly discredited the entire idea in the eyes of a large seg-

ment of the population but also created a climate of opinion which the Nazis could use for their own purposes" (*Beyond Eagle and Swastika: German Nationalism Since 1945* [Middletown, Conn.: Wesleyan University Press, 1967], 245).

6. Friedrich, "Nuremberg and the Germans," in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), 90.

7. Plischke, "Denazification in Germany," 216–217.

8. Hans Schmitt, ed., *U.S. Occupation of Europe After World War II* (Lawrence: Regents Press of Kansas, 1978), 93. Thomas H. Etzold and John Lewis Gaddis, eds., *Containment: Documents on American Policy and Strategy, 1945–1950* (New York: Columbia University Press, 1979).

9. This was a residual effect of the Morgenthau Plan, but the perception was based more on fantasy than fact. However, there were enough Jewish war crimes officials (prosecutors, interrogators, translators, etc.) to provide a germ of truth. There is no evidence to support the contention that these individuals were vindictive in accordance with American policy. If anything, as Peter Grose points out, U.S. policy was moving in a different direction:

"As Major General Stephen J. Chamberlin, director of army intelligence in Washington, informed Eisenhower, 'valuable intelligence on Russia and Russian dominated countries can be developed more rapidly by this method than other.' In the less formal language of an American staff officer in Frankfurt, speaking to journalist John Gunther, 'Are we dealing with our former enemies, or our future allies? We have not yet decided whether we want to win the last war or the next one' (Peter Grose, *Operation Rollback* [New York: Houghton Mifflin, 2000], 25).

10. Schmitt, *U.S. Occupation of Europe*, 35.

11. Columbia University Oral History Project, Benjamin Bittenweiser, 1:28, 2:201. The former Assistant High Commissioner stressed, "our primary goal was to get Germany 'on its feet' as soon as possible" (31). Tauber, *Beyond Eagle and Swastika*, 36. Due to the American mishandling of denazification, "Many . . . seemingly unjustly treated by a badly floundering administration of the law, withdrew in sullen resentment, a ready audience for the irresponsible demagoguery of unreconstructed Nazi leaders" (36). Etzold and Gaddis, eds., *Containment*, 118–119. The Policy Planning Staff made the observation in the February 24, 1948 "Review of Current Trends."

12. Louis Snyder, *The Roots of German Nationalism* (Bloomington: Indiana University Press, 1978), 175. Although Snyder is referring to the German reaction to the Treaty of Versailles, this background knowledge is key to understanding the post-World War II nationalists' attitudes toward war crimes. "The old Germany was suffering on the cross while the terrible punishment of Bolshevism hovered over the world as the Divine vengeance for the Victors. Here was the added feature of the myth—the initial suggestion that the Allies never understood that Germany was the vital bulwark against Bolshevik expansionism" (175). This would be the theme of an increasing number of German critiques in the years after World War II. Many Nazis felt vindicated by the turn of events.

13. Robert Jackson, letter to President Harry Truman, 4 December 1945. From

Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council Law No. 10* (Washington, D.C.: United States Government Printing Office, 1949), 262–263.

14. Lucius Clay, *Decision in Germany* (New York: Doubleday, 1950), 251.

15. All of the military directives are contained in the introductory sections of all of the volumes of the Green Series.

16. Jean Smith, ed., *The Papers of General Lucius Clay* (Bloomington: Indiana University Press, 1974), 658. For more on Clay and clemency see Columbia University Oral History Project, Lucius Clay.

17. Jean Smith, *Lucius D. Clay: An American Life* (New York: Holt, 1990), 308. Clay stood firmly behind the trials at several key points. Taylor was impressed: “He would listen and decide quickly and firmly. I liked him. I thought he was a fine commanding officer and I had very high regard for him” (251). Taylor said that General Clay was “Just about the best boss I ever had.” Clay recalled, “It was resolved that we would proceed in the United States Zone under Military Government, and Justice Jackson’s able young assistant, General Telford Taylor, was persuaded to head the prosecution staff” (251).

18. Telford Taylor, “An Approach to the preparation of the prosecution of Axis Criminality,” early June 1945, in Smith, ed., *The American Road to Nuremberg*, 209. Smith praises Taylor’s contribution: “Jackson and his staff had also raised the level of legal draughtsmanship, and the new executive agreement was more tightly and precisely composed than any of its predecessors. In addition, among the new faces brought in by the justice were such men as Colonel Telford Taylor, who, although they did not play a part in this drafting, would soon leave their mark by asking tough, direct questions” (142).

19. Many military men were offended by the preponderance of high-ranking, Harvard-educated lawyers at Nuremberg. Tom Bower observes: “But control of the operation was firmly—too firmly some said afterwards—in the hands of a Harvard law school mafia. . . . They diligently tried to covert a group of undistinguished and conservative American judges to a radical theory: that educated, respected and otherwise normal businessmen could be guilty of murder” (*Blind Eye to Murder: Britain, America and the Purging of Nazi Germany—A Pledge Betrayed* [London: Andre Deutsch, 1981], 256).

20. Robert Kempner, interview by author; tape recording, Locarno, Switzerland, 23 February 1988.

21. Ibid. Otto Kranzbühler described Robert Kempner to this author: “He was a divided personality, he really felt as a German, he loved Germany. He was full of hate for Hitler and those who did not allow him to love his country. I had a very good relationship with the opposite points of view. He asked me to defend Hitler’s adjunct . . . in a denazification trial. [He] was one of Kempner’s proteges and he wanted him to come free—typical Kempner, some people he really helped” (interview with author). Bower, *Blind Eye to Murder*, 278–279.

22. Bower, *Blind Eye to Murder*, 278–279. Some in the prosecution staff (Taylor and Sprecher) worked for New Deal agencies. Former congressman from Indiana Charles LaFollette served as a prosecutor in the Justice case. One can safely assume that the vast majority of the prosecutors were sympathetic to the prosecution's broadened conception of international law.

23. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 164.

24. Clay, *Decision in Germany*, 251.

25. Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 69. Julius Stone did not consider international society to be anything like domestic society.

26. Joseph Borkin, *The Crime and Punishment of I. G. Farben* (New York: Free Press, 1978), 139.

27. Robert Conot, *Justice at Nuremberg* (New York: Carroll and Graf, 1983), 517. Other second-generation critics included William Langer, Francis Case, Harold Knutsen, and John Taber. See George F. Kennan, *Memoirs 1925–1950* (Boston: Atlantic Monthly, 1967), 260. The movement away from a vindictive policy also occurred in Japan and also was led by Kennan. Philip Piccigallo observes in *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (Austin: University of Texas Press, 1979): “United States authorities, in accordance with Kennan’s advice, recognized the need to stabilize Japan, politically and economically, and to ‘win’ that nation to its side in the Cold War” (46). Unlike the Nuremberg trials, which he and other realists like Hans Morgenthau criticized, Kennan made a point of praising the “fairness” of the military commissions in the Far East (46).

28. Kennan, *Memoirs 1925–1950*, 260. Gaddis describes the impact of the Long Telegram: “This 8,000-word telegram from George Kennan probably did more than any other single document to influence the evolution of early postwar United States’ foreign policy. The ‘long telegram’ was both an analysis of Soviet behavior and a prescription for American action. In it, Kennan advanced the now famous argument that Soviet hostility sprang from nothing the West had done, but from the need Russian leaders felt for a hostile outside world as a means of justifying their own autocratic rule” (50).

29. Ibid.

30. Ibid.

31. Ibid.

32. Ibid.

33. Ibid.

34. Christopher Simpson, *The Splendid Blond Beast: Money, Law, and Genocide in the Twentieth Century* (New York: Grove, 1993), 98.

35. Kennan, *Memoirs 1925–1950*, 260.

36. Christopher Simpson, *Blowback: America’s Recruitment of Nazis and Its Effects on the Cold War* (New York: Weidenfield and Nicolson, 1988), 41. For a self-serving but highly entertaining first-hand account see Reinhard Gehlen, *The Service* (New York: World

Publishing, 1972). The best study in English is Mary Ellen Reese's *General Reinhard Gehlen* (Fairfax, Va.: George Mason University Press, 1990), 8–9. Gehlen and the captured Germans were interrogated by Captain John Bokor: “During the weeks following Bokor’s new assignment Gehlen gradually laid his cards on the table. Not only did he know where the precious archives were buried, but he had also maintained the embryo of an underground espionage operation that could put the records to use against the Soviet Union” (*General Reinhard Gehlen* 41). Bokor kept the details of Gehlen’s offer and managed to get his top generals off the Allied war criminal lists. The captain was operating on his own in violation of the Yalta accords, which required the United States to hand over Germans involved in the eastern front.

37. Simpson, *Blowback*, 42. See also Reese, *General Reinhard Gehlen*, 32. The OSS was tipped off about the existence of the microfilm and was soon jockeying for control of the spymaster and his records. According to Simpson, “Gehlen and seven of his senior officers were transferred to the camp [Camp King], where they were constituted as a ‘historical study group,’ supposedly working on a report on the German general staff. Gehlen’s precious cache of records was located and shipped to the interrogation center under such secrecy that not even the CIC’s chain of command was informed” (*Blowback* 53). According to Lieutenant Colonel John Bokor, son of the captain: “Nobody had legalized, really, the functions of intelligence in those days. Today maybe things have changed, but back then the intelligence agent was on his own. . . . There wasn’t any sheet music for us to sing from in those days. That’s how a lot of those guys [former Nazis] got hired” (53).

38. Ibid. The American espionage chief commented on the lack of information: “Even the most elementary facts were unavailable—on roads and bridges, on the location and production of factories, on city plans and airfields.” Rositzke credits Gehlen with playing a “primary role” in providing the Americans with this basic information. See also Reese, *General Reinhard Gehlen*, 142.

39. According to Simpson, *Blowback*, Gehlen convinced American officials that war with the Soviet Union was not just possible but imminent. Eventually Bokor won the support of Walter Bedell Smith and Edwin Siebert. Gehlen would soon play a disproportionately large role in shaping American perceptions of the Soviet Union.

40. Martin Lee, *The Beast Reawakens* (New York: Little, Brown, 1997), 30.

41. Reese, *General Reinhard Gehlen*, 69. Reese places the absorption of the Nazi intelligence operation (*Fremde Heere Ost*) into context: “As the Soviets provoked more hostile incidents (what Anthony Cave Brown calls ‘flourishes’), and as the Americans began to appreciate how little they understood Soviet intentions and capabilities, Gehlen’s confidence began to revive. And with good reason, information about the new adversary was at a premium, and compared with many former Nazis being used by Army Intelligence, Gehlen looked benign as well as smart.”

42. The trials were not held one at a time; several were conducted simultaneously. Drexel Sprecher, interview by author, tape recording, Chevy Chase, Maryland, 29 May 1987.

43. Smith, ed., *The Papers of General Lucius Clay*, 252. At the time the Military Gov-



ernor supported the war crimes trials: "In 1947, I urged the Department of the Army to permit the Foreign Ministry, Military Command and Krupp cases to be brought to trial before the program was discontinued, and to find additional judges for the requisite courts. This was approved with the understanding that no further cases would be considered. I was unable to meet my commitment of July 1948 for completion because defense counsel had to be given as much time as it desired to prepare its evidence."

44. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 118.

45. *Ibid.*, 164.

46. Articles 4 through 20 of the 1907 Hague Conventions specifically prohibit far less extreme types of POW mistreatment. Medical experiments on humans had been outlawed as early as 1907.

47. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 164. Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (New York: Oxford University Press, 1989), 48–49. Article 4 of the 1907 Hague Agreement's Annex to the Convention states: "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated." Article 6 is more specific: "The State may utilize the labor of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war."

48. Walter Beals, *The First German War Crimes Trial* (Chapel Hill: Documentary Publications, 1985), 141–185. This book provides a one-page biography of each defendant.

49. Appleman, *Military Tribunals and International Crimes*, 146.

50. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 177. For the scientific standards see Appleman, *Military Tribunals and International Crimes*, 147–148. See also Robert J. Lifton, *The Nazi Doctors* (New York: Basic, 1983) and Michael Kater, *Doctors Under Hitler* (Chapel Hill: University of North Carolina Press, 1989).

51. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 118.

52. John Alan Appleman, *Military Tribunals and International Crimes* (Westport, Conn.: Greenwood, 1971), 158 and Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 155. See also *U.S. Military Tribunal Nuremberg, Transcript, Case II, Milch*, 2258.

53. Appleman, *Military Tribunals and International Crimes* provides an extensive discussion of "the Nuremberg defense": "Defense counsel frequently brought out this testimony, in their arguments, that the individual defendants had no choice but to perform the acts charged against them. Particularly in a dictatorship . . . there was but one leader, the rest were followers. They raised the question, with reference to subordinates, of the legal defense of respondeat superior—or, let the master answer, rather

than the servant; and, in the case of those in command, of the doctrine of Act of State—or, in other words, the act of the leader is the act of the sovereign, and the State should answer instead of the individual” (54).

54. Ibid., 147–148.

55. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 118.

56. Ibid., 175.

57. Ibid., 176–177.

58. Levie, *Terrorism in War*, 301.

59. Appleman, *Military Tribunals and International Crimes*, 167. The quote is from Taylor’s *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 177.

60. None of the defendants was found guilty of aggression or conspiracy. The vast majority of the convictions were for “war crimes” or traditional violations of the codes of war and the broadened conception of “crimes against humanity.” Roberts and Guelff, eds., *Documents on the Laws of War*, 48–49.

61. Ingo Müller, *Hitler’s Justice*, trans. Deborah Lucas Schneider (Cambridge: Harvard University Press, 1991), 270–271. Müller describes the unintended results of the deaths: “Precisely because the men on trial were not fanatical National Socialists, the ordinary workings of the judicial system during the Third Reich were exposed to view, and it became clear to what extent the largely conservative legal profession and its symbolic figurehead, Schlegelberger, had been profoundly involved in the reign of terror” (271). U.S. Government, *Trials of the German War Criminals Before the Nuernberg Military Tribunals Under Control Council No. 10*, Vols 1–15 (Washington, D.C.: U.S. Government Printing Office, 1949), 966.

62. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 169.

63. Appleman, *Military Tribunals and International Crimes*, 158.

64. American Nuremberg Trials, *Case 3—United States v. Josef Altstoetter et al.*, 1167.

65. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 173.

66. Ibid.

67. *U.S. Military Tribunal Nuremberg, Transcript, Case III, Altstoetter* (Nuremberg: Secretariat for Military Tribunals, 1949), 10793–94.

68. Ibid., 966.

69. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 173–174.

70. Robert Maguire, letter to family, 21 October 1947, Constance Maguire Wilson Papers, Eureka, California (in possession of the author). When the War Department contacted him, there was little doubt as to his decision. He wrote: “Well my dear I have some rather interesting and tremendous news. Last night when I got up to my room there was notice that a long distance call from Washington had come. . . . They finally located the officer who wanted me at his home. He said that General Clay in Germany had cabled asking for my appointment as one of the Judges of the Nurem-

berg Court. . . . My present feeling is to accept if they feel that I can be spared for that period of time. It is an opportunity that comes once in a lifetime. . . . If we go we would have to be in Nuremberg by Oct. 30 or Nov. 30, if we couldn't make the first court" (1). Maguire provided his family with a running commentary on his experiences at Nuremberg. His letters begin in the fall of 1947 and end in December 1948. While he was writing the tribunal opinion, his wife, Ruth, continued the correspondence until their departure in the spring of 1949.

71. Ibid.

72. Ibid., 1. Robert Maguire made numerous reference to the destruction that surrounded him.

73. Ibid., 2.

74. Ibid.

75. Robert Maguire, letter to family, 24 February 1948, Constance Maguire Wilson Papers, 1. The judge described the case and the early courtroom activities: "We have been engaged in analyzing and condensing the indictment which is 75 pages in length relating to 21 defendants, and in making up a classified chart, following each defendant through the mazes of the indictment, and referring to each page on which any of his activities are mentioned, some job." *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker* (Nuremberg: Secretariat for Military Tribunals, 1949), 1:1.

76. Robert Jackson, quoted in Michael Luders, "The Strange Case of Ernst von Weizsaecker," M.A. thesis, Columbia University, 1988, 7. Luders's study was extremely helpful in outlining the defense arguments in the von Weizsäcker case.

77. Ibid.

78. U.S. Government, *Trials of the German War Criminals Before the Nuernberg Military Tribunals Under Control Council No. 10*, Vols 1–15 (Washington, D.C.: U.S. Government Printing Office, 1949), 12:139. Taylor claimed: "The German diplomats of aggression, however, wore the mantle of diplomacy to cloak their nefarious policies which were solely directed toward the realization of the criminal aims of the Third Reich" (148). See also *The New York Times*, January 7, 1948, 10, col. 5. In late February 1948, Robert Maguire met with Professor Weber to discuss the German view of the trial and the role of the government bureaucracy under a dictatorship. Maguire wrote: "Sunday afternoon I went over to call on a Prof. von Eckardt, who holds the chair of sociology and journalism. . . . I wanted to learn from him what the liberals thought of the present situation, what they thought of what we were doing, and what they thought could be done. After expressing his views, he suggested we go see Prof Weber, who, he said was Germany's leading Economist. We did and found a charming, humorous old man past 75, seated in a study whose walls were lined with books and papers, and we talked for over an hour" (Robert Maguire, letter to family, 21 December 1947, Constance Maguire Wilson Papers, 2).

79. Levie, *Terrorism in War*, 386. My student at Columbia University, Greg Lembrich, also pointed this fact out in his paper on the Ernst von Weizsäcker case.

80. Richard von Weizsäcker, *From Weimar to the Wall*, trans. Ruth Hein (New York: Broadway Books, 1999), 92.

81. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 12:150.

82. William Seabury, *Wilhelmstrasse: A Study of German Diplomats Under the Nazi Regime* (Berkeley: University of California Press, 1954), 14. From Luders, "The Strange Case of Ernst von Weizsaecker," 32. Fritz Stern, *The Politics of Cultural Despair: A Study in the Rise of Germanic Ideology* (Berkeley: University of California Press, 1974). "Even before 1933, the National Socialists had made deep inroads into the ranks of the German elites. Hitler knew how to cultivate their vulnerabilities, how to reassure the elites that he was a German nationalist, the true redeemer" (165).

83. See Buruma, *The Wages of Guilt*, 175.

84. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 12:151.

85. *Ibid.*, 156–157.

86. *Ibid.* 157, 160.

87. *Ibid.*, 221.

88. *Ibid.*, 150, 154, 158–160.

89. *Ibid.*, 140–141. The prosecution argued that "Members of the Reich Chancellery were responsible for informing the Fuehrer and Reich Chancellor about current questions of policy and prepare directives" (141). The Tusas have described Hans Lammers's performance in the IMT: "His very appearance might have weighed against his evidence, but then under cross-examination the authoritative, contemptuous bureaucrat gave way. He was so desperate to save himself that he shoved blame onto Hitler and Bormann—all the time failing to notice or even not caring that every word backed up prosecution charges of criminal policies" (*The Nuremberg Trial* 312).

90. *Ibid.*, 199. Other headlines included FIRING ON ETHNIC GERMANS BY RURAL POLICE.

91. *Ibid.*, 200, 202. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28244.

92. *Ibid.*, 193–194. Richard Walter Darré's National Socialist zealotry attracted Hitler in 1930. Darré described the German peasantry as "the Life Spring of the Nordic Race" (194). In 1939 Darré described his prewar objective: "the whole work of agrarian policy since the seizure of power was . . . dominated by the preparation for a possible war" (194).

93. *Ibid.*, 194.

94. *Ibid.*, 205. Stuckart was responsible for the civil administration of Germany's conquered territories. The prosecution contended that "Stuckart looms into prominence in the incorporation of conquered territories into the Third Reich. He headed the central offices for the civil administration of Austria, Sudetenland, Bohemia and Moravia, Alsace-Lorraine, Luxembourg, Norway and the occupied southern territories" (205).

95. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28222. Funk made this statement on October 14, 1939. David Kaiser describes the Four-Year Plan in *Politics and War* (Cambridge: Harvard University Press, 1990). In 1936, "Hitler . . .

absolutely refused to slow down rearmament and entrusted Goering with the task of preparing the German economy and German Army for war in four years. He rejected both a return to the world economy and the satisfaction of Germany's colonial demands by peaceful means. He was proud of having freed Germany, as he saw it, from dependence upon export markets. . . . The Four-Year Plan concentrated upon expanding heavy industrial capacity and developing synthetic substitutes for two critical imported raw materials, oil and rubber. To achieve these goals, Goering rapidly increased state ownership of the economy and reserved the Maximum possible foreign exchange for imports of raw materials" (373).

96. Ibid., 142, 172, 179. Paul Koerner met Hermann Goering in 1926; four years later he went to work in the Offices of the Four-Year Plan, where he also met and aided Heinrich Himmler. In 1936, when the Office of the Four-Year Plan took control of the German economy, Koerner was named State Secretary for the Four-Year Plan.

97. Ibid., 169. See also Tusa, *The Nuremberg Trial*, 272. "Koerner, once State Secretary in the Prussian Ministry, also pressed the line that everyone had seen, heard and spoken no evil, even arguing that since Germany had built up agricultural production in countries she occupied, she had a right to take a little of the 'surplus.' As Dean said in a cable to the Foreign Office that evening, both Koerner and Brauchitsch had 'made a very bad impression' and were too obviously lying."

98. Ibid., 187. The bankers were involved in the intimate details of concentration camp construction and liquidation of confiscated property like gold and glasses. Defendant Rasche played such a prominent role in the rearmament that he earned himself a jingle: "Who marches behind the leading tank? It is Dr. Rasche of the Dresdner Bank."

99. Ibid., 176, 208–210. Schwerin von Krosigk was designated a political heir in Hitler's will. He was Minister of Finance until the fall of the Reich; he was in charge of collecting a one-billion-RM loan and storing concentration camp loot.

100. Ibid., 192.

101. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28291–92., 12: 176–177, 193. Puhl attempted to shift the onus of guilt to Funk when he testified before the IMT: " 'Funk told me that he had arranged with Reichsführer Himmler to have the Reichsbank receive in safe custody gold and jewels for the SS. Funk directed that I should work out the arrangements with Pohl, who, as head of the economics sections of the SS, administered the economic side of the concentration camps.' Funk vehemently denied the charges and tried to shift the blame back to Puhl. Funk reeled under the relentless cross-examination of Thomas Dodd: 'I cannot here tell more to the tribunal than I have already said, that is the truth. Let Herr Puhl be responsible before God for what he put in the affidavit. It is absolutely clear that Herr Puhl is now trying to put the blame on me and to exculpate himself. If he has done these things for years with the SS, it is his guilt and his responsibility.' Dodd replied, 'You are trying to put the blame on Puhl, are you not?' Funk: 'No. He is blaming me and I repudiate that.' Dodd: 'The trouble is, there was blood on this gold, was there not, and you knew this since 1942?' " (Conot, *Justice at Nuremberg*,

406). This and other shoddy performances on the stand in the IMT case led Conot to conclude: "It was evident that Funk, Puhl, and Thoms were all lying about the extent of their knowledge—though at the beginning they had not been fully aware of the manner in which the SS had acquired their booty" (404–408). For more on Puhl laundering gold and other valuables for the Nazis, see Tom Bower, *Nazi Gold* (New York: HarperCollins, 1997).

102. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28378. Chief of Prisoner of War Affairs Gottlob Berger faced a mountain of damning evidence, like the fact that he proposed the "Heu Aktion" project to Alfried Rosenberg. This was the code name for a project to enslave fifty thousand ten- to fourteen-year-olds. Berger was also involved in the formation and activities of the Dirlwanger Brigade.

103. Gerald Reitlinger, *The SS: Alibi of a Nation 1922–1945*, (New York: Viking, 1957), 171. In 1935, Dirlwanger was sentenced to two years' imprisonment for "offenses on a minor." According to Reitlinger, "When he was released, Berger used his influence to get poor old Oskar into the Condor Legion, who were serving in Spain under General Franco. In 1939, when Dirlwanger had to return to Germany, Berger, as head of the SS Staff Office, got him reinstated as a colonel of the general SS Reserve" (172). For more on Dirlwanger see French MacLean, *The Cruel Hunters* (Atglen, Pa: Schiffer Military History, 1998).

104. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28393.

105. Reitlinger, *The SS: Alibi of a Nation 1922–1945*, 174n4. At Nuremberg, Berger and others tried to maintain that killing units like the Dirlwanger regiment were not part of the SS. Reitlinger rejects this contention: "The text of Himmler's second Posen speech was only discovered in 1953, and it casts a dubious light on the testimony, given years previously at Nuremberg, by Gottlob Berger. . . . Both fought hard to maintain that the Dirlwanger regiment was not part of the SS at all" (172).

106. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 218–220. Walter Schellenberg was an SS general and also a close friend and confidant of Heinrich Himmler. For more on Schellenberg, see Richard Breitman, *Official Secrets* (New York: Hill and Wang, 1998), 227, 255.

107. Reitlinger, *The SS: Alibi of a Nation 1922–1945*, 180. Schellenberg's claim that his office was only an information service was greatly undercut by the discovery that many of the executions of Jews and Commissars had been carried out in his offices.

108. *Ibid.*, 351.

109. *Ibid.*, 353.

110. Robert Kempner, interview by author, tape recording, Locarno, Switzerland, 23 February 1988.

111. Robert Maguire, letter to family, 21 December 1947, Constance Maguire Wilson Papers, 2.

112. Robert Maguire, letter to family, 19 January 1948, Constance Maguire Wilson Papers, 1.

113. *Ibid.* The judge's description of German soldiers is ironic when compared to his description of American soldiers. In a letter of 10 January 1948 (in possession of

the author), he described two German soldiers he met on the train: "The train was crowded to the last inch of space. There were so many Americans going that the only place we could find was a compartment mean [*sic*] to hold six people, but in which eight were crowded, two of them blind Germans, who evidently had lost their eyesight in the war. One was a young man with a handsome refined face, and the other an older man still wearing his army clothes, and accompanied by a seeing eye dog, a beautiful intelligent animal. We gave them . . . cigarettes, for which they seemed quite grateful, the old man saying, time and again, Dankeshon, Camrad, danke schon."

114. *Ibid.*, 2.

115. *Ibid.*

116. *The New York Times*, 13 January 1948, 9, col. 1. Kathleen McLaughlin described the significance of this testimony: "Her testimony implicated especially the No. 1 defendant, Baron Ernst von Weizsäcker, and Otto Meissner on the trial of Nazi diplomats and officials" (9).

117. Robert Maguire, letter to family, 10 January 1948, Betty Maguire Frankus Papers, 1.

118. Robert Maguire, letter to family, 25 January 1948, Constance Maguire Wilson Papers, 1.

119. This became the crux of von Weizsäcker's defense against the charges of crimes against peace.

120. Robert Maguire, letter to family, 25 January 1948, Connie Maguire Wilson Papers, 1.

121. Walter LaFeber, *America, Russia, and the Cold War* (New York: Knopf, 1985), 71–72.

122. *Ibid.*, 72.

123. Jean Smith, "The View from USFET: General Clay's Interpretation of Soviet Intentions in Germany, 1945–1948" in Schmitt, ed., *The U.S. Occupation of Europe*, 73.

124. *Ibid.*

125. Clay, letter to General Eisenhower, 28 July 1947, in Jean Smith, ed., *The Papers of General Lucius Clay* (Bloomington: Indiana University Press, 1974), 1:389–390.

126. *Ibid.*, 390.

127. Simpson, *Blowback*, 54. Heinz Hohne of *Der Spiegel* claimed that during the first few years of the Cold War "seventy percent of all the U.S. government's information on Soviet forces came from the Gehlen organization" (54).

128. *Ibid.*, 65. This comment echoes John Kenneth Galbraith, who once observed that the Cold War produced an American James Bondism "based on the thesis that Communist disrespect for international law and accepted standards of behavior could only be countered by an even more sanguinary immorality on the part of the United States" (Galbraith, "The Sub-Imperial Style of American Foreign Policy," *Esquire* 77[1972]: 79–84). J.F.C. Fuller considered the Soviet Union inferior militarily: "Not of two ill-prepared Powers faced with a better prepared one, as at Munich, but of the two greatest industrial powers in the world, at the time rapidly approaching full rear-

mament, faced with an unreliable power crippled by over two years of ferocious warfare, and almost entirely dependent on their assistance to maintain his armies in the field. Actually, in August 1943, the position of Russia was diametrically opposite of the one posited in the Hopkins document" (288–289).

129. Smith, *Lucius D. Clay*, 75. "In February, while Congress debated the Marshall Plan for European recovery, Czechoslovakia receded further behind the Iron Curtain as the non-Communist members of government were ousted. Doomsayers in Washington believed their prediction fulfilled, although as George Kennan has noted, such a move changed very little and should have been anticipated. On the heels of events in Prague, Lt. Gen. S.J. Chamberlin, Director of Army Intelligence, visited Clay in Berlin. He impressed upon Clay the pitiful unreadiness of U.S. armed forces, the fact that military appropriations were pending before Congress, and the need to galvanize public support for substantial rearmament" (75).

130. *Ibid.*, 75–76. "In fairness to Clay, it must be recognized that he did not envision how the cable would be used or what its effects would be. His intent was to assist the Army before Congress; it was not to create war hysteria in the country. In fact, Clay was appalled when its contents were leaked to the *Saturday Evening Post*. 'The revelation of such a cablegram,' he advised Bradley, 'is not helpful and in fact discloses the viewpoint of a responsible commander out of context with many parallel reports'" (Smith, ed., *The Papers of General Lucius Clay*, 2:961–962).

131. Jean Smith, *Lucius D. Clay: An American Life* (New York: Holt, 1990), 76.

132. Michael Howard, "Governor General of Germany," *Times Literary Supplement*, 29 August 1975.

133. Etzold and Gaddis, eds., *Containment*. The Policy Planning Staff saw their objective as returning Germany to self-government: "Thirdly, we must have the courage to dispense with military government as soon as possible and to force the Germans to accept responsibility once more for their own affairs. They will never begin to do this as long as we will accept that responsibility for them" (120). Peter Grose, *Operation Rollback* (New York: Houghton Mifflin, 2000), 96.

134. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 202–203.

135. *Ibid.*, 203.

136. *Trials of War Criminals before Nuernberg Military Tribunals Under Control Council No. 10* (Washington, D.C.: U.S. Government Printing Office, 1949).

137. *Ibid.*, 789.

138. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 203. Transcripts, case 7, 10, 446.

139. *Ibid.*, 204. General Taylor's description of the judgment leaves open the possibility of legitimate legal differences: "One can easily understand these protests, but, in the writer's view, they have tended to obscure the admirable workmanship of the judgment. Furthermore, these were much mooted questions, with highly political overtones, and it is hard to criticize the court's conservative determination to apply international law, 'as we find it,' not 'as we would have it.' In the long run, this may well



promote the revision of international law along more enlightened lines, which is far more important than the decision with respect to these particular defendants" (207).

140. *U.S. Military Tribunal Nuremberg, Transcript, Case VII, List* (Nuremberg: Secretariat for Military Tribunals, 1949), 10441. The first paragraph read: "In no other way can an army guard and protect itself from the gadfly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically lawful belligerents and are not entitled to protection as prisoners when captured."

141. *Ibid.*

142. Appleman, *Military Tribunals and International Crimes*, 192; Transcripts, case 7, 10441-2.

143. *U.S. Military Tribunal Nuremberg, Transcript, Case VII, List*, 10446.

144. *Ibid.* See also Roberts and Guelff, eds., *Documents on the Laws of War*, 48-49.

145. Appleman, *Military Tribunals and International Crimes*, 186.

146. Columbia University Oral History Project, Lucius Clay, 561.

147. *U.S. Military Tribunal Nuremberg, Transcript, Case VII, List*, 10542. Charles Wennerstrum's comments appeared in the conservative *Chicago Tribune* on February 23, 1948. Telford Taylor's rebuttal was printed the same day in a *New York Times* article entitled, "Prosecutor Scores War-Crimes Judge." Tom Schwartz describes the role assumed by the *Chicago Tribune* in the Nuremberg debates: "The conservative Chicago Tribune, with the remarks of Judge Charles Wennerstrum . . . made itself the mouthpiece of the critics of the Nuremberg trials" ("*Die Begnadigung Deutscher Kriegsverbrecher. John J. McCloy und die Haftlinge von Landsberg*" in *Vierteljahrshefte für Zeitgeschichte* 38 [July 1990]: 382).

148. Frank Buscher, *The U.S. War Crimes Trial Program in Germany, 1946-1955* (Westport, Conn.: Greenwood, 1989), 188.

149. "Nazi Trial Judge Rips 'Injustice,'" *Chicago Tribune*, February 23, 1948.

150. Buscher charges in *The U.S. War Crimes Trial Program* that Hal Foust's transmissions were intercepted by the army in violation of U.S. wiretapping laws (35). Taylor described how he received Wennerstrum's comments before they were printed in the United States: "There was a place in Frankfurt where most of the American newspapers had their headquarters where the members of the press hung up what was going out." Telford Taylor, interview by author, tape recording, New York City, 24 February 1993.

151. Telford Taylor, letter to Charles Wennerstrum, 21 February 1948, reprinted in Appleman, *Military Tribunals and International Crimes*, 190-191. "It has come to my attention that yesterday, a few hours before your departure from Nürnberg, you gave an interview to a representative of the *Chicago Tribune*, in the course of which you made a deliberate, malicious, and totally unfounded attack on the integrity of the very trials in which you yourself were a presiding judge. It is clear from the nature of your remarks that you were not speaking on behalf of your Tribunal or in your official capacity, but were volunteering purely personal views. Since your remarks are subversive of the interests and policies of the United States, they must not go unan-

swered" (190). When Wennerstrum arrived back in the United States on February 24, 1948, he was met by the press with a copy of Taylor's comments. The judge stood behind his prior statements. *The New York Times* reported: "Questioned as to his original criticism of persons 'with personal ambitions,' he said they applied 'to the prosecutors and their superior' " (February 25, 1948, 10, col. 3). The other two judges from the Hostage case were with Wennerstrum on the flight back to the United States but were unwilling to side with their colleague, according to the same article: "Accompanying Wennerstrum on the homeward flight . . . were Judge Edward F. Carter . . . and Judge George J. Burke . . . his associates at the trial. They refused to enter the controversy. Both associate judges, however, asserted that they were satisfied with the outcome. . . . Judge Carter's only comment was, 'We heard the case, we wrote an opinion and we think the facts were as we found them.' To this, Judge Burke added, 'The opinion was rather long and well thought out. Beyond that, I have no opinion.'" Telford Taylor, interview with author.

152. Appleman, *Military Tribunals and International Crimes*, 191.

153. *Congressional Record*, December 16, 1948, 11468.

154. As Buscher notes in *The U.S. War Crimes Trial Program*, American criticism provided a pretext for German critics.

155. Schwartz, "Die Begnadigung Deutscher Kriegsverbrecher," 380. Translation by the author and Martin Splichal.

156. Buscher, *The U.S. War Crimes Trial Program*, 35–36.

157. Robert Maguire, letter to Constance Maguire Wilson, 24 February 1948 (in possession of the author).

158. Ibid. Maguire was somewhat pessimistic about the revolutionary impact of the Nuremberg trials: "Personally I have never much been inclined to name calling, and there is a serious question as to whether in being so vigorous we aren't making it more difficult to come to an understanding with Brother Stalin. I think it has become perfectly clear that the late F.D.R. who should have known better, and Harry S., who had no opportunity to know anything about the questions, made terrific and tragic mistakes at Moscow and Potsdam. They were full of benevolence and enthusiasm, and were dealing with exceedingly cool-headed men who knew exactly what they wanted, and proceeded to trade us out of our eye teeth. . . . The more one looks into the history of peoples, particularly those of Russia and the East, the less enthusiastic he is likely to be; they have in the past and they are now, bogged down in the age old jealousies, ideology, racial, religious, and political that have been the eternal causes of war, and the people of each country refuse to examine their own mirrors to see where they have been wrong, but insist on the errors and shortcomings of their neighbors. . . . There is a very natural tendency to say, 'if you didn't then, why should we trust you a second time?' I find no one, and I have heard of no one who has anything good to say of them. Many say that individually they like Russian people, but politically they are utterly ruthless, and without faith. The stories that I hear of what they have done and are doing in the regions here and in other countries are almost unbelievable for horror, cruelty and oppression" (Ibid., 2).

159. Ibid.
160. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsäcker*, 13:97.
161. James Brand, letter to Robert Maguire, 12 May 1948, Betty Maguire Frankus Papers, 1.
162. Ibid.
163. Walter Rockler, interview by author, tape recording, Washington, D.C., 18 April 1987. Robert Maguire, letter to family, 14 April 1948, Constance Maguire Wilson Papers, 2.
164. American Nuremberg Trials, *Case 9—United States v. Otto Ohlendorf*, 531. The evidence in the Einsatzgruppen case was specific and highly incriminating. The majority of it consisted of the group's reports from the Soviet Union.
165. Appleman, *Military Tribunals and International Crimes*, 202.
166. Ibid. See Christopher Browning, *Ordinary Men* (New York: HarperCollins, 1998).
167. Ibid. On the stand Ohlendorf testified, "I was the leader in Einsatzgruppen D in the southern sector; and in the course of the year . . . it liquidated approximately 90,000 men, women and children. The majority of those liquidated were Jews, but there were among them some communist functionaries" (International Military Tribunal, *Trial of the Major War Criminals* [Nuremberg: IMT, 1947], 4:206).
168. American Nuremberg Trials, *Case 9—United States v. Otto Ohlendorf*, 569, 530–531; Appleman, *Military Tribunals and International Crimes*, 202.
169. See *ibid.*, 202–203, for a summary of Taylor's closing statement.
170. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 183.
171. Ibid., 181.
172. Ibid., 184.
173. Levie, *Terrorism in War*, 376.
174. Ibid.
175. *Interrogation Report of Carl Schmitt, Nuremberg Office of U.S. Chief Counsel for War Crimes, Evidence Division*, transcript No. 1842. Reprinted in *Telos* 72 (Summer 1987). Although Schmitt offered no substantive comments on Ernst von Weizsäcker, his initial reaction is telling when compared to his responses to other important Nazis like Hans Lammers. Schmitt seemed genuinely surprised by von Weizsäcker's inclusion and the activities in which the diplomat was involved.
176. *Case Eleven—Ernst von Weizsäcker*, XII: 237–238.
177. Robert Louis Stevenson, *The Strange Case of Dr. Jekyll and Mr. Hyde*, from Luders, "The Strange Case of Ernst von Weizsäcker," iii.
178. Von Weizsäcker, *From Weimar to the Wall*, 48.
179. Ibid.
180. Luders, "The Strange Case of Ernst von Weizsäcker," 63–64. In the cases that preceded it, "Unlike in the case of Weizsäcker, in which political resistance played a decisive part in his defense, it had merely been stated as a mitigating circum-

stance that both defendants had occasionally advocated the tempering of certain measures. The key distinction was that in the IMT cases none of the defendants nor their witnesses considered their actions to constitute political resistance" (68n29).

181. Von Weizsäcker, *From Weimar to the Wall*, 95.

182. Klemens von Klemperer, *German Resistance Against Hitler* (Oxford: Clarendon, 1992), 102.

183. Von Weizsäcker, *From Weimar to the Wall*, 90.

184. *Trials of War Criminals before Nuernberg Military Tribunals Under Control Council No. 10*, XII:152–153.

185. *Ibid.*, 154–156.

186. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28328; Kaiser, *Politics and War*, 432–433. David Kaiser makes the point that “deportation” became a synonym for execution: “It seems, then, that by the late summer of 1941 deportation meant not deportation and resettlement, but rather deportation and murder” (403–404).

187. John Cornwell, *Hitler's Pope: The Secret History of Pius XII* (New York: Viking, 1999), 300. See also Guenter Lewy, *The Catholic Church and Nazi Germany* (New York: Da Capo, 1964), 300–302.

188. *Ibid.*, 311. According to Cornwell, “The letter indicates the subtle double game that Weizsäcker had played throughout the deportation episode. It was Weizsäcker who helped stop the further arrests of Jews by raising the threat of papal protests that Pacelli had no intention of making. Now that no further arrests were to come, he could speak complacently of the Pope’s willingness to remain silent. But what of the thousands who had died?” (312). Ian Buruma on von Weizsäcker’s role in the Vatican: “Since 1943, he had served as ambassador to the Vatican—a rather crucial posting, since the Germans wanted to make sure the Pope kept silent about the Final Solution. Whether or not it was due to Weizsaecker’s diplomatic skills, the Pope did not disappoint them” (Buruma, *The Wages of Guilt*, 142). See also Michael Phayer, *The Catholic Church and the Holocaust* (Bloomington: Indiana University Press, 2000).

189. *Trials of War Criminals before Nuernberg Military Tribunals Under Control Council No. 10*, XII:148.

190. *Ibid.*, 152.

191. *Ibid.*, 148–153.

192. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28331. Parts of Hassell’s diary were introduced as rebuttal evidence by the Prosecution (NG 5759, Exhibit C-288, Doc. Bk. 204A); from Luders, “The Strange Case of Ernst von Weizsaecker.” For more on the resistance see Hans Gisevius, *To the Bitter End* (Boston: Houghton Mifflin, 1947); Peter Hoffman, *The History of the German Resistance, 1933–1945* (Cambridge: MIT Press, 1979); Allen Dulles, *Germany’s Underground* (New York: Macmillan, 1947); Hans Royce, ed., *20 Juli 1944* (Bonn: Heraus-gegeben von der Bundeszentrale für Heimatdienst, 1953).

193. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 8538.

194. LaFeber, *America, Russia and the Cold War*, 71–72.

195. William Caming, conversation with author, 7 July 1987. William Caming, interviews by author, tape recording, Summit, New Jersey, 9 October 1987, fall 1989. Similar sentiments were expressed to the author by Telford Taylor, Drexel Sprecher, Robert Kempner, Walter Rockler in interviews and conversations. The Italians were in the midst of an election campaign and the Communist Party was running strong. George Kennan and other high-level policy makers were greatly alarmed by the prospect of the Italian Communist Party gaining control of the government through a popular election. The list of men involved in the anti-Communist effort in Italy reads like a Cold War all-star team roster. It included George Kennan, Allen Dulles, James Angleton, Frank Wisner, and William Colby. The Americans worked with the Vatican on behalf of Christian Democrat candidates. Their aid included various types of agitprop, specifically designed to highlight “American munificence and communist atrocities, both real and manufactured.” Maguire was unaware of the motor behind the campaigning, but sensed a strange fervor. He wrote, “you never saw such campaigning, and such apparent eager interest . . . they are so close to the fear or love of Russia and Communism that it is all they think of.” The Italian election forced him to consider his own views. Maguire wrote, “Communism is an utterly evil thing not because it opposes and would destroy capitalism, but because its primary tenet is the destruction of the right of men to think for themselves, to speak their thoughts, to believe as they will and to criticize the mistakes, real or fancied of those in power.”

See Simpson, *Blowback*, 90–91. For more on the CIA’s role in the Italian election see William Corson, *The Armies of Ignorance* (New York: Dial/James Wade, 1977); see also Wilson Miscamble, *George F. Kennan and the Making of American Foreign Policy* (New Jersey: Princeton University Press, 1992).

196. Friedrich, “Nuremberg and the Germans,” 92.

197. *Defense Brief—Lammers-Meissner-Cross Closing*, X1B11:4, 42.

198. *Ibid.*, 67.

199. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 12:257.

200. *Ibid.*, 358. Edmund Veesenmayer’s attorney made a similar argument: “His work there was guided only by the thought of helping his comrades who were fighting desperately against the overwhelming power of the Red Army . . . this man moved along a lonely ridge between life and death in his work, day by day, year by year, motivated by his love for Germany, and moved by the thought of achieving a better European order” (300). *Green Series* vol. XII, 358–359.

201. *Ibid.*

202. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28432. In a speech at a 1935 Nazi Party rally, Dietrich described his view of the press under a modern dictatorship: “The liberalistic age boasted of the Press as a Seventh Power. . . . In National Socialist Germany that kind of press was eliminated with lightning speed by the arm of the law! A fate which it deserved a thousand fold, overtook it on the first day of the revolution. . . . And dear Party Members, we did our full duty by our pro-

gram in this respect also. In National Socialist Germany, enemies of the state and the people are not tolerated in the press; they are exterminated" (28432).

203. The IMT set the precedent followed by the tribunals in the Flick, Farben, and Krupp cases. The majority of the American courts bowed to the IMT's conservative precedents.

204. Schacht was found innocent under Counts 1 and 2 and acquitted. Appleman, *Military Tribunals and International Crimes*, 171–172.

205. *U.S. Military Tribunal Nuremberg, Transcript, Case X, Krupp* (Nuremberg: Secretariat for Military Tribunals, 1949), 13435–37.

206. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 319.

207. *Ibid.*, 197.

208. *Ibid.*, 319.

209. Borkin, *The Crime and Punishment of I. G. Farben*, 142.

210. *Ibid.*, 144.

211. *Ibid.*, 134.

212. *Ibid.*, 148.

213. *Ibid.*, 149.

214. *Ibid.*

215. *Ibid.*

216. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 198.

217. Borkin, *The Crime and Punishment of I. G. Farben*, 150.

218. *Ibid.*, 151.

219. *Ibid.* Appleman, *Military Tribunals and International Crimes*, 181. Judge Hebert agreed: "bowing to such weighty precedents as the acquittal by the International Military Tribunal of Schacht and Speer on the charges of Crimes Against Peace; of the acquittal by Military Tribunal III of the leading officials of the Krupp firm on similar charges. . . . I do not agree with the majority's conclusion that the evidence presented in this case falls so far short of sufficiency as the Tribunal's opinion would seem to indicate. The issues of fact are truly so close as to cause genuine concern as to whether or not justice has actually been done because of the enormous and indispensable role these defendants were shown to have played in the building of the war machine which made Hitler's aggressions possible" (181).

220. *Ibid.*

221. Borkin, *The Crime and Punishment of I. G. Farben*, 155.

222. Levie, *Terrorism in War*, 480.

223. Borkin, *The Crime and Punishment of I. G. Farben*, 154. See Josiah DuBois, *The Devil's Chemists: 24 Conspirators of the International Farben Cartel Who Manufacture Wars* (Boston: Beacon, 1952) for his account of the trial.

224. Appleman, *Military Tribunals and International Crimes*, 211.

225. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 193. The Krupp Works' use of slave labor violated a number of the convention's articles.

226. *U.S. Military Tribunal Nuremberg, Transcript, Case X, Krupp*, 12380–81.
227. *Ibid.*, 13451–52.
228. Appleman, *Military Tribunals and International Crimes*, 180–181.
229. Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials*, 193. Appleman, *Military Tribunals and International Crimes*, 177–178. The most severe sentences were two eight-year terms. Eleven of the twenty-three defendants were acquitted or released for time served. The weekly *Christ und Welt* of Stuttgart featured a picture of Curtis Shake, presiding judge at the Farben trial, with the following caption: “The president of the U.S. Military Tribunal in the Nuremberg I. G. Farben trial, who excelled by his just conduct of the proceedings, by his absolute objectivity and disregard for all vindictive sentiments, as well as by his endeavor to understand the nature of German conditions between 1933 and 1945.” Appleman, *Military Tribunals and International Crimes*, 181nb.
230. Robert Maguire, letter to Katie Maguire, 27 July 1948 (in possession of the author).
231. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28087. The Ministries case transcript was 28,085 pages long, and this does not include the 9,067 pages of documentary exhibits.
232. Dower, *Embracing Defeat*, 453; Piccigallo, *The Japanese on Trial*, 46. This was a political event, even though the United States had been careful to use the “hocus-pocus of a judicial procedure which belies its real nature.”
233. Levie, *Terrorism in War*, 386.
234. Minear, *Victor’s Justice*, 72. The trial lasted thirty-one months, from May 3, 1946 through November 1948. Seven were sentenced to death, sixteen to life, one to twenty years, and one to seven years. There were no acquittals. Five died in prison, while the remaining twelve prisoners were paroled between 1954 and 1956. “In 1958, the last ten were granted clemency following discussions with the former victorious powers” (Dower, *Embracing Defeat*, 450). In Khabarovsk, twelve former members of Japan’s infamous Unit 731 were put on trial; all pled guilty and confessed (Dower, *Embracing Defeat*, 449). Levie on the Chabarovsk trial: “Four had been in the Kwantung Army and eight in Units 731 and 100” (Howard Levie, *Terrorism in War: The Law of War Crimes* [Dobbs Ferry, N.Y.: Oceana, 1993], 164). Tanaka, *Hidden Horrors*, 2 and Dower, *Embracing Defeat*, 450. From 1945 to 1951, Allied military commissions in the Far East sentenced 920 to death and 3,000 to various prison terms (vi). U.S. trials in the Pacific were held in the Philippines (215); China (75); Pacific Islands (123); and Yokohama (996) (Piccigallo, *The Japanese on Trial*, 74).
235. Judith Shklar, *Legalism: Laws, Morals, and Political Trials* (Cambridge: Harvard University Press, 1964), 185–186. Shklar points out the weakness of natural law as a basis for the charge of aggressive war: “Many observers have noted that natural law is capable of too many interpretations in any concrete situation to provide an objective and impersonal basis for international criminal trials. At Tokyo there was a telling illustration of this point. Justice Bernard based his dissent on natural law too, but in his view it rendered the charge of waging aggressive war illegitimate. In short, the

very charge which Mr. Keenan's natural law supported, Justice Bernard's natural law rejected" (185). In his dissenting opinion, the French justice wrote that the defendants were only "accomplices," and the "principal author . . . escaped all prosecution." Dower, *Embracing Defeat*, 460.

236. Ibid., 460. See also Piccigallo, *The Japanese on Trial*, 29. For more on Hirohito's wartime role and nonindictment, see Herbert Bix, *Hirohito and the Making of Modern Japan* (New York: HarperCollins, 2000).

237. Piccigallo, *The Japanese on Trial*, 30.

238. Levie, *Terrorism in War*, 390.

239. R. John Pritchard and Sonia Magbanua Zaide, eds., *The Tokyo War Crimes Trials* (New York: Garland, 1981), 21:1226. Pal wrote: "For reasons given in the foregoing pages, I would hold that each and every one of the accused must be found not guilty of each and every one of the charges in the indictment and should be acquitted of all those charges. . . . I believe that this is really an appeal to the political power of the victor nations with a pretense of legal justice. It only amounts to piecing up want of legality with matter of convenience" (1226).

240. David Luban, *Legal Modernism* (Ann Arbor: University of Michigan Press, 1994), 340–341. Levie wrote that Judge Pal "went to Tokyo prepared to strike a blow for Asia's freedom from European colonization" (*Terrorism in War* 152).

241. Ibid., 341.

242. Piccigallo, *The Japanese on Trial*, 31.

243. Pritchard and Zaide, eds., *The Tokyo War Crimes Trials*, 1091. Dower, *Embracing Defeat*, 473.

244. Shklar, *Legalism*, 186–187.

245. Ibid., 187.

246. Pritchard and Zaide, eds., *The Tokyo War Crimes Trials*, 279; Dower, *Embracing Defeat*, 473.

247. Pritchard and Zaide, eds., *The Tokyo War Crimes Trials*, 279; Dower, *Embracing Defeat*, 460.

248. Robert Maguire, letter to Katie Maguire, 27 July 1948, 1. Maguire knew his trial would be the last to finish in the summer of 1948 when he wrote his mother: "Our case moves along but not very rapidly to my disgust and disappointment but there is little we can do about it. Two of the Tribunals close this week, Krupp and Farben, and the High Command Case will probably finish sometime about the middle of August but we can look forward to no such luck. However, one of these days, it is likely we will be hopping on the steamer for the U.S.A. and particularly, Portland and Birdshill" (2).

249. Ruth Maguire, letter to Katie Maguire, 9 November 1948, Betty Maguire Frankus Papers, 1.

250. Ruth Maguire, letter to Katie Maguire, 13 January 1949. Now it was clear Powers would not concur with the majority opinion, and this added several months to the Maguires' stay. Ruth informed her mother-in-law of the delay: "you are probably wondering when we are leaving Nurenberg. We do not know the actual date,



but Bob is working hard and hopes to leave by the end of the month. It is a long, drawn-out affair, this ‘Ministries Case’ and sometimes I guess he wishes he had taken the ‘High Command Case’ for he would have been thru . . . 2 or 3 months ago. If he had known that he would have to stay as long as this he said he would not have come. However, when it’s all over, I think he will be glad to have had the experience over here—in spite of the grueling last months” (1). Ruth makes no specific mention of the divided court.

251. *Stars and Stripes*, April 12, 1949.

252. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 14:316.

253. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28092–93.

254. *Ibid.*, 28093.

255. *Ibid.*

256. *Ibid.*, 28096–97. Jack Raymond of *The New York Times* observed this in an article entitled “Five High Nazis Guilty of Helping Hitler to Violate Peace”: “The court rejected the defense claim that the Soviet-German treaty disclosed that the Soviet Union was just as guilty as Germany of waging aggressive war” (*New York Times*, April 12, 1949, 1, col. 1).

257. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28097. *The New York Times* reported the convictions for crimes against peace: “The conviction on the aggressive war count was the first in the twelve trials conducted by the United States since the International Military Court at Nuremberg convicted Hermann Goering and other makers of Nazi high policy” (Raymond, “Five High Nazis Guilty,” 1).

258. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28121. Jack Raymond described the court’s reasoning: “Although the court conceded Weizsaecker ‘continuously discouraged Ribbentrop’s penchant for aggressive war,’ a ‘radically different’ attitude was attributed to him after the Munich pact. ‘The reason for this we think is obvious,’ the court declared. ‘Before Munich he feared that France and England would take up arms in defense of Czechoslovakia and that if it did so, Germany would suffer defeat. After Munich he felt danger to Germany had vanished and he looked with complaisance if not approval on the future fate of Czechoslovakia’ ” (Raymond, “Five High Nazis Guilty,” 1).

259. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28121.

260. *Ibid.*

261. *Ibid.*, 28140.

262. *Ibid.*, 28122.

263. *Ibid.*, 28293.

264. *Ibid.*, 28292.

265. *Ibid.*, 28096–97.

266. Powers rejected the charges on the grounds that these acts were not traditional war crimes because they were not committed by combatants or (in the cases of Austria and Czechoslovakia) during wartime.

267. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28116.

268. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 14:877.
269. *Ibid.*, 14:872. See Levie, *Terrorism in War*, 95 for the Powers quote.
270. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 14:890.
271. Appleman, *Military Tribunals and International Crimes*, 222–223.
272. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28285.
273. *Ibid.*
274. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 12:219–220.
275. “Report of the Advisory Board on Clemency for War Criminals to the U.S. High Commission for Germany Advisory Clemency Report,” RG 59, Box 5 (Clemency Board on German War Criminals), 13, NA.
276. *Ibid.*
277. Appleman, *Military Tribunals and International Crimes*, 223.
278. Levie, *Terrorism in War*, 478n136.
279. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 14:931. According to Judge Powers’s conservative reading of the laws of war: “To be guilty—I repeat—the defendant must have participated in the initiation of a war of aggression. In order to do that, he must have committed some act intended to have some effect in bringing about a war, knowing it would become a war of aggression. That evidence is conspicuous by its absence here” (894). Jack Raymond analyzed the Powers dissent in an article entitled “Nuremberg Judge Dissents on Guilt” (*The New York Times*, April 14, 1949, 8, col. 1): “Most of the court’s verdicts were immediately condemned by one of its members, Judge Leon W. Powers. He said in a dissenting opinion that his two colleagues were endorsing a ‘strange doctrine’ of attributing guilt to those who merely had knowledge of a crime. . . . Judge Powers’ contention that ‘guilt is personal and individual and must be based on personal acts of an individual charged,’ was in direct contradiction to the majority view that those who did the planning and administrative work of the crimes were ‘equally guilty’ with concentration camp commanders and other implementers of the crimes.”
280. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 14:930.
281. *Ibid.* 14:931.
282. *Ibid.* 14:866–871.
283. William Caming, paper delivered at University of South Carolina College, September 11, 1998, 13; American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 14:947. “Ernst Von Weizsaecker, Gustav Adolf Steenracht von Moyland, Wilhelm Keppler, Wilhelm Stuckart, Richard Walter Darré, Otto Dietrich, Gottlob Berger, Walter Schellenberg, Lutz Scherin von Krosigk, Emil Puhl, Paul Koerner, Paul Pleiger, and Hans Kehrl presented to and filed with the Tribunal a motion to set aside the decision and the judgment of conviction ‘on the grounds that said decision and judgment is contrary to the facts, contrary to law, and against the weight of the

evidence; on the ground that this Court has no jurisdiction to hear and determine the alleged charges, and on the further ground that the facts alleged and the facts found do not constitute an offense against the law of nations or against the laws of the sovereign power of the United States,' and on the ground 'that the rulings made are not in conformity with the principles of the due process of law, and the Constitution and laws of the United States, the international law, and the rules of law generally applicable to the trial of criminal cases" 14:946-947.

284. *Stars and Stripes*, April 15, 1949, 1.

285. *Ibid.*

286. Wilbourn Benton, ed., *Nuremberg: German Views of the War Trials* (Dallas: Southern Methodist University Press, 1953), 197.

### 5. Nuremberg: A Cold War Conflict of Interest

1. Richard von Weizsäcker, *From Weimar to the Wall*, trans. Ruth Hein (New York: Broadway Books, 1999), 90, 95.

2. Klemens von Klemperer, *German Resistance Against Hitler* (Oxford: Clarendon, 1992), 26. A review of Marion Thielenhaus' study of a group of German diplomats, *Zwischen Anpassung und Widerstand: Deutsche Diplomaten, 1938-1941* (Paderborn: Ferdinand Schöningh, 1985) by Gerhard Weinberg (*Journal of Modern History* 9 [Sept. 1987]: 638) raises many of the same questions as the tribunal majority in the Ministries case: "The state secretary is in many ways the central figure in the book. If Thielenhaus is rather sympathetic to him in her presentation, she certainly shows him to have been vehemently and continually anti-Czech and positively hysterical in his hatred of Poland. He is portrayed as what might be called a conventional ultranationalist, and—in view of his inability to comprehend from his excellent vantage point that it was Hitler who was driving German foreign policy in 1938 and 1939—quite extraordinarily stupid. . . . The sketch in the first chapter of German diplomats in the early years of Nazi rule includes no discussion of the Jewish question, and no conclusions are drawn by the author from her observation that (p. 88) only one document in the whole Foreign Ministry archives revealed an effort to assist the persecuted. If she had extended her scope to include at least minimal reference to von Weizsäcker's regular review of the reports of the murder squads (*Einsatzgruppen*), his role in the extraction of Jews from all over Europe for dispatch to the killing centers, his rejection out of hand of the Swedish government's offer to accept the Norwegian Jews to prevent their being murdered, and his postwar admiring comment on one of the leaders of the murder squads, she might have seen more clearly a side of the central figure in the book that is entirely blocked out by the tunnel vision of this monograph."

Michael Luders, "The Strange Case of Ernst von Weizsäcker," refuses to offer an opinion on the diplomat's innocence or guilt, but gives this Robert Louis Stevenson quote as a preface. Dr. Jekyll's description of himself applies fittingly to the former State Secretary: "Though so profound a double-dealer, I was in no sense a hypocrite; both sides of me were in dead earnest; I was no more myself when I laid aside

restraint and plunged in shame, than when I laboured, in the eye of day, at the furtherance of knowledge or the relief of sorrow and suffering" (iii).

3. Jörg Friedrich, "Nuremberg and the Germans," in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), 92. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker* (Nuremberg: Secretariat for Military Tribunals, 1949), 28122; see also 28328.

4. John Cornwell, *Hitler's Pope: The Secret History of Pius XII* (New York: Viking, 1999), 310.

5. Hearings before a Subcommittee on Armed Services, U.S. Senate, 81st Congress, 1st Session, pursuant to Senate Resolution 42, *Investigation of Army Action with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, Battle of the Bulge, near Malmédy, Belgium, December, 1944*, 102. See also Frank M. Buscher, *The U.S. War Crimes Trial Program in Germany, 1946–1955* (Westport, Conn.: Greenwood, 1989), 41; Glenn Smith, *Langer of North Dakota: A Study in Isolationism* (New York: Garland, 1978), 148–150.

6. David Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (New York: Free Press, 1983), 74.

7. *Investigation of Army Action with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, Battle of the Bulge, near Malmédy, Belgium, December, 1944*, 352.

8. Ibid.

9. Ibid., 102. The German magazine *Die Strasse* filed this brief for the men of Kampfgruppe Peiper: "Americans and Germans demand Review. . . . The gallows wait for the accused of the Malmedy Trial for four years. Twenty-eight prisoners of the Landsberg Prison had been sentenced to death; six of these prisoners were sentenced to death in the Dachau Malmedy Trial. These six men had nothing to do with concentration camps, neither had they been assigned to liquidation squads, but they were soldiers of the 6th Armored Army, who participated in the final German Eifel Offensive. American politicians and lawyers had tried for years to obtain a Review of the Malmedy Trial. Petitions for Clemency were submitted, although innocent men need no pardon, only justice" (January 21, 1947). McCarthy bore into one witness with his most famous statement during the hearings: "I assume that you and I would agree that an innocent man will scream about as loudly as a guilty man if you are kicking him in the testicles, and an innocent man will perhaps sign the same confession that a guilty man will if you kick him long and hard enough" (Oshinsky, *A Conspiracy So Immense*, 50).

An American newspaper article reported McCarthy's outrageous behavior: "At one point, Senator McCarthy alleged that Senator Baldwin had been 'criminally wrong' in continuing as chairman of the investigation of the group while his law partner, former Major Dwight Fanton, who had headed a military government team that extracted the confessions from accused Nazis, was under charge. A protest, based on Senate rules, was laid by Senator Charles W. Tobey, Republican of New Hampshire. Mr. McCarthy conceded that he might have gone too far in his language" ("Malmedy Inquiry Held 'Whitewash,'" *The New York Times*, July 27, 1949, 1, col. 1).

10. Oshinsky, *A Conspiracy So Immense*, 80.

11. Buscher describes how the Malmedy investigations played into the hands of the German propagandists: "The Board of Review report would undoubtedly have been of great value to the German anti-war crimes propaganda. But the bishops did not really need such confidential information to criticize the operation. Fortunately for them, there were the Malmedy hearings in the spring and fall of 1949, which lent themselves to this purpose. The German Protestant bishops became downright theatrical during this phase of the Malmedy controversy" (*The U.S. War Crimes Trial Program* 100).

12. Alfred Seidl offered this characterization during the Ministries case. Martin Hillenbrand, "The United States and Germany," in Wolfram Handrider, ed., *West German Foreign Policy 1949-1979* (Boulder: Westview, 1990), 74-75. See also Buscher, *The U.S. War Crimes Trial Program*, 37, 93-95. Buscher writes, "The clemency program of the American war crimes operation can be divided into two parts. During the first phase from 1946 to January 1951 . . . American officials thought that the early clemency programs should serve another purpose. Since U.S. authorities in Germany viewed the war crimes program as an important part in their effort to reform and reeducate the German people, the post-trial treatment of war criminals, in addition to the trials themselves, became a vital part of this educational device. The United States intended to use the proceedings against war criminals to demonstrate to the Germans the horrendous crimes Nazism had inflicted on its victims. . . . In contrast, sentence review and clemency were meant to promote the superior values of democratic society, which entitled even the perpetrators of mass murder to fair treatment" (69).

13. Buscher, *The U.S. War Crimes Trial Program*, 37.

14. Franz Bluecher, letter to Thomas Handy, 21 May 1951, RG 466, U.S. High Commission for Germany, Security Segregated Records 1949-1952, Box 28, 321.6, NA.

15. American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsaecker*, 14:952; "The defendants von Weizsaecker and Woermann insist that our judgment against them on count five is based upon the false hypothesis that at the time they had knowledge of the extermination program established at Auschwitz. Such is not the fact. We were and are convinced beyond reasonable doubt that both were aware that the deportation of Jews from occupied countries to Germany and the East meant their ultimate death. No one can read the record concerning the Dutch Jews and have any question as to the facts." The tribunal majority reaffirmed their rejection of the defense argument that the German diplomats thought that Auschwitz was merely a labor camp: "In an attempt to persuade us that these concentration camps, including Auschwitz, were merely labor camps and not murder factories until after 1942, the defense has offered much testimony. An analysis reveals that great care was exercised not to state that prior to that time Jews were merely labored and were not murdered, but to emphasize that the mass murder program had not been instituted until after 1942, when convoys of Jews were driven into the gas chambers immediately on arrival

at the camps" (American Nuremberg Trials, *Case 11—United States v. Ernst von Weizsäcker*, 14:952, 957–958).

16. *Ibid.*, 14:960; William Caming, "The Nuremberg Prosecutors Reflect on the Triumph of Justice and Morality," September 26, 1997; paper delivered at the University of South Carolina, 1998, 14.

17. Theo Kordt, letter to Lord Halifax, 13 December 1949, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.

18. Robert Maguire, "The Unknown Art of Making Peace: Are We Sowing the Seeds of World War III?" *American Bar Association Journal* 35 (Nov. 1949): 907.

19. *Ibid.*

20. *Ibid.*, 973.

21. Robert Maguire, letter to Kathy Bomke, 29 April 1959, 2 (in possession of the author).

22. *Ibid.* While praising the fairness of the Nuremberg trials, von Knieriem made a very important observation concerning the obsolescence of the laws of war: "No one who occupies himself with the legal problems of the Nuremberg trials can avoid a consideration of the laws of warfare. But what has happened to these rules of law during the last decades? Have they not perhaps disappeared? Each modern war has been more radical and more horrible than the preceding one; each war has swept away a part of the international law of warfare" (Wilbourn Benton, ed., *Nuremberg: German Views of the War Trials* [Dallas: Southern Methodist University Press, 1953], xxi).

23. Friedrich, "Nuremberg and the Germans," 92. See Tauber, *Beyond Eagle and Swastika*, 40: "Apart from the program of de-nazification, the Allied policy which aroused the most intense public controversy . . . and which most affected the development of radical nationalism was undoubtedly the trial and conviction of the top Nazi leaders before the International Military Tribunal at Nuremberg. . . . Without a doubt, the vast majority of Germans were disabused of certain illusions, some of them deeply rooted, about the Nazi regime." Tauber makes an important point about the irrationality of this debate: "from a nonlegal point of view, the Allies made a mistake when they decided in Moscow and London to bring war criminals before their own courts. Horrendous and overwhelming as the evidence against the Nazi leaders was, or perhaps *because* it was so horrendous and overwhelming, there was a widespread inclination to discount it as propaganda. It must be appreciated that the Germans had been surfeited with the Big Lie for twelve long years. They had, on the whole, developed a certain skeptical immunity to it. When the Allies, in apparent ignorance of that fact, began their publicity campaign for the trials, nationalists and bitter opponents of the occupation regimes quickly exploited this widespread suspicion to cast doubt on the entire procedure" (40).

24. Clay, *Decision in Germany*, 258–259. Clay proved to be a more stalwart supporter of the trials than John McCloy. In 1949, when several of Germany's leading bishops sent the Military Governor a letter criticizing the Nuremberg trials and comparing them to Hitler's trials of the German officers involved in his assassination attempt, Clay "rebutted the bishops' statement point by point. The military governor was

deeply disappointed that even Germany's bishops, as the highest moral authorities, had learned little or nothing from the tragic evidence presented at the trials. . . . Clay argued he could not understand how the review of the evidence could lead the Evangelical church to sympathize with the perpetrators of mass murder" (Buscher, *The U.S. War Crimes Trial Program*, 107).

25. Ann and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1984), 66–67; Thomas Alan Schwartz, *America's Germany: John J. McCloy and the Federal Republic of Germany* (Cambridge: Harvard University Press, 1991), 42–43. See also McCloy obituary, *The New York Times*, March 12, 1989.

26. Buscher, *The U.S. War Crimes Trial Program*, 56. See also Walter LaFeber, *America, Russia, and the Cold War* (New York: Knopf, 1985), 71–72.

27. Thomas Schwartz, "From *Occupation to Alliance*," 137; LaFeber, *America, Russia, and the Cold War*, 73. East Germany held war crimes trials of its own. "In 1964 the East Germans noted that of a total of 12,807 convictions related to the Nazi era, 11,274 took place between 1948 and 1950. In 1950 alone the Waldheim trials led to 4,092 convictions, including 49 executions, 160 life sentences, and 2,914 sentences longer than ten years. The Waldheim trials took place from April to June 1950. Trumpeted as an example of East German determination to confront the Nazi past, the trials instead did more to undermine East German claims to upholding the rule of law. Many cases were decided on the basis of past membership in organizations such as the Nazi Party, the SS, or the Wehrmacht, rather than demonstration of individual responsibility for crimes" (Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* [Cambridge: Harvard University Press, 1997], 73).

28. *Ibid.*, 306. Paul Nitze, George Kennan, H. Freeman Matthews, and Averell Harriman all urged Secretary of State Dean Acheson to rearm Germany. Tom Bower, *Blind Eye to Murder: Britain, America and the Purging of Nazi Germany—A Pledge Betrayed* (London: Andre Deutsch, 1981) states that the German influence increased "in direct proportion to the rising tension in Europe." German scorn for the trials initially stemmed from the Allies' "association with Stalin's Russia." Their hurt feelings of national honor could not be ignored "after the murder of Masaryk and the communist coup in February 1948" (253). David Kaiser describes the unprecedented political aims of both Cold War protagonists in *Politics and War* (Cambridge: Harvard University Press, 1990): "Both the Soviet and American governments, to begin with, have proclaimed foreign policy goals of extraordinary scope. The official premises of the Cold War make even the dreams of Napoleon look relatively restrained. Since the proclamation of the Truman Doctrine in 1947, the government of the United States has theoretically committed itself to the maintenance of non-Communist regimes throughout the world, without reference to their particular strategic importance. At times American policies have gone further, suggesting that the security of the United States required the disappearance of communism. The Soviet government has claimed to be assisting the gradual transition of the entire world from capitalism to socialism and communism. Both powers, in short, have put themselves forward as a model which the rest of the world must inevitably follow" (423).

29. Ibid., 305. There is considerable fluctuation in the estimates of Soviet military strength. Schwartz's numbers make the differentiation between battle-ready divisions (27) and reserve divisions (75). Stephen E. Ambrose claims in *The Rise to Globalism* (New York: Penguin, 1980) that the ratio of Soviet superiority in ground forces was ten to one. Schwartz, "Occupation to Alliance," 265. Adenauer stated in an interview with an American newspaper that the United States would have to assume the burden of defending West Germany.

30. See Schwartz, "Occupation to Alliance," 266–267 for more on Adenauer and rearmament. For more on the rise of Konrad Adenauer see Richard Hiscocks, *The Adenauer Era* (New York: Lippincott, 1966). In the first elections of the West German Bundestag in 1949, the Christian Democratic Union took a majority of seats and Adenauer was elected Chancellor by one vote. See "Judge Advocate General to the Assistant Secretary of War, November 22, 1944," in Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record 1944–1945* (Stanford: Hoover Institution Press, 1982). Cramer's suggestions are interesting given the final fate of the German war criminals and the more recent efforts to revise the history of the Third Reich: "I feel quite strongly that the world cannot afford to dispose of the war guilt question by compelling the vanquished nations to make an admission under duress, as it did in article 231 of the Versailles Treaty in 1919. There must be convincing proof of guilt, which should be preserved in such form that the record of trial can be widely distributed" (58).

31. On April 1, 1950, Landsberg Prison held 663 war criminals convicted by American courts (ibid., appendix B).

32. For a detailed, case-by-case analysis of the verdicts and sentences see Telford Taylor, *Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials* (Washington, D.C.: U.S. Government Printing Office, 1949) and John Alan Appleman, *Military Tribunals and International Crimes* (Westport, Conn.: Greenwood, 1971). See also Jean Smith, ed., *The Papers of General Lucius Clay* (Bloomington: Indiana University Press, 1974), 962. Contrary to the claims of the High Commissioner, General Clay had ordered his legal staff (Alvin Rockwell, Judge Madden, and Colonel Raymond) to review all of the death sentences in an effort to see if any grounds existed for commutation. After his legal staff issued their report, General Clay reviewed each case and upheld all but one death sentence. McCloy's premise for creating a clemency board was that no review had been provided. That was a false statement. There were a number of death sentences in the Medical case (7), the Pohl case (3), and the Einsatzgruppen case (13). Levie, *Terrorism in War*, 135–136.

33. Buscher, *The U.S. War Crimes Trial Program*, 107. According to Buscher, "The veterans and refugee groups clearly equated the . . . war criminals with regular POWs," 106–7.

34. Because the IMT was in the hands of the four powers and the Germans were incarcerated in Spandau Prison, their sentences were not easily manipulable because their modification required a consensus. The Russians were not as forgiving in the cases of major war criminals.



35. The High Commissioner made this point most strenuously in his letter to Eleanor Roosevelt and maintained it until his death.

36. Office of the U.S. High Commissioner for Germany, *Landsberg: A Documentary Report* (Frankfurt: U.S. Army, 1951), 18. This report was the first official pronouncement of the High Commissioner's decisions regarding clemency for the German war criminals. It was included in the February 1951 issue of the High Commissioner's "Information Bulletin." McCloy decided to review the sentences of the now "controversial" American war crimes program and offered this justification for his action: "Since my arrival in Germany I have received many letters and petitions asking clemency for war crimes prisoners convicted at Nuremberg and confined in Landsberg Prison. It is a fundamental principle of American justice that accused persons shall be given every opportunity to maintain their innocence." General Clay intended to execute those on Landsberg's death row. He did not want to pass the burden to his successor, John McCloy. Langer's Senate resolution forced the Military Governor to await the findings of the Baldwin committee (a Senate investigation) before proceeding (Smith, ed., *The Papers of General Lucius Clay*, 1012).

37. High Commissioner's press release, 11 January 1950. RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.

38. Friedrich, "Nuremberg and the Germans," 93. According to Buscher, the German clergy's disapproving statements about American war crimes policy "clearly showed that U.S. efforts to use the trials to reeducate the Germans were in serious trouble. American officials, convinced that National Socialism had resulted from Germany's authoritarian and militaristic past, hoped that the war crimes program would underscore the need to democratize German society. In contrast, the Germans interpreted war crimes trials as attempts to prove their collective guilt. Wurm and Dibelius's attitudes confirmed that the Germans viewed themselves as victims of arbitrary and cruel occupation policies, and not as a people ready and willing to assume responsibility for the Holocaust and other Nazi atrocities" (Buscher, *The U.S. War Crimes Trial Program*, 101–102).

39. Theo Kordt, letter to Lord Halifax, 13 December 1949. This letter was included with Lord Halifax's 19 January 1950 letter to President Truman. RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.

40. Ibid.

41. President Truman, letter to Lord Halifax, 10 February 1950, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.

42. Ernst von Weizsäcker was released from Landsberg Prison on October 16, 1950, several months before the McCloy sentence revisions were announced. Army Commands War Crimes Branch, Cases Tried—Miscellaneous Administration Files, RG 338, NA.

43. Smith, ed., *The Papers of General Lucius Clay*, 305.

44. John Raymond warned, "Any presentation of new evidence by the defendants without the prosecution being represented would be *ex parte* and open to criticism." John Raymond, letter to Colonel Byroade, 2 February 1950, RG 59, Box 16 (War Crimes 1949, 1950, 1952), NA.

45. John Hohenberg, *New York Post*, February 2, 1950.
46. John Hohenberg, *New York Post*, February 3, 1950.
47. John Raymond, memo of conversation, 2 February 1950, RG 59, Box 16 (War Crimes 1949, 1590, 1952), NA.
48. Ibid.
49. Dean Acheson, confidential cable to HICOG, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952). Dean Acheson, letter to John McCloy, 5 February 1950, RG 466, U.S. High Commission for Germany, Security-Segregated General Records 1949–1952, Box 28, 321.6, War Criminals File, NA.
50. Office of the U.S. High Commissioner for Germany, *Landsberg: A Documentary Report*, 3.
51. Ibid.
52. Schwartz, "Occupation to Alliance," 286.
53. Political theorist Robert Jervis has written that in international politics the preconceptions and expectations of the observer are often as important as the empirical facts. "The perceiver's expectations and needs strongly influence what he will see. Subtle messages are easily missed; when they are not, they are usually assimilated to the perceiver's pre-existing beliefs." Robert Jervis, *The Logic of Images in International Relations* (New York: Columbia University Press, 1989), xix. Robert Leckie, *The War in Korea* (New York: Random House, 1963), 20–21. Walter LaFeber, "NATO and the Korean War: A Context," *Diplomatic History* 3 (Spring 1986): 461. LaFeber considers this an example of American preconceptions being confirmed: "The conflict in Korea was a watershed in the history of American foreign policy, but like all watersheds, it had indispensable tributaries. The war did not mark an abrupt break or turn in President Harry S. Truman's foreign policy plans, but formed part of a continuum that had its more important origins ten months earlier when the Soviets exploded their first atomic device and it became clear, with the writing of the State Department White Paper, that the United States had to accept the conquest of China by the Communists. So too, important changes in the NATO alliance did not suddenly become real after June 1950, but had begun in the fall and winter of 1949 when (despite the absence of Soviet military threats to Western interests—an absence acknowledged by top State Department experts) the United States began the institutional restructuring of its foreign policy" (*America, Russia, and the Cold War* [New York: Knopf, 1985], 461–462).

Jervis attaches more importance to the Korean War in "The Impact of the Korean War on the Cold War," *The Journal of Conflict Resolution* 24(4)(Dec. 1980): "the Korean War shaped the course of the Cold War by both resolving the incoherence which characterized U.S. foreign and defense efforts in the period 1946–1950 and establishing important new lines of policy. Second, if the war had not taken place, no other events were likely to have occurred that would have produced the effects that Korea did. . . . Thus without Korea, international history would have been very different" (563). Theodore White most famously described what the Korean War brought for Germany: "quick, complete and unconditional profit" (*Fire in the Ashes* [New York: William Sloan

Associates, 1953], 157). This is probably the single most widely quoted statement concerning the impact of the Korean War on German reconstruction. William Manchester, *The Arms of Krupp* (New York: Bantam, 1968), 751. Manchester's best-seller was extremely helpful because it clearly laid out the events of the Peck Panel and the first clemency procedure for German war criminals. But in trying to write a gripping narrative, Manchester offers a conspiracy theory that blames the Korean War, Washington, and John McCloy for the release of Alfried Krupp and other German war criminals. Though there is some truth to his argument, it is overstated (208–209). For a differing point of view on the impact of the Cold War and the war criminals, see Geoffrey Herf.

54. Robert Divine, *Since 1945: Politics and Diplomacy in Recent American History* (New York: Knopf, 1985), 35.

55. Schwartz, *Occupation to Alliance*, 306. Thomas H. Etzold and John Lewis Gaddis, eds., *Containment: Documents on American Policy and Strategy, 1945–1950* (New York: Columbia University Press, 1978), 383–384. Gaddis argues that the new American strategic doctrine, outlined in “NSC-68 constitutes the most elaborate effort made by United States officials during the early Cold War years to integrate political, economic and military considerations into a comprehensive statement of national security policy. In response to a presidential directive to analyze the combined implications of the Communist victory in China, the Soviet atomic bomb, and the American decision to construct a thermonuclear weapon, a special State and Defense department group headed by Paul Nitze (who in January 1950 had replaced Kennan as head of the Policy Planning Staff) drafted NSC-68 in February and March 1950. The completed study, comprising some seventy single-spaced, legal-sized typed pages, was forwarded to President Truman on April 7, 1950. . . . NSC-68 can be viewed as a ‘call to arms’ to stave off that prospect by significantly upgrading Western defense capabilities. It can also be seen as an argument in favor of what later came to be known as ‘flexible response’ ” (383–384; for text of NSC-68 see 385–442). For more on NSC-68 see Paul Hammond, “NSC-68: Prologue to Rearmament,” in Warner Schilling, Paul Hammond, and Glenn Snyder, eds., *Strategy, Politics and Defense Budgets* (New York: Columbia University Press, 1962), 267–378.

56. Isaacson and Thomas, *The Wise Men*, 513. This is one of McCloy's most famous statements as High Commissioner. Many have accused him of engaging in convenient hyperbole. Like Clay's cable before, he used the cable to influence policy. McCloy made a rather abrupt shift in 1950. As early as February he told a West German audience, “there will be no German army or air force.” Drew Middleton, “McCloy Warns the Germans Against a Revival of Nazism,” *The New York Times*, February 7, 1950.

57. Manchester, *The Arms of Krupp*, 753. The official decision to rearm Germany came on September 11, 1950, in NSC-82. It initially called for a European defense force with Soviet participation.

58. Hiscocks, *The Adenauer Era*, 220.

59. *Ibid.*, 220.

60. Buscher, *The U.S. War Crimes Trial Program*, 44.

61. *U.S. Military Tribunal Nuremberg, Transcript, Case XI, Weizsaecker*, 28087.
62. Conrad Snow, letter to State Department legal advisor Jack Tate, 26 July 1950, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
63. Manchester, *The Arms of Krupp*, 756.
64. John Raymond, confidential memo to Robert Bowie, 11 September 1950, RG 59, Box 18 (War Crimes Clemency 1950–1955). Fredrick Moran reflected on his experience in Germany in a letter to Conrad Snow in October 1950: “I reduced the material to a minimum, but the human beings in Landsberg are still in my mind. I can’t forget the ‘Generals’ who are sick old men, existing in a world which has discarded the values by which they formerly lived. These men are the only people at Landsberg towards whom I wish we had been more generous in our recommendations.”
65. Robert Bowie, letter to John Raymond, 11 September 1950, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
66. *Ibid.*
67. Confidential memo of conversation with the President, 16 November 1950, RG 59, Box 29, NA.
68. William Langer with Senator McCurran, *Congressional Record*, December 18, 1950 (Washington, D.C.: U.S. Government Printing Office), 16707–9.
69. Columbia University Oral History Project, Benjamin Bittenweiser, 112.
70. Secret letter from Henry Broade to John McCloy, 6 January 1951, RG 59, Box 18 (War Crimes Clemency, 1950–1955), NA.
71. Jack Raymond, “Bonn Legislators Press McCloy for Amnesty for War Criminals,” *The New York Times*, January 10, 1951. This January 12, 1951, cable from a liaison officer to High Commissioner McCloy described the mood of the Bundestag leaders: “During informal conversation January 11, Bundestag President Ehlers stated McCloy’s interview regarding Landsberg executions made a strong and favorable impression on Parliamentary delegation. Germans were especially impressed with High Commissioner’s sincere and honest desire to explore even the slightest bit of evidence in favor of condemned war criminals. . . . Only disappointment voiced by delegation after interview, according to Ehlers, centered around refusal of High Commissioner to accept German argument based Article 102 Basic Law (abolition of death penalty)” (Samuel Reber to McCloy, 12 January 1951, Misc. Administration File, RG 338, NA).
72. *Ibid.*
73. *Der Spiegel* magazine (1/31/51) accused John McCloy of having “an almost pathological love for Germany.”
74. *The New York Times*, January 10, 1951.
75. *Ibid.* See also Samuel Reber to John McCloy, 12 January 1951, Misc. Administration Files, RG 338, NA, Misc. Admin. Files, Misc. Files, Modern Military Branch, Suitland.
76. Bower, *Blind Eye to Murder*, 368.
77. Martin Lee, *The Beast Reawakens* (New York: Little, Brown), 69. See also *The New York Times*, “Defends War Criminals: Skorzeny Hitler Aide, Warns in Spain Against Executions,” January 13, 1951. See also Rand C. Lewis, *A Nazi Legacy: Right-*

*Wing Extremism in Postwar Germany* (New York: Praeger, 1991). Buscher describes the early resurgence of post–World War II German nationalism: “Nonetheless, German nationalism between 1946 and 1955 . . . differed from its aggressive predecessor during the Third Reich, although it bore some features which were reminiscent of the widespread post-World War I reaction to the Treaty of Versailles” (91).

78. Adrian Fisher to Dean Acheson, and a draft of a letter to President Truman on the subject of the German war criminals, 25 and 31 January, 1951, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.

79. Ibid.

80. Office of the U.S. High Commissioner for Germany, *Landsberg: A Documentary Report*, 55.

81. Buscher, *The U.S. War Crimes Trial Program*, 63.

82. Manchester, *The Arms of Krupp*, 756. Once again, McCloy’s interpretation was not borne out by the facts. Krupp and his father wholeheartedly aided the Nazi rise. Manchester shows how McCloy repeats the arguments made by Krupp’s defense team. Moreover, these arguments were largely rejected by an extremely conservative American war crimes tribunal in 1948. Manchester’s accusation that the clemency was “illegal” is incorrect, but he does point to the weakness of the High Commissioner’s legal arguments. On McCloy’s letter to Eleanor Roosevelt, Manchester writes: “At times the explanations which went out over his signature bordered on sophistry; the confiscation decree had ‘already been partially rescinded by General Clay’ (Clay had merely pointed out that he couldn’t enforce it outside the American zone), and in his reference to foreign workers he merely mentioned Krupp’s ‘use’ of them, never Krupp’s *treatment* of them, the hard rock upon which Telford Taylor had built his case” (766). Thomas Schwartz’s most thorough analysis of the war crimes question is “*Die Begnadigung Deutscher Kriegsverbrecher. John J. McCloy und die Haftlinge von Landsberg*” in *Vierteljahrshefte für Zeitgeschichte* 38 (July 1990).

83. Appleman, *Military Tribunals and International Crimes*, 219.

84. Office of the U.S. High Commissioner for Germany, *Landsberg: A Documentary Report*, 55.

85. Manchester described the Krupp Works as “a hallowed institution of war” (*The Arms of Krupp*, 766).

86. *The New York Times*, February 2, 1951.

87. Buscher considered the reason to be that “The Germans did not think that their actions in the East were considerably different from what other powers had done in the countries they had occupied. This was coupled with a tendency to blame Germany’s post-war problems, such as the loss of the Eastern territories and the economic hardships of the immediate post-war years, on an Allied conspiracy, instead of viewing them as one of the consequences of military defeat. In short, the Germans viewed themselves as a victimized nation. Such an interpretation of the recent past was bound to affect the war crimes program. As early as 1946 there were indications that even the average German was at least indifferent, if not opposed, to American education attempts in that area” (91–92).

88. Office of the U.S. High Commissioner for Germany, *Landsberg: A Documentary Report*, 64.

89. Ibid.

90. Ibid., 63–64.

91. Ibid., 64.

92. Ibid.

93. Ibid., 3. Judge Gordon Simpson reaffirmed the findings of the Army court: “I am likewise convinced that Peiper was the motivating spirit of the terror spreading, killing-prisoner-of-war procedure of this spearhead. The record of the trial is detailed and voluminous. The evidence is compelling and has convinced everyone who has read it objectively that these criminals committed the acts as found by the court which tried them.”

94. Ibid., 65.

95. Ibid., 67.

96. Kurt Tauber, *Beyond Eagle and Swastika: German Nationalism Since 1945* (Middletown, Conn.: Wesleyan University Press, 1967), 1:39. This book describes the important role of the German veteran groups in the early 1950s.

97. McCloy defended his role in the Japanese concentration camps similarly. In 1981, he testified before a congressional committee on Japanese internment. McCloy biographer Kai Bird describes the debacle: “He mistakenly thought he would be accorded the usual deference and courtesy of an elder statesman. Things did not work out that way. When he tried to describe conditions in the internment camps as ‘very pleasant,’ the audience burst into spontaneous laughter. . . . McCloy felt misunderstood. . . . He didn’t understand why anyone would think he ever had the power to decide these issues. ‘I was just a leg man,’ he protested. He was further annoyed when *Harper’s* magazine profiled him in a long cover story as ‘the most influential private citizen in America.’ He tried to stop the publication of the article and, failing that, vigorously protested its treatment of his role in the internment, Auschwitz, and Krupp decisions” (*The Chairman: John J. McCloy, the Making of the American Establishment* [New York: Simon and Schuster, 1992], 659–660).

Jacob Heilbrunn makes a simple, yet often overlooked point: “Certainly McCloy’s lack of compassion for the Jews trapped in Auschwitz contrasts curiously with his solicitude for their prosecutors” (“The Real McCloy,” *The New Republic* [October 16, 1992], 44). Heilbrunn’s statement about McCloy’s role in the deportation of Japanese Americans is telling. “The cunning with which McCloy carried out the internment of the issei and the nisei, first- and second-generation Japanese respectively, proved that he was a good student of Root’s on flouting the Constitution and abdicating moral responsibility.” Heilbrunn was not impressed by McCloy’s strategic legalism: “Once again McCloy was more papist than the pope. He came down on the Army’s side. ‘If it is a question of the safety of the country, [or] the Constitution of the United States,’ he exclaimed, ‘why the Constitution is just a scrap of paper to me’ ” (42). Many years after leaving Germany, McCloy best described the mindset of the American lawyer-statesmen: “I saw my public service in terms of getting things done. . . . I never con-

sidered myself a politician, but rather a lawyer, so the question I asked myself in the various jobs I had was 'What should we do to solve the problem at hand?' then I tried to solve the problem" (*New York Times* obituary, March 12, 1989). In 1951 his objectives were to rearm and realign Germany with the United States. One fast-growing "problem at hand" was the continued imprisonment of German war criminals.

98. Friedrich, "Nuremberg and the Germans," 98.

99. Buscher, *The U.S. War Crimes Trial Program*, 118. Buscher describes the shortcomings of the American system: "However, this system was without a foundation due to the absence of a more general long-range punishment policy encompassing all aspects of the occupation. . . . A second important shortcoming was the lack of any planning for an appellate court" (22). Tom Schwartz places the lack of careful planning into the larger context of American foreign policy: "The historical memory of the Americans, as is well known, is very short, and just as the prohibition of fraternization with the German people was abandoned, the passionate anti-German posture did not last as long as the trials dragged on" ("*Die Begnadigung Deutscher Kriegsverbrecher*" [translation by the author and Martin Splichal] 378). Buscher describes the role that sentence review played in the post-trial period: "Most importantly, these operations put in place a mechanism which made the political abuse of sentence reviews and clemency possible in the coming years. It is not surprising that the Allies and the Germans decided to rely on this method of sentence reduction after January 1951" (*The U.S. War Crimes Trial Program* 59). Bower, *Blind Eye to Murder*, 368. The most prominent German private interest group was the *Heidelberger Juristenkreis*, or Heidelberg circle of jurists. According to Frank Buscher, "The group maintained close ties with Adenauer and his government, and it carried enough political weight to arrange conferences with American occupation authorities. This allowed the Juristenkreis to work as a clearing house for information and to draw up policy proposals for the German government regarding possible solutions to the war criminals problem. As a result, this secretive organization credited itself with two major developments in the early 1950s: the Article 6 Allied-German mixed clemency commission in 1952 and the concept of the interim mixed boards in 1953" (*The U.S. War Crimes Trial Program* 101). The less respectable advocacy group was Ernst Achenbach's *Vorbereitender Ausschuss für die Herbeiführung einer Generalamnestie* (Preparatory Committee for a General Amnesty, also known as the Essen Amnesty Committee). Their argument was "*Nach totale krieg, totale Amnestie.*" The Essen Amnesty Committee wanted all war criminals freed, regardless of their crimes (101).

100. *Ibid.*, 101.

101. Otto Kranzbühler, interview by author, tape recording, Tegensee, Germany, 16 August 1996.

102. *Ibid.*

103. *Ibid.*

104. Buscher, *The U.S. War Crimes Trial Program*, 105. American Consul General LaVerne Baldwin to State Department, Washington, 28 February 1952, RG 59, Box 29, NA.

105. An interesting report was issued by the Political and Public Affairs Section of the American Consulate General, August 20, 1951, and classified all the clemency appeals according to the interests of the petitioning parties. RG 466, Box 28, 321.6. See also Buscher, *The U.S. War Crimes Trial Program*, 91–92. A 1952 HICOG survey, “Current West German View on the War Crimes Issue,” indicated that the powerful and educated were most aggressive in their rejection of the trials and imprisonment of the war criminals (HICOG Office of Public Affairs, Research Analysis Staff, 8 September 1952, RG 338, Box 469).

106. Princess Iseberg was given the sobriquet “the mother of the red jackets” and waged a one-woman battle to win freedom of the convicted German war criminals. She sent telegrams to President Truman, Secretary of State Acheson, and Mrs. McCloy (who was a distant cousin of Konrad Adenauer). According to *Der Spiegel*, the Princess even dined with the McCloyes and pleaded the case of the condemned for two and a half hours. She argued that “the red jackets had suffered horrible torment in fear of death and are almost insane.” According to one account, Mrs. McCloy sent the princess a check to aid the prisoners and wrote: “I too feel that we have to bridge our mutual problems, and I assure you, it was for Mr. McCloy and myself not only an honor but also a great joy to have you as our guest” (*Der Spiegel*, 31 January 1951; quoted in Haren Tetens, *The New Germany and the Old Nazis* [New York: Random House, 1961], 209). See also Princess Helene von Iseberg, telegram to General Handy, 11 September 1951, RG 338, NA.

Much of the German historiography concurs: “Recent studies indicate that the West German elites provided the most resistance to Allied occupation policies and reform efforts. Wolfgang Benz described this phenomenon in his survey on Allied initiatives to reform the civil service” (92; see also Wolfgang Benz, “*Versuche zur Reform des öffentlichen Dienstes in Deutschland 1945–52: Deutsche Opposition gegen alliierte Initiativen*,” *Vierteljahrshafte für Zeitgeschichte* 29 [1981]: 216–245; Verena Botzenhart-Viehe, *The German Reaction to the American Occupation 1944–1947*, Ph.D. diss., University of California-Santa Barbara, 1980). Botzenhart-Viehe also documents the role of German elites in “instigating the opposition to American reeducation efforts” (from Buscher, *The U.S. War Crimes Trial Program*, 115). Thomas Schwartz makes a similar point: “One of the main problems remained the extent to which a significant portion of the political, economic, ecclesiastical and economic elites of the new Federal Republic sympathized with the condemned war criminals. This solidarity undermined the attempt of the Americans” (“*Die Begnadigung Deutscher Kriegsverbrecher*” 379).

107. Herman Guthard, letter to General Handy, 25 January 1951, Army Command War Crimes Branch, Misc. Admin. Files, RG 338, NA.

108. Tauber, *Beyond Eagle and Swastika*, 356.

109. *Defense Briefs, Lammers and Meissner, Cross/Closing, XIB*, (Nuremberg: Secretariat for Military Tribunals, 1949), 67.

110. Buscher, *The U.S. War Crimes Trial Program*, 118.

111. Tauber, *Beyond Eagle and Swastika*, 259.

112. Article 131 of the Federal Republic of Germany’s Basic Law denied members



of the Waffen SS their military pensions. Waffen SS veterans would later argue that they had been collectively branded with guilt by association.

113. Tauber, *Beyond Eagle and Swastika*, 346.

114. *Ibid.*, 349. Former SS officer and veteran group organizer Harald Milde embodied this tendency to an extreme degree: "One should not debate about Adolf Hitler. That man was too great to be judged by any old hack writer. . . . Men like Adenauer and Heuss shall not be mentioned in the same breath with a man like Adolf Hitler. . . . There is perhaps only one chance and that is that we soldiers, we front-line soldiers of all nations join together before it is too late." Milde was a former SS major and right-wing activist. He argued that all former soldiers should remain aloof from party politics and join together in one all-embracing Wehrmacht. Buscher describes the military's attitudes toward the issue of war crimes: "The former military men considered the release of the war criminals a prerequisite to a German contribution to the EDC. The veterans condemned the Allied war crimes trials, and particularly those involving Wehrmacht officers, as a direct attack on the honor of the German soldier. One critic, Infantry General Schack called this alleged defamation of Germany's military the '*kulturschande*' (cultural disgrace) of the twentieth century. . . . The German response to the punishment of the war criminals strongly points to a continuity in German nationalism. The 1945 surrender evidently did not lead to a clean break and a completely new national identity, even though post-war German nationalism did not contain the militaristic and authoritarian features of its predecessor" (*The U.S. War Crimes Trial Program* 91–92).

115. *Ibid.* "In addition, U.S. officials wanted Adenauer to win the September 1953 federal elections. But the war criminals problem had put the chancellor in the very awkward position of appearing to be more pro-Allied than pro-German" (148).

116. "Bavarian Reactions to Decisions Concerning Landsberg War Criminals," 2 February 1951, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.

117. Tauber, *Beyond Eagle and Swastika*, 259.

118. Field Marshal Kesselring's letter was restrained in comparison to the more zealous nationalists, but he struck the same anti-Soviet chords: "However, I am sure, Sir, that you are as interested in the formation of first-class troops as I, the former German leader, am interested in seeing the German troop contingent formed. Our neighbor in the East whose disadvantages and advantages I know quite well, will easily find out whether or not the new German soldier will equal the one of 1940 to 1945. The Kremlin will draw its conclusions accordingly. . . . It seems to me, Sir, the time to change courses. It is not only the former German soldiers who would be happy to see the problem of war criminals solved; we will all be grateful to you if you order further releases and thereby make the public understand that the course has been changed. Time is against us." "It is our duty as soldiers to abandon our usual reserve in order to tell the politicians very clearly that the direction taken in 1945 will result in severe damage and disadvantages to the soldiers of today and tomorrow—damage which will make the difference between victory and defeat in war" (Kesselring to Eddy, 31 December 1952, Army Command War Crimes Branch, Misc. Admin. Files, RG 338, NA).

119. Lee, *The Beast Reawakens*, 65.
120. "Bavarian Reaction to Decision Concerning Landsberg War Criminals," 9 February 1951, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.
121. "West German Reactions to the Landsberg Decisions," U.S. High Commission confidential report, 6 March 1951, RG 59, Box 5 (Clemency Board on German War Criminals), NA.
122. "German Buergermeisters and the Landsberg Decisions," State Department Office of Public Affairs, 21 March 1951, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.
123. Ibid.
124. Ibid.
125. "Further Findings on West German Reactions to the Landsberg Decisions," State Department Office of Public Affairs, 30 March 1951, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.
126. *The New York Times* quoted Governor Dewey's description of Peck Panel member Fredrick Moran in his obituary, "a pioneer leader in parole."
127. "Germany's 'Dreyfus Affair': I Accuse! An open letter from General Oswald Pohl (in Landsberg Prison) to General Karl Wolff," RG 59, Box 29, NA.
128. HICOG Bonn to State Department Washington, 24 May 1951, RG 59, Box 29, NA.
129. Buscher, *The U.S. War Crimes Trial Program*, 91-92.
130. Ibid., 125-127.
131. John McCloy, letter to Eleanor Roosevelt, 12 March 1951, 2, Roosevelt Library, Hyde Park, New York.
132. Ibid., 2-3.
133. Ibid. As the years went by McCloy grew prickly about his more controversial legacies (the Landsberg decisions, the concentration camps in California, and the decision not to bomb the railways leading to Auschwitz). The Landsberg decisions were the worst of his career, and McCloy knew it. In the late 1970s he still clung to the position that there was "not a goddamn bit of truth" to the contention that international politics had motivated his decisions. When William Manchester presented the former High Commissioner with the case against him, he merely looked at the paper and replied, "That's ancient history" (Manchester, *The Arms of Krupp*, 770).

What further complicates the McCloy case is the number and prominence of his supporters. Benjamin Ferencz, the former Chief Counsel in the Einsatzgruppen case, defends the High Commissioner. In a letter to the author, Ferencz wrote: "Sure, some U.S. leaders were primarily interested in getting Germany re-armed but that does not mean that releasing war criminals was the negotiated price deliberately paid for German cooperation. As misguided as the commutations may have been, and as detrimental to the Nuremberg proceedings as they were, it is my own considered judgment that as far as McCloy is concerned, there were other motives that were decisive, and the re-armament consideration—if it existed at all—was rather a sub-conscious desire to get the past behind us and move on to a new Germany as part of a unified western

alliance" (Benjamin Ferencz, letter to author, 23 February 1990). McCloy wrote Ferencz a most revealing letter in the spring of 1980: "At long last I acknowledge receipt of your book which I have read with great interest. It opened up a number of facts which were new to me. I am much impressed by the research that must have gone into it. If I had all the facts I now have, I might have reached a more just result. It was an ordeal that I would not care to repeat" (John McCloy, letter to Ben Ferencz, 10 April 1980 [courtesy of Benjamin Ferencz]). Although there was a hint of regret in this personal letter, publicly McCloy stubbornly refused to concede his past errors, which seemed to provoke as much irritation as his actual decisions. His lack of contrition irritated author Peter Irons. In a letter to the *New York Times Book Review*: "Forty years apart, John J. McCloy made telling comments about the internment. Responding to an Army general who questioned its legality, he said, 'The Constitution is just a scrap of paper.' Before the Presidential commission in 1981, he defended the internment as 'retribution' for the Pearl Harbor attack. His lack of repentance gives McCloy a unique and unenviable place in American history" (Peter Irons, *New York Times Book Review*, July 5, 1992, 4). *The New York Times*, John McCloy obituary, March 12, 1989. Jacob Heilbrunn, "The Real McCloy," *The New Republic*, May 11, 1992, 40.

134. John McCloy, letter to Eleanor Roosevelt, 12 March 1951, Roosevelt Library, Hyde Park, NY, 2.

135. *New York Herald Tribune*, March 29, 1951. The *Information Bulletin* refused to print Telford Taylor's response to McCloy's Eleanor Roosevelt letter.

136. "Shawcross Condemns Leniency Granted to War Criminals," *New York Herald Tribune*, March 29, 1951.

137. State Department London to Secretary of State, 29 March 1951, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.

138. John McCloy, telegram to Dean Acheson, 30 March 1951, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.

139. *The New York Times*, May 25, 1951.

140. *The New York Times*, June 8, 1951.

141. Friedrich, "Nuremberg and the Germans," 98.

142. American Vice Consul Ernest Ramsaur, confidential cable to State Department, 29 June 1951, RG 59, Box 29, NA.

143. *Ibid.*

144. *Ibid.*

## 6. The War Criminals and the Restoration of West German Sovereignty

1. Frank Buscher, *The U.S. War Crimes Trial Program in Germany, 1946–1955* (New York: Greenwood, 1989), 132–133.

2. *Ibid.*

3. *Ibid.*, 135.

4. State Department Bonn, secret cable to Secretary of State, 30 October 1951, RG 59, Box 29, NA.

5. Ibid. See also Jörg Friedrich, "Nuremberg and the Germans," in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), 99.
6. U.S. Embassy London (Gifford), secret cable to Secretary of State, 21 December 1951, RG 59, Box 24 (War Crimes Clemency July 1952–December 1953), NA.
7. Ibid.
8. High Commissioner McCloy, secret cable to Secretary of State, 21 December 1951, RG 59, Box 29, NA.
9. Ibid.
10. Buscher, *The U.S. War Crimes Trial Program in Germany*, 75.
11. Ibid., 135.
12. Kurt Tauber, *Beyond Eagle and Swastika: German Nationalism Since 1945* (Middletown: Wesleyan University Press, 1967), 259.
13. Charles Thayer, secretary report to the State Department, 12 March 1952, RG 59, Box 29, NA.
14. Ibid.
15. Ibid.
16. Otto Kranzbühler, interview by author, tape recording, Tegernsee, Germany, August 1996. See also Friedrich, "Nuremberg and the Germans," 99.
17. Otto Kranzbühler, interview by author, tape recording, Tegernsee, Germany, August 1996.
18. Ibid.
19. Ibid.
20. Friedrich, "Nuremberg and the Germans," 102–105. The treaty articles related to war crimes are reprinted in Cooper, ed., *War Crimes*.
21. Otto Kranzbühler, interview by author, Tegernsee, Germany, August 1996; Buscher, *The U.S. War Crimes Trial Program in Germany*, 127. From Richard Hiscocks, *The Adenauer Era* (New York: Lippincott, 1966): "The Brussels Treaty of 1948 was to be extended to include the German Federal Republic and Italy and was to become known as the Western European Union; the Federal Republic was to become a member of NATO; and the Bonn agreements of May 1952, subject to certain minor alterations, were to come into force. These arrangements, known as the Paris treaties, were ratified in February 1955 by the Federal Republic and in March by France. They went into effect on May 5. The Western occupation of Germany came to an end; the Allied high commissioners became ambassadors; subject only to the reservations agreed upon in May 1952, the Federal Republic attained full sovereignty; and it became a member of the Western alliance" (39).
22. "McCloy Confident on West Germany," *The New York Times*, July 17, 1952; see also Buscher, *The U.S. War Crimes Trial Program in Germany*, 141.
23. Admiral Gottfried Hansen to Matthew Ridgeway, 10 August 1952, RG 59, Box 29, NA. See also a *Frankfurt Allgemeine* article of 18 August 1952, "A Mortgage of a Special Kind," by Adelbert Weinstein.
24. Ibid.
25. Ibid.

26. *Anzeiger*, September 3, 1952, RG 59, Box 29, NA.
27. Friedrich, "Nuremberg and the Germans," 97.
28. HICOG, Secret Report on War Criminals to State Department, 6 September 1952, RG 59, Box 29, NA.
29. Ibid.
30. State Department Office of Public Affairs August Flash Survey, 16 September 1952, RG 59, Box 29, NA. See also Buscher, *The U.S. War Crimes Trial Program*, 109.
31. Buscher, *The U.S. War Crimes Trial Program in Germany*, 144. See also State Department Bonn to Secretary of State, 17 September 1952, RG 59, Box 29, NA.
32. Buscher, *The U.S. War Crimes Trial Program in Germany*, 144.
33. Ibid., 143. See also appendix B.
34. Ibid., 80.
35. James Riddleberger, secret letter to Walter Donnelly, 13 October 1952, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.
36. Ibid.
37. Christopher Simpson, *The Splendid Blond Beast: Money, Law, and Genocide in the Twentieth Century* (New York: Grove, 1993), 20–22.
38. Ibid.
39. Ibid., 25; Columbia Oral History Project: John McCloy, 21.
40. Buscher, *The U.S. War Crimes Trial Program in Germany*, 149.
41. "War Criminal Question" Report from HICOG written by various staff members of the State Department's Office of Political Affairs, 22 December 1952, RG 466, Box 28, 321.6, NA.
42. Ibid., 3.
43. State Department deputy legal advisor John Raymond to Brewster Morris, 5 January 1953, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
44. John Auchincloss to John Raymond, 9 January 1953, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.
45. Ibid.
46. Ibid.
47. "Political Brief No. 5: Political Aspects of the War Criminal Question," 1 February 1953, RG 59, Box 17 (War Crimes 1953–1959), NA.
48. Ibid.
49. Ibid.
50. John Raymond to the Department of Defense, 15 May 1953, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
51. Preconference memo on the war criminals prepared by State Department legal advisor John Auchincloss, 31 March 1953, RG 59, Box 17 (War Crimes 1953–1959), NA.
52. Ibid.
53. Ibid.
54. "U.S.-German Political Talks, April 8, 1953: Minutes—Second General Meeting," RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.

55. The minutes of the talks are also in *The Foreign Relations of the United States: Germany and Austria 1952-1954* (Washington, D.C.: U.S. Government Printing Office, 1983), 434. Townsend Hoopes, *The Devil and John Foster Dulles* (Boston: Little, Brown, 1973), 67. Dulles was a consummate strategic legalist whose Wall Street firm had strong ties with German industrialists. Historian Michael Coles describes Dulles in an unpublished review of Hoopes's book: "The book deals with Dulles, the righteous Christian crusader against the devil in the guise of communism. It also deals with Dulles the lawyer who was at his best in dealing with the immediate tactical needs of his client and possibly at his worst in assessing the long term impact of those tactics" (Coles, unpublished book review, 1990, 1). Christopher Simpson offers a more conspiratorial treatment of the Dulles brothers and their relations with German big business and its impact on the prosecution of the German war criminals in the *The Splendid Blond Beast*. However, Simpson's contentions are not without some footing in historical fact.

56. *Ibid.*, 434, 442-443.

57. *The New York Times*, July 14, 1953.

58. "U.S.-German Political Talks, April 8, 1953: Minutes—First General Meeting," RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.

59. James Conant to Secretary of State, 1 April 1953, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.

60. "Memo Regarding Proposed Parole of German War Criminals," 4 June 1953, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.

61. *Ibid.*

62. *Ibid.*

63. *Ibid.*

64. *Ibid.*

65. Confidential Memo on the Parole System for German War Criminals in U.S. Custody, 9 June 1953, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.

66. *Ibid.*

67. *Ibid.*

68. *Ibid.*

69. James Riddleberger to Secretary of State John Foster Dulles, 15 June 1953, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.

70. *Ibid.*

71. *Ibid.*

72. *Ibid.*

73. *Ibid.* "The military objections are firmly held, and there is no prospect of overcoming them by further argument at the same level."

74. James Riddleberger to John Foster Dulles, 19 June 1953, RG 59, Box 18 (War Crimes Clemency 1950-1955), NA.

75. *Ibid.*

76. John Auchincloss to John Raymond, 29 June 1953, RG 59, Box 17 (War Crimes 1953-1959), NA.

77. John Foster Dulles to U.S. High Commission in Bonn, 25 June 1953, RG 59, Box 17 (War Crimes 1953–1959), NA.

78. Memo on war criminal paroles written by John Auchincloss and John Raymond for Secretary of State John Foster Dulles, 26 June 1953, RG 59, Box 17 (War Crimes 1953–1959), NA.

79. Buscher, *The U.S. War Crimes Trial Program in Germany*, 81–82.

80. Colonel Howard Levie (JAG Chief of Internal Affairs) to Brigadier General George Gardes, 5 March 1956, Army Command War Crimes Branch, Misc. Admin. Files, RG 338, NA. See also Buscher, *The U.S. War Crimes Trial Program in Germany*, 81–84.

81. Levie to Gardes, 5 March 1956. See also RG 59, Box 17, War Crimes: 1953–1959, “Briefing for Secretary’s Press Conference December 6, 1955.”

82. Levie to Gardes, 5 March 1956.

83. Ibid.

84. Ibid.

85. Michael Balfour, *West Germany: A Contemporary History* (Connecticut: Croom & Helm, 1982), 190. By 1952, Chancellor Adenauer publicly vowed to wage an all-out effort to free the German war criminals. Alan Cowell, “Germany Defends Pensions for SS Veterans,” *The New York Times*, May 9, 1999: “More than half a century after World War II, the German authorities have acknowledged that war disability pensions are still being paid to members of Waffen-SS units and even to war criminals.”

86. From T. H. Tetens, *The New Germany and the Old Nazis* (New York: Random House, 1961), 65–66.

87. Ibid., 67.

88. Dr. Friedrich Middelhaue to Thomas Handy, RG 466, 321.6, NA.

89. Paul Gernert, U.S. Parole Officer to the High Commissioner, 23 April 1954, Army Command War Crimes Branch, Misc. Admin. Files, RG 338, NA. Frank Buscher considers the action of the IMPAC board a sell-out of American war crimes policy. But the Americans were not alone; the British and French instituted similar programs: “Although IMPAC did not release all war criminals from American custody, it sufficiently reduced the problem so that German rearmament and sovereignty were no longer in jeopardy. The United States had sold out its war crimes program—so had the British and French. Thus, the trial operation, which was to punish the perpetrators and, at the same time, teach the Germans the virtues of democracy by demonstrating the evils of Nazism, simply fell by the wayside” (*The U.S. War Crimes Trial Program in Germany* 85).

90. Dower, *Embracing Defeat*, 514, 453; State Department legal advisor John Auchincloss to Geoffrey Lewis at the U.S. embassy in Bonn, 28 January 1954, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.

91. Ibid.

92. Ibid.

93. Ibid.

94. Drafted by John Auchincloss for Cecil Lyon to James Bonbright, State Department, 16 February 1954, RG 59, Box 17 (War Crimes 1953–1959), NA.

95. Ibid.
96. Ibid.
97. "Memorandum of Conversation: General Amnesty for Japanese War Criminals, February 16, 1954," RG 59, Box 18 (War Crimes Clemency 1950–1955), NA. The participants in this meeting included State Department Far East heads Ambassador John Allison and Walter Robertson. State Department legal advisor John Raymond, former Peck Panel member Conrad Snow, and Cecil Lyon represented the State Department's German interests.
98. Ibid.
99. Secretary of State John Foster Dulles to Ambassador Allison, 26 May 1954, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
100. Geoffrey Lewis to Edwin Plitt, 25 May 1954, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
101. Richard Hagan to John Raymond, June 1954, RG 59, Box 18, NA.
102. Buscher, *The U.S. War Crimes Trial Program in Germany*, 149–151. See for a good summary of the death of the EDC Treaty.
103. *The New York Times*, August 30, 1954.
104. Ambassador Conant to Secretary of State, 20 December 1954, RG 59, Box 18, NA.
105. State Department Bonn Memorandum: "Conversation with Von Meratz and Heye," 18 January 1955, RG 59, Box 18, NA.
106. Ibid.
107. Ibid.
108. Elim O'Shaughnessy, director of HICOG political affairs office, to State Department Washington, 2 March 1955, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.
109. Ibid.
110. James Conant to Secretary of State Dulles, 22 January 1955, RG 59, Box 18, (War Crimes Clemency 1950–1955), NA.
111. Richard Hagan, secret letter to John Raymond, 4 March 1955, RG 59, Box 18, NA.
112. *The New York Times*, July 26, 1953.
113. Buscher, *The U.S. War Crimes Trial Program in Germany*, 153.
114. Secretary of State, cable to State Department Bonn, 25 July 1955, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
115. Colonel Howard Levie to Brigadier General George Gardes, 5 March 1956, 2, Army Command War Crimes Branch, Misc. Admin. Files, RG 338, NA.
116. Ibid.
117. Ibid.
118. Richard Hagan to John Raymond, 19 April 1955, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
119. See Stephen Ambrose, *Citizen Soldiers* (New York: Touchstone, 1997), 224–225, for more on Bastogne.



120. Knox Lamb, U.S. Embassy Bonn to State Department, 3 August 1955, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.
121. Ibid.
122. Ibid.
123. Ibid.
124. American Embassy Bonn to State Department Washington, 3 August 1955, RG 59, Box 17, NA.
125. Ibid.
126. Ibid.
127. State Department Bonn to State Department Washington, 16 September 1955, Box 18 (War Crimes Clemency 1950–1955), RG 59, NA.
128. For more on Dietrich, see Reitlinger, *The SS: Alibi of a Nation*, 56–57.
129. Ambassador Conant to Secretary of State, 4 November 1955, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
130. State Department Bonn to Washington, 7 November 1955, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
131. Estes Kefauver to John Foster Dulles, 8 November 1955, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
132. Veterans of Foreign Wars Commander Joseph Lombardo to Secretary of Defense Charles Wilson, 8 November 1955, RG 59, Box 18, (War Crimes Clemency 1950–1955), NA.
133. Ibid.
134. State Department legal advisor John Raymond, press release to Mr. Wilkinson, 29 November 1955, RG 59, Box 17 (War Crimes 1953–1959), NA.
135. Ambassador Conant to Secretary of State, 30 November 1955, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
136. Ibid.
137. “Briefing for Secretary’s Press Conference,” 6 December 1955, RG 59, Box 17 (War Crimes 1953–1959), NA.
138. Livingston Merchant to James Conant, 10 December 1955, RG 59, Box 18 (War Crimes Clemency 1950–1955), NA.
139. Ibid.
140. Ibid.
141. John Raymond, secret memo to Ambassador Conant, 27 December 1955, RG 59, Box 17 (War Crimes 1953–1959), NA.
142. Livingston Merchant to Ambassador Conant, 30 December 1955, RG 59, Box 17 (War Crimes 1953–1959), NA.
143. Ibid.
144. Papal Nuncio Archbishop Fargo to Secretary of State Dulles, 6 January 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
145. *Stars and Stripes*, January 6, 1956.
146. Report by Elim O’Shaughnessy, U.S. Embassy Bonn, 18 January 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

147. Ibid.
148. British Embassy Washington to State Department, 1 January 1956, Box 19 (War Crimes Clemency January 1956–1959), RG 59, NA. “It would be contrary to long-established precedent in the United Kingdom to publish the reasons on which the recommending majority bases advice to the executive authority on the exercise of clemency.”
149. John Auchincloss to Max Meron, 3 February 1956, RG 59, Box 19 (War Crimes Clemency Jan. 1956–1959), NA.
150. Ibid.
151. State Department general counsel Knox Lamb to State Department, 13 February 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
152. State Department legal advisor John Raymond to assistant legal advisor John Auchincloss, 8 March 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA. See also “258 Germans under American Law in the Sovereign Federal Republic” in *Der Stern*, March 17, 1956.
153. Robert Upton to John Raymond, 29 March 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA: “for the average case rather than the exceptional case in which the granting of parole would defeat the ends of justice.”
154. State Department legal advisor John Raymond to assistant legal advisor John Auchincloss, 11 April 1956, RG 59, Box 16 (War Crimes 1949, 1950, October 16, 1952–December 31, 1952), NA.
155. Conrad Snow, chairman of the Clemency and Parole Board for War Criminals, to Senator Robert Upton, 10 April 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
156. Major General Claude Mickelwait to State Department legal advisor John Raymond, 12 April 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
157. Ibid.
158. Senator Robert Upton to State Department legal advisor John Raymond, 29 March 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
159. Ibid.
160. Ibid.
161. Ibid.
162. Ibid.
163. Robert Upton to John Raymond, 8 May 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
164. John Raymond to Robert Upton, 10 May 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
165. Robert Upton to John Raymond, 17 May 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA. Robert Upton to John Raymond, 8 May 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
166. Numbers from Colonel Howard Levie to General George Gardes, 25 January 1956, Parole Report, Army Command War Crimes Branch, Misc. Admin. Files, RG 338, NA.

167. Elim O'Shaughnessy, State Department Bonn, to Secretary of State, 9 June 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

168. "Chancellor Adenauer Visit, Washington: German War Criminals Held by the United States," 8 June 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

169. Robert Upton to John Raymond, 11 June 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

170. Ibid.

171. Ibid.

172. Ibid.

173. American Legion National Commander Addington Wagner to Secretary of State John Foster Dulles, 15 June 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

174. "Memorandum of Conversation: The Mixed Board," 26 June 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA. The participants in this meeting were Robert Upton, John Raymond, and Robert Creel from the State Department's German section.

175. "Memorandum of Conversation: Public Information in German War Crimes Cases," 31 July 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA. The participants in this meeting were John Raymond, John Auchincloss, Spencer Phenix, Mr. Kearney, and Mr. Lampson.

176. Robert Upton to John Raymond, 7 September 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

177. Edward Lampson, State Department Germany, to Mr. Lisle, 9 November 1956, RG 59, Box 17 (War Crimes 1953–1959), NA.

178. Ibid.

179. State Department Memo, "War Criminals," drafted by Richard Kearney, 12 December 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

180. Ibid.

180. Ibid.

181. Ibid.

182. Ibid.

183. Spencer Phenix to John Raymond, 8 February 1957, RG 59 Box 19 (War Crimes Clemency January 1956–1959), NA. There was a cover letter and memos A and B.

184. Ibid.

185. Ibid.

186. Ibid.

187. Ibid.

188. Ibid.

189. John Raymond's handwritten comment was clipped to the Phenix cover letter, 14 March 1957, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

190. Spencer Phenix, secret letter to John Raymond, 17 April 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

191. Spencer Phenix, secret letter to John Raymond, 21 July 1957, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
192. “Memorandum of Conversation: Informal Approach by German Embassy on German War Criminals,” 18 March 1957, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
193. Spencer Phenix to John Raymond, 17 April 1957, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
194. Ibid.
195. Ibid.
196. Richard Hagan to John Raymond, 30 April 1957, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
197. Spencer Phenix to John Raymond, 2 July 1957, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
198. Ambassador Bruce, secret cable to Secretary of State, 14 December 1957, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
199. Ibid.
200. American Nuremberg Trials, *Case 9—United States v. Otto Ohlendorf*, vol. 4, 542, 562, 569.
201. See Office of the U.S. High Commissioner for Germany, *Landsberg: A Documentary Report* (Frankfurt: U.S. Army, 1951) for a breakdown of the individual cases. RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
202. Spencer Phenix to John Raymond, 30 April 1956, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
203. Ambassador Bruce to Secretary of State, 6 May 1958, RG 59, Box 19 (War Crimes Clemency January 1956–1959) and John Raymond to Spencer Phenix, 7 May 1958, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
204. Robert Wolfe, ed., *Americans as Proconsuls: United States Military Government in Germany and Japan, 1944–1952* (Washington, D.C.: U.S. Government Printing Office, 1978), 238. See also Dower, *Embracing Defeat*, 514.
205. Spencer Phenix to John Raymond, 13 May 1958, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.
206. John Raymond to Spencer Phenix, 23 June 1958, RG 59, Box 19 (War Crimes Clemency January 1956–1959), NA.

### Conclusion

1. “Inactive Inmates—201 Files to Be Retired,” Cases Tried—Misc. Administration Files: Correspondence and Reports—U.S. Parole Supervisor (Misc. Files), RG 338, NA.
2. Frank Buscher, *The U.S. War Crimes Program in Germany, 1946–1955* (Westport, Conn.: Greenwood, 1989), 153.
3. Jörg Friedrich, “Nuremberg and the Germans,” in Belinda Cooper, ed., *War Crimes: The Legacy of Nuremberg* (New York: TV Books, 1999), 93.

4. Jeffrey Herf, *Divided Memory: The Nazi Past in the Two Germanys* (Cambridge: Harvard University Press, 1997), 206.

5. Ibid., 296. According to Raul Hilberg, between 1958 and 1977, the West German government formally charged 816 and sentenced 118 to life; 398 were sentenced to prison terms, but there were no convictions in 300 cases. For more on the West German post-1958 trials, see Raul Hilberg, *The Destruction of the European Jews* (New York: Holmes and Meier, 1985), 1086–1088; see also Adalbert Rückerl, *The Investigation of Nazi Crimes: 1945–1978* (Hamden, Conn.: Archon, 1980).

6. Interview with author, Locarno, Switzerland, 17 January 1990.

7. Nayan Chanda, *Brother Enemy: The War After the War* (New York: Harcourt, Brace, Jovanovich, 1986), 377.

8. *Die Angkar* produced and directed by Heynowsky and Scheumann Studios, 1981. Sary was interviewed by an East German camera crew in 1981.

9. There are many interpretations of the Melian dialogue found in Thucydides' *The History of the Peloponnesian War*. Michael Walzer considered the "dialogue between the Athenian generals Cleomedes and Tisias and magistrates of the island state of Melos . . . one of the high points of Thucydides' *History* and the climax of his realism. . . . His spokesmen are two Athenian generals, who demand a parlay and then speak as generals have rarely done in military history. Let us have no fine words about justice, they say. . . . We will instead talk about what is feasible and what is necessary" (Michael Walzer, *Just and Unjust Wars* [New York: Basic, 1977], 5).

The powerful Athenians attempt to coerce the isolated Melians into accepting a deal: "Instead we recommend that you should try to get what it is possible for you to get, taking into consideration what we both really do think; since you know as well as we do that, when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept" (Thucydides, *History of the Peloponnesian War* [New York: Penguin, 1972], 401–402). When the Melians resist these efforts, the Athenians speak more frankly: "Do not be led astray by a false sense of honour—a thing which often brings men to ruin when they are faced with an obvious danger that somehow affects their pride. . . . And, when you are allowed to choose between war and safety, you will not be so insensitively arrogant as to make the wrong choice. This is the safe rule—to stand up to one's equals, to behave with deference towards one's superiors, and to treat one's inferiors with moderation. Think it over again . . . you are discussing the fate of your country, that you have only one country, and that its future for good or ill depends on this one single decision which you are going to make" (406–407). The Melians refuse to submit, so the Athenians build a wall around the city of Melos. After a few skirmishes, more Athenian forces arrive and "siege operations were carried on vigorously" (408). The story grows tragic: "the Melians surrendered unconditionally to the Athenians, who put to death all the men of military age whom they took, and sold the women and children as slaves. Melos itself they took over for themselves, sending out later a colony of 500 men" (408).

10. Daniel Patrick Moynihan, *On the Law of Nations* (Cambridge: Harvard University Press, 1990), 1.

11. Michael Ignatieff, *Warrior's Honor* (New York: Holt, 1997), 6.

12. For more on the UN and U.S. responses to Rwanda, see *Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda*, UN document, December 15, 1999.

13. Michael Ignatieff, *Virtual War* (New York: Holt, 2000), 118. George Kennan, *Around the Cragged Hill* (New York: Norton, 1993), 206.

14. Barbara Crossette, "Helms, in Visit to U.N., Offers Harsh Message," *The New York Times*, January 21, 2000, 1.

15. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York: Bantam, 1971), p. 207. See also Peter Maguire, "War Criminals Have Little to Fear," *New York Newsday*, January 22, 1999.

16. Eugene Davidson, *The Nuremberg Fallacy* (New York: Macmillan, 1973), 9.

To Kurt Vonnegut, World War II veteran and survivor of the Dresden firebombing, neither war nor law was the problem—rather, it was man. In his novel *Jailbird*, Walter, an American army official at Nuremberg, describes the "new era" being born: "The world has learned its lesson at last, at last. The closing chapter to ten thousand years of madness and greed is being written right here and now—in Nuremberg. Books will be written about it. Movies will be made about it. It's the most important turning point in history." Ruth, a concentration camp survivor, is more circumspect: "'Walter,' she said, 'sometimes I think you are only eight years old.' 'It's the only age to be when a new era is being born.' . . . 'Well,' said Ruth. . . 'when you eight-year-olds kill Evil here in Nuremberg, be sure to bury it at a crossroads and drive a stake through its heart—or you just might see it again at the next full mooooooooooooooooooooooooooon.' "

17. Sven Lindqvist, *Exterminate All the Brutes*, trans. Joan Tate (New York: New Press, 1996), 2.