CONCLUSION

Finally, we are left with two myths: the American myth of the redemptive trial and the German myth of harsh victor's justice. The outcome of the Nuremberg trials does not affirm the contention that political justice is, by its very nature, illegitimate—if anything, America's post–World War II war crimes policies show the many types and gradations of political justice. What is most often overlooked, especially about the American Nuremberg trials, is the leniency of most of the original sentences. Originally convicted and sentenced to twenty and twenty-five years respectively in the Ministries case, high-ranking Nazis like Hans Lammers and Gottlob Berger were both released from Landsberg Prison in December 1951.[1] As for the "ex post facto" laws like those concerning "aggression," all of the Nuremberg courts proved reluctant to apply, much less convict, under these controversial new laws. In the industrialist cases, several of the courts were almost unwilling to punish CEOs whose companies had demanded, utilized, and egregiously mistreated slave labor. The more systematic killing of millions of civilians was a massive violation of both customary military practice and the codified laws of

war, not to mention the fact that it was done with a cold-blooded precision that was unique in human history. The Nuremberg trials left a complex and mostly sensible set of military and political standards that were not upheld in the post–World War II era.

It was not enough for American leaders to simply defeat and destroy the Third Reich; they also insisted on reforming their vanquished foes. The assumption that the Germans would denounce their former leaders and embrace their conquerors' value system was erroneous. During the 1950s, die-hard Nazis were allowed to exploit the Cold War and in the end considered themselves unjustifiably persecuted. The most important agents of "persecution" were America's punitive occupation policies, and above all, the Nuremberg trials.

The war crimes trials' initial credibility problems were exacerbated by American leniency—a second policy that contradicted the original, punitive occupation policy (JCS 1067). As a result of this dramatic shift, a very basic debate was reopened. Instead of discussing the shocking atrocities committed by many of the high-ranking convicts, American officials were forced to defend the basic legal legitimacy of the trials. Frank Buscher attributes the shift in German attitude to the hard line taken by West German lawmakers on the sentence validity question in the early 1950s: "Most importantly, during the period between the creation of the Federal Republic and the attainment of sovereignty, the parliament stubbornly refused to accept any responsibility for Nazi Germany's atrocities and war crimes. Instead, legislators of almost all parties portrayed the Allies as villains and violators of the law."[2] It was ironic, as Jörg Friedrich points out, that the convicted war criminals did not want to be "judged by their standards or treated according to their own methods."[3] Strategic legalism in the form of nonjudicial, post-trial sentence reductions allowed the State Department to shift the direction of American war crimes policy without officially contradicting JCS 1067. However, American actions spoke far louder and more eloquently than the State Department's dissembled words. American public opinion polls showed the German public split nearly 50/50 in their opinions of Nuremberg's IMT in 1946, but by the early 1950s West German public opinion had turned sharply against the trials.[4]

However, just as the Allies were releasing their last convicted war criminals in the late 1950s, something amazing did occur. In 1958, the West German government opened the Central Office of the State Ministries

for the Investigation of National Socialist Crimes of Violence in Ludwigsburg. The West German government began to try concentration camp staff and *Einsatzkommandos* for violations of German law during World War II. Although men like Treblinka commandant Franz Stangl were sentenced to long prison terms, many West Germans found it odd that their government had chosen to move so far down the chain of command in their own trials. Between 1958 and the end of 1985, West German courts convicted 992 Germans for wartime atrocities. However, many of the sentences were extremely lenient. Historian Jeffrey Herf explains how the American and Allied war crimes clemencies of the 1950s undermined the subsequent German trials: "these decisions had a profoundly negative impact on subsequent trials in German courts because higher-ranking officials who had been amnestied in 1951 offered testimony in trials in the 1960s against lower-ranking officials who bore less guilt. As a result, it became more difficult to gain convictions in these later cases."[5] "They had too many friends," the late Nuremberg prosecutor Robert Kempner explained to the author in a 1988 interview. "The man who wanted parole told their people, 'If you don't sign good things about the parole business, I will tell about you'—very simple—'I will tell about you.' " Kempner offered this telling anecdote about the German trials:

> I was sitting with the Chief German Justice during the Auschwitz case as a spectator. You saw Veesenmayer as a witness for the defense and he was a free man. . . . He told the court stories and this judge next to me asked me, "Who is this man?" and I said, "This is a very nice acquaintance of mine, he was only responsible for 400,000 Jews." "Why is he running around?" I said, "Because he is a defense witness for the Auschwitz case." Veesenmayer came back when he was through and he stopped at me and said, "How are you?" and I said, "We have both grown older." Later I talked with a reserve judge and he said, "It is very bad for us, Veesenmayer is running free and we should judge about the little SS men who killed only two."[6]

Although Edmund Veesenmayer was sentenced to twenty-five years in the Ministries case, he too was released in December 1951.

The idea that the U.S. government took a firm position on the subject of war crimes and in the process, "reeducated" postwar Germans and Japanese was and remains a comforting myth. The U.S. proved unwilling

to uphold sentences that were justified and in many cases lenient. Soldiers who individually killed civilians by the thousands, judges who twisted the law to suit the whims of despots, diplomats who were caught double dealing, bankers who laundered the booty of the dead, industrialists who used and abused slave labor, and doctors who mutilated living humans in the name of science—to name only a few—deserved to pay a heavy price for such acts.

During the Cold War, the superpowers defied international authority and took cynical, strategic legalism to new heights. Although there were prominent exceptions, like the Eichman trial (1960) and the Calley and Medina trials (1971). However, on the global level—international law, the Nuremberg Principles, the Hague Conventions, even the customary laws of war—provided little protection for civilians caught on the wrong side of the political dividing line in places like Vietnam, Cambodia, East Timor, Afghanistan, and El Salvador, to name only a few.

Actually, the tragic fate of Cambodia clearly demonstrates the weakness of international law during the Cold War. After the Vietnamese toppled the Khmer Rouge in 1979, it soon became clear that Pol Pot's regime had systematically carried out some of the worst atrocities since World War II. Did the United States call for the prosecution of Pol Pot, Ieng Sary, Khieu Samphan, and other Khmer Rouge leaders? No, quite the opposite: in 1979, Cyrus Vance, the Carter administration's UN representative, voted to allow the deposed, genocidal regime to retain its seat in the UN General Assembly. After the decision, a senior U.S. official justified the decision to journalist Nayan Chanda: "The choice for us was between moral principles and international law. The scale weighed in favor of law because it served our security interests."[7] Deposed Khmer Rouge leader Ieng Sary put it most succinctly in a 1981 interview: "First are the aggressors and expansionists headed by the Soviet Union. . . . It is good that the USA and China are agreed here. We too are on this team!"[8]

The cynicism of American strategic legalism reached new heights in 1985, when the International Court in the Hague agreed to hear the Nicaraguan Sandinista government's case against the United States for mining its harbors and illegally supporting the Contra guerrillas. Rather than contest the charges, the Reagan administration simply withdrew from the International Court's jurisdiction for a two-year period. Although the court ultimately ruled against the United States, this had little effect on Reagan's secret war in Central America and provided a

graphic illustration of Thucydides' famous maxim from the Melian dialogue, "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."[9]

Former U.S. Senator Daniel Patrick Moynihan argues that by 1990, there was "a certain disorientation in American foreign policy," which grew out of "our having abandoned, for practical purposes, the concept that international relations can and should be governed by a regime of public international law." Though alarmed by America's decision to shed all international legal pretense, Moynihan was more bothered by the fact that "this idea had not been succeeded by some other reasonably comprehensive and coherent notion as to the kind of world order we do seek, or which at all events we do accept and try to cope with."[10] This lack of vision became most apparent after the collapse of the Soviet Union and the end of the Cold War.

The post–Cold War world confronted American leaders with any number of daunting challenges and in the process exposed the limits of American power and vision on the most pressing questions of our time. Although Nuremberg's International Military Tribunal continues to provide an important symbolic model for human rights advocates, the end of the Cold War saw genocidal civil wars in Rwanda and Bosnia vie for the West's increasingly fragmented and unfocused attention. Most shocking about the "postmodern" wars of the 1990s was that the line between soldier and civilian had all but vanished. Michael Ignatieff goes so far as to argue that in "postmodern" conflict, "war crimes and atrocities" became "integral to the very persecution of war."[11]

The strategic legalism of the Reagan and Bush administrations during the final years of the Cold War have been transformed into a more timid, therapeutic form of legalism under the Clinton administration. With genocides in Rwanda and former Yugoslavia, the mantra "Never Again," became, in the words of President William Jefferson Clinton, "I am sorry." At the time of Rwanda's hundred-day massacre (claiming between 700,000 and 900,000 lives and sparking an ongoing civil war in the Congo), his administration did not push for UN intervention, downplayed clear warnings, and even quibbled over using the word "genocide" to describe the clearest example since World War II.[12] However, this did not deter President Clinton from making a postgenocide airport stop in Kigali to apologize to Rwandans for his error in judgment. More distress-

ing than Clinton's day-late, dollar-short "concern" is the growing acceptance of the idea that it is permissible to stand aside and watch knowingly as genocide is carried out on live television as long as it is likely that a dozen or so ringleaders will be solemnly indicted and tried by an international tribunal in the not-too-distant future. As Michael Ignatieff observes: "The two tribunals were created in 1993 and 1994 by Western governments who had done little or nothing to stop the crimes the tribunals were set up to punish. Instead of armed intervention, the international community promised the victims justice, in the form of a prosecutor, a panel of judges, and a secretariat of investigators and lawyers."

The duality—the yawning chasm between American rhetoric and foreign policy, the very thing that so infuriated postwar Germans—continues to widen. George Kennan observes, "And thus, extravagantly do we, like a stern school master clothed in the mantle of perfect virtue, sit in judgment over all other governments, looking sharply down the nose of each of them to see whether its handling of its domestic affairs meets our approval."[13]

Today the American duality is alive and well in the persons of Secretary of State Madeline Albright and U.S. Ambassador for War Crimes David Scheffer. Their public relationship is not unlike that of President Woodrow Wilson and his Secretary of State Robert Lansing. While Albright has strongly advocated the enforcement of international criminal law and urged the prosecution of everyone from Pol Pot to Slobodan Milosevic, her top war crimes official has proven considerably more conservative.

In 1998 the American duality was forced into the stark light of the Roman summer. Many of the world's international legal luminaries had gathered to hammer out the details of the UN's long-awaited international criminal court at the Rome Conference. Finally, much to the dismay of human rights groups and international law advocates, the United States sided with China, Iraq, Algeria, India, and Israel and refused to join the one hundred other nations signing the treaty to create a permanent international criminal court. Once again, the American delegates wanted one set of international laws for the rest of the world and another, more flexible set for the United States. In January 2000, Jesse Helms, chairman of the Senate Foreign Relations Committee, met with the UN Security Council and issued an ominous warning: "a UN that seeks to impose its presumed authority on the American people, without their

consent, begs for confrontation and—I want to be candid with you—eventual U.S. withdrawal."[14]

Fifty years after the United Nations adopted the "Nuremberg Principles," there remains a great deal of confusion surrounding the issues raised by these revolutionary trials. Though they certainly served as a warning to rogue political leaders that under the right set of political circumstances they might find themselves held accountable, other aspects of the Nuremberg legacy remain far less certain. The UN has not captured, much less tried, major war criminals in former Yugoslavia and Cambodia. One has to ask whether it is possible to enforce a Nuremberg-based set of international laws under tense, armed, diplomatic compromises like the Dayton Accords and the Paris Agreements.

Given the fate of international law since Nuremberg, the time has come to reconsider the legacy of the Nuremberg trials as more of an anomaly than a paradigm. In the year 2000, human rights and war crimes only become considerations for U.S. foreign policy when they correspond with larger policy objectives, or more commonly, when they turn into public relations problems. Lurching from global crisis to global crisis, we live in an age when strategic, much less moral, doctrines have been replaced by pyschobabble, public opinion polls, and that great arbiter of justice, CNN. Today, Telford Taylor's description of America "as a sort of Steinbeckian 'Lennie,' gigantic and powerful, but prone to shatter what we try to save" has never seemed more fitting.[15]

The early to mid-1990s were heady times for those who believed that a Nuremberg-derived system of international criminal law would soon take root. However, at the end of the decade and the bloodiest century in recorded history, the so-called "international community" has grown increasingly indifferent to and accepting of the horrors suffered by its most powerless, politically insignificant members. Laws of war professor Jonathan Bush described the phenomenon: "What was most troubling about this early 1990s feeling was that it overvalued what trials can do and completely missed the point of what Nuremberg did and didn't do."

Today, despite the most comprehensive set of laws governing war and international relations in human history, the oldest and most basic distinction, the one between soldier and civilian, is fast disappearing. A nineteenth-century German historian calculated that from 1496 B.C.–A.D. 1861, a span of 3,357 years, only 227 had been years of peace while 3,130 had been years of war. For every year of peace there had

been thirteen years of war.[16] As Sven Lindqvist suggests in his book *Exterminate All the Brutes*, "You already know enough. So do I. It is not knowledge that we lack. What is missing is the courage to understand what we know and draw conclusions."[17] Having just concluded the bloodiest century in the history of man, is it enough to seek salvation in new codes of international criminal law? More laws are not necessary; what is necessary if we are to avoid an even bloodier twenty-first century is the will to enforce the laws that exist.