

of law from the domestic sphere to the international sphere. Although illiberal or totalitarian states accustomed to running domestic show trials might try to do the same at the international level, the serious pursuit of international justice rests on principled legalist beliefs held by only a few liberal governments. Liberal governments sometimes pursue war crimes trials; illiberal ones never have.

Still, the power of legalist ideas alone is not wholly sufficient as an explanation, because nonrhetorical calls for international justice are fitful. Why is it right at some times for some states, and not at other times for other states? If principled ideas are so important to foreign policy, why do states so often fail to live up to those ideas? These questions lead to the two other major arguments of this book. First, even liberal states almost never put their own soldiers at risk in order to bring war criminals to book. Second, even liberal states are more likely to seek justice for war crimes committed against their own citizens, not against innocent foreigners. These two arguments are flip sides of a common coin: the selfishness of states, even of liberal ones. We put our own citizens first—by an amazing degree. The war crimes policy of liberal states is a push-and-pull of idealism and selfishness.

IDEALISM IN INTERNATIONAL RELATIONS

Victors' Justice

Tojo Hideki had few doubts about the true character of the Allies' international military tribunal at Tokyo. In December 1948, he said, "In the last analysis, this trial was a political trial. It was only victors' justice."¹⁹ When Nuremberg's prison psychiatrist asked Hermann Göring to sign a copy of Göring's own indictment as a unique souvenir, the former Reichsmarschall could not resist editorializing: "The victor will always be the judge, and the vanquished the accused."²⁰ Wilhelm II, hiding in Holland after World War I, scorned Allied efforts to bring him to book: "[A] tribunal where the enemy would be judge and party would not be an organ of the law but an instrument of political tyranny aiming only at justifying my condemnation."²¹ Zeljko Raznatovic, the indicted Serb paramilitary leader better known as Arkan, once said, "I will go to a war-crimes tribunal when Americans are tried for Hiroshima, Nagasaki, Vietnam, Cambodia, Panama!"²² Even the victors sometimes make this argument. "I suppose if I had lost the war, I would have been tried as a war

criminal," said Curtis LeMay, who targeted some sixty-three Japanese cities for annihilation by American bombing in World War II. "Fortunately, we were on the winning side."²³

It is perhaps not surprising that these men felt this way. What is striking is the extent to which their skepticism is reflected in typical good-faith beliefs about war crimes tribunals today.²⁴ Even Immanuel Kant unhappily admitted that, in the state of war, "where no tribunal empowered to make judgments supported by the power of law exists," judgment would rest on power: "neither party can be declared an unjust enemy (since this already presupposes a judgment of right) and the outcome of the conflict (as if it were a so-called 'judgment of God') determines the side on which justice lies."²⁵ The frequently expressed argument that war crimes tribunals are simply victors' justice has deep roots. As Thrasymachus says in Plato's *Republic*, "[E]verywhere justice is the same thing, the advantage of the stronger."²⁶

The Thrasymachus tradition in the study of international relations is usually called realism. Realists—the dominant thinkers in America and Britain since at least 1945—argue that international relations differ from domestic politics in the lack of a common ruler among self-interested states.²⁷ To survive in such conditions of anarchy, states must rely on self-help for their own security; they become, in the great sociologist Raymond Aron's vivid phrase, "cold-blooded monsters."²⁸ In the dangerous brawl of international anarchy, realists argue, idealistic and legalistic policies are a luxury that states can ill afford. In his classic history of the Peloponnesian War, Thucydides has Cleon, a cruel Athenian, say:

Our business, therefore, is not to injure ourselves by acting like a judge who strictly examines a criminal; instead we should be looking for a method by which, employing moderation in our punishments, we can in future secure for ourselves the full use of those cities which bring us important contributions. And we should recognize that the proper basis of our security is in good administration rather than in the fear of legal penalties.²⁹

Thus to realists, international moralizing in general—and punishing war criminals in particular—is mystifying.³⁰ Writing on the eve of World War II, E. H. Carr insisted that "politics are not (as utopians pretend) a function of ethics, but ethics of politics." Contemptuous of "utopianism," Carr scorned efforts to blame Wilhelm II for World War I.³¹

In a sweeping book that lavishes attention on the Krüger telegram and the Fashoda crisis, Henry Kissinger does not even mention Nuremberg.³²

In 1954, the British historian A.J.P. Taylor asked, "Who cares now whether William II and Berchtold were 'war-criminals'?"³³ Later, under fire for praising Munich, Taylor dug himself in further: "In international affairs there was nothing wrong with Hitler except that he was a German."³⁴ Underlying this apology for Nazi Germany was Taylor's incomprehension of the application of moral standards to diplomacy: "I have never seen any sense in the question of war guilt or war innocence. In a world of sovereign states, each does the best it can for its own interest; and can be criticised at most for mistakes, not for crimes."³⁵ Taylor even suggested that moralizing only made wars more vicious: "Bismarck's planned wars killed thousands; the just wars of the twentieth century have killed millions."³⁶

Other realists quibble less with the notion of punishment than with the use of legal methods. George Kennan, the American diplomat who created the cold war doctrine of containment, warned, "I see the most serious fault of our past policy formulation to lie in something I might call the legalistic-moralistic approach to international problems."³⁷ And some realists simply cannot be bothered with legal niceties. Kennan preferred summary execution for Nazi leaders. And at the end of World War II, Hans Morgenthau, the father of American realism,³⁸ said, "I am doubtful of the whole setup under which these [Nuremberg] trials will be conducted. What, in my opinion, they should have done is to set up summary courts-martial. Then they should have placed these criminals on trial before them within 24 hours after they were caught, sentenced them to death, and shot them in the morning."³⁹

Realists often fear that war crimes tribunals will interfere with the establishment of international order. Carrying the hatreds and moral passions of war over into a peace settlement is dangerous. Kissinger admired the Congress of Vienna's generous treatment of France after the Napoleonic Wars: "A war without an enemy is inconceivable; a peace built on the myth of an enemy is an armistice. It is the temptation of war to punish; it is the task of policy to construct. Power can sit in judgment, but statesmanship must look to the future."⁴⁰ Overheated moral judgments and particularly "personal retribution," Kissinger implied, risk undermining a peace.⁴¹

The most recent updating of realism, in the twilight of the cold war, maintains these themes. Such neorealism argues that in an anarchic international system, unitary states facing potential threats from *tous azimuts* will attempt to maximize either power or security. The result will be

a balance of power. As Kenneth Waltz put it in the founding book of neorealism, "Self-help is necessarily the principle of action in an anarchic order."⁴² The states in Waltz's system are all essentially alike, behaving the same abroad regardless of how they run their domestic politics: "[S]o long as anarchy endures, states remain like units."⁴³

Like Taylor and Kissinger, Waltz hopes that removing overheated moral debates from the international arena will have a pacifying effect: "If might decides, then bloody struggles over right can more easily be avoided." And he is skeptical about injecting justice into international politics: "Nationally, the force of a government is exercised in the name of right and justice. Internationally, the force of a state is employed for the sake of its own protection and advantage." He is equally wary of international law: "National politics is the realm of authority, of administration, and of law. International politics is the realm of power, of struggle, and of accommodation. The international realm is preeminently a political one."⁴⁴ Law, to Waltz, is the antithesis of the anarchic international system.

These neorealists take a dim view of international legalism. International norms and institutions are epiphenomenal, mere veils over state power. As John Mearsheimer, a realist political scientist, puts it, "Realists maintain that institutions are basically a reflection of the distribution of power in the world. They are based on the self-interested calculations of the great powers, and they have no independent effect on state behavior."⁴⁵ To realists, a war crimes tribunal is simply something that the countries that decisively win a war inflict on the helpless country that loses it. It is punishment, revenge, spectacle—anything but justice.

It is hard not to be impressed with the force of much of the realist line of argument. Kennan, sensibly, recoiled at the notion of a Soviet judge sitting at Nuremberg despite the Soviet Union's own complicity, aggressions, and atrocities.⁴⁶ When the Ottoman Empire was defeated, it faced war crimes trials; when Atatürk drove Britain and Greece back, the new peace treaty dropped those demands. Criminals such as Stalin, Mao, and Pol Pot never faced justice from Western states appalled at their atrocities because they had not been militarily defeated first.

Realism also deflates much of the high-flown rhetoric of victorious states as self-serving. Throughout this book, states abandon lofty projects of international justice when that endangers their soldiers. Finally, realism provides a welcome corrective against the occasionally otherworldly musings of some international lawyers. To make rabbit stew, first catch a rabbit.

So why not adopt a realist approach? I will argue that war crimes tribunals are more than just vehicles for the crude application of power. There is no way of determining what will be done to accused war criminals without reference to ideas drawn from domestic politics.⁴⁷ In particular, there are five main anomalies that confound realism.

First, critically, there is a distinctive legalism to the notion of war crimes tribunals. These efforts are not simply disguised purges, although they often do have the result of getting rid of undesirable enemy leaders. The victors were not just trying to dispose of enemies; they were aiming at men they saw as *criminals*.⁴⁸ The documentary record clearly shows that the motivations for the trials at Leipzig, Constantinople, Nuremberg, Tokyo, The Hague, and Arusha were not merely to purge. Victorious liberals saw their foes as war criminals deserving of just punishment. Realists would either be baffled by this or deplore it.

After all, one hardly needs trials to dispose of accused war criminals. Why not just shoot them? If one considers such a brutal solution to be out of the question, that only a barbarian state would do such a thing, that only testifies to the extent to which legalism has permeated our political culture. Even liberal countries have been tempted to skip trials. Lloyd George swept to victory in the 1918 elections with his supporters chanting, "Hang the kaiser!" At the Québec Conference, Churchill and Roosevelt agreed to the Morgenthau Plan, which envisioned the summary execution of the Nazi leadership (they later reconsidered). Muhamed Sacirbey, Bosnia's UN ambassador and a former foreign minister, pointedly remembers this: "[A]fter World War II, before Nuremberg, the British and Russian view of Nuremberg was that we don't need a trial: let's just take them out in the back and shoot them." More recently, Gérard Prunier, a respected scholar of the Rwandan genocide, singled out "maybe 100 men who have committed not only a crime against humanity but a sin against the Spirit by locking up a whole nation into the airless sadomasochistic inferno. They have to die."⁴⁹

Even some people who are otherwise dedicated to the rule of law believe that some atrocities go beyond the realm of law. The application of municipal law to war crimes is in many ways the legal equivalent of a bad analogy. The worst crimes in Western law are utterly pallid next to crimes against humanity.⁵⁰ A war crimes trial applies an old precedent to deeds that are a universe away from the conditions that created that precedent. As Robert Penn Warren's fictional demagogue Willie Stark put it,

I know a lot of law. . . . But I'm not a lawyer. That's why I can see what the law is like. It's like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't ever enough blanket to cover the case, no matter how much pulling and hauling, and someone is always going to nigh catch pneumonia. Hell, the law is like the pants you bought last year and the seams are popped and the shankbone's to the breeze. The law is always too short and too tight for growing humankind.⁵¹

There is no such thing as *appropriate* punishment for the massacres at Srebrenica or Djakovica; only the depth of our legalist ideology makes it seem so. Watching the unfolding spectacle at Nuremberg, political theorist Hannah Arendt wrote, "For these crimes, no punishment is severe enough. It may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug."⁵² This is no theoretical abstraction. Anthony Eden, the British foreign secretary, made the same point in 1942: "The guilt of such individuals is so black that they fall outside and go beyond the scope of any judicial process."⁵³ Today, who could really say it would be totally unjust to shoot thugs like Théoneste Bagosora or Ratko Mladic?

War crimes tribunals risk the acquittals of history's bloodiest killers in order to apply legal norms that were, after all, designed for lesser crimes. The Allied efforts to punish German and Turkish war criminals after World War I ended in fiasco, in large part because of the law. The British high commissioner in Constantinople complained, for instance, that a top Ottoman official was surely morally and criminally guilty, but that without "definite proof against him," he might escape justice.⁵⁴ Eden worried, "[T]he precedent of public trials of prominent statesmen shows that the procedure is rarely advantageous to the prosecution."⁵⁵ Nuremberg had its acquittals, and the court red-facedly dismissed a case against Krupp because the British thought they were trying Gustav Krupp (*père*) while the Americans were aiming for Alfried Krupp (*fils*).⁵⁶ Of 1,409 Japanese defendants tried in American courts after World War II, only 163 were sentenced to death.⁵⁷ Dusan Tadic, the first person to stand trial in The Hague, was initially acquitted on seven murder charges, and the judges dismissed 11 of 31 charges against him on the grounds that he could not have violated the Geneva Conventions because the war in Bosnia was not an international one—a vindication for Serbia.⁵⁸ And when

Augusto Pinochet's cruelty was brought before Britain's Law Lords, they at one point ruled that he could be extradited only for crimes committed after December 1988, when Britain implemented the Torture Convention at home—letting Pinochet off the hook for all but the last fifteen months of his seventeen years of dictatorship. British authorities later ruled Pinochet too ill to stand trial. Why risk this kind of thing? The only sturdy answer to these questions is the power of the legalistic norm.

Second, it seems that some norms of domestic politics occasionally spill over into the international realm.⁵⁹ After all, states do not only try defeated enemies; sometimes they try their own soldiers and leaders. Edmund Burke, while a member of Parliament in Britain, impeached Warren Hastings, the corrupt former governor general of Bengal, on twenty-two charges of high crimes and misdemeanors; Hastings was dramatically tried in the House of Lords in 1788–95.⁶⁰ In October 1956, an Israeli patrol massacred forty-three Israeli Arab villagers of Kfar Qassem, who had unwittingly violated a curfew imposed for the Suez War; after public outcry, the Israeli soldiers were tried by a military court and jailed, although the sentences were later shortened.⁶¹ The United States halfheartedly put a handful of its own soldiers on trial after the MyLai massacre, although only one was ever convicted (and Richard Nixon helped get his sentence reduced to a mere three years).⁶² In 1982, Menachem Begin's government was hounded from power after an Israeli judicial committee concluded that Begin and Ariel Sharon, his defense minister, bore indirect responsibility for the Sabra and Shatila massacres.⁶³ These cases can hardly be said to be victors' justice. Rather, they suggest that a country's norms can be so sincerely held that it will put its *own* soldiers and leaders on trial even in times of national upheaval.

Third, sometimes states pursue justice for victims who are not citizens of the victor states. British sympathy for the Armenians in 1915 and after was quite sincere. Even if Henry Stimson, the American secretary of war who was the architect of Nuremberg, took no great interest in the Holocaust, the administration was pressured to take account of the extermination of the Jews by Henry Morgenthau Jr., the treasury secretary, and by American Jews. Lackadaisical as the Clinton administration's response to the slaughters in Bosnia and Rwanda was, America did ultimately push for the establishment of international tribunals for these horrors. It is hard to find a NATO interest in Kosovo except humanitarianism. This is hardly a triumph of idealism, but it is not the complete absence of it either.

Fourth, war crimes tribunals seem to make an impact even in the absence of a military victory—suggesting that norms may have a certain independent power even when not fully backed up by states. To be sure, the Hague tribunal, forced to rely on the whims of NATO countries for its enforcement, lacks the scope and comprehensiveness of Nuremberg. But the tribunal has had an impact on Balkan diplomacy. During the NATO war over Kosovo, The Hague indicted Milosevic and other top Yugoslav leaders. Goldstone's indictment of Karadzic and Mladic, at a minimum, made it embarrassing to do business with them. Since then, American diplomats have been progressively more insistent on the need to punish indicted war criminals. For an underfunded international institution that until recently shared its office space with a Dutch insurance firm, the Hague tribunal has made a clear difference.

Similarly, the UN criminal tribunal for Rwanda is not easily explained as victors' justice. In Rwanda there was both a victory and an attempt at international justice, with the latter set up mostly to mitigate the excesses of the former. In 1994, over half a million people, mostly Tutsi, were killed by Hutu extremists. After that genocide, the Tutsi-dominated Rwandan Patriotic Front's guerrillas took back the capital city of Kigali and put tens of thousands of suspected Hutu *génocidaires* in appalling jails. The UN court is distinct from the Rwandan regime's own prosecutions, which aim at low-level perpetrators while leaving more important figures to the UN's jurisdiction. The UN tribunal was established partly because of dissatisfaction with the quality of justice likely to be dispensed by the overburdened, penniless, and understandably vengeful Rwandan regime.

Fifth, critically, not all victors' justice is the same. Göring's argument was not just that he was in the dock because he lost the war. He also implicitly argued that Allied leaders would too be in the dock if they had lost instead, and that therefore there was nothing to recommend the Allied brand of justice over the Nazi one. This argument has somehow found a certain amount of public currency. Oddly, although there are precious few people who would be indifferent if asked to choose between standing trial in a Soviet domestic court or an American one, there are plenty who think that there is not much difference between an *international* Soviet or American tribunal. Aron, hardly an unclear thinker, wrote: "It is easy to imagine the use that the victorious Reich would have made of its right to punish the 'criminal' states (Poland, France, Great Britain)."⁶⁴ Had the Nazis won, there is no reason to believe they would have set up a bona fide war crimes tribunal—even for acts like the fire-

bombing of Dresden, which could easily be considered a war crime. The Nazis might have set up a show trial, but it is wildly unlikely that they would have created anything more impartial. Nazi domestic courts were heavily rigged toward political persecution.⁶⁵ It seems safe to assume that the Nazis would have been equally as cynical in their use of the courts after a victory in World War II as they were after their victory in German domestic politics. There is in fact an empirical example of what a totalitarian state might have done as a victor in World War II: the Soviet Union's heavy-handed attitude toward Nuremberg and Tokyo.⁶⁶

Nor is it difficult to tell a show trial from a truly legalistic one. A bona fide trial includes an independent judiciary, the possibility of acquittal, some kind of civil procedure, and some kind of proportionality in sentencing. As D. B. Somervell, the British attorney general, put it in 1944, "A trial involves a charge or charges for offences against some law, a decision on evidence, arguments on each side, and, if the accused is found guilty, the imposition by the Court of a penalty."⁶⁷ "The modern view of criminal justice, broadly," wrote Max Weber, "is that public concern with morality or expediency decrees expiation for the violation of a norm; this concern finds expression in the infliction of punishment on the evil doer by agents of the state, the evil doer, however, *enjoying the protection of a regular procedure.*"⁶⁸ In contrast, a show trial has no chance of returning an acquittal, keeps the judges in thrall to the prosecution and behind that the state, cares little for procedure or standards of evidence, and has a propensity toward the quick execution. In 1946, Vyacheslav Molotov, the Soviet foreign minister, explained to shocked Western officials what awaited sixteen Polish underground leaders in Soviet custody: "The guilty ones will be tried."⁶⁹

For all these reasons, the phrase "victors' justice" is in the end a largely uninformative one. The kind of justice one gets depends on the nature of the conquering state. The question is not whether we are looking at victors' justice. Probably. But *which* victor? And what justice?

The Liberal Approach

Realists argue that the exigencies of anarchy force states to similar behavior—an amoral struggle for security—regardless of their domestic ideals. So democracies and dictatorships alike do what they need to do to survive.⁷⁰ This runs contrary to a long tradition of seeing domestic politics as crucially important for foreign policy. Plato accused tyrants of stirring up wars to distract their subjects from their misery at home.⁷¹ Rousseau

blamed states for causing wars.⁷² Lenin, Hobson, and Schumpeter saw domestic roots for imperialism.⁷³ And in a more optimistic vein, Kant relied on republican constitutions to bring perpetual peace.⁷⁴

So the foreign policy of liberal states might reflect liberal principles, at least up to a point. This opens the door to idealism in foreign policy. The reintroduction of domestic norms even in the extremities of wartime shows that states have options, and that their choices can therefore be morally judged.

An enduring dilemma of American foreign policy is the difficulty of maintaining American domestic ideals abroad: of being as pure in conducting foreign policy as in conducting domestic policy. "It was assumed that the foreign-policy institutions, like other [American] political institutions, would reflect the basic values of the preexisting and overwhelmingly preponderant ideology," wrote Samuel Huntington, an eminent political scientist. "Yet precisely these institutions—foreign and intelligence services, military and police forces—have functional imperatives that conflict most sharply and dramatically with the liberal-democratic values of the American Creed."⁷⁵ Elsewhere, Huntington worried that, in American civil-military relations, "[t]he real problem was the ideological one, the American attitude of mind which sought to impose liberal solutions in military affairs as well as in civil life."⁷⁶ Political scientist Aaron Friedberg argues that America's cold war technology-based nuclear deterrence strategy was largely determined by American domestic liberalism, which was ideologically opposed to the kind of intrusive, militarized garrison state that would be necessary to support a war-fighting strategy against the Soviet Union.⁷⁷

There is an increasing body of evidence by political scientists suggesting that domestic preferences are reflected in a state's approach to international affairs. Making an argument similar to mine, David Lumsdaine writes, "The values and practices of domestic political life are apt to be preferred in international politics."⁷⁸ In a sweeping study of foreign aid, he shows that the most generous foreign aid donors were those countries that had generous social welfare programs at home.⁷⁹ Andrew Moravcsik argues that states act purposefully abroad to represent the interests of some part of the domestic polity.⁸⁰ And Huntington argues that American liberalism tends to "transpose its domestic successes to foreign relations," especially lawyerly measures like a World Court and outlawing war.⁸¹

Liberals argue that democracies almost never fight each other.⁸² Democratic peace theorists believe that some combination of liberal institutions and norms combines to make democratic states behave radically

differently from other states on the fundamental question of international relations—whether to go to war. My argument is related to the democratic peace school: I argue that liberal ideals make liberal states take up the cause of international justice, treating their humbled foes in a way utterly divorced from the methods practiced by illiberal states.⁸³

What does this mean for war crimes tribunals? If a war crimes tribunal is victors' justice, it makes a difference who the victors are. Victorious legalist liberal states tend to operate abroad by some of the same rules they observe at home.⁸⁴ "A trial, the supreme legalistic act," wrote liberal political theorist Judith Shklar, "like all political acts, does not take place in a vacuum. It is part of a whole complex of other institutions, habits, and beliefs. A trial within a constitutional government is not like a trial in a state of near-anarchy, or in a totalitarian order."⁸⁵

As Kennan, Huntington, and others have (often disapprovingly) noted, liberal America has a propensity toward a lawyerly foreign policy. From the *Paquete Habana* (a 1900 case with the Supreme Court sitting as an international court of prize)⁸⁶ to the recent use of the 1789 Alien Tort Statute⁸⁷ to try to bring Karadzic before a New York court, American courts have not shied away from stepping outside of American borders. The Alien Tort Statute, strengthened by the *Filartiga* decision in 1980, and joined with the Torture Victim Protection Act of 1991, has been used against such figures as a former Guatemalan defense minister, a former president of Haiti, and the estate of the late Ferdinand Marcos, the ex-dictator of the Philippines.⁸⁸ Yamashita Tomoyuki, a Japanese general charged with not preventing his troops from committing war crimes in the Philippines, appealed his case all the way up to the Supreme Court.⁸⁹ Warren Christopher, Clinton's first secretary of state—and a prominent Los Angeles lawyer—says of the Hague tribunal: "I had a sort of a lawyer's sense of not wanting to interfere with the proceedings of the tribunal."

Liberal diplomats can be startlingly explicit about their exportation of domestic norms. In 1918, as the Imperial War Cabinet decided to seek Wilhelm II's trial, Frederick Smith, the British attorney general, said, "Grave judges should be appointed, but we should . . . take the risk of saying that in this quarrel we, the Allies, taking our stand upon the universally admitted principles of the moral law, *take our own standards of right and commit the trial of them to our own tribunals.*"⁹⁰ As Woodrow Wilson put it in his address to Congress on declaring war in 1917, "We are at the beginning of an age in which it will be insisted that the same standards of conduct and of responsibility for wrong shall be observed among na-

tions and their governments that are observed among the individual citizens of civilized states."⁹¹ And Robert Jackson wrote to Truman that

*our test of what is legally crime gives recognition to those things which fundamentally outraged the conscience of the American people and brought them finally to the conviction that their own liberty and civilization could not persist in the same world with the Nazi power. . . . The feeling of outrage grew in this country, and it became more and more felt that these were crimes committed against us and against the whole society of civilized nations by a band of brigands who had seized the instrumentality of a state. I believe that those instincts of our people were right and that they should guide us as the fundamental tests of criminality.*⁹²

Even those who do not welcome such statements agree on the underlying dynamic. Kennan wrote that such international legalism "undoubtedly represents in part an attempt to transpose the Anglo-Saxon concept of individual law into the international field and to make it applicable to governments as it is applicable here at home to individuals."⁹³ Idealism begins at home.

There are two strong pieces of evidence to support the liberal view of international relations. First, *every* international war crimes tribunal that I am aware of—Leipzig, Constantinople, Nuremberg, Tokyo, The Hague, and Arusha—has rested on the support of liberal states. Second, conversely, when illiberal states have fought each other, they have *never* established a bona fide war crimes tribunal. They may trade accusations of atrocities as propaganda, but nothing more legalistic. Think of the Chaco War between Bolivia and Paraguay, the 1970 Syrian invasion of Jordan, the 1985–87 Sino-Vietnamese War, or the Iran-Iraq War.⁹⁴

After the Franco-Prussian War, Bismarck scorned any talk of putting Napoleon III on trial.⁹⁵ While the liberal Allies were having a series of war crimes trials in the Pacific, the Soviet Union did not bother with any sort of judicial proceedings for the hundreds of thousands of Japanese prisoners of war captured in Stalin's brief foray into Manchuria.⁹⁶ The seriousness of the Soviet Union's commitment to legality can perhaps be judged by the fact that the Soviets tried to include the Katyn forest massacre at the Nuremberg trials—despite the fact that the massacre had actually been committed by the *Soviets*. The Soviet judge was the only one to dissent from the Nuremberg judgment, objecting to three acquittals and the sentencing of Rudolf Hess to life in prison instead of hanging.⁹⁷ The Soviets wanted a show trial, and were piqued when the other three Allies

would not let them have it.⁹⁸ The exportation of domestic habits is not always a welcome development.

WAR CRIMES LEGALISM

Due Process across Borders

Much of this book chronicles the principled belief that war criminals must be put on trial—a legalistic solution to a complex moral and political problem. Legalism, as defined by Shklar, is “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.”⁹⁹ In this book, legalism mostly manifests itself as a fixation on process, a sense that international trials must be conducted roughly according to well-established domestic practice—not just rule-following, but rule-following when it comes to war criminals. (I properly ought to say “war crimes legalism,” but that seems cumbersome.) Liberal states are legalist: they put war criminals on trial in rough accordance with their domestic norms.

There is a growing academic interest in the power of ideas in international relations.¹⁰⁰ But it is difficult to trace precisely the influence of ideas. One problem is that it can be difficult to anticipate which ideas will prove influential.¹⁰¹ Another is that it is hard to specify *ex ante* what exactly the content of these ideas is, which can lead to circular explanations that infer ideas backward from the actions of states. And another is that one will confuse ideas with self-interest.¹⁰² But one can sidestep these hazards by locating the sources of ideas in clear, well-established domestic politics, and then tracing their functioning in the international arena. Neither the source nor the presence of the idea of legalism is hard to discern. The common (and correct) statement that international law lags behind domestic law shows that causality runs from domestic norms to international ones.

Liberal states believe, with varying degrees of intensity and seriousness, in universal rights. Such states also have well-established judicial systems and domestic norms of nonviolent contestation in politics. From such peaceful ways of politics and tribunals, liberal leaders learn a respect for due process. And because of their belief in the universal applicability of their liberal principles, liberal leaders are tempted to use those methods of fair trial even outside their own borders.¹⁰³

The Universal Application of Domestic Norms

Liberal states—that is, states that respect civil and political rights—almost never commit atrocities at home.¹⁰⁴ Liberal politicians do not profess radical violence or revolution, do not rise to power by killing, and do not stay there by repression.¹⁰⁵ The quietude of liberal polities is enhanced by a strong, well-respected judicial system. Whatever the domestic imperfections and ethnic hatreds in liberal states, in their domestic nonviolence and well-established judicial systems they are still qualitatively different from illiberal states.¹⁰⁶ Accustomed to such norms, liberal leaders can be genuinely shocked by overseas atrocities. As Ernest Pollock, the British solicitor general, said while preparing lists of German war crimes suspects in 1919: “The test that had been applied by himself and his French colleagues was: ‘Do these charges shock any plain man’s conscience?’”¹⁰⁷ Liberal elites think: we do not do such things here.¹⁰⁸ Even in the darkest days of World War II, when he wanted to execute the top Nazis, Churchill did not trust his country to tolerate such killings, “for I am certain that the British nation at any rate would be incapable of carrying out mass executions for any length of time, especially as we have not suffered like the subjugated countries.”¹⁰⁹

There is more underlying liberal states’ legalism than just the rule of law. After all, some authoritarian states also respect the rule of law, albeit often harsh laws. But the liberal acceptance of the rule of law comes in the context of rights, often protected by the courts. Political trials cut deeply against the liberal grain.

These rights, whether resting on natural law (as in Vattel), a Rawlsian thought-experiment, divinity, or a process of discourse, are often seen as universal, or at least not strictly domestic rights.¹¹⁰ In 1788, in Parliament, Burke dismissed the venal Hastings’s notion of

a plan of Geographical morality, by which the duties of men in public and in private situations are not to be governed by their relations to the Great Governor of the Universe, or by their relations to men, but by climates, degrees of longitude and latitude, parallels not of life but of latitudes. As if, when you have crossed the equinoctial line all the virtues die. . . . [T]he laws of morality are the same every where, and. . . there is no action which would pass for an action of extortion, of peculation, of bribery and of oppression in England, that is not an act of extortion, of peculation, of bribery and of oppression in Europe, Asia, Africa, and all the world over.¹¹¹

The most important practical liberal document, the American Declaration of Independence, says that all men are created equal, with inalienable rights. It does not specify that those men must be Americans, not Bosnians. Approvingly citing Justice Hugo Black, Louis Henkin, a distinguished scholar of the Constitution, argues that the Constitution was “not only a social contract by citizens for citizens. It was not only for home consumption. It established a community of conscience and righteousness and the people directed their representatives to respect individual human rights wherever they exercised the people’s authority, in or outside the United States.”¹¹² For Henkin, there is little difference between foreign and domestic rights-based constraints: “In principle, then, the Bill of Rights limits foreign policy and the conduct of foreign relations as it does other federal activities.”¹¹³ Political scientists echo the theme. “Within a transnational domestic culture,” wrote Bruce Russett, “as within a democratic nation, others are seen as possessing rights and exercising those rights in a spirit of enlightened self-interest.”¹¹⁴

Because these rights can be seen as universal, they can be spread. Strictly speaking, a British-imposed war crimes tribunal on behalf of British prisoners of war need not rely on universal rights, but on a sense of British responsibility for Britons. But liberal states often go beyond that. The notion of human rights is axiomatic to today’s liberal citizens. When seeking justice for the Armenians, the Jews, the Kurds, the Bosnian Muslims, the Rwandan Tutsi, or the Kosovars, liberal states rest their efforts on universal rights—hence the famous category of crimes against *humanity*. This category is not just an invention of Nuremberg; it dates back at least to the 1915 Armenian massacres. Universal human rights do not respect “geographical morality” or sovereignty.

Theoretically, any ideology that transcends sovereignty—like pan-Arabism, pan-Slavism, or Marxism—can extend its jurisdiction beyond national borders. But Marxist and pan-Arabist states are not necessarily legalist, so this might result in political support for a group of victims but not in trials: outrage, but not legalism. Many Muslim countries sympathized with the plight of Muslims in Bosnia, which built pressure for the creation of the Hague tribunal; but American proposals for trying Iraqi war criminals for atrocities against Kuwaitis and Kurds have generated scant enthusiasm among the Persian Gulf monarchies, even though all of the parties in question are Muslim. Israel abducted and tried Adolf Eichmann according to the constraints of Israeli legalism,

but it would not do the same for war criminals who were not perpetrators of the Holocaust.¹¹⁵

The roots of Western universalism may partially lie, ironically enough, in a pan-Christian concern for the laws of war. Hugo Grotius was moved to write by cruelty among warring Christians, and Thomas Aquinas claimed the Greek tradition of natural law for Christianity.¹¹⁶ In practice, European Christian sympathy for fellow Christians under Ottoman rule resulted in numerous semi-humanitarian interventions. In 1774, Russia was granted a right to intervene in the Ottoman Empire to help Russian Orthodox Christians; Britain and Russia sided with the Greeks in their war of independence in 1821–30; in 1860, France sent six thousand troops to Syria and Lebanon to help Maronites being massacred by Druse; and in 1876 Gladstone raged against the “Bulgarian horrors.”¹¹⁷ In the 1915 Armenian massacres, British solicitude rested on both a kind of pan-Christian solidarity as well as a more universal humanitarianism.

Whatever its precise lineage, in practice, it is only liberalism that has looked so far beyond its own borders. Lloyd George’s legalism did not respect sovereignty, monarchy, empire, or even divinity: he once told the Imperial War Cabinet that Alexander the Great and Moses should have been tried as war criminals.¹¹⁸

This universalistic legalism can be baffling to the war criminals who face it. During the Armenian massacres, Henry Morgenthau Sr., America’s ambassador to the Sublime Porte, tried to appeal to the conscience of Talaat Pasha, the Ottoman minister of the interior and one of the masterminds of the atrocities. Talaat once told Morgenthau, “You are a Jew; these people are Christians.” Morgenthau snapped, “[A]t least in my ambassadorial capacity I am 97 per cent. Christian. . . . I do not appeal to you in the name of any race or any religion, but merely as a human being.”¹¹⁹

There is of course the danger that liberal states will overreach. Shklar warned: “When, for example, the American prosecution at the Tokyo Trials appealed to the law of nature as the basis for condemning the accused, he was only applying a foreign ideology, serving his nation’s interests, to a group of people who neither knew nor cared about this doctrine. The assumption of universal agreement served here merely to impose dogmatically an ethnocentric vision of international order.”¹²⁰ My point is not whether it is wise for liberal states to impose their norms on Turks, Iraqis, Serbs, and so on. The point is that it happens.

The Importance of Due Process

What exactly does it mean to be legalist? From World War I to Kosovo, liberal states have consistently seen attacks on civilians and cruelty to prisoners of war as criminal acts. Even with foggier and less easily justifiable charges, like aggression, legalists remain devoted to the idea that a *trial* is the proper way of dispensing justice. This is only one rule among many that could guide the legalistic mind, but it is a crucial one. As Henkin notes, "The constitutional provisions that afford fair criminal procedures apply also to persons charged with violating foreign affairs statutes, even to foreign nationals accused of espionage."¹²¹ Legalism is above all about due process. Thus, Jackson, in his report on the London Conference, wrote of the importance of

provisions which assured to the defendants the fundamentals of procedural "due process of law." Although this famous phrase of the American Constitution bears an occasionally unfamiliar implication abroad, the Continental countries joined us in enacting its essence—guaranties securing the defendants every reasonable opportunity to make a full and free defense. Thus the charter gives the defendant the right to counsel, to present evidence, and to cross-examine prosecution witnesses.¹²²

America might have been willing to fudge a bit by creating new categories of crimes, but it was conservative about the essential modalities for a trial: jurists steeped in Western domestic legal traditions, the possibility of acquittal, standards of evidence, proportionate punishment, and so on. A court-martial or an international military tribunal is not the same thing as, say, the U.S. Court of Appeals for the Second Circuit, and American and Continental law are hardly identical; but an amalgam of basically fair liberal legal arrangements is still easily discernible from a Soviet-style show trial. The American lawyers trying Japanese war criminals conducted themselves "just like 'the boys back home.'" ¹²³ "It was as if Sullivan & Cromwell or Milbank, Tweed, Hadley & McCloy decided to conduct a trial," writes one commentator on Nuremberg. "The aura of the prevailing New York corporate law firm culture drifted across the Atlantic and landed in Nuremberg."¹²⁴

The accusation may be murder, rape, or theft—or genocide, or aggression—but the case will wind up in a court. Cruelty to prisoners of war, or mass killing of civilians, have been criminal throughout this century—and well before.¹²⁵ (True, some legalists have not shown a particular hor-

ror of setting new precedents, such as when arguing about whether sovereignty entitles a government to slaughter its own subjects. The novelty of some charges, like genocide or rape, was not the result of a desire to convict the accused on trumped-up charges; it was generally a product of the accused's innovations in cruelty.¹²⁶) To be sure, there is a distinct danger that politicized charges, of which Wilhelm's "supreme offence against international morality and the sanctity of treaties" is the most glaring example ever put up by liberal states, may make a mockery of the method of a trial. There are charges so unfair that they undo any notions of due process. But such excesses are usually checked by the judges who will eventually hear such cases. Liberal states have not been willing to seriously compromise their domestic standards of a fair trial when putting foreign leaders on trial.¹²⁷ Nuremberg was a stripped-down version of domestic British or American trials, but not so much that it could fairly be called a naked exercise of state power. State power was exercised before Nuremberg, to put the Nazis in the dock; but once they were there, they faced full-blown Western legalism as it had developed in its domestic context.

This is not always to the liking of some lawyers, who worry that extending the law abroad will only corrupt the law. This is a kind of lawyerly isolationism: our laws are too good for just anybody. Lawyers, after all, take precedent seriously, which can be paralyzing in the face of innovations in atrocity.¹²⁸ Robert Lansing, Wilson's secretary of state, frowned at the idea of trying Wilhelm II for starting World War I, and at the idea of crimes against humanity—anything, that is, that expanded the scope of international law. Stimson hesitated to prosecute German crimes against German Jews. Nuremberg and Tokyo's charges of aggressive war raised many eyebrows. In *Profiles in Courage*, John Kennedy lauded Robert Taft for opposing plans for Nuremberg.¹²⁹ And at the Supreme Court, Chief Justice Harlan Fiske Stone noted,

It would not disturb me greatly . . . if that power were openly and frankly used to punish the German leaders for being a bad lot, but it disturbs me some to have it dressed up in the habiliments of the common law and the Constitutional safeguards to those charged with crime. . . .

Jackson is away conducting his high-grade lynching party in Nuremberg. . . . I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas.¹³⁰

Stone does not dwell on the alternative to a high-grade lynching: the usual type of lynching.¹⁵¹

Once a president or prime minister has turned the judgment of defeated enemies over to the judges, the outcome is in the hands of laws that developed from domestic traditions. Arendt, suspicious of the motives of David Ben-Gurion, Israel's prime minister, in trying Eichmann, was nevertheless impressed by the fairness of the Israeli judges: "[T]he trial is presided over by someone who serves Justice as faithfully as Mr. Hausner [the prosecutor] serves the State of Israel."¹⁵² America sent some of its finest jurists to Nuremberg; Jackson, a Supreme Court justice, was in the habit of ignoring executive wishes. (Stalin sent Vishinsky.) Richard Goldstone had headed the Goldstone commission investigating atrocities in democratizing South Africa—another good way of learning to defy your own government.¹⁵³ The leaders of the executive branch understand perfectly well what risks—acquittals, technicalities, tedium—they are taking. But a liberal executive still sometimes leaves the fate of war criminals up to the courts.

Legalism's Antithesis: Totalitarian Show Trials

Political trials have earned a bad reputation since those of Socrates and Jesus. In France before the Revolution, the poor who defied the state faced special rigged trials.¹⁵⁴ But such illiberal trials reached their apotheosis in modern totalitarian states. These regimes show the opposite of liberal legalism: the complete subversion of legal norms. The judiciary has no independence. Predictable bureaucratic authority is replaced with arbitrary terror. Nazi and Soviet show trials, Shklar wrote, have "nothing to do with justice. Their end is elimination, terror, propaganda, and re-education. . . . They are part of regimes that have already abandoned justice as a policy, and our judgment of these courts must depend on our view of the ends they serve, not of their 'betrayal' of justice, since the ideologies which inspire them are profoundly illegalistic and indeed hostile to the whole policy of justice."¹⁵⁵ These trials took a terrible toll. From 1933 to 1945, Nazi civilian courts executed an estimated 16,560 people, plus 40,000 to 50,000 German soldiers killed after courts-martial. Even setting aside the use of courts in collectivization, the Soviet Union sentenced a million people to death in the 1937–39 purges, and perhaps twelve million people died from 1936 to 1953 in camps after being purged.¹⁵⁶

In *Mein Kampf*, Hitler had written that "one day a German national tribunal must condemn and execute several tens of thousands of the criminals who organized and are responsible for the November treason and everything connected with it."¹⁵⁷ Nazi domestic trials, instruments of the Nazi state rather than checks upon it, aimed at discovering if the accused had become an enemy of the race. As legal scholar Ingo Müller has noted: "As a result, the purpose of a trial now became not so much to determine whether the accused had broken a law, but rather 'whether the wrongdoer still belongs to the community'; the criminal trial was supposed to be 'an evaluation and segregation of types.' A decisive characteristic of National Socialistic theory was that emphasis was placed less on the act committed than on the 'criminal personality.'"¹⁵⁸ Nazi "jurisprudence" ordered purges, established concentration camps, wrote the Nuremberg Laws, and took away the civil rights of Jews.¹⁵⁹ In 1934, the Nazi regime created its special *Volksgesichtshof* (People's Court) to realize Hitler's ambition in *Mein Kampf*. In 1944, after the failure of the Stauffenberg plot to kill Hitler, Hitler gave a glimpse of his idea of justice: "This time the criminals will be given short shrift. No military tribunals. We'll haul them before the People's Court. No long speeches from them. The court will act with lightning speed. And two hours after the sentence it will be carried out. By hanging—without mercy."¹⁶⁰

The story was much the same in the Soviet Union. Hitler even once referred to Roland Freisler, the president of the *Volksgesichtshof*, as "our Vishinsky."¹⁶¹ Russia had an unhappy history of rigged tsarist political trials, but the Communist version of the practice, under Andrei Vishinsky's prosecution, reached unprecedented depths. Robert Tucker described the 1938 show trial as "a gigantic texture of fantasy into which bits and pieces of falsified real history have been woven along with outright fiction."¹⁶² As historian Adam Ulam put it,

The Bolshevik mind—and not only Stalin's, though his was the extreme case in point—was unable to distinguish between theoretical and factual reality, between the world of ideologically inspired dreams or suspicions and the world of hard facts. . . . They [Bukharin and Rykov] must have realized, as Stalin did during the purge trials, that the indictment was manufactured and the confessions exacted through pressure. But these were "details"; the essential fact was that the accused were of hostile class origin and hence *capable* of the crimes of which they were charged. The principle "innocent until proven guilty" is not so much alien as incomprehensible to someone nurtured on Communist dogmas and categories.

Does one have to *prove* that the *kulak* is an enemy of the Soviet power? . . . Freedom, wrote an English jurist, was secreted in the interstices of procedure. Stalinist terror bred upon Communist semantics: terms like class war, class justice, enemy of the people, encouraged a frame of mind in which individual guilt or innocence was the consequence not of facts but of political and social imperatives of the moment.¹⁴³

Reporting on the 1976 trial of four Czech rock musicians, Václav Havel wrote that the court system had become "a judiciary fully aware of how it is manipulated by power, but incapable of defying that power and so, ultimately, accepting the pitiful role of a subordinated employee of the 'masters.'" ¹⁴⁴ The contrast with real legalism is stark.

THE POLITICS OF WAR CRIMES TRIBUNALS

Five Propositions

Liberals need to ask why liberal states so often fail to pursue war crimes tribunals, and realists need to ask why war crimes trials happen at all.¹⁴⁵ Moving from theory to practicalities, there are at least five important recurring themes in the politics of war crimes tribunals.¹⁴⁶ First, it is only liberal states, with legalist beliefs, that support bona fide war crimes tribunals. That much, at least, is a minor triumph for idealists. Illiberal states, in contrast, are more cynical: they may support a show trial only as a way of pursuing a Carthaginian peace.

There are sharp limits to liberal idealism. As the second proposition, even liberal states tend not to push for a war crimes tribunal if so doing would put their own soldiers at risk. From the Napoleonic Wars to Bosnia, this is perhaps the single biggest impediment to the creation of robust institutions of international justice.

Third, there is a distinctly self-serving undertone to liberal campaigns for international justice. Even liberal states are more likely to be outraged by war crimes against their own citizens than war crimes against foreigners. The more a state has suffered, the more likely it is to be outraged.

Fourth, even liberal states are most likely to support a war crimes tribunal if public opinion is outraged by the war crimes in question. And they are less likely to support a war crimes tribunal if only elites are outraged.

Finally, nonstate pressure groups can be effective in pushing for a tribunal, by shaming liberal states into action and providing expertise. This

theme does not come up as much as the other four, for these nonstate groups only came of age after World War II. Taken together, these five propositions constitute a sketch of the politics behind the support, or abandonment, of war crimes tribunals.

FIRST PROPOSITION: THE LEGALISM OF LIBERAL STATES

Only liberal states have legalist domestic norms that have a clear impact on foreign policy. Illiberal states can do things the easy way: summary executions, show trials, or ignoring the issue of war crimes altogether. Liberal states find it much tougher to do so.¹⁴⁷ No doubt, there will be decision makers in liberal governments who scoff at the idea of war crimes trials. But liberal governments, even if they might otherwise prefer to either ignore war criminals or summarily execute them, tend to be bound by their own liberalism.

Ironically, this legalism can interfere with war crimes prosecutions. The recourse to law brings in a series of standards that can make it difficult to prosecute. Robert Lansing had legal objections to putting Wilhelm II on trial; some American officials were reluctant to include Nazi atrocities against German Jews in the Nuremberg charges; and it has been difficult to find adequate evidence to convict Arkan or Milosevic. Liberal diplomats often find themselves squirming at the challenge of exporting their domestic standards.

SECOND PROPOSITION: PROTECTING SOLDIERS

For want of a better term, call this the Scott O'Grady phenomenon. In June 1995, O'Grady, an American F-16 pilot, was shot down by the Bosnian Serb Army. While the White House still refused to send American troops to save Bosnian civilians, America went to extraordinary lengths to bring O'Grady home safe, sending Marine commandos into hostile Serb territory. O'Grady got a hero's welcome back in America, and his name is still fairly well known. What is striking is not just that even liberal states value the lives of their own more than those of foreigners, but how *radically* the lives of foreigners are discounted. There is no doubt that O'Grady's life is precious; the puzzle is why Bosnian lives were seen as so cheap.

To realists, this makes a kind of sense. Security is paramount, and if there is a trade-off between protecting soldiers and protecting the innocent, the innocent are liable to get the worst of it. Hans Morgenthau wrote, "[T]he principle of the defense of human rights cannot be consis-

tently applied in foreign policy because it can and it must come in conflict with other interests that may be more important than the defense of human rights in a particular instance."¹⁴⁸ Here, the protection of soldiers stands as a kind of rough proxy for some of these other interests.¹⁴⁹ Liberal universalism only goes so far. "Americans are basically isolationist," Clinton said in 1993, as American soldiers were dying in Somalia. "They understand at a basic gut level Henry Kissinger's vital-interest argument. Right now the average American doesn't see our interest threatened to the point where we should sacrifice one American life."¹⁵⁰

This proposition is also perhaps a way of explaining the absence of a call for a war crimes tribunal in the aftermath of the horrors committed by Mao, Stalin, or (until very recently) Pol Pot. Western complicity aside, what country was going to risk its soldiers to bring them to trial? This also explains why war crimes tribunals are almost invariably linked to a peace settlement. In war, the soldiers are already at risk. If a proposed tribunal puts them at greater risk, the tribunal idea is in serious trouble; if the proposal calls for putting them in harm's way in the first place, it has even slimmer chances.

This is not only the military's fault. True, militaries are often the center of opposition to war crimes prosecutions; as Samuel Huntington noted, "The military man normally opposes reckless aggressive, belligerent action."¹⁵¹ It is unexceptionable that officers and military commanders want to protect their troops; but civilian leaders also shrink from casualties in the pursuit of international justice, as shown repeatedly in Bosnia. Conversely, one of the reasons Nuremberg went off so well was that the Allies had already decided to occupy Germany even before settling on a war crimes policy. It was assumed that catching war criminals would not increase the danger to troops, and in the event even Göring and Frank surrendered quietly. Whenever the safety of one's own is at stake, considerations of justice for others melt away.

THIRD PROPOSITION: PUTTING CITIZENS BEFORE FOREIGNERS

When will states be outraged at war crimes? Countries are first and foremost outraged by wars waged against them. The playwright Eugène Ionesco has a character say, "If only it had happened somewhere else, in some other country, and we'd just read about it in the papers, one could discuss it quietly, examine the question from all points of view and come to an objective conclusion. . . . But when you're involved yourself, when you suddenly find yourself up against the brutal facts you can't help feel-

ing directly concerned—the shock is too violent for you to stay cool and detached."¹⁵² There is no doubting the sincerity of British outrage during the Blitz, or the depth of Russian feeling during Hitler's invasion—or, for that matter, German outrage during the fire-bombing of Dresden, or Japanese outrage at the atomic bombings of Hiroshima and Nagasaki. The fact that the names of O'Grady and Nurse Edith Cavell (a Briton executed by Germans in World War I) are widely known shows a great concern for even a handful of one's own citizens. Any state, liberal or otherwise, may be solicitous of its own citizens.

Even liberal states are primarily concerned with war crimes against their own. During World War I, eagerness for war crimes trials increased in proportion to the severity of suffering: Wilson was less interested in hanging the kaiser than Lloyd George was, and Belgium and France were, in turn, more enthusiastic about it than Britain. British officials came to worry more about prosecuting Turks who had mistreated British prisoners of war than Turks who had killed Armenians. Britain has shown more interest in prosecuting Libyans for the Lockerbie terrorist incident than in punishing Serbs for atrocities against Bosnian Muslims. A liberal state that has suffered in a war will be more likely to seek international justice than one that has not. And a liberal state will probably be more concerned with prosecuting war crimes against its own citizens than those against foreigners, even when the suffering of the foreigners far outweighs that of the citizens of that liberal state.

Liberal states do make universalistic arguments for the protection of those who are *not* their citizens. Liberal states are more apt to pursue prosecution for war crimes committed against their own citizens; but because they are universalists, liberal states may also be outraged by crimes against humanity committed against noncitizens.¹⁵³ Selfishness predominates, but not totally.

FOURTH PROPOSITION: OUTRAGE, MASS AND ELITE

Legalism alone is not enough; one also needs outrage. Any country, liberal or not, can be outraged by an enemy's war crimes. Such fury is a necessary but not sufficient condition for supporting a war crimes tribunal. Outrage alone could result in summary executions, as proposed by Prussia in 1815 and, on a vast scale, by the Soviet Union in 1943. Conversely, legalism without outrage could result in a dreary series of futile legal briefs.

Liberal domestic institutions can be conducive to voicing mass outrage for two reasons. First, they do not offer elites the option of using certain methods to silence public opinion. If Stalin had decided for some reason not to punish the Nazis, he would have had ways of stifling the outrage of average Russians that were not available to Churchill or Roosevelt. Nor can liberal states muzzle an inconvenient press. Second, by definition, democracies are responsive to public opinion.

Polls from World War II show that the British and American publics were bitterly punitive toward the Axis, and policymakers responded to that. As Kennan disapprovingly wrote, “[A] good deal of our trouble seems to have stemmed from the extent to which the executive has felt itself beholden to short-term trends of public opinion in the country and from what we might call the erratic and subjective nature of public reaction to foreign-policy questions.”¹⁵⁴ The dynamic can work in reverse, too: elite outrage can stoke mass outrage, through speeches and propaganda. The British election of 1918, in which Lloyd George’s government rode and stoked public anger at Wilhelm II, is a fine example of both. One could equally well explain British enthusiasm for war crimes trials for Wilhelm II and other Germans by pointing to the British public’s anger, or to that of Lloyd George and Curzon.

This is not to say that liberal diplomats will not sometimes try to stand against their public’s wishes. In France in 1815, Castlereagh, Britain’s foreign secretary, did not mind doing business with Bonapartists whom the English public could not stomach. In such situations, one would expect the elites to win out in the short term. Elites are simply closer to policy decisions; mass opinion may not influence them fast enough. A determined leader can act now and worry about public opinion later. This is less likely in liberal states, where elites know that the price of flouting public opinion may yet be paid on election day, but still not impossible.

In the long term, such elites are taking a real risk. Wilson preferred the League of Nations to punitive war crimes trials, although many Americans disagreed. Today, Madeleine Albright’s push for a tougher war crimes policy may manage to win out, but it always risks being swamped in bureaucratic infighting or overruled—by the Pentagon, Bill Clinton, or an American electorate with no stomach for casualties. The best guarantee of an idealistic policy is consistent idealistic pressure from the electorate.

FIFTH PROPOSITION: NONSTATE ACTORS

Some idealists have long hoped to tame a world of Realpolitik by relying on international public opinion. In 1870, Gladstone wrote:

Certain it is that a new law of nations is gradually taking hold of the mind, and coming to sway the practice, of the world; a law which recognises independence, which frowns upon aggression, which favours the pacific, not the bloody settlement of disputes, which aims at permanent and not temporary adjustments; above all, which recognises, as a tribunal of paramount authority, the general judgment of civilised mankind.¹⁵⁵

It was on that kind of foundation that the League of Nations briefly rested, and it is that hope that inspires human rights groups to push for war crimes tribunals.

Since the 1960s, international human rights groups have grown stronger. In the debates over ex-Yugoslavia and Rwanda, nongovernmental organizations (NGOs) have been a noticeable voice—although states are still by far the most powerful international actors. The Hague tribunal has taken advantage of NGO resources: forensic experts from Physicians for Human Rights, documentation from Human Rights Watch, funding for the commission of experts by the Soros Foundation, and so on.¹⁵⁶ But in the end, these NGOs can claim credit, or bear responsibility, for the establishment of the tribunal mostly insofar as they were able to persuade the liberal members of the Security Council. The pleas of Human Rights Watch presumably had little impact in Beijing, but they were a source of embarrassment in Washington.¹⁵⁷

Pressure from NGOs is not a necessary condition for the establishment of a war crimes tribunal. The courts at Leipzig, Constantinople, Nuremberg, and Tokyo were set up without the benefit of today’s human rights NGOs. But now that they do exist, these NGOs can provide expertise and raise the domestic costs in a liberal country for ignoring foreign atrocities.

This book is primarily about the politics of international justice. For the sake of truth in advertising, it is *not* about three closely related topics—not for any lack of interest, but in the hopes of focusing an already large book.

First, this book is not about domestic transitions to democracy. That is why Bosnia features here and South Africa does not. In democratizations, there is some consensus on what the national community is; not so in wars. More important, democratizations usually involve an amnesty for the ancien régime as a negotiated price of a peaceful transition.¹⁵⁸ In contrast, all of my cases here involve defeat in war: an opportunity for the sheer imposition of justice that is exceedingly rare in democratization. Students of democratization tend to view Latin America and Eastern Europe as having distinct dynamics in confronting authoritarian human rights violations; international justice has its own dynamics, too.

Second, this book is not primarily about international institutions. It is true that institutions, domestic or international, are often the repositories of ideas.¹⁵⁹ Realists and institutionalists both agree that these institutions are the creation of a powerful state—a hegemon, in political scientist Robert Keohane's formulation.¹⁶⁰ Realists tend to believe that these institutions remain tools of states; neoliberal institutionalists argue that "sticky" institutions can linger long after the hegemon has faded from the scene, playing a powerful role even without backing from a state.¹⁶¹ This book does not address this debate because my case studies tend to come at the very moments when international institutions—the Holy Alliance, the League of Nations, the International Court of Justice, the UN—are being created. Nuremberg was part and parcel of a post-World War II network of institutions that included the UN and the Bretton Woods organizations,¹⁶² and Leipzig was linked to the creation of the League of Nations.

The major exceptions are the twin UN tribunals for ex-Yugoslavia and Rwanda, and the nascent permanent ICC. The Hague tribunal has stigmatized Karadzic and Milosevic as indicted war criminals, showing the power of international institutions. The Hague has shown surprising independence and durability, despite fitful political support. Although they have almost certainly never read Keohane, the tribunal's staff sound like neoliberal institutionalists. "It's a sort of Frankenstein," said an official in the prosecutor's office, neatly summing up much of the neoliberal institutionalist argument. "You create the monster and then you can't control it." Did Goldstone, the first chief prosecutor, think that the Security Council had realized in 1993, when it first set up the tribunal, that the court would indict Karadzic and Mladic? "Probably not," says Goldstone. "But that's what happens when you create an institution. They really take on a life of their own."

Finally, this book is not about international law. There has been a great deal written about international criminal justice, but this book is mostly interested in the politics that underpin (and undermine) international law.

To reiterate, my argument is that the pursuit of war criminals can only be explained with reference to domestic political norms in liberal states. Authoritarian and totalitarian powers may seek to punish defeated foes, or they may choose to do business with them. When they have chosen punishment, they did not use legal methods; rather, they took arbitrary steps like shooting their enemies, or at best putting on an obviously rigged show trial. And in one respect, liberal and illiberal states are similar: they have tended not to put their own soldiers at risk for international justice.

But unlike illiberal states, liberal states are often constrained by their domestic norms. Liberal states commonly see their enemies not as mere foes, but as war criminals deserving legal punishment. Liberal states are unlikely to shoot war criminals, although they can be tempted by that prospect. Rather, even when liberal decision makers are painfully aware of the risks of acquittal, delay, and embarrassment posed by a war crimes tribunal, domestic norms push them to apply due process beyond their own borders. Liberal states are most likely to seek such legalistic punishment when it is their own citizens who have suffered war crimes, but they also sometimes pursue war criminals for atrocities against foreigners. So in the crucial question of how to treat a defeated foe, liberal states are profoundly different from illiberal ones.

The bulk of this book will be spent developing these themes across five historical chapters: the aftermath of the Napoleonic Wars; World War I; the Armenian genocide; World War II and the Holocaust; and the wars of Yugoslavia's disintegration. This book also considers three other cases throughout the course of the narrative: the Tokyo trials for Japanese war criminals after World War II; the abortive American pursuit of Iraqi Ba'athists during the Persian Gulf crisis; and the UN war crimes tribunal, in Arusha, Tanzania, for the 1994 Rwandan genocide. In an epilogue, I will consider, more speculatively, whether war crimes tribunals seem to be effective tools for reconciliation in shattered societies.

In their closing arguments in Tihomir Blaskic's trial, over two years later, the prosecutors blamed Croatia's president, Franjo Tudjman, for the "ethnic cleansing" of the Lasva Valley. For its part, Croatia, fearing an indictment of Tudjman, was refusing to turn over subpoenaed docu-

ments that might be incriminating, and dragging its heels on the extradition of two other war crimes suspects. The Hague formally complained to the Security Council, while Tudjman himself publicly denounced the prosecutors as "dilettantes." Justice was still grinding slow.

Tudjman died of cancer before the trial ended. Blaskic finally heard the verdict against him on March 3, 2000. Convicted on nineteen charges of command responsibility and individual responsibility for the ravaging of the Lasva Valley and Ahmici, Blaskic was sentenced to forty-five years imprisonment—the stiffest sentence handed down by the tribunal to date, for the highest-ranked military officer to be convicted. In his summary of the court's findings, Judge Claude Jorda of France made a point of blaming Tudjman's Croatia for "pitting the Muslims and Croats of central Bosnia against each other." The verdict was received angrily by Bosnian Croat leader Ante Jelavic, the Croat member of Bosnia's three-person presidency, who denounced it as a sentence "against Croatian people in Bosnia as a whole." Ivica Racan, the prime minister of the more moderate government that had emerged in Croatia after Tudjman's death, called for an appeal of "a really severe sentence." But Bosnian officials applauded the verdict, calling it a step towards reconciliation.

For Blaskic, justice will now be measured in the creeping minutes of those forty-five years. For the liberal states that brought Blaskic to the dock, justice is measured in the ability of such trials to bring a sense of fairness and dignity to Bosnians, and maybe even a sense of order to a violent world.

St. Helena

ONE HUNDRED AND FOUR YEARS after the end of the Napoleonic Wars, in 1919, the British government found itself thinking through the fate of Wilhelm II by reconsidering what it had done to Napoleon Bonaparte. The attorney general, Gordon Hewart, commissioned a lengthy scholarly report on the British decision to detain Napoleon at St. Helena.¹ In meetings of the Imperial War Cabinet and in inter-Allied conferences, the fate of Napoleon came up repeatedly.²

What had changed since 1815? In most regards, the way the Allies had dealt with the Bonapartists was in line with realism. Enemies were treated as enemies, no more and no less. Wellington did not see his opponents as war criminals. Nor was he much concerned with legal niceties like trials. British leaders did not even discuss putting Napoleon before an international tribunal before whisking him off to Elba and to St. Helena.

This is a far cry from Nuremberg. The great powers knew they wanted to dispose of Napoleon, and they were willing to use extralegal methods to do so. Napoleon did not have the benefit of anything like the stern insistence of Georges Clemenceau or Henry Stimson or (maybe) Madeleine Albright that enemy leaders were also war criminals who had to be put on *trial*, not merely gotten rid of as undesirables. In short, 1815 largely saw the exercise of naked state power. In that sense, the aftermath of the Hundred Days makes the aftermaths of the Armenian genocide, World War I, and World War II all the more striking. They did not bother with a trial for Napoleon in 1815; and yet they were obsessed with trials a century later.

The aftermath of the Napoleonic Wars is a favorite case for realists. In an implicit rebuke to harsher and more moralistic peaces, Henry Kissinger writes approvingly of the magnanimous (if not particularly effective) decision to send Napoleon to Elba: "The early nineteenth century was not yet a period which measured the extent of its triumph by the degree of personal retribution exacted."³ For Kissinger, the great virtue of the era of the Congress of Vienna is that it avoided self-righteous punishment for France: "It is to the credit of the statesmen who negotiated the settlement of the post-Napoleonic period that they resisted the temp-

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G.J.B.
Princeton
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* Notes *

NOTE ON SOURCES

This book is based on archival records and memoirs and, for the ex-Yugoslavia sections, on an extensive series of interviews with knowledgeable sources, including government officials at the highest levels short of head of state. I interviewed figures including Richard Goldstone, Louise Arbour, Antonio Cassese, Anthony Lake, Warren Christopher, John Shattuck, Dick Morris, Graham Blewitt, Peter Galbraith, Warren Zimmermann, Muhamed Sacirbey, and over three hundred others over the course of five years. I relied on sources in the American, British, French, Bosnian, Croatian, and Serbian governments, in the UN (including the Hague tribunal), NATO, the OHR in Bosnia, human rights groups, and elsewhere. Many sources were interviewed several times, including Goldstone and Arbour. I went to Bosnia, Serbia, and Croatia for research, as well as The Hague and Western capitals; some of the most thought-provoking interviews were conversations with ordinary Bosnians, Croatians, Serbians, and Kosovars, and with Western soldiers and aid workers in ex-Yugoslavia. The people listed above spoke on the record at least some of the time. But many of the interviews, including those with top-ranking officials, were conducted "on background"—I use the information, but protect the identity of the source. There are many useful facts I was told off the record and are therefore not printed here.

Some of the reporting was originally done for *The Economist*, as well as *The Washington Post* and *The New Republic*. I have been greatly helped by other reporters, whose coverage (often under dangerous conditions) and goodwill were invaluable. When I'm relying on another reporter, I footnote. All other quotations without footnotes are from my own reporting, except for readily available public statements by major leaders.

Documents are cited as follows: from the British Public Records Office, in Kew, London, as FO (Foreign Office papers) or CAB (Cabinet papers); from America's National Archives II, in College Park, Maryland, by R.G. (record group); from France's Archives diplomatiques, in the Quai d'Orsay, Paris, by série and sous-série. Unless otherwise noted, Quai d'Orsay records are from série Europe 1918–1940. *FRUS* refers to the official *Foreign Relations of the United States* volumes. Henry Stimson's diaries, unpublished, are at Yale University. Translations from French sources are my own unless otherwise noted.

A small number of contemporary State Department documents declassified under the Freedom of Information Act are available on-line at <http://foia.state.gov/>. Until vastly more records are declassified, no account of policy toward ex-Yugoslavia—including this book—can be seen as definitive.

CHAPTER ONE INTRODUCTION

1. See Marcus Tanner, *Croatia: A Nation Forged in War* (New Haven: Yale University Press, 1997), pp. 289–90, and the Hague tribunal's second amended indictment: *Prosecutor of the Tribunal against Tihomir Blaskic*, IT-95–14-T, 25 April 1997. See also the

original indictment: *Prosecutor of the Tribunal against Kordic et al.*, IT-95-14-T, in *International Criminal Tribunal for the former Yugoslavia Yearbook 1995* (New York: UN, 1995), pp. 229-39.

2. ICTY *Bulletin*, nos. 5-6, 24 April 1996. A second courtroom was built years later, and then a third.

3. Unbeknownst to most reporters covering the tribunal—myself most definitely included—the prosecutor's office had been issuing secret indictments.

4. One academic mistakenly writes, "History's first international criminal court was the Nuremberg Tribunal," and in his book's subtitle forgets the Tokyo trials (Michael Scharf, *Balkan Justice: The Story behind the First International War Crimes Trial since Nuremberg* [Durham, N.C.: Carolina Academic Press, 1997], p. 3).

5. In two of these cases, the Napoleonic Wars and the Gulf War, in the end the victors chose not to hold trials; these cases are included as counter-examples.

6. Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle, 1970), p. 24.

7. *Ibid.*, p. 18.

8. For examples of Indian legalism, see B. N. Mehrih, *War Crimes and Genocide: The Trial of Pakistani War Criminals* (Delhi: Oriental Publishers, 1972), and S. C. Chaturvedi, "The Proposed Trial of Pakistani War Criminals," *Indian Journal of International Law*, vol. 11, no. 4 (October 1971), pp. 645-54. For an English-language sketch of the politics, see, variously, "Bangla Govt. Decides on a Genocide Probe," *Hindustan Times*, 2 January 1972, p. 1; "War Crimes Panel Demand" and "JS for Handing over War Criminals to Bangla," *Hindustan Times*, 3 January 1972, p. 6; L. M. Singhvi, "Trial at the Bar of Humanity," *Hindustan Times Sunday World*, 9 January 1972, pp. 11-12; "Mujib Rejects Links with Pak: Genocide Trial Demanded under UN Aegis," *Hindustan Times*, 11 January 1972, p. 1; "No Immunity to War Criminals, India Tells UN," *Hindustan Times*, 18 January 1972, pp. 1, 10; "POWs' Trial Will Do Harm, Says Bhutto," *Hindustan Times*, 5 May 1972, p. 1; "Dacca Defers Trials Till after Talks," *Hindustan Times*, 27 May 1972, p. 1.

9. Telford Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Knopf, 1992), p. 641.

10. Paul Lewis, "Top 5 on U.N. Council Back Call for Inquiry on Iraqi War Crimes," *New York Times*, 21 October 1990, p. A12; Marc Fisher, "Germany, Passive in Gulf War, Takes Initiative on Refugees," *Washington Post*, 17 April 1991, p. A23; and Adam Roberts, "The Laws of War in the 1990-91 Gulf Conflict," *International Security*, vol. 18, no. 3 (winter 1993-94), pp. 174-75.

11. See Martin Indyk speech, Washington Institute for Near East Policy, 18 May 1993, pp. 14-15. On Anfal, see Human Rights Watch-Middle East, *Iraq's Crime of Genocide: The Anfal Campaign against the Kurds* (New Haven: Yale University Press, 1995); Jonathan C. Randal, *After Such Knowledge, What Forgiveness?* (New York: Farrar Straus Giroux, 1997); and Middle East Watch and Physicians for Human Rights, *The Anfal Campaign in Iraqi Kurdistan: The Destruction of Koreme* (New York: Human Rights Watch, 1993).

12. This book owes its greatest debt to a work of political theory, not international relations, which emphasizes moral questions over empirical ones: Judith N. Shklar's magnificent *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1986).

13. Closely related is the question of why states continue to support a war crimes tribunal after its establishment. The dynamics do not seem to change much, although once a tribunal is up and running, some states find it embarrassing to abolish it.

14. It is important for political theory, too. Shklar wrote "of the great puzzles raised by the trials of war criminals. How should one assign responsibility for acts committed by public agents, not on their own initiative, but as members of governmental organizations? Who can try such people? These are not minor issues in contemporary political theory" ("Hannah Arendt as Pariah," in *Political Thought and Political Thinkers* [Chicago: University of Chicago Press, 1998], Stanley Hoffmann, ed., p. 372).

15. In Henry Morgenthau Jr., *Morgenthau Diary—Germany* (Washington, D.C.: U.S. Government Printing Office [GPO], 1967), vol. 2, 18 May 1945, p. 1508.

16. See Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York: Knopf, 1946), p. 10.

17. Martin Gilbert, *Churchill: A Life* (London: Minerva, 1992), p. 677; Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932-1945* (New York: Oxford University Press, 1995), p. 472.

18. War crimes trials were included in the Treaty of Versailles, the preeminent example of a harsh peace. But the American advocates of war crimes trials at the end of World War II were also against the many punitive measures of the Morgenthau Plan, which included summary executions of war criminals.

19. In Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton: Princeton University Press, 1971), p. 3. In September 1945, Tojo had made much the same point more emphatically. "I should like not to be judged by a conqueror's court," he said, and then shot himself. He survived (Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* [New York: William Morrow, 1987], p. 44).

20. G. M. Gilbert, *Nuremberg Diary* (New York: Farrar Straus, 1947), p. 4. Göring later said, "As far as the trial is concerned, it's just a cut-and-dried political affair, and I'm prepared for the consequences. I have no doubt that the press will play a bigger part in the decision than the judges. —And I'm sure that the Russian and French judges, at least, already have their instructions. I can answer for anything I've done, and can't answer for anything I haven't done. But the victors are the judges. . . . I know what's in store for me" (pp. 12-13).

21. *Série Europe 1918-1929, sous-série Allemagne*, vol. 28, Wilhelm II to Hindenburg, 5 April 1921. For a similar complaint by Turks, see FO 371/6505/E13968, Turkish prisoners (Ali Ihsan, Tefik, Sabit, Djemal, Ibrahim Hakki, Hilmi, etc.) to Curzon, 1 September 1921.

22. "The World Tries Again: Making Rules for War," *The Economist*, 11 March 1995, p. 23.

23. Richard Rhodes, "The General and World War III," *New Yorker*, 19 June 1995, p. 48.

24. See Kenneth Anderson, "Nuremberg Sensibility: Telford Taylor's Memoir of the Nuremberg Trials," *Harvard Human Rights Journal*, vol. 7 (spring 1994), pp. 281-93.

25. Immanuel Kant, "To Perpetual Peace: A Philosophical Sketch," in *Perpetual Peace and Other Essays* (Indianapolis: Hackett, 1983), Ted Humphrey, trans., p. 110. See also Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977), p. 89.

26. Plato, *Republic* (New York: Basic Books, 1968), Alan Bloom, trans., book 1, 339a, p. 16. Thrasymachus is talking about justice internal to a regime, so his skepticism is even more radical than that of most realists.

27. On realists and liberals, see Michael W. Doyle, *Ways of War and Peace: Realism, Liberalism, and Socialism* (New York: W. W. Norton, 1997).

28. Raymond Aron, *De Gaulle, Israel and the Jews* (London: André Deutsch, 1969), John Sturrock, trans., p. 27.

29. Thucydides, *Peloponnesian War*, p. 221.

30. As Robert Keohane, a thoughtful critic of realism's limitations, wrote, "From a Realist perspective, it is remarkable how moralistic governments often are in discussing their obligations and those of others" (*After Hegemony: Cooperation and Discord in the World Political Economy* [Princeton: Princeton University Press, 1984], p. 126).

31. E. H. Carr, *The Twenty Years' Crisis, 1919–1939* (1939; reprint, New York: Harper and Row, 1964), pp. 64, 148.

32. Henry Kissinger, *Diplomacy* (New York: Simon and Schuster, 1994). Unsurprisingly, Kissinger has no stomach for pursuing war criminals in Bosnia ("Limits to What the U.S. Can Do in Bosnia," *Washington Post*, 22 September 1997, p. A19).

33. A.J.P. Taylor, *The Struggle for Mastery in Europe, 1848–1918* (Oxford: Oxford University Press, 1971), p. 574.

34. A.J.P. Taylor, *The Origins of the Second World War* (New York: Atheneum, 1961), p. xxviii.

35. *Ibid.*, p. xiii.

36. A.J.P. Taylor, *Bismarck: The Man and Statesman* (New York: Knopf, 1955), p. 79.

37. George F. Kennan, *American Diplomacy* (Chicago: University of Chicago Press, 1984), p. 95. See also Richard Ullman, "The U.S. and the World: An Interview with George Kennan," *New York Review of Books*, 12 August 1999, pp. 4, 6.

38. Morgenthau—no relation to Henry Morgenthau Sr. or Jr.—was not totally allergic to legalism. He considered it "inevitable that certain rules of law should govern these [inter-state] relations" (Hans J. Morgenthau, *Politics among Nations: The Struggle for Power and Peace* [New York: Knopf, 1964], 3rd ed., p. 276), offered moral judgments about wartime justice (pp. 233–59), and even specifically considered international courts (pp. 290–93).

39. In Robert Jackson, introduction to Whitney R. Harris, *Tyranny on Trial: The Evidence at Nuremberg* (Dallas: Southern Methodist University Press, 1954), p. xxxiii. See also Morgenthau, *Politics among Nations*, p. 237.

40. Henry A. Kissinger, *A World Restored: Metternich, Castlereagh, and the Problems of Peace 1812–1822* (Boston: Houghton Mifflin, 1973), p. 138.

41. *Ibid.*, p. 140.

42. Kenneth N. Waltz, *Theory of International Politics* (Lexington, Mass.: Addison-Wesley, 1979), p. 111.

43. *Ibid.*, p. 93ff.

44. *Ibid.*, pp. 112–13.

45. John Mearsheimer, "The False Promise of International Institutions," *International Security*, vol. 19, no. 3 (winter 1994–95), p. 7.

46. George F. Kennan, *Memoirs, 1925–1950* (New York: Pantheon, 1983), p. 261.

47. The international structure is often indeterminate; structural explanations, like Waltz's, cannot account for the variation in outcomes (and cannot dismiss that variation as unimportant unless realists are prepared to argue that events like the Hundred Days and Nuremberg are unimportant). True, Waltz aims at a theory of international relations, not of specific foreign policies. But this often does not stop neorealists from trying to explain foreign policy decisions, as Stephen Walt does with great skill in *The Origins of Alliances* (Ithaca, N.Y.: Cornell University Press, 1987).

48. Functional explanations therefore do not suffice.

49. Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (New York: Columbia University Press, 1997), p. 355. He ultimately favors trials, but scorns the fact that the UN tribunal will not use the death penalty.

50. See Shklar, *Legalism*, p. 167, and "A Life of Learning," in Bernard Yack, ed., *Liberalism without Illusions: Essays on Political Theory and the Political Vision of Judith N. Shklar* (Chicago: University of Chicago Press, 1996), p. 274.

51. Robert Penn Warren, *All the King's Men* (New York: Harvest, 1996), p. 136.

52. Arendt to Karl Jaspers, 17 August 1946, in their *Correspondence, 1926–1969* (New York: Harcourt Brace, 1992), Lotte Kohler and Hans Saner, eds., p. 54. See also Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon, 1998), pp. 121–22.

53. CAB 66/25, Eden war criminals memorandum, W.P. (42) 264, 22 June 1942.

54. FO 371/4173/68097, Calthorpe to Balfour, 20 April 1919.

55. CAB 66/25, Eden war criminals memorandum, W.P. (42) 264, 22 June 1942.

56. *Trial of the Major War Criminals before the International Military Tribunal* (Nuremberg: Secretariat of the Tribunal, 1947), vol. 1 (hereafter *IMT*), pp. 139–40, 146; Taylor, *Anatomy*, pp. 91–94. Jackson said that public opinion would not tolerate letting off Krupp, "the very symbol of aggressive warfare"; but he had no choice (FO 371/50999/U9574, Nuremberg chief prosecutors meeting, 10:30 A.M., 9 November 1945).

57. Philip R. Piccigallo, *The Japanese on Trial: Allied War Crimes Operations in the East, 1945–1951* (Austin: University of Texas Press, 1979), p. 95.

58. "Tadic Case: The Verdict," ICTY press release, CC/PIO/190-E, 7 May 1997. For an analysis, see Roy Gutman, "Confusion in War Crimes Cases," *Newsday*, 13 May 1997, p. A16. The ruling was overturned on appeal in July 1999, with a finding that the war had been international.

59. Why doesn't the United States assassinate foreign leaders? Why do Nazi war crimes prosecutions continue to this day, when Germany is thoroughly rehabilitated?

60. See P. J. Marshall, ed., *The Writings and Speeches of Edmund Burke: India: The Launching of the Hastings Impeachment* (Oxford: Clarendon Press, 1991), vol. 6.

61. Howard M. Sachar, *A History of Israel: From the Rise of Zionism to Our Time* (New York: Knopf, 1989), vol. 1, pp. 536, 595.

62. *United States v. William L. Calley, Jr.*, 22 U.S.C.M.A. 534 (1973). In 1962, Neil Sheehan, a war reporter in Vietnam, wondered if America's leaders should be "placed in the dock and made to stand trial for their lives" for Vietnam. (William Prochnau, *Once Upon a Distant War* [New York: Vintage, 1996], p. 282). It was Sheehan's concern about war crimes that led to the publication of the Pentagon Papers in *The New York Times*. Sheehan had written a huge review of books alleging war crimes in Vietnam ("Should We Have War Crime Trials?" *New York Times Book Review*, 28 March 1971). Daniel Ellsberg, a young Pentagon official who had turned against the war, had also

become obsessed with war crimes. He had tried to leak the Pentagon Papers to Senator William Fulbright of Arkansas, but Fulbright refused to have them. When Ellsberg saw Sheehan's article on war crimes, he decided to leak the Pentagon Papers to Sheehan (David Halberstam, *The Powers That Be* [New York: Dell, 1979], pp. 789–92).

63. Ze'ev Schiff and Ehud Ya'ari, *Israel's Lebanon War* (New York: Simon and Schuster, 1984), Ina Friedman, trans., pp. 281–85. A liberal might point out that these are both instances of democracies engaged in unpopular wars; that may say something about how and when countries will come to hold genuine convictions about norms, but such second-image arguments are beyond the scope of neorealism.

64. Raymond Aron, *Peace and War: A Theory of International Relations* (New York: Praeger, 1967), Richard Howard and Annette Baker Fox, trans., p. 114.

65. Ingo Müller, *Hitler's Justice: The Courts of the Third Reich* (Cambridge, Mass.: Harvard University Press, 1994), Deborah Lucas Schneider, trans., p. 52.

66. See Robert C. Tucker and Stephen F. Cohen, eds., *The Great Purge Trial* (New York: Grosset and Dunlap, 1965), especially p. ix.

67. FO 371/39010/C17547/14/62, Somervell memorandum to Churchill, "Germany: Trial of Hitler and His Colleagues," 15 December 1944.

68. Max Weber, *Economy and Society* (Berkeley: University of California Press, 1978), Guenther Roth and Claus Wittich, eds., vol. 2, p. 647. Italics added.

69. Adam B. Ulam, *Stalin: The Man and His Era* (Boston: Beacon Press, 1989), p. 619n.5.

70. Waltz, *Theory of International Politics*, pp. 76–78, 93–101, 102–23, 127–28.

71. Plato, *Republic*, 556e–567b, pp. 245–46.

72. See Stanley Hoffmann, "Rousseau on War and Peace," in his *Janus and Minerva: Essays in the Theory and Practice of International Politics* (Boulder, Colo.: Westview Press, 1987).

73. Vladimir I. Lenin, *Imperialism: The Highest Stage of Capitalism* (New York: International Publishers, 1939); J. A. Hobson, *Imperialism: A Study* (London: George Allen and Unwin, 1902); Joseph A. Schumpeter, *Imperialism and Social Classes* (New York: Kelly, 1951), Heinz Norden, trans.

74. Kant, *Perpetual Peace*.

75. Samuel Huntington, *American Politics: The Promise of Disharmony* (Cambridge, Mass.: Harvard University Press, 1981), p. 237. Huntington argues that American foreign-policy institutions "have existed in uneasy and fundamentally incompatible coexistence with the values of the prevailing ideology" (p. 238). See also Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979), p. 62, and Mark Danner, *The Massacre at El Mozote* (New York: Vintage, 1994), pp. 9–10.

76. Samuel P. Huntington, *The Soldier and the State: The Theory and Politics of Civil-Military Relations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1985), p. 457; see also pp. 143–57.

77. Aaron L. Friedberg, *In the Shadow of the Garrison State: America's Anti-Statism and Its Cold War Grand Strategy* (Princeton: Princeton University Press, 2000).

78. David Lumsdaine, *Moral Vision in International Politics: The Foreign Aid Regime, 1949–1989* (Princeton: Princeton University Press, 1993), p. 22.

79. *Ibid.*, pp. 23–24.

80. Andrew Moravcsik, "A Liberal Theory of International Politics," *International Organization*, vol. 51, no. 4 (fall 1997), p. 518.

81. Huntington, *Soldier and the State*, p. 150. See also, for instance, Helen Milner, "International Theories of Cooperation among Nations: Strengths and Weaknesses," *World Politics*, vol. 44, no. 3 (April 1992), pp. 466–96; Robert O. Keohane, "International Institutions: Two Approaches," in his *International Institutions and State Power: Essays in International Relations Theory* (Boulder, Colo.: Westview, 1989); and Peter B. Evans et al., eds., *Double-Edged Diplomacy: International Bargaining and Domestic Politics* (Berkeley: University of California Press, 1993).

82. The literature is large, and growing. See Kant, *Perpetual Peace*, Michael W. Doyle, "Liberalism in World Politics," *American Political Science Review*, vol. 80, no. 4 (December 1986), pp. 1151–69; Doyle, "Kant, Liberal Legacies, and Foreign Affairs, part 1," *Philosophy and Public Affairs*, vol. 12, no. 3 (summer 1983), pp. 205–35; Doyle, "Kant, Liberal Legacies, and Foreign Affairs, part 2," *Philosophy and Public Affairs*, vol. 12, no. 4 (fall 1983), pp. 325–53; Bruce Russett, *Crasping the Democratic Peace: Principles for a Post-Cold War World* (Princeton: Princeton University Press, 1993); John M. Owen IV, *Liberal Peace, Liberal War: American Politics and International Security* (Ithaca, N.Y.: Cornell University Press, 1997), and "How Liberalism Produces Democratic Peace," *International Security*, vol. 19, no. 2 (fall 1994), pp. 87–125; Bruce Russett and Zeev Maoz, "Normative and Structural Causes of Democratic Peace, 1946–1986," *American Political Science Review*, vol. 87, no. 3 (September 1993), pp. 624–38.

83. Like Owen, I argue that it is liberalism, not democracy, that is the causal factor. (Owen, *Liberal Peace, Liberal War*, pp. 15–17.)

84. It is for this reason that the history of international war crimes tribunals is bound up in the history of the two preeminent liberal states, Britain in the nineteenth century and America in the twentieth century.

85. Shklar, *Legalism*, p. 144.

86. *The Paquete Habana*, Supreme Court of the United States, 1900, 175 U.S. 677, 20 S.Ct. 290.

87. 28 U.S.C. §1350. For more on the Alien Tort Statute, see the critical decisions in *Filartiga v. Pena-Irala*, United States Court of Appeals, Second Circuit, 1980, 630 F.2d 876; *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984); and *Forti v. Suarez-Mason*, United States District Court, Northern District California, 1987, 672 F. Supp. 1531. See also Anne-Marie Burley, "The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor," *American Journal of International Law*, vol. 83, no. 3 (July 1989), pp. 461–93.

88. "Thugs Brought to Book: The Law," *The Economist*, 22 March 1997, pp. 31–32.

89. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1992), pp. 319–21.

90. CAB 23/43, Imperial War Cabinet 39, 28 November 1918, 11:45 A.M., p. 4. Italics added.

91. *Public Papers of Woodrow Wilson: War and Peace: Presidential Messages, Addresses, and Public Papers 1917–1924* (New York: Harper, 1925), Ray Stannard Baker and William E. Dodd, eds., vol. 5, p. 11.

92. Jackson to Truman, 6 June 1945, in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials: London, 1945* (Washington, D.C.: U.S. Department of State, 1947), pp. 48–50. Italics added.

93. Kennan, *American Diplomacy*, p. 95. See also Kissinger, *World Restored*, pp. 328–29.
94. For a standard data set, see J. David Singer and Melvin Small, *Correlates of War Project: International and Civil War Data, 1816–1992* (Ann Arbor, Mich.: Inter-University Consortium for Political and Social Research, April 1994), ICPSR 9905.
95. Eugene Davidson, *The Trial of the Germans: An Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg* (1966, reprint, Columbia: University of Missouri Press, 1997), p. 11.
96. Brackman, *The Other Nuremberg*, p. 52.
97. Soviet dissent, *IMT*, pp. 342–64.
98. The cynicism was not complete. Nikitchenko did not object to lighter sentences than death for Walter Funk, Karl Dönitz, Erich Räder, Baldur von Schirach, Albert Speer, and Constantin von Neurath.
99. Shklar, *Legalism*, p. 1.
100. For classic statements, see Max Weber, “The Social Psychology of the World Religions,” in *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1958), H. H. Gerth and C. Wright Mills, eds. and trans., p. 280; John Maynard Keynes, *The General Theory of Employment, Interest and Money* (London: Macmillan, 1936), p. 383; and Isaiah Berlin, “Two Concepts of Liberty,” in his *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), pp. 118–19. More recently, see Judith Goldstein, *Ideas, Interests, and American Trade Policy* (Ithaca, N.Y.: Cornell University Press, 1993); Doyle, *Ways of War and Peace*, p. 21; Jack Snyder, *Myths of Empire: Domestic Politics and International Ambition* (Ithaca, N.Y.: Cornell University Press, 1991), pp. 1–10, 31–60; Peter A. Hall, ed., *The Political Power of Economic Ideas: Keynesianism across Nations* (Princeton: Princeton University Press, 1989), p. 361; Judith Goldstein and Robert O. Keohane, “Ideas and Foreign Policy: An Analytical Framework,” in Goldstein and Keohane, eds., *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Ithaca, N.Y.: Cornell University Press, 1993), pp. 29–30; Kathryn Sikkink, *Ideas and Institutions: Developmentalism in Brazil and Argentina* (Ithaca, N.Y.: Cornell University Press, 1991); Kathleen R. McNamara, *The Currency of Ideas: Monetary Politics in the European Union* (Ithaca, N.Y.: Cornell University Press, 1998); Sheri Berman, *The Social Democratic Moment: Ideas and Politics in the Making of Interwar Europe* (Cambridge, Mass.: Harvard University Press, 1998); Thomas Risse-Kappen, “Ideas Do Not Float Freely: Transnational Coalitions, Domestic Structures, and the End of the Cold War,” *International Organization*, vol. 48 (spring 1994), pp. 185–214; Owen, *Liberal Peace, Liberal War*; and Daniel Jonah Goldhagen, *Hitler’s Willing Executioners: Ordinary Germans and the Holocaust* (New York: Knopf, 1996), pp. 9, 21. For a social constructivist perspective, emphasizing the power of culture, see Peter J. Katzenstein, ed., *The Culture of National Security: Norms and Identity in World Politics* (New York: Columbia University Press, 1996); Elizabeth Kier, *Imagining War: French and British Military Doctrine between the Wars* (Princeton: Princeton University Press, 1997); Alastair Iain Johnston, *Cultural Realism: Strategic Culture and Grand Strategy in Chinese History* (Princeton: Princeton University Press, 1995); and Alexander Wendt, “Anarchy Is What States Make of It: The Social Construction of Power Politics,” *International Organization*, vol. 46, no. 2 (spring 1992), pp. 391–425, as well as his “The Agent-Structure Problem in International Relations Theory,” *International Organization*, vol. 41, no. 3 (summer 1987), pp. 335–70, and “Constructing International Politics,” *International Security*, vol. 20, no. 1 (summer 1995), p. 73. On

the power of human rights ideals, see Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998), p. 119, and Martha Finnemore, *National Interests in International Society* (Ithaca, N.Y.: Cornell University Press, 1996), p. 87.

101. For a typical expression of frustration, from a political scientist who believes that ideas are important explanatory variables, see Robert A. Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1971), pp. 181–88.

102. For a critique of the norm-based argument for the democratic peace on these grounds, see Joanne Gowa, “Democratic Disputes and International Disputes,” *International Organization*, vol. 49, no. 3 (summer 1995), pp. 514–16; and Henry S. Farber and Joanne Gowa, “Politics and Peace,” *International Security*, vol. 20, no. 2 (fall 1995), pp. 125–26. More generally, see Kenneth Shepsle, “Comment,” in Roger Noll, ed., *Regulatory Policy and the Social Sciences* (Berkeley: University of California Press, 1985), pp. 234–36.

103. See Stanley Hoffmann, *Duties beyond Borders: On the Limits and Possibilities of Ethical International Relations* (Syracuse, N.Y.: Syracuse University Press, 1981). Deliberately, I am examining liberal and illiberal states, not democracies and nondemocracies. Democratic public opinion might well tolerate summary executions, as will be shown in the chapters on Leipzig and Nuremberg. But liberalism tends to preclude that option. For a similar distinction, see Owen, *Liberal Peace, Liberal War*, pp. 15–17.

104. R. J. Rummel, *Power Kills: Democracy as a Method of Nonviolence* (New Brunswick, N.J.: Transaction, 1997), pp. 91–98. This is faint praise, and intentionally so. Racial discrimination is of course perfectly possible in liberal societies, but it is often accompanied by a sense of shame: a realization, slowly rising to the surface, that such bigotry is a betrayal of the liberal legacy.

105. Russett, *Crashing the Democratic Peace*, p. 31.

106. The argument that such domestic norms can make a decisive impact on foreign policy is a familiar one from the democratic peace literature. Zeev Maoz, for instance, finds that domestic executions correlate directly with the likelihood of a country’s involvement in foreign conflict. Maoz finds that democratic norms reduce the likelihood of conflict abroad (*ibid.*, pp. 86–92).

107. Anglo-French conference, London, 13 December 1919, 11 a.m., in E. L. Woodward and Rohan Butler, eds., *Documents on British Foreign Policy 1919–1939: Volume II: 1919* (London: His Majesty’s Stationery Office, 1948), 1st ser., pp. 756–57.

108. There is of course substantial hypocrisy here. While liberal states do not carry out atrocities at home, they do in *guerre à outrance*. Hiroshima, Dresden, My Lai, No Gun Ri. And liberal states have also carried out brutal colonial projects, and capped that in wars of decolonization, as France did in Algeria. For those who take their liberal principles seriously, this is a source of considerable anguish. Sometimes liberals plead good motives (e.g., Truman had never aspired to destroy Hiroshima, but did so in order to end the war; see Lucy S. Dawidowicz, *The Holocaust and the Historians* [Cambridge, Mass.: Harvard University Press, 1981], pp. 17–19). Sometimes domestic norms will belatedly try to reassert themselves over wartime practices, as after My Lai and after Sabra and Shatila. For more on these moral dilemmas, see Walzer, *Just and Unjust Wars*, p. 325; Shklar, *Legalism*, p. 164; Taylor, *Nuremberg and Vietnam*; and Seymour M. Hersh, *My Lai 4* (New York: Random House, 1970). The most I will claim is

that liberal states are often aware that they are not being true to their domestic traditions, whereas illiberal states usually feel no such dilemma. Liberal states pushing for war crimes tribunals are frequently hypocritical—but not always, and not completely. In contrast, as Shklar put it: “Crimes against humanity were not something that the Nazis engaged in merely because they were an occupying power in hostile territory. They engaged in them because they were Nazis” (*Legalism*, p. 164).

Still, the important analytical point for this book is that liberal politics at home can lead to liberal politics abroad. The example of European colonialism cuts both ways, for the end of Europe’s imperialism was driven by, among other things, the spread of liberal ideas (J. Daniel Philpott, Jr., “Revolutions in Sovereignty: On Ideas, Power, and Change in International Relations,” Ph.D. diss., Harvard University, 1995, pp. 188ff). Burke wanted “to enlarge the circle of national justice to the necessities of the empire we have obtained” (opening speech, “Impeachment of Warren Hastings,” in Burke, *Works* [London: John C. Nimmo, 1887], vol. 9, p. 343). Less frequent violations of *jus in bello* will also presumably follow the growth of liberalism. Explaining the precise lags and hypocrisies is a matter for future work; it would only confound this book if I claimed that liberal ideas invariably and promptly spill over into foreign policy. But much of this book is dedicated to explaining when liberal states will betray their own principles by letting war criminals go free. The spread of liberal ideas is slow and tortuous, whether these ideals are confronting racism, colonialism, or the punishment of war criminals.

It should also be pointed out that those who deplore the war crimes committed by liberal states may find them all the more reason to support war crimes tribunals, which create additional pressures for all sides to obey standards of *jus in bello*. Judge Radhabinod Pal’s blistering dissent at Tokyo rested on a *tu quoque* argument, and Jackson was wary of charging Nazis for indiscriminate bombing: “[W]e left out of our draft the destruction of villages and towns, because I have seen the villages and towns of Germany. I think that you will have great difficulty distinguishing between the military necessity for that kind of destruction as distinguished from some done by the Germans, assuming the war to be legitimate. It seems to me that those subjects invite recriminations that would not be useful in the trial” (Jackson, *Report*, 25 July 1945, p. 380). Such arguments are more likely to resonate in liberal states than in illiberal ones.

109. CAB 66/42, Churchill war criminals note, War Cabinet, W.P. (43) 496, 9 November 1943.

110. See Robert L. Holmes, *On War and Morality* (Princeton: Princeton University Press, 1989), pp. 152–59. On the enduring power of the natural law tradition in just war theory, see James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry* (Princeton: Princeton University Press, 1981), pp. 85–118.

111. Marshall, *Writings and Speeches of Edmund Burke*, p. 346.

112. Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (New York: Columbia University Press, 1990), p. 100. See also Black’s plurality opinion in *Reid v. Covert*, 354 U.S. 1, 17 (1957). It would be theoretically possible to have a liberal state that rests on a social contract only among its citizens, but Henkin rejects that reading of the Constitution. This opens the door for America to do things like harangue China about human rights violations within China.

113. Louis Henkin, *Foreign Affairs and the Constitution* (New York: W. W. Norton, 1972), p. 254.

114. Russett, *Grasping the Democratic Peace*, p. 32.

115. Israel is not a clear-cut case, because it is both liberal and Zionist. Many Israelis, and not just those on the left, would agree with novelist Amos Oz: “[T]here always have been those who contend that we are forbidden to adopt the murderous methods of the enemy, that we are forbidden, unconditionally and without ‘it depends,’ to be war criminals, even when war criminals seek to destroy us. And if there have been some war criminals among us—and there have been—we must isolate and denounce them and not turn their ‘precedents’ into the norm. It is forbidden to commit war crimes—and not because ‘crime doesn’t pay.’ . . . No. It is forbidden simply because it is forbidden. Period. This is an axiom” (*The Slopes of Lebanon* [New York: Harcourt Brace Jovanovich, 1989], Maurie Goldberg-Bartura, trans., p. 188).

116. Holmes, *War and Morality*, pp. 153–54.

117. William Ewart Gladstone, *Bulgarian Horrors and the Question of the East: The Turco-Servian War* (New York: Lovell, Adam, Wesson, 1876); Vahakn N. Dadrian, “Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications,” *Yale Journal of International Law*, vol. 14, no. 2 (summer 1989), pp. 233–38.

118. CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon, London, p. 8.

119. Henry Morgenthau Sr., *Ambassador Morgenthau’s Story* (Garden City, N.Y.: Doubleday, Page, 1918), pp. 333–34. Morgenthau later even turned Talaat’s gibe around, wearing his transcendence of ethnicity as a badge of honor: “I can think of no greater honour than to be recalled because I, a Jew, have been exerting all my powers to save the lives of hundreds of thousands of Christians” (p. 379).

120. Shklar, *Legalism*, p. 128. For a superb critical account of the Tokyo trials, see John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: Free Press, 1999), pp. 443–84. See also Minear, *Victors’ Justice*, and Radhabinod Pal, *International Military Tribunal for the Far East: Dissident Judgment* (Calcutta: Sanyal and Co., 1953).

121. Henkin, *Foreign Affairs and the Constitution*, p. 254.

122. Jackson, *Report*, p. xi.

123. Piccigallo, *Japanese on Trial*, p. 91.

124. Anderson, “Nuremberg Sensibility,” p. 290.

125. See Roy Gutman and David Rieff, eds., *Crimes of War: What the Public Should Know* (New York: Norton, 1999), pp. 155, 177–78, 282–85, 342–43.

126. Genocide was not codified as an international crime until after World War II, but the Allies condemned the extermination of the Armenians as criminal in 1915. There were rape charges against Japanese defendants after World War II, and the Hague and Arusha tribunals are breaking new legal ground in prosecuting rape as a war crime. But for much of this book, the basic definition of a war crime is largely unchanged. The one big exception is aggression, seen as a crime after both world wars, but not today.

127. The most dubious case is the Tokyo tribunal. For criticisms, see Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (New York: Meridian, 1994);

Minear, *Victors' Justice*, and Dower, *Embracing Defeat*. Piccigallo argues that the vast majority of the Allied trials were fair, often remarkably so (*Japanese on Trial*, pp. 213–15).

128. See, for instance, Frederic Herbert Maugham, *U.N.O. and War Crimes* (London: J. Murray, 1951), including an anti-Nuremberg postscript by Lord Hankey that manages to never mention the Holocaust.

129. John F. Kennedy, *Profiles in Courage* (New York: Harper and Row, 1964), pp. 231–44.

130. Quoted in Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (New York: Viking, 1956), p. 716.

131. For more sustained rebuttals, see Richard A. Posner, *The Problems of Jurisprudence* (Cambridge, Mass.: Harvard University Press, 1990), pp. 228–39, and Carlos Santiago Nino, *Radical Evil on Trial* (New Haven: Yale University Press, 1996), pp. 149–58.

132. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin, 1994), p. 5. See also Tom Segev, *The Seventh Million: The Israelis and the Holocaust* (New York: Hill and Wang, 1994), Haim Watzman, trans., pp. 323–66, and Prina Lahav, *Judgment in Jerusalem: Simon Agranat and the Zionist Century* (Berkeley: University of California Press, 1997).

133. See Richard J. Goldstone, *Do Judges Speak Out?* (Johannesburg: South African Institute of Race Relations, 1993).

134. Alexis de Tocqueville, *The Old Regime and the French Revolution* (1856; reprint, New York: Doubleday, 1983), Stuart Gilbert, trans., pp. 191–92.

135. Shklar, *Legalism*, p. 148.

136. Charles S. Maier, *The Unmasterable Past: History, Holocaust, and German National Identity* (Cambridge, Mass.: Harvard University Press, 1988), p. 74.

137. In Müller, *Hitler's Justice*, p. 140.

138. *Ibid.*, p. 79.

139. *Ibid.*, pp. 81–119.

140. Quoted in William L. Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (New York: Simon and Schuster, 1990), p. 1070. See also Müller, *Hitler's Justice*, p. 148, and Karl Dietrich Bracher, *The German Dictatorship* (New York: Holt, Rinehart and Winston, 1970), Jean Steinberg, trans., p. 459. Hitler was not speaking of Stauffenberg, who, along with three other officers, had been shot already, but of thousands of friends and relatives of alleged conspirators.

141. In Shirer, *Rise and Fall of the Third Reich*, p. 1070.

142. Tucker and Cohen, *Great Purge Trial*, p. xxiii.

143. Ulam, *Stalin*, p. 413.

144. Václav Havel, "The Trial," in his *Open Letters: Selected Writings 1965–1990* (New York: Knopf, 1991), pp. 104–5.

145. That is, realism underpredicts and liberalism overpredicts the incidence of war crimes tribunals.

146. These arguments are, for political scientists, a series of brittle hypotheses, derived from international relations theory. In the dissertation that this book is based on, they are explicitly treated as such. The subsequent case study chapters are attempts to falsify these hypotheses by testing them against empirical evidence (see Karl R. Popper, *The Logic of Scientific Discovery* [New York: Harper and Row, 1968]). The

dependent variable—support for a tribunal—is a *preference*, not necessarily any particular political outcome. My null hypothesis, drawing on neorealism, is: (1) either liberal or illiberal states only set up war crimes tribunals as a way of punishing a defeated enemy; and (2) the tribunals thus set up are indistinguishable from each other; it makes no difference which state is pushing for the tribunal. The *n* in this study is not just five, but actually twenty: various countries reacting in five extensive cases and three lesser case studies. (For a more detailed explanation of my methodology, see my "Judging War: The Politics of International War Crimes Tribunals," Ph.D. diss., Harvard University, 1998, pp. 75–99.) On case study methods, see Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* (Princeton: Princeton University Press, 1994), p. 45. See also Stephen Van Evera, *Guide to Methods for Students of Political Science* (Ithaca, N.Y.: Cornell University Press, 1997), pp. 49–88. I have selected some of my cases precisely in order to have variation on the explanatory variables (liberal and illiberal states, outraged and indifferent public opinion, etc.). I have not selected on the dependent variable (King, Keohane and Verba, *Designing Social Inquiry*, pp. 129–38. Van Evera is less strict about selecting on the dependent variable [*Guide to Methods*, p. 47]). See also David Collier, "The Comparative Method: Two Decades of Change," in Dankwart A. Rustow and Kenneth Paul, eds., *Comparative Political Dynamics: Global Research Perspectives* (New York: Harper Collins, 1991), pp. 7–31; Harry Eckstein, "Case Study and Theory in Political Science," in Fred I. Greenstein and Nelson W. Polsby, eds., *Handbook of Political Science*, vol. 7, *Strategies of Inquiry* (Reading, Mass.: Addison-Wesley, 1975), pp. 79–137; Alexander L. George and Timothy J. McKeown, "Case Studies and Theories of Organizational Decision Making," in *Advances in Information Processing in Organizations* (Greenwich, Conn.: JAI Press, 1985), vol. 2, pp. 21–58; and Arend Lijphart, "Comparative Politics and Comparative Method," *American Political Science Review*, vol. 65, no. 3 (September 1971), pp. 682–98. For more specific discussions of how to do good case study work, see Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China* (Cambridge: Cambridge University Press, 1979), p. 36; Walt, *Origins of Alliances*, pp. 11–12; Jeffrey W. Legro, *Cooperation under Fire: Anglo-German Restraint during World War II* (Ithaca, N.Y.: Cornell University Press, 1993), pp. 46–51; and Alon Peled, *A Question of Loyalty: Military Manpower in Multiethnic States* (Ithaca, N.Y.: Cornell University Press, 1998), pp. 10–15.

147. I will not dwell much on the distinction made above between liberal and illiberal states, mostly because the countries in question in my case studies fit easily. There are finer distinctions to be made (Stalin's Soviet Union was noticeably more illiberal than Wilhelmine Germany; Churchill's Britain was a parliamentary democracy unlike Roosevelt's presidential democracy), but I cannot imagine anyone suggesting, say, lumping Britons and Soviets together.

148. Hans Morgenthau, "Human Rights and Foreign Policy," in Kenneth W. Thompson, ed., *Moral Dimensions of American Foreign Policy* (New Brunswick, N.J.: Transaction, 1984), p. 344. See also Walzer, *Just and Unjust Wars*, pp. 101–2.

149. It has the further advantage of being easy to identify empirically, and is not time-dependent: the protection of soldiers is much the same thing from 1815 to 2000.

150. George Stephanopoulos, *All Too Human: A Political Education* (New York: Little, Brown, 1999), p. 214.

151. Huntington, *Soldier and the State*, p. 69. He quotes an American captain (p. 68) who in 1946 wrote that the military professional "must be the 'no' man for idealism and wishful thinking."

152. Eugène Ionesco, *Rhinoceros* (New York: Grove Press, n.d.), Derek Prouse, trans., pp. 78–79.

153. Taken together with my second proposition, this is, oddly, slightly paradoxical advice for war criminals. A war criminal who takes a liberal state's soldier hostage can pressure the liberal state to give up on justice. But if the war criminal kills that soldier, the war criminal incurs the liberal state's wrath and increases the risk of facing a war crimes trial.

154. Kennan, *American Diplomacy*, p. 93.

155. William Ewart Gladstone, "Germany, France, and England," in his *Gleanings of Past Years, 1843–77* (London: John Murray, 1879), p. 256.

156. See Keck and Sikkink, *Activists beyond Borders*.

157. Andrew Moravcsik argues that international pressure "works when it can work through free and influential public opinion and an independent judiciary" ("Explaining International Human Rights Regimes: Liberal Theory and Western Europe," *European Journal of International Relations*, vol. 1, no. 2 [1995], p. 158).

158. Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), pp. 211–31. See also Guillermo O'Donnell and Philippe C. Schmitter, *Transitions from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies* (Baltimore: Johns Hopkins University Press, 1986), pp. 28–32; Nino, *Radical Evil on Trial*; Neil J. Kriz, ed., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (Washington, D.C.: United States Institute of Peace, 1995), 3 vols.; Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998), pp. 56–74, 96–107; Tina Rosenberg's extraordinary *The Haunted Land: Facing Europe's Ghosts after Communism* (New York: Vintage, 1996); and Kader Asmal, Louise Asmal, and Ronald Suresh Roberts, *Reconciliation through Truth: A Reckoning of Apartheid's Criminal Governance* (New York: St. Martin's Press, 1997).

159. Sikkink, *Ideas and Institutions*, p. 2. See also Stephen D. Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in Krasner, ed., *International Regimes* (Ithaca, N.Y.: Cornell University Press, 1983), pp. 1–21; Robert O. Keohane and Joseph S. Nye, *Power and Interdependence* (Boston: Little, Brown, 1977).

160. Keohane's book is mostly written from an egoist perspective, but he does admit that reducing moral obligations to a strategy of reciprocity is "probably too cynical" (*After Hegemony*, pp. 126–27), because of principled officials, like Woodrow Wilson and Jimmy Carter, and electorates. On this account, Keohane at least implies that moralism comes into foreign policy from domestic principles, presumably democratic ones. Keohane himself is concerned about the ethical value of cooperation (pp. 10–11, 247–57).

161. "For Realists, in other words, the early postwar regimes rested on the *political hegemony* of the United States," Keohane wrote. "Thus Realists and Institutionalists could both regard early postwar developments as supporting their theories" (*After Hegemony*, p. 9).

162. One could also argue that the legacy of Nuremberg is itself a kind of institution, a banner carried by human rights groups if not by other institutions. Nuremberg,

after all, was a product of American hegemony, and could have effects that outlasted that hegemony, shaping the beliefs and expectations of actors half a century later. A neoliberal institutionalist could argue that the emergence of the Hague and Arusha tribunals only show how far-reaching the legacy of Nuremberg was. Merely by claiming the mantle of Nuremberg, the Hague tribunal made it impossible for the UN Security Council to abolish it outright even when the member states might have secretly wanted to do so.

CHAPTER TWO

ST. HELENA

1. CAB 24/85, G.T. 7806, Second Interim Report of the Commission of Enquiry into Breaches of the Laws of War, 3 June 1919, appendix: H. Hale Bellot, "Memorandum on the Detention of Napoleon Buonaparte."

2. CAB 23/43, Imperial War Cabinet 37, 20 November 1918, noon; CAB 28/5, Allied Conference, London, 2 December 1918, I.C.-98; and série Europe 1918–1940, sous-série Allemagne, vol. 25, Allizé to Pichon, 23 November 1918. Napoleon's fate came up in the planning for Nuremberg, too. (See, for instance, Memorandum for the President, 18 January 1945, in Bradley F. Smith, ed., *The American Road to Nuremberg: The Documentary Record, 1944–1945* [Stanford, Calif.: Hoover Institution Press, 1982], p. 109.) A French general once reminded Ratko Mladic that Napoleon had ended up at St. Helena. Mladic laughed (Roger Cohen, *Hearts Crowned Brutal: Sagas of Sarajevo* [New York: Random House, 1998], p. 234).

3. Kissinger, *World Restored*, p. 140.

4. *Ibid.*, p. 139.

5. Rory Muir, *Britain and the Defeat of Napoleon, 1807–1815* (New Haven: Yale University Press, 1996), p. 325.

6. Castlereagh, 3rd ser., iii, pp. 498–99, in CAB 24/85, Bellot appendix to Commission of Enquiry report, p. 381.

7. Russett, *Grasping the Democratic Peace*, p. 15.

8. Tocqueville, *Old Regime*, p. 206.

9. Muir, *Britain and Defeat of Napoleon*, p. 377.

10. Quoted in Kissinger, *World Restored*, p. 134.

11. Muir, *Britain and Defeat of Napoleon*, pp. 369–70.

12. Henry Houssaye, *1815: La première restauration, le retour de l'île d'Elbe, les Cent Jours* (Paris: Perrin, 1911), vol. 1, p. 459. *The Morning Post*, *The Observer*, and other papers were similar.

13. *Ibid.*, pp. 459–63.

14. Wellington to Beresford, 7 August 1815, in Arthur Wellesley, Duke of Wellington, *Despatches, Correspondence, and Memoranda of Field Marshall Arthur, Duke of Wellington, K.C.* (London: J. Murray, 1867–80), vol. 8, p. 231.

15. Castlereagh to Liverpool, 3 August 1815, in Robert Stewart, Viscount Castlereagh, *Correspondence, Despatches, and Other Papers of Viscount Castlereagh, Second Marquess of Londonderry* (London: John Murray, 1853), Charles William Vane, ed., 3rd ser., military and diplomatic, vol. 2, p. 451.