



**LUND UNIVERSITY**  
Center for Middle Eastern Studies

## A TRIBUTE TO REASON

An Appraisal of the 1860 Beirut Tribunal and Commission in light of the 1945  
Nuremberg Tribunal

Thesis submitted in partial fulfillment  
of the requirements of the degree of  
Master of Arts  
In Middle Eastern Studies

Author:	Fé de Jonge
Advisor:	Darcy Thompson
Examiner:	Vittorio Felci
Date:	14 June 2018



## **Abstract**

The Nuremberg International Military Tribunal (Nuremberg IMT), created in 1945, has been put forward by international legal scholars as the first international criminal tribunal, and the starting point of international criminal justice. However, throughout history, there have been other initiatives to try individuals for mass atrocities on the international level, comparable to the Nuremberg IMT to varying degrees. One such example is the Extraordinary Tribunal for Beirut (ETB) and the International Commission of Inquiry (ICoI), a dual institution created in 1860 in Mount Lebanon after the civil war to try and punish individuals for atrocities committed during the conflict. This thesis conducts an in-depth study and comparison of the Nuremberg IMT and the ETB and ICoI, to examine whether both the Nuremberg IMT and the ETB and ICoI fit within the concepts of international criminal justice and the international criminal tribunal, in order to see whether the ETB and ICoI should be considered the first international criminal tribunal and the actual starting point of international criminal justice.

Guided by the concepts of international criminal justice and the international criminal tribunal, this study engages in a comparison of the key actors, events and documents which led to the creation of the Nuremberg IMT and the ETB and ICoI, as well as their institutional features, their organisation, operation, laws and procedures. This study concludes that both the Nuremberg IMT and the ETB and ICoI are very similar in nature, both fit within the definition of an international criminal tribunal, and both institutions aimed to pursue the goal of international criminal justice. However, the fit is not perfect, even within the broadest definition of the concepts used. Nevertheless, this thesis argues that when examining historical tribunals, the fit does not need to be perfect and the use of very basic concepts with a limited set of criteria allows for a flexible and broad framework of examination. While the ETB and ICoI could now, on the basis of this study, be considered the first international criminal tribunal and the starting point of international criminal justice, it is to be hoped that the adoption of a similar framework by other scholars will mean that the ETB and ICoI will not be considered the starting point of international criminal justice for long.

## **Acknowledgments**

Gratitude and a curse for the men of the Shehadi family, who introduced this topic to me and sent me on this fascinating journey into the past. May you continue to challenge me thus. I cannot thank my supervisor, Darcy Thompson, enough for joining me on this journey, for exploring uncharted legal, regional and historical territories, for having faith in my abilities and seeing through the chaos that is my personality. May you never have to supervise another student who dares to tread into so many research fields at once with so little aptitude. Infinite gratitude for Markus too, as you have been and continue to be an invaluable friend who listened while I whined, cried and yelled, without fail and without judgment. May you hopefully stick around for much more. Many, many thanks also to Marc, Barbara, Giorgia and Rebecca, who provided me with invaluable wisdoms and guided me through the maze that was this thesis. May I return the favour when needed.

Gratitude to all my classmates and all the people who I was fortunate enough to meet in Lund and Beirut; you have taught me more than I thought possible. May our paths cross again soon. I thank my family, for providing me with diversions and distractions when least expected, for always giving me new insights and for showing an unwavering interest in every aspect of the directionless vessel that is my life. May your patience with your children remain as constant as the Dutch weather. And finally, a special thanks to my two favourite Kazakhis, for adding a bit of impropriety to an otherwise unimpressive internship experience. May you ever remain as hopeless and marvellous as you are.

# Table of Contents

## Abstract

## Acknowledgments

## Table of Contents

<b>1. Introduction</b> .....	<b>1</b>
1.1 Historical Context .....	2
1.2 Problem Statement .....	2
1.3 Aims of the Study .....	3
1.4 Outline of the Study .....	4
<b>2. Literature Review</b> .....	<b>5</b>
2.1 The History of the International Criminal Tribunal.....	5
2.2 The Historical International Criminal Tribunal .....	8
2.3 Conclusion .....	11
<b>3. Conceptual Framework</b> .....	<b>12</b>
3.1 International Criminal Justice .....	12
3.2 The International Criminal Tribunal .....	14
3.3 The Research.....	16
<b>4. Methodology</b> .....	<b>18</b>
4.1 Research Paradigm.....	18
4.2 Research Design.....	19
4.3 Data .....	21
4.4 Data Collection .....	22
4.5 Data Analysis Technique .....	23
4.6 Delimitations and Limitations.....	24
<b>5. Findings I: The Nuremberg International Military Tribunal</b> .....	<b>26</b>
5.1 The Creation.....	26
5.2 The Nuremberg International Military Tribunal.....	30
<b>6. Findings II: The Beirut Tribunal and the International Commission</b> .....	<b>35</b>
6.1 The Creation.....	35
6.2 The Extraordinary Tribunal for Beirut and the International Commission of Inquiry	39

<b>7. Analysis .....</b>	<b>45</b>
7.1 International Criminal Justice .....	45
7.2 International Criminal Tribunal .....	49
7.3 Considerations.....	51
<b>8. Conclusion.....</b>	<b>54</b>
<b>9. Bibliography .....</b>	<b>55</b>
9.1 Primary Sources .....	55
9.2 Secondary Sources .....	56
<b>APPENDIX A: Archival Material.....</b>	<b>61</b>

## 1. Introduction

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

– Robert H. Jackson, 21 November 1945

This is the opening statement of Robert H. Jackson, Chief Prosecutor for the United States at the Nuremberg International Military Tribunal (Nuremberg IMT).<sup>1</sup> The Nuremberg IMT was created in 1945 by the United States (US), the Soviet Union (USSR), the United Kingdom (UK) and France after the Second World War to try members of the Nazi leadership for crimes against peace, war crimes and crimes against humanity. Aiming to establish individual criminal accountability for mass atrocities on the international level, the Nuremberg IMT has been put forward by international legal scholars as the first international criminal tribunal, and the starting point of international criminal justice as a response of the international community to mass atrocities.<sup>2</sup>

However, throughout history, there have been prior international initiatives to try individuals for mass atrocities, comparable to the Nuremberg IMT to varying degrees. One such example is a dual institution created in Mount Lebanon after the 1860 civil war. The Extraordinary Tribunal for Beirut

---

<sup>1</sup> *The Avalon Project*, “Nuremberg Trial Proceedings, Count I: Nazi Conspiracy and Aggression, Volume 1, Chapter V,” accessed May 12, 2018, [here](#).

<sup>2</sup> See, *inter alia*, Kai Ambos, *Treatise on International Criminal Law, Volume I: Foundations and General Part* (Oxford: Oxford University Press, 2013), 4; Ilias Bantekas and Susan Nash, *International Criminal Law, Second Edition* (London: Cavendish Publishing, 2003), 325; Yves Beigbeder, *International Criminal Tribunals: Justice and Politics* (Basingstoke: Palgrave Macmillan, 2011), 20; Roberto Bellelli, “The Establishment of the System of International Criminal Justice,” in *International Criminal Justice*, ed. Roberto Bellelli (Abingdon: Routledge, 2016), 11; Mark A. Drumbl, “Pluralizing International Criminal Justice,” *Michigan Law Review* 103, no. 6 (May 2005): 1296-1298; Hans Ehard, “The Nuremberg Trial Against the Major War Criminals and International Law,” *The American Journal of International Law* 43, no. 2 (April 1949): 224; Mark Findlay and Clare McLean, “Emerging International Criminal Justice,” *Current Issues in Criminal Justice* 18, no. 3 (March 2007): 457-458; Philippe Kirsch, “Applying the Principles of Nuremberg in the International Criminal Court,” *Washington University Global Studies Law Review* 6 (2007): 50; Richard Overy, “The Nuremberg Trials: International Law in the Making,” in *From Nuremberg to The Hague*, ed. Philippe Sands (Cambridge: Cambridge University Press, 2003): 2; William A. Schabas and Nadia Bernaz, “Introduction,” in *Routledge Handbook of International Criminal Law*, eds. William A. Schabas and Nadia Bernaz (Abingdon: Routledge, 2011), 1.

(ETB) and the International Commission of Inquiry (ICoI) tried and punished individuals for widespread atrocities committed during the civil war.

### **1.1 Historical Context**

The Mount Lebanon civil war started in late May 1860 before being halted by Ottoman troops mid-August 1860.<sup>3</sup> Thousands of civilians were killed during one attack on Damascus alone. Entire villages, churches, mosques and monasteries were destroyed, and thousands of people fled from their homes.<sup>4</sup> After Ottoman troops, led by the Ottoman Minister of Foreign Affairs Fuad Pasha, arrived in the region, order was restored. Furthermore, Fuad Pasha created a series of extraordinary tribunals to try individuals for atrocities committed during the war. In September 1860, Fuad Pasha travelled to Beirut to create a tribunal there, the Extraordinary Tribunal for Beirut.

Already in July 1860, suggestions for the creation of a body which would establish the facts surrounding the conflict, as well as individual criminal responsibility of the perpetrators, compensation for the victims and recommendations for the future of the region were circulated among some European states.<sup>5</sup> Through diplomatic communications, this body was shaped into a commission, with Fuad Pasha and diplomats from the UK, France, Austria, Russia and Prussia as its members. Over time, the Commission transformed into a “quasi-court”, operating alongside the ETB, in which European commissioners acted as “[a]ssessors with his Excellency [Fuad Pasha] on the cases brought before him and responsible for whatever verdict might be rendered upon each.”<sup>6</sup>

### **1.2 Problem Statement**

A preliminary examination of the ETB and ICoI suggests that this dual institution shares many similarities with the Nuremberg IMT. Both institutions are judicial bodies, created by international powers, that seemed to pursue international criminal justice, meaning individual criminal responsibility for serious atrocities on the international level. However, apart from one article in a

---

<sup>3</sup> Caesar E. Farah, *The Politics of Interventionism in Ottoman Lebanon, 1830-1861* (London: I.B. Tauris, 2000), 557-558 and 608; Leila Tarazi Fawaz, *An Occasion for War* (Berkeley: University of California Press, 1994), 47-100 and 109-119; Benjamin E. Brockman-Hawe, “Constructing Humanity’s Justice: Accountability for ‘Crimes Against Humanity’ in the Wake of the Syria Crisis of 1860,” in *Historical Origins of International Law: Volume 3*, eds. Morten Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping (Brussels: Torkel Opsahl Academic EPublisher, 2015): 186-191.

<sup>4</sup> Fawaz, *An Occasion*, 49-60 and 63-74; Farah, *Interventionism*, 566-582; Brockman-Hawe, “Constructing Justice,” 181.

<sup>5</sup> Brockman-Hawe, “Constructing Justice,” 190 and 210-211.

<sup>6</sup> *Ibid*, 215.

book on the origins of international criminal law,<sup>7</sup> international legal scholarship has failed to give this dual institution any in-depth scholarly attention. In fact, in connection to this gap in the existing literature, research on the history of international criminal tribunals more generally has been rather unfocused, arbitrary and fragmented, as this study will show.

The objective of this thesis is therefore to study the ETB and ICoI in detail, to compare the ETB and ICoI to the Nuremberg IMT, widely considered the first international criminal tribunal and the starting point of international criminal justice, and to assess whether both the Nuremberg IMT and the ETB and ICoI fit within the aims of international criminal justice and the definition of the international criminal tribunal. This, in turn, allows the researcher to examine whether the ETB and ICoI should be considered the first international criminal tribunal and the actual starting point of international criminal justice. Therefore, this thesis will be guided by the following research question:

*Should the case of the ETB and ICoI be considered the first international criminal tribunal and the starting point of international criminal justice?*

### **1.3 Aims of the Study**

An examination of the ETB and ICoI would shed light on two inadequately researched legal-historical institutions. If these institutions are found to be sufficiently comparable to the Nuremberg IMT and fit within the aims of international criminal justice and the definition of the international criminal tribunal, then the argument could be made for expanding the existing timeline of international criminal justice. Furthermore, an in-depth study of the ETB and ICoI would further our knowledge and understanding of previous international initiatives to establish individual criminal responsibility for mass atrocities. This, in turn, could encourage other international legal scholars to dedicate more research to historical studies of international criminal tribunals, which would further improve the timeline of international criminal justice. Finally, by adopting a structured methodology and using a defined conceptual framework in the examination of historical institutions, this study hopes to set an example for further studies on the history of international criminal tribunals and historical tribunals.

---

<sup>7</sup> *Ibid*, 181-248.

#### ***1.4 Outline of the Study***

As this thesis combines three research fields, namely Middle Eastern Studies, International Criminal Law and History, the following structure has been chosen to facilitate easy reading for practitioners in these three fields, as well as for outsiders. This study starts with the literature review, which examines how scholars in the field of international criminal law have approached the history of international criminal tribunals, and how they have studied historical international criminal tribunals. The conceptual framework examines the two main concepts which guide the study, namely the principle of international criminal justice and the institute of the international criminal tribunal. The subsequent chapter presents the methodology, explaining the framework within which the research was carried out. This thesis has two findings chapters, one on the Nuremberg IMT and one on the ETB and ICoI, which detail their creation, features and procedures. The subsequent analysis chapter consists of the actual comparison of the creation, features and procedures of both institutions, which is guided by the concepts presented in the conceptual framework, and analyses the results and their meaning for the research field. This thesis will end with a conclusion, briefly summarising the study and its results and explaining the actual implications of the research.

## 2. Literature Review

This thesis examines whether a historical dual institution, the ETB and ICoI, can be considered an international criminal tribunal (ICT), comparing it to a generally accepted historical international criminal tribunal, the Nuremberg IMT. As this thesis assesses both a historical tribunal and a potentially historical tribunal, it is important to understand how other scholars, in particular international legal scholars, have approached the history of ICTs. This entails an understanding of how scholars in the field of international criminal law have traced the history of ICTs and how they have studied historical tribunals. The approaches they take towards history, the methods of identification, categorisation and classification guide this thesis, as they show the researcher how other researchers have approached the field, allowing the researcher to place the current study within this pre-established framework.

Therefore, the first section of this literature review discusses how these scholars have approached the history of ICTs, examining how they have identified such tribunals and which methodologies and concepts they used. The second section examines how the same scholars have studied the institutions which they have classified as historical ICTs and which aspects and features they examine.

### 2.1 *The History of the International Criminal Tribunal*

The sources which discuss the history of international criminal tribunals can be divided into three types. The first category are chapters in textbooks and handbooks which aim to provide a comprehensive overview of the field of international criminal law. These books all contain chapters on ICTs, which often discuss a number of past ICTs. Some authors, such as Kai Ambos and Ilias Bantekas and Susan Nash, briefly mention examples of institutions pursuing international criminal justice created before the twentieth century. Ambos starts the chapter with what seems to be a rather random selection of cases in which “crimes against the basic principles of humanity” were committed but never punished, before discussing the exceptional case of the 1474 trial of Peter von Hagenbach and the failed prosecutions after World War I.<sup>8</sup> Bantekas and Nash take a similarly arbitrary approach, discussing the same cases as Ambos, but adding short references to the 1268 trial of Duke of Suabia and the court created after the 1870 Franco-Prussian war.<sup>9</sup> Other authors,

---

<sup>8</sup> Ambos, *Treatise*, 1-4.

<sup>9</sup> Bantekas and Nash, *International Criminal Law*, 325-326.

such as Robert Cryer *et al.*, M. Cherif Bassiouni and Gerhard Werle and Florian Jeßberger start their chapters on the history of international criminal trials with the failed attempts to establish accountability for war crimes after World War I.<sup>10</sup> Cryer *et al.* justify such an approach by arguing that the chapter aims to examine the modern history of international criminal trials only,<sup>11</sup> without specifying why such modern history starts with the First World War. Cherif Bassiouni and Werle and Jeßberger assert that the Nuremberg and Tokyo International Military Tribunals (IMTs) constituted the first milestones in the international criminal justice system, before examining the failed post-World War I initiatives.<sup>12</sup> Guénaél Mettraux, lastly, commences his chapter on the historical framework of international criminal law with the Nuremberg IMT, without any introduction of the topic.<sup>13</sup>

The same applies to the second category, namely books which examine international criminal tribunals specifically. Roberto Bellelli and Yves Beigbeder, for example, commence their respective overviews of international criminal tribunals with an examination of the Nuremberg and Tokyo IMTs, without explaining why these overviews should start with the Second World War.<sup>14</sup> Geert-Jan Alexander Knoops starts his comparative study of international criminal tribunals with the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR), omitting any justification for this choice.<sup>15</sup> Timothy McCormack starts his chapter on the evolution of prosecutions of international crimes, with a disclaimer that his historical overview will be “brief and necessarily selective”,<sup>16</sup> without explaining the selection itself, before reviewing varying examples of laws and trials which resemble modern international criminal law and tribunals, starting with sixth century BC China and ending with the work of the International Law Commission on a permanent international criminal court.<sup>17</sup> Charles Anthony Smith engages in a very limited

---

<sup>10</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law, Second Edition* (Leiden: Martinus Nijhoff Publishers, 2014), 535-540; Cryer *et al.*, *An Introduction to International Criminal Law and Procedure, Second Edition* (Cambridge: Cambridge University Press, 2010), 109-110; Gerhard Werle and Florian Jeßberger, *Principles of International Criminal Law, Third Edition* (Oxford: Oxford University Press, 2014), 1-5.

<sup>11</sup> Cryer *et al.*, *Introduction*, 109.

<sup>12</sup> Cherif Bassiouni, *Introduction*, 535-540; Werle and Jeßberger, *Principles*, 1-5.

<sup>13</sup> Guénaél Mettraux, “Trial at Nuremberg,” in *Routledge Handbook of International Criminal Law*, eds. William A. Schabas and Nadia Bernaz (Abingdon: Routledge, 2011), 5-13.

<sup>14</sup> Bellelli, “Establishment,” 11-12; Beigbeder, *International Criminal Tribunals*, 20-48.

<sup>15</sup> Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals, Second Edition* (Leiden: Brill Nijhoff, 2014), 2-9.

<sup>16</sup> Timothy L. H. McCormack, “War Crimes: A Critical Introduction,” in *The Law of War Crimes: National and International Approaches*, eds. Timothy L. H. McCormack and Gerry J. Simpson (The Hague: Kluwer Law International, 1997), 32.

<sup>17</sup> McCormack, “War Crimes,” 32-64.

historical excursion in his book on ICTs, presenting the criminal trial of King Charles I of England in the seventeenth century as the first war crimes trial, before discussing the criminal trial of Captain Henry Wilz during the American Civil War, after which he examines the Nuremberg and Tokyo IMTs.<sup>18</sup>

The third category concerns books which focus on specifically on the history of international criminal law and historical trials, and which cover initiatives taken before the twentieth century in their discussions on historical tribunals. Gary Jonathan Bass, for example, explores the attempts at punishing the Bonapartists in 1815, the Leipzig war crime trials after the First World War, the 1919 Constantinople trials of Ottoman officials for the Armenian genocide and war crimes committed during the First World War, the Nuremberg IMT and the ICTY.<sup>19</sup> The book by Kevin Jon Heller and Gerry Simpson takes a comparable approach in its selection of historical war crimes trials, studying the 1474 trial of Peter von Hagenbach, the Franco-Siamese Mixed Court, the Ottoman State Special Military Tribunal for the Genocide of the Armenians, and several examples of *ad hoc* war crimes trials after the Second World War, amongst other initiatives.<sup>20</sup> The series of books edited by Morten Bergsmo, Cheah Wui Ling and Yi Ping on the historical origins of international criminal law consists of five volumes, each containing articles on a variety of historical events which in one way or another connect to international criminal justice.<sup>21</sup> It is in volume three of this series that the article by Benjamin Brockman-Hawe on the ETB and ICoI, discussed below, is published. Similar to the book by Heller and Simpson, a statement of the relevant concepts and methodologies is missing in the series. However, this absence must be excused, considering that these are both edited works and consists of papers submitted by a multitude of authors.

What these authors have in common with regard to their approach towards the history of ICTs is the fact that, even though they do explore institutions created before the Nuremberg IMT, there is a different approach towards these institutions. While these authors consider and discuss the Nuremberg IMT as an international criminal tribunal, they fail to take a similar approach towards institutions created before the Nuremberg IMT. In fact, they do not seem to consider such

---

<sup>18</sup> Charles Anthony Smith, *The Rise and Fall of War Crimes Trials* (Cambridge: Cambridge University Press, 2012), 29-78.

<sup>19</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance* (Princeton: Princeton University Press, 2000), 17 and 327-433.

<sup>20</sup> Kevin Jon Heller and Gerry Simpson, *The Hidden Histories of War Crimes Trials* (Oxford: Oxford University Press, 2013), 13-102.

<sup>21</sup> See, *inter alia*, Morten Bergsmo, Cheah Wui Ling and Yi Ping, *Historical Origins of International Criminal Law: Volume I* (Brussels: Torkel Opsahl Academic EPublisher, 2014).

institutions as true ICTs. These scholars approach the topic without clear definitions of past ICTs, or an explanation of the methodology of identification or categorisation. They seem to take a piecemeal approach to the topic and do not engage in a systematic investigation of ICTs. Without clear and generally accepted definitions of the concepts involved, and without a coherent methodology, the results of any historical excursion into the past of ICTs become highly divergent. Different scholars include and exclude different institutions on entirely arbitrary grounds and seem to consider these historical excursions as exactly that: amusing diversions into the past. Such a diversified and myriad description of the history of ICTs is unwelcome, as it is an important subject for international legal scholars to comprehend. To understand the past is to understand the present, meaning that we cannot understand the current state of affairs if one is unaware of how one got there in the first place. Furthermore, we cannot learn from the past for future purposes if we are unaware of this past and the mistakes made.

## **2.2 *The Historical International Criminal Tribunal***

This section examines how international legal scholars have conducted their examinations of selected historical international criminal tribunals, leaving aside any brief mentions of historical trials and unsuccessful or aborted initiatives. The following paragraphs use the same structure as the previous section, categorising the sources according to the type of text. In most cases these texts start with an examination of one tribunal and adopt a similar structure for the examination of other tribunals. Therefore, the following section will look at the structure the authors have adopted for their first examination.

All the authors who wrote chapters on the history of ICTs for textbooks and handbooks follow the same structure when engaging in an in-depth examination of historical tribunals, which often start with a study of the Nuremberg IMT. The authors start with events which led to the creation of the Nuremberg Tribunal, such as negotiations, conferences and communications between state actors, as well as the relevant documents that resulted from these events.<sup>22</sup> Next, Ambos briefly discusses the defendants of the Nuremberg IMT, before engaging in a similarly structured discussion on the Tokyo IMT.<sup>23</sup> Bantekas and Nash, Mettraux, and Werle and Jeßberger examine the law of the 1945 Charter of the International Military Tribunal, which was the founding document of the Nuremberg

---

<sup>22</sup> Ambos, *Treatise*, 4; Bantekas and Nash, *International Criminal Law*, 326-327; Cryer *et al.*, *Introduction*, 111; Cherif Bassiouni, *Introduction*, 551-552; Werle and Jeßberger, *Principles*, 5; Mettraux, "Trial," 5-7.

<sup>23</sup> Ambos, *Treatise*, 5-6.

IMT, focusing on the different types of jurisdiction of the Tribunal.<sup>24</sup> Mettraux and Werle and Jeßberger go on to discuss the defendants and details of the trial itself, before examining the final judgment of the Tribunal.<sup>25</sup> Cryer *et al.* focus on the organisational aspects of the Tribunal, discussing the organisation of the judiciary, prosecution and defence, the criminal charges, the proceedings of the Tribunal and the judgment.<sup>26</sup> Bantekas and Nash, Cryer *et al.*, Mettraux, and Werle and Jeßberger subsequently engage in a short assessment of the Tribunal, addressing some of the critiques which the IMT has received.<sup>27</sup> Cherif Bassiouni engages in a lengthy discussion on the development of the law which was to be applied by the Nuremberg IMT and only includes a small section on the trial itself.<sup>28</sup>

Of the works of the second category, namely those which focus on international criminal tribunals, only the texts by Beigbeder and Smith engage in a detailed study of historical international criminal tribunals. With regard to the Nuremberg IMT, after discussing the negotiations and events which preceded the creation of the Tribunal, Beigbeder examines the 1945 Charter, the judges and prosecutors, the judgment itself and criticisms related to the Tribunal's legitimacy, fair trial rights, the judges and the charges.<sup>29</sup> Knoops starts with a discussion of the ICTY and ICTR, detailing their creation by the United Nations, their institutional characteristics, their rules of procedure and evidence and their legacies.<sup>30</sup> Bellelli's sections on the post-World War II tribunals and subsequent tribunals are short and only discuss the achievements and criticisms of the tribunals.<sup>31</sup> While Smith engages in a much longer assessment of the tribunals he investigates, dedicating fifty pages to a discussion of the trial of King Charles I of England, he does not structure his study as the previous authors have done.<sup>32</sup> Instead of examining the different features of the trial, the text focuses on the events, the actors and circumstances which surrounded the trial and its political consequences. Consequently, the book does not read as a study of legal institutions within the framework of international criminal law. McCormack's chapter only consists of short descriptions of historical

---

<sup>24</sup> Bantekas and Nash, *International Criminal Law*, 327-333; Mettraux, "Trial," 7-8; Werle and Jeßberger, *Principles*, 7.

<sup>25</sup> Mettraux, "Trial," 9-12; Werle and Jeßberger, *Principles*, 7-8.

<sup>26</sup> Cryer *et al.*, *Introduction*, 111-113.

<sup>27</sup> Bantekas and Nash, *International Criminal Law*, 333-334; Cryer *et al.*, *Introduction*, 113-115; Mettraux, "Trial," 12-13; Werle and Jeßberger, *Principles*, 8-10.

<sup>28</sup> Cherif Bassiouni, *Introduction*, 551-556.

<sup>29</sup> Beigbeder, *International Criminal Tribunals*, 21-33.

<sup>30</sup> Knoops, *Introduction*, 2-9.

<sup>31</sup> Bellelli, "Establishment," 11-16.

<sup>32</sup> Smith, *War Crimes Trials*, 1-50.

events, and he discusses both his own assessment of events and the assessments of other authors.<sup>33</sup> However, these short sections are insufficient if the reader is to fully comprehend the meaning of events which are discussed.

The sources of the third category, namely works which examine historical ICTs specifically, all take a similar approach. The book by Bass mainly focuses on the political aspects of a number of trials, without detailing the legal aspects. The first chapter examines initiatives to try the Bonapartists in 1815, looking at the states involved and their motivations, interactions and decisions, and discussing how the events shaped international relations.<sup>34</sup> While interesting from a political perspective, the chapters do not engage in full study of the trials discussed. Although the book by Heller and Simpson is an edited work, consisting of papers submitted by a variety of authors, the different chapters all follow a similar structure. The chapter by Jennifer Balint on the Ottoman State Special Military Tribunal for the Genocide of the Armenians will be used as an example here. Balint first discusses the background of events, before examining the actors involved, the relevant documents and the negotiations aimed to instigate international prosecutions.<sup>35</sup> Subsequently, Balint examines the creation of the Special Military Tribunal, its operations and the record of the trials, as well as the political context in which the tribunal operated.<sup>36</sup> As the book series by Bergsmo, Cheah and Yi contain articles by different scholars as well, the final part of this section will examine only one article from this series, namely the article by Brockman-Hawe on the ETB and ICoI.

Brockman-Hawe starts his chapter with an overview of the events of the 1860 Mount Lebanon civil war, the atrocities committed during the conflict and the response by the Ottoman Empire and European states.<sup>37</sup> Next, the author describes the creation and operation of the Extraordinary Tribunal for Damascus, which was created after the war ended, before discussing first the creation and operation of the ETB and secondly the ICoI.<sup>38</sup> While the chapter provides valuable information as to the character and characteristics of the ETB and ICoI, it is not as well-structured as the texts reviewed previously. Not only is the chapter written as a historical description of events rather than an examination of a tribunal, there are ambiguities and gaps related to some of the facts, events and

---

<sup>33</sup> McCormack, "War Crimes," 32-37.

<sup>34</sup> Bass, *Vengeance*, 66-99.

<sup>35</sup> Jennifer Balint, "The Ottoman State Special Military Tribunal for the Genocide of the Armenians: 'Doing Government Business'," in *The Hidden Histories of War Crimes Trials*, eds. Kevin Jon Heller and Gerry Simpson (Oxford: Oxford University Press, 2013), 80-85.

<sup>36</sup> Balint, "Ottoman State Tribunal," 85-94.

<sup>37</sup> Brockman-Hawe, "Constructing Justice," 184-191.

<sup>38</sup> *Ibid*, 191-232.

actors, and irregularities regarding the timeline. The conclusion of the author that a comparison of the ETB and ICoI to an international criminal court is futile seems faulty at best, considering that the author in the article makes no attempt to engage in any kind of comparison and does not even define the concepts involved or the framework of assessment.

Nevertheless, the sources reviewed in this section do provide important guidelines as to how to structure a study of historical international criminal tribunals. For a full examination of any historical tribunal, one must start not with the tribunal itself, but with the events that preceded its creation – the context of its creation. This means a discussion of the actors involved and their motivations, important events and documents that influenced the negotiations on the tribunal, and the eventual outcomes of these events. Furthermore, the examination of the tribunal itself must consider all its features, related to the creation and organisation of the court and its members, the law and procedures it applied and the cases it tried.

### **2.3 Conclusion**

This chapter reviewed the literature of international legal scholars on the history of international criminal tribunals, examining the ways in which authors have approached the historiography of ICTs and how they have studied historical tribunals. With regard to the historiography of ICTs, this review found that authors have failed to adopt a unified, singular and consolidated approach, and that the identification and categorisation of historical ICTs depends solely on the disposition and choice of the author. While a unified and substantiated methodology is highly desirable in approaching the history of ICTs, as properly understanding the past is highly relevant for understanding the present and future, this review found that such a methodology is generally absent.

With regard to the literature studying the specifics of historical tribunals, while some authors did not engage in a structured study of these ICTs, instead taking an approach focused on chronological descriptions of historical events, other scholars did take a methodical approach. Furthermore, these scholars often use the same structure for their investigations. These texts start with a description of events preceding the creation of the tribunal in question, discussing the actors involved and their ideals and motivations, as well as key events and documents which led to the creation of the tribunal. Subsequently, the main features of the tribunal are discussed, focusing on the organisation, laws and procedures of the tribunal. Such a structure provides an overview of tribunals which is clear, easy to understand and comprehensive, and this framework is used to guide the study of the Nuremberg IMT and ETB and ICoI.

### 3. Conceptual Framework

The aim of this thesis is to examine whether the ETB and ICoI can be considered the first international criminal tribunal and the actual starting point of contemporary international criminal justice. In order to answer the research question, this thesis investigates whether the ETB and ICoI can be successfully compared to what is argued to be the first international criminal tribunal, the Nuremberg IMT. In essence, as will be explained below, an international criminal tribunal is the embodiment of international criminal justice, and so the starting point of international criminal justice is the first international criminal tribunal.

This statement presents two concepts in need of elaboration, namely the idea of international criminal justice (ICJ) and the international criminal tribunal (ICT). To investigate the research question of this thesis, the concepts of ICJ and the ICT must be deconstructed to identify what ideas, values and practices they represent. This is necessary to be able to assess whether these ideas, values and practices can be discerned in the ETB and ICoI. The following chapter examines and deconstructs these concepts, breaking them down into different terms and elements and discussing the meaning of each term separately. Such a deconstruction allows for a structured examination of the ETB and ICoI, to see whether and to what extent these elements are visible in this dual institution.

#### 3.1 *International Criminal Justice*

The concept of international criminal justice is a complex, multifaceted and dynamic concept. As Frédéric Mégret argues, international criminal justice cannot just be, “it must also *act* since the very principle of its existence cannot be derived from the mere facts of its being.”<sup>39</sup> The concept of ICJ is therefore best explained by what it aims to do. A comprehensive definition of the goal of ICJ is provided by Cherif Bassiouni who describes ICJ as “the application of the principle of accountability for certain international crimes [before a] judicial body. Such a body must be duly constituted and impartial, and its legal processes must be fair in accordance with international legal standards.”<sup>40</sup> Within this broad definition, one can discern three main elements, which represent the core of ICJ.

---

<sup>39</sup> Frédéric Mégret, “International Criminal Courts and Tribunals: The Anxieties of International Criminal Justice,” *Leiden Journal of International Law* 29 (2016), 200.

<sup>40</sup> M. Cherif Bassiouni, “International Criminal Justice in Historical Perspective: The Tension Between States’ Interests and the Pursuit of International Justice,” in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 131.

Accountability is the first element, referring to the need to establish responsibility for international crimes. The element of universality is visible in the type of crimes for which ICJ seeks to establish accountability, namely mass atrocities. The element of justice is found in the balance between the need to punish mass atrocities and protect the rights of victims and humanity, and the need for proceedings which establish accountability to be fair, impartial and protective of the rights of the accused.

The first element, universality, relates to the nature of the acts which ICJ responds to. The atrocities that ICJ focuses on constitute acts of violence committed against human beings which are widespread and large-scale in nature. Such mass atrocities are considered to be so heinous that they violate universally accepted norms of humanity and commonly shared values, and as such do not only affect and outrage direct victims, but humanity in its entirety.<sup>41</sup> This argument was first made when the Nuremberg and Tokyo IMTs were created, and has remained a core value of ICJ until this day.<sup>42</sup> Additionally, it is argued that, because these acts violate universal norms and affect the entirety of humanity, there is an obligation of states towards humanity as a whole to investigate, prosecute, adjudicate and punish these acts.<sup>43</sup>

The second element concerns the principle of accountability, meaning the criminal accountability of individuals for their involvement in mass atrocities.<sup>44</sup> International criminal justice focuses on establishing the responsibility of individuals, and specifically the responsibility of high level perpetrators or individuals who committed the largest number of crimes, as they are considered to bear the greatest responsibility.<sup>45</sup> Establishing such responsibility involves a multitude of acts, as it aims “to identify, classify and explain forms of violence and rule breaking”, according to Peter Dixon and Chris Tenove.<sup>46</sup> The objective of accountability requires investigation, prosecution, adjudication and punishment of the mass atrocities committed.<sup>47</sup> Antonio Cassese argues that this

---

<sup>41</sup> Drumbl, “Pluralizing,” 1297; Danielle Smogard, “The Evolution of International Criminal Justice,” *Hemispheres: Transitions & Regime Change* 35 (2012): 17-18.

<sup>42</sup> *Ibid.*

<sup>43</sup> Drumbl, “Pluralizing,” 1297; Smogard, “Evolution,” 17-18; Adolfo Ceretti, “Collective Violence and International Crimes,” in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 13-14.

<sup>44</sup> Smogard, “Evolution,” 17-18.

<sup>45</sup> Antonio Cassese, *Cassese's International Criminal Law, Second Edition* (Oxford: Oxford University Press, 2008), 441–442.

<sup>46</sup> Peter Dixon and Chris Tenove, “International Criminal Justice as a Transnational Field: Rules, Authority and Victims,” *The International Journal of Transitional Justice*, 7 (October 2013): 400.

<sup>47</sup> Dixon and Tenove, “Transnational Field,” 400; Cherif Bassiouni, *Introduction*, 535.

approach to accountability is preferred over alternatives such as revenge, as it independently establishes individual responsibility instead of arbitrary responsibility, it pre-empts desires for retaliation, it allows for reconciliation and it creates an independently verified account of events.<sup>48</sup>

The third element, justice, can be defined as “a moral ideal that the law seeks to uphold in the protection of rights and punishment of wrongs”.<sup>49</sup> The moral ideal of justice in its contemporary understanding has two sides. On the one hand, ICJ aims to punish wrongs, namely mass atrocities, thereby promoting and protecting the rights of both victims and wider society.<sup>50</sup> ICJ, through the investigation, prosecution and punishment of individual perpetrators, intends to uphold the moral ideal of the law and achieve justice for victims and humanity as a whole.<sup>51</sup> ICJ has the capacity to offer victims an alternative to vengeance, a voice and role in proceedings, suitable reparations and an officially established record of events.<sup>52</sup> On the other hand, this moral ideal that the law aims to uphold also means that the proceedings which punish wrongs and establish individual accountability need to be fair, impartial and free from bias.<sup>53</sup> If contemporary justice is to be achieved, such proceedings must not only protect the rights of victims and wider society, but also the rights of those who are tried.<sup>54</sup>

### **3.2 *The International Criminal Tribunal***

As stated in the introduction of this chapter, international criminal tribunals are the embodiment of international criminal justice. The goal of an ICT is equal to the aim of ICJ, namely to do justice by establishing international criminal accountability of the individual for heinous acts which violate universal norms and affect humanity as a whole. However, this does not explain what an ICT does to reach that aim, or even what an ICT is. The following section, therefore, examines how authors have defined ICTs, and how ICTs are identified and categorised.

---

<sup>48</sup> Antonio Cassese, “Reflections on International Criminal Justice,” *The Modern Law Review*, 61, no. 1 (January 1998): 1-6.

<sup>49</sup> *Oxford Dictionary of Law*, c.v. “justice,” accessed May 12, 2018, [here](#).

<sup>50</sup> Dixon and Tenove, “Transnational Field,” 400.

<sup>51</sup> Carsten Stahn, “Evolution, Revolution or New Culture? The Changing Anatomy of International Criminal Justice,” *International Criminal Law Review* 15 (2015): 1134.

<sup>52</sup> Dixon and Tenove, “Transnational Field,” 408-409; Cassese, “Reflections,” 5-6; Findlay and McLean, “Emerging,” 472-473.

<sup>53</sup> Cherif Bassiouni, *Introduction*, 131; Mégret, “Anxieties,” 210; Kirsch, “Applying,” 502.

<sup>54</sup> Mégret, “Anxieties,” 210.

From the outset, it must be noted that after having examined a multitude of sources, no clear, unequivocal and encompassing definition of ICTs emerges. Basing themselves on past and present courts which generally have been accepted as ICTs of some sort, scholars seem to identify ICTs by what they consider to be the defining features of these tribunals.<sup>55</sup> These features relate *inter alia* to the legal bases of the ICT, as well as to its legal status under international law, the law to be applied, including the rules of procedure and evidence, the subject matter jurisdiction, the composition and appointment of the panel of judges, and the overall organisation of the tribunal. Nevertheless, the choice of past and present tribunals whose features are used to define the general ICT is arbitrary, meaning that there is no agreement even on the selection of features which are most relevant. This basically presents a circular problem. Because there is no general definition of the ICT, definitions are based on features of past and present tribunals – but who can decide which tribunals are included if there is no definition of ICTs? Who decides which tribunals are to be generally accepted as ICTs?

In light of this absence, this section will provide a very basic definition of an ICT, based on the elements which make up the phrase ‘international criminal tribunal’ and based on ICJ as the guiding principle of the ICT. The term ‘international criminal tribunal’ consists of three elements. The most undefined element is ‘tribunal’, as authors have not specifically discussed the meaning of this term. The Cambridge Dictionary defines a tribunal as “a special court or group of people who are officially chosen, especially by the government, to examine (legal) problems of a particular type.”<sup>56</sup> Subsequently, a court is defined by the Cambridge Dictionary as “a place where trials and other legal cases happen, or the people present in such a place, especially the officials and those deciding if someone is guilty.”<sup>57</sup> A tribunal therefore represents both a location and a group of actors, selected to examine a specific legal problem or issue.

The specific legal problem or issue is defined by the second element, the term ‘criminal’. The Cambridge Dictionary defines ‘criminal’ as “related to crime.”<sup>58</sup> As the aim of ICJ is to establish accountability for largescale atrocities, “related to crime” in the context of the ICT does not refer to

---

<sup>55</sup> See, *inter alia*, Ambos, *Treatise*, 4-9 and 19-53; Bantekas and Nash, *International Criminal Law*, 325-413; Cassese, *International Criminal Law*, 253-270; Cryer *et al.*, *Introduction*, 109-200; Knoops, *Introduction*, 2-23; Schabas and Bernaz, “Introduction,” 5-32 and 51-106; Werle and Jeßberger, *Principles*, 95-127.

<sup>56</sup> *Cambridge Dictionary Online*, s.v. “tribunal,” accessed April 27, 2018, [here](#). Oxford Dictionaries defined tribunal as “a court of justice”, without providing a definition of that term and therefore did not offer much guidance.

<sup>57</sup> *Cambridge Dictionary Online*, s.v. “court,” accessed April 27, 2018, [here](#).

<sup>58</sup> *Cambridge Dictionary Online*, s.v. “criminal,” accessed April 27, 2018, [here](#).

any or all crimes, but refers specifically to such mass atrocities which violate universal norms and which affect humanity as a whole. In addition, “related to crime” means that the legal problem being examined is guided by procedures and laws which focus on establishing the criminal accountability of individuals for their participation in the crimes of mass atrocities.

Finally, the Cambridge Dictionary defines ‘international’ as “involving more than one country”,<sup>59</sup> which is not technically wrong, but does seem slightly simplistic. In addition, the definition of Oxford Dictionaries, interpreting ‘international’ as “existing, occurring, or carried on between nations”, with the sub definition “agreed on by all or many nations.”<sup>60</sup> This means that, as the committed mass atrocities affect humanity as a whole, the international community has an obligation towards humanity to investigate, prosecute, adjudicate and punish these acts.<sup>61</sup> Therefore, the international tribunals establishing responsibility for mass atrocities are created by the international community, either by states, the main actors within the international system, or international organisations consisting of states.<sup>62</sup> Secondly, the ‘international’ element is also visible in the organisation of the tribunal, meaning that the group of actors involved in the proceedings establishing accountability have different nationalities and different legal backgrounds.

### **3.3 The Research**

The previous two sections established the following: international criminal justice is a concept which aims to do justice by establishing criminal accountability of individuals for mass atrocities which are so heinous that they violate universal norms and affect humanity as a whole. An international criminal tribunal is a place where a group of actors of various nationalities and backgrounds come together to conduct proceedings which are criminal in nature, to establish whether individuals can be held accountable for committing mass atrocities which affect humanity as a whole and which violate universal norms. The ICT is the physical embodiment of the principle of ICJ. These two concepts will guide this research, as they provide the framework for the comparative case study conducted in this thesis.

---

<sup>59</sup> *Cambridge Dictionary Online*, s.v. “international,” accessed April 27, 2018, [here](#).

<sup>60</sup> *Oxford Dictionaries Online*, s.v. “international,” accessed April 27, 2018, [here](#).

<sup>61</sup> Drumbl, “Pluralizing,” 1297; Smogard, “Evolution,” 17-18; Adolfo Ceretti, “Collective Violence and International Crimes,” in *The Oxford Companion to International Criminal Justice*, ed. Antonio Cassese (Oxford: Oxford University Press, 2009), 13-14.

<sup>62</sup> Dixon and Tenove, “Transnational Field,” 399.

As the embodiment of ICJ, the aim of the Nuremberg IMT and ETB and ICoI must be the pursuit of international criminal accountability of individuals for mass atrocities. This means that in the considerations of the aims which the creators had in mind when setting up these two courts, it must be clear that the pursuit of ICJ, however formulated, was an important consideration. The pursuit of ICJ must also be visible in the proceedings of the tribunals, which must have been focused on establishing individual criminal accountability for mass atrocities and must have strived to do justice in the sense described above.

Furthermore, both the Nuremberg IMT and the ETB and ICoI also have to look like the embodiment of ICJ, in order for them to be considered examples of international criminal tribunals. The ICT definition presented in this chapter provides the core elements of the ICT, the skeletal framework, which both the Nuremberg IMT and the ETB and ICoI need to possess. The ICT definition will guide the comparison, providing the framework within both courts will have to fit. The different elements of the provided definition can be found in the institutional characteristics of the courts, which is one part of the comparison. A full consideration of the ICT definition also encompasses its shortcomings, and these accepted shortcomings will also be considered within the framework of comparison.

## 4. Methodology

As stated in the Introduction, international legal scholars have put forward that the first international criminal tribunal and the starting point of international criminal justice is the Nuremberg IMT. However, preliminary research seems to suggest that the ETB and ICoI share many features with the Nuremberg IMT, and yet they are not included in the historical narrative on ICTs. The aim of this study is therefore to compare the ETB and ICoI to the Nuremberg IMT to see in what ways these institutions are similar to one another in their purposes, structures and processes. This comparison is guided by the two concepts of international criminal justice and the international criminal tribunal. If the Nuremberg IMT and the ETB and ICoI are found to be sufficiently comparable, and fit within the concepts of ICJ and the ICT, then the narrative of the Nuremberg IMT as the starting point of international criminal justice, as put forward by international legal scholars, could be challenged. This study is therefore guided by the following research question:

*Should the case of the ETB and ICoI be considered the first international criminal tribunal and the starting point of international criminal justice?*

### 4.1 Research Paradigm

The research paradigm which this thesis follows is historical realism. Realism follows the view that there exists an independent, external reality and truth which can be discovered by researchers, and which is separate from any thoughts, actions or descriptions.<sup>63</sup> Subsequently, historical realism assumes the existence of a singular and factual historical reality which exists independently from our knowledge of it, and supports the idea that there is an objective understanding of historical events.<sup>64</sup> Historical researchers who adhere to the historical realism paradigm strive to uncover and describe the historical events as they occurred, including actors, time and places, and believe their accounts can be verified by relying on historical testimonies as factual evidence.<sup>65</sup> As argued fittingly by Adrian Kuzminski, “[t]hese historians accept the validity of testimony as much as do

---

<sup>63</sup> Alan Bryman, *Social Research Methods, Fourth Edition* (Oxford: Oxford University Press, 2012), 29; Karen O’Reilly, *Ethnographic Methods, Second Edition* (Abingdon: Routledge, 2012), 55; E. G. Guba and Y. S. Lincoln, “Competing Paradigms in Qualitative Research,” in *Handbook of Qualitative Research*, ed. N. K. Denzin and Y. S. Lincoln (Thousand Oaks: Sage, 1994), 109.

<sup>64</sup> Adrian Kuzminski, “Defending Historical Realism,” *History and Theory* 18, no. 3 (October 1979): 316-317; C. Behan McCullagh, “Historical Realism,” *Philosophy and Phenomenological Research* 40, no. 3 (March 1980): 421; Bernard Waites, “In Defence of Historical Realism,” *Rethinking History* 15, no. 3, (September 2011): 327.

<sup>65</sup> Kuzminski, “Historical Realism,” 317.

courts of law [...].”<sup>66</sup> In effect, historical knowledge conforms to scientific knowledge, and historical realism aligns with scientific realism.<sup>67</sup>

The historical realism paradigm implies a very specific approach to historical research, one that accepts the existence of an objective truth which exists independently and externally from the researcher and which can be discovered by the researcher. The researcher approaches the data through a one-way mirror. This means that the researcher observes the data but aims to avoid influencing the data and aims to avoid being influenced by the data. Such an approach best facilitates the full discovery of an objective reality, without subjectivity or interpretation clouding the examination of data.

The aim of this thesis is a comparison of two institutions. This thesis gives a full description of both institutions, in order to successfully compare these two institutions. This entails a reconstruction of a time, a place, a set of actors and the legal systems they created. This reconstruction is based on official documentation of the time, as well as on accounts of the actors involved. These documentations and accounts are accepted as facts which accurately describe the time, place, actors and systems. While accepting that not all historical documentation and accounts can be identified or accessed, this thesis works from the premise that it is still possible for a researcher to discover and reconstruct an objective historical truth on the basis of the documentation that is available.

#### **4.2 Research Design**

The research design of this thesis follows the structure of a comparative historical case study. A case study involves an in-depth examination of a specific instance of a certain phenomenon,<sup>68</sup> with an emphasis on the location or setting of the case.<sup>69</sup> This study follows a multiple-case design, as it examines two cases, namely the ETB and ICoI on the one hand, and the Nuremberg IMT on the other hand. The ETB and ICoI are taken together as one case, because, even though the ETB was created by the Ottoman Foreign Minister and the ICoI by representatives of the European powers, their operations were interlinked, interrelated and interdependent.<sup>70</sup> Together, the ETB and ICoI passed judgment on individuals for the crimes committed during the 1860 Mount Lebanon civil war,

---

<sup>66</sup> *Ibid.*

<sup>67</sup> Waites, “Historical Realism,” 327-328.

<sup>68</sup> Earl Babbie, *The Practice of Social Research, Thirteenth Edition* (Belmont: Wadsworth/Cengage Learning, 2013), 338.

<sup>69</sup> Bryman, *Methods*, 67.

<sup>70</sup> Brockman-Hawe, “Constructing Justice,” 200 and 210-232.

and so they are examined as one case. Furthermore, as this study aims to compare the two cases selected, the comparative case study design is most appropriate for this thesis. Finally, considering that the two selected cases represent institutions that existed in the past and are no longer in operation, this thesis follows a comparative historical case study approach.

a) *Case Selection*

The ETB and ICoI represent one of the two cases being examined in this research. The rationale behind this selection is based on the observation that they seem to share many features with contemporary ICTs, and yet they are not considered an ICT or part of the historical development of international criminal justice. While there are many examples of historical courts that share some features with international criminal tribunals, the ETB and ICoI were chosen because of the large number of features it seems to share with contemporary tribunals. The fact that it has been overlooked by international criminal scholars despite these similarities makes a study of the ETB and the ICoI particularly interesting. The ETB and ICoI therefore present a unique case.<sup>71</sup>

The Nuremberg IMT is selected as the second case, as it has been presented by international legal scholars as the first international criminal tribunal, and thus the starting point of international criminal justice.<sup>72</sup> Considering that international criminal law and the institutions that apply this field of law have considerably developed since the Nuremberg IMT, a comparison of the ETB and ICoI to, for instance, a more contemporary international criminal tribunal such as the International Criminal Court, would not be as fruitful as selecting a case deemed to mark the very start of international criminal justice. Such contemporary tribunals have been built on the lessons learnt from previous institutions. A comparison to the Nuremberg IMT, which is currently considered to be the first of its kind, allows for a consideration of its faults, its limitations and the specificities of the time in which the tribunal was created.

A thorough comparison requires a comprehensive understanding of both institutions. This comparison is guided by the concepts presented in the Conceptual Framework of this thesis, namely the concepts of international criminal justice and the international criminal tribunal. As international criminal tribunals are the embodiment of ICJ, for the Nuremberg IMT and the ETB and ICoI to be considered contemporary tribunals, the pursuit of ICJ must be the main aim of these two tribunals.

---

<sup>71</sup> Bryman, *Methods*, 70.

<sup>72</sup> See footnote 2.

The concept of ICJ can be found in the rationale, motivations and ideologies behind the creation of the Nuremberg IMT and the ETB and ICoI. This in turn requires a thorough examination of the context in which these institutions were created to see whether the actors involved aimed to pursue some form of ICJ. Furthermore, the pursuit of ICJ must also be visible in the proceedings of the two institutions, which must aim to achieve justice by establishing individual criminal accountability for mass atrocities. The concept of the ICT requires an examination of the structure of the institutions, the building blocks which together create what can be considered an international criminal tribunal. These building blocks relate to different aspects of the organisation of the institutions, the law applied, the procedures followed and the cases judged by them.

### **4.3 Data**

The data used in this research is both historical and qualitative in nature. The aim was to look for data which described the contextual and institutional characteristics of both institutions. The study uses both primary and secondary data produced in the English language.

The primary data, meaning data generated by the researcher who creates the framework surrounding the data collection and analysis, is historical in nature, as it was found in documentation produced in the period during which the Nuremberg IMT and the ETB and ICoI were created and were operational. A distinction must be made between primary data on the ETB and ICoI and the primary data on the Nuremberg IMT. The primary data on the ETB and ICoI constitutes archival material, in the form of letters and reports produced between 1860 and 1862. With regard to the ETB and ICoI, no official historical documentation exists on this dual institution, as there was no official output documenting the proceedings of the ETB and ICoI. For instance, there was no official publication of the law of the ETB and ICoI, nor was there any documentation regarding the judgments they rendered, or even the details surrounding the creation and proceedings of the ETB and ICoI. This stands in stark contrast to the Nuremberg IMT, on which plentiful official documentation exists. When it comes to the ETB and ICoI, primary data was found in historical European diplomatic reports and communications between diplomats and between diplomats and their respective governments, produced between 1860 and 1862. The articles, reports and communications produced in English could be found in different British archives. A full list of all the individual archival references used is included in Appendix A.

The primary data regarding the Nuremberg IMT also constitutes historical documentation. However, in the case of the Nuremberg IMT, official documentation on the tribunal does exist. This

includes documents regulating its structure and proceedings, such as the 1945 London Charter of the International Military Tribunal, and documents relating specifically to the case before the tribunal, such as the final judgment. Furthermore, primary data on the Nuremberg IMT was also found in statements, reports, plans, memoranda and minutes of meetings produced by representatives and leaders of the Allied Powers. The majority of these documents was found online, while the remainder was found in monographs exclusively containing publications of documentary records.<sup>73</sup>

Secondary data, meaning data collected and analysed by previous researchers, is especially relevant for information on the contextual elements of both the ETB and ICoI and the Nuremberg IMT. The authors of these secondary sources have conducted extensive research on the events examined in this thesis and have been able to provide a comprehensive overview of the relevant periods. This data was found in academic books and articles.

#### **4.4 Data Collection**

Due to time constraints, the selection of relevant data was based on the data choices made by other scholars who have previously written on the topic of this thesis. Whenever one such source provided relevant information on the ETB and ICoI, and referred to an English historical document, the archival reference number was noted down. Subsequently, the title of the archival series in which the document appeared was located in the bibliography of the relevant source. For example, much of the correspondence was part of a series called *Correspondence relating to the Affairs of Syria 1860-1861*, which contains communications between British state officials dated between spring 1860 and late 1861.<sup>74</sup>

Subsequently, the locations of the series were identified, and it was concluded that most of the relevant diplomatic communications were to be found in the United Kingdom National Archives and the United Kingdom Parliamentary Archives in London and in the Public Record Office of Northern Ireland in Belfast. All three archives were accessed in person and the majority of the relevant series were found in these archives. The series were identified and photographed or burned

---

<sup>73</sup> See, *inter alia*, Michael R. Marrus, *The Nuremberg War Crimes Trial 1945-46* (Boston: Bedford Books, 1997); Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977); Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, 1981).

<sup>74</sup> Houses of Parliament, Parliamentary Papers, *Correspondence Relating to the Affairs of Syria 1860-1861* (London: Harrison and Sons, 1861).

on a CD, read in their entirety and relevant communications were identified within these series, in addition to the pre-selected communications.

The primary data on the Nuremberg IMT was found in mainly two sources. The first source is the website of the Avalon Project of the Yale Law School Lillian Goldman Law Library, which is an open access database of historical legal documents.<sup>75</sup> The website has a comprehensive collection of the different official documents related to the Nuremberg IMT. The second source concerns monographs containing different relevant documents on the Nuremberg IMT.<sup>76</sup> The secondary sources, namely academic books and articles on the ETB and ICoI and Nuremberg IMT, were accessed online or through different libraries, such as the Lund University libraries and the Peace Palace Library.

#### **4.5 Data Analysis Technique**

The technique applied in this research is qualitative content analysis, identifying relevant language and words through the use of codes. Following the research paradigm of historical realism, this research examined the manifest content, namely the direct wording which can be observed, and not the latent content, which is the underlying meaning of the words. This thesis used *a priori* codes related to the chosen concepts of international criminal justice and international criminal tribunals. These codes were key terms and other words that connect to the broader concepts of ICJ and ICTs in some manner.

With regard to the concept of ICJ, the relevant vocabulary relates back to the ideologies, motivations and dispositions of the actors involved, to show a certain type of inclination. Relevant examples of these *a priori* codes include words such as ‘justice’, ‘crimes’, ‘responsibility’, ‘humanity’, ‘punishment’, ‘fairness’ and ‘rights’. The data was examined to find expressions and acts in which these codes were visible.

With regard to the ICT, it was important to identify the institutional, organisational, legal and procedural characteristics of the two cases. While some words related to the theme of justice were easily identified through their obvious legal meaning, such as ‘heinous acts’, ‘death penalty’ and ‘testimony’, other words were more ambiguous and were identified as keywords through their

---

<sup>75</sup> *The Avalon Project*, “The International Military Tribunal for Germany,” last accessed May 12, 2018, [here](#).

<sup>76</sup> See footnote 75.

context, such as the official positions and occupations of the defendants, reflected in words like ‘ministers’, ‘military commanders’, ‘ambassadors’ and ‘industrialists’. Overall, the selection of codes was based on those aspects of the tribunals which would allow a meaningful comparison of the relevant institutional characteristics.

The collected data was divided into two sections, with three subsections each. The first section relates to the negotiations preceding the creation of the tribunals and is divided into the key actors and their motivations, key events and documents, and key outcomes. The aim was to establish a clear overview of the different actors, activities and acts which led to the creation of the institutions. The second section relates specifically to the characteristics of the tribunals and is divided into the creation and operation of the court, substantive legal matters and procedural legal matters. This division was chosen as it constitutes a logical categorisation from a legal perspective and was based on the structures which emerged from a review of the relevant literature.

Subsequently, the data from the two institutions was compared and analysed on the basis of the relevant vocabulary, guided by the concepts of international criminal justice and the international criminal tribunal. This entailed not only a comparison of the features of the Nuremberg IMT and the ETB and ICoI, but also an assessment of how well these two institutions fit within the concepts used. On the basis of the results of this comparison and analysis, some conclusions for the research field were drawn.

#### **4.6 *Delimitations and Limitations***

The delimitations and limitations of this thesis are mainly related to the selection, availability and accessibility of the primary data. First of all, the availability and accessibility of data on the ETB and ICoI was limited, as primary data could only be found in archives, some of which could not be accessed and even if the archives could be accessed, some of the archival documents could not be found. By contrast, there is an abundance of English or translated sources on the Nuremberg IMT which could be freely and easily accessed online. This made the collection and analysis of primary data on the Nuremberg IMT easier and less time consuming. While this in itself was not a limitation, the imbalance in the quantity, quality and accessibility of English sources could possibly lead to an unbalanced and incomplete comparison. However, the researcher is aware of these limitations, but feels that sufficient documentation has been collected for the scope of the comparative case study.

Furthermore, choices were made concerning the selection of archival materials, which had consequences for the information collected and the research conducted. First of all, this study solely collected and analysed data produced in the English language. While there is data on the ETB and ICoI produced in different languages, mainly French and Ottoman Turkish, these are languages in which the researcher is not proficient. This focus on English sources limits the possibility of gaining a complete and exhaustive understanding of the ETB and ICoI, and also narrows the diversity of views on the ETB and ICoI. This being said, a large number of texts were available in English, which allowed the researcher to develop a nuanced understanding of the ETB and ICoI. Secondly, the selection of relevant archival data on the ETB and ICoI was based on the selection of data by other scholars who have written on this dual institution. This can give a skewed view of the ETB and ICoI, as it is dependent on the selection criteria of other researchers, which might not be known to the author of this thesis. Data deemed irrelevant by these researchers might have been relevant for this thesis. However, by examining not only the pre-identified documents but the entire archival series in which the documents appeared, additional data could be identified.

## 5. Findings I: The Nuremberg International Military Tribunal

The following chapter examines the different aspects of both the creation, the main features and the procedures of the Nuremberg International Military Tribunal (Nuremberg IMT). This chapter starts with an overview of the key actors, events and outcomes which combined led to the creation of the Nuremberg IMT. Subsequently, the main institutional characteristics of the Tribunal are examined in detail, describing the organisation, laws and procedures of the Nuremberg IMT.

### 5.1 *The Creation*

In Europe, the Second World War which had started in 1939 ended with the unconditional surrender of the German armed forces on 8 May 1945, in the presence of representatives from the US, the USSR, the UK and France as the victorious powers.<sup>77</sup> However, negotiations between the Allied Powers on the fate of the leadership of Nazi Germany had already started in 1943.<sup>78</sup> The following section will examine and deconstruct this period between the first negotiations of 1943 and the eventual creation of the IMT. While the section on key actors focuses on the state parties and actors involved and their respective motivations, the section on key events and documents examines important points in time, landmark moments in the negotiations which were crucial for the creation of the Tribunal. The section on key outcomes details the final result of the negotiations and the starting point of the Tribunal.

#### a) *Key Actors*

The state parties involved in the negotiations preceding the creation of the Nuremberg IMT were the US, the USSR and the UK, while France only joined in the final stages of the negotiations. Initial discussions, which already took place long before the war ended, focused on the broader question of what should happen to the Nazi leadership after the war.

In the US, different state departments were involved in the discussion, and disagreements existed both between and within these departments.<sup>79</sup> The Secretary of the Treasury, Henry Morgenthau, preferred summary executions.<sup>80</sup> However, other members of the US government, such as Secretary

---

<sup>77</sup> Edmund Jan Osmańczyk, *Encyclopedia of the United Nations and International Agreements, Volume 2, Third Edition* (New York: Routledge, 2003), 818.

<sup>78</sup> Marrus, *Nuremberg Trial*, 21.

<sup>79</sup> Telford Taylor, *The Anatomy of the Nuremberg Trials* (London: Bloomsbury Publishing, 1993), 33-34.

<sup>80</sup> Taylor, *Anatomy*, 33-34; Eugene Davidson, *The Trial of the Germans* (Columbia: University of Missouri Press, 1966), 17; Smith, *Nuremberg*, 47; Marrus, *Nuremberg Trial*, 23 and 24-26.

of War, Henry Stimson, favoured the idea of a trial and considered the creation of a special tribunal symbolic for a new world order.<sup>81</sup> Both sides drafted proposals supporting their positions and setting out their plans.<sup>82</sup> In one draft, Stimson argued that the US should be part of “an international tribunal constituted to try” the leadership of the Nazi regime.<sup>83</sup> In a subsequent proposal, it was put forward that such an international tribunal would bring to justice “the guilty of this generation [...] according to due process of law” and would solemnly condemn “the conduct of the Axis [through] an international adjudication of guilt [...]”<sup>84</sup> Furthermore, in a January memorandum to President Franklin D. Roosevelt, Stimson and others argued that swift executions “would be violative of the most fundamental principles of justice, common to all the United Nations.”<sup>85</sup> However, no official position on the matter was taken by President Roosevelt, and when he passed away in April 1945, his successor Harry Truman, who was himself a former judge,<sup>86</sup> pursued the idea of a trial, by appointing a chief US prosecutor, accepting the January Memorandum as official US policy and circulating a draft proposal for a tribunal.<sup>87</sup>

The USSR favoured the idea of a trial from the very start,<sup>88</sup> with the government stating early on in the war that “severe punishment must overtake all who are guilty of these most atrocious crimes against culture and humanity [...]”<sup>89</sup> In 1942, Foreign Minister Vyacheslav Molotov stated that “Hitler’s Government and its accomplices will not escape severe responsibility and deserved punishment for all their unparalleled crimes against [...] all freedom-loving people.”<sup>90</sup> Furthermore, the USSR government was the first Allied Power to suggest the creation of “a special international tribunal, and to punish according to all the severity of criminal law, any of the leaders of Fascist Germany [...]”<sup>91</sup> The aim of such an international trial would be to broadcast the guilt of the Nazi

---

<sup>81</sup> Taylor, *Anatomy*, 33-34; Davidson, *The Trial*, 17-18.

<sup>82</sup> Marrus, *Nuremberg Trial*, 23-30; Smith, *Reaching Judgment*, 36-37.

<sup>83</sup> Marrus, *Nuremberg Trial*, 27.

<sup>84</sup> *Ibid*, 29.

<sup>85</sup> *Ibid*, 30.

<sup>86</sup> Overy, “Nuremberg Trials,” 5; Norbert Ehrenfreund, *The Nuremberg Legacy* (Basingstoke: Palgrave Macmillan, 2007), 10; Smith, *Nuremberg*, 37.

<sup>87</sup> Bradley F. Smith, *The American Road to Nuremberg: The Documentary Record, 1944-1945* (Stanford: Hoover Institution Press, 1982), 139; Marrus, *Nuremberg Trial*, 33-35; Smith, *Nuremberg*, 53; David M. Crowe, *War Crimes, Genocide, and Justice* (New York: Palgrave MacMillan, 2014), 158; Taylor, *Anatomy*, 32; Smith, *Reaching Judgment*, 37-38.

<sup>88</sup> Smith, *Reaching Judgment*, 39.

<sup>89</sup> George Ginsburgs, “The Nuremberg Trial: Background,” in *The Nuremberg Trial and International Law*, eds. George Ginsburgs and Vladimir Nikolaevich Kudriavtsev (Dordrecht: Martinus Nijhoff Publishers, 1990), 12.

<sup>90</sup> *Ibid*, 13-14.

<sup>91</sup> *Ibid*, 15; Marrus, *Nuremberg Trial*, 19.

leadership to the world.<sup>92</sup> This remained the official position of the USSR, and in February 1945 during the Yalta Conference, the leader of the USSR, Joseph Stalin, once more confirmed to Churchill his preference for a trial.<sup>93</sup>

The British leadership favoured summary executions for the leaders of Nazi Germany almost until the end of the war,<sup>94</sup> with Prime-Minister Winston Churchill stating in February 1945 that the major Nazi leaders “should be shot as soon as they were caught and their identity established”,<sup>95</sup> while Foreign Secretary Anthony Eden stated that “[the perpetrators] fall outside and go beyond the scope of any judicial process.”<sup>96</sup> Lord Chancellor, Sir John Simon asserted that “the method by trial, conviction, and judicial sentence is quite inappropriate for notorious ringleaders [...]”.<sup>97</sup> The British government opposed the creation of an international tribunal, considering it too time-consuming, impractical and a potential platform for Nazi propaganda.<sup>98</sup> However, in May 1945, the British government conceded, accepting the positions of the USSR and US and the proposal to examine the option of an international trial.<sup>99</sup>

France joined the negotiations on the creation of a tribunal only at the end of April 1945, during the United Nations Conference on International Organization in San Francisco.<sup>100</sup> Nevertheless, the head of the provisional government in France, Charles de Gaulle, explicitly stated that judicial proceedings were the preferred option.<sup>101</sup>

#### *b) Key Events and Documents*

As stated, the key events represent points in time which were crucial for the eventual creation of the Tribunal. These points in time were conferences, during which representatives of the state parties convened to discuss and reach agreement on a range of matters, including the punishment of the Nazi leadership. Of particular importance are the documents produced at the conclusion of these conferences, which stipulate the agreements reached between the state parties. This section

---

<sup>92</sup> Davidson, *The Trial*, 18.

<sup>93</sup> Marrus, *Nuremberg Trial*, 33.

<sup>94</sup> Smith, *Nuremberg*, 29-30 and 47; Smith, *Reaching Judgment*, 35; Marrus, *Nuremberg Trial*, 23 and 24-26; Taylor, *Anatomy*, 29.

<sup>95</sup> Marrus, *Nuremberg Trial*, 33.

<sup>96</sup> Overy, “Nuremberg Trials,” 3.

<sup>97</sup> Marrus, *Nuremberg Trial*, 23.

<sup>98</sup> *Ibid*, 23 and 33.

<sup>99</sup> *Ibid*, 35-36; Taylor, *Anatomy*, 32-33; Smith, *Reaching Judgment*, 38-39.

<sup>100</sup> Smith, *Reaching Judgment*, 38-40.

<sup>101</sup> Taylor, *Anatomy*, 32.

examines the most important conferences, during which the state parties discussed the fate of the Nazi leadership, and the relevant documents.

In October 1943, at the end of the Moscow Conference, the foreign ministers of the US, the USSR and the UK issued the Moscow Declaration, which acknowledged the “atrocities, massacres and executions”, “ruthless cruelties” and “monstrous crimes” perpetrated by the Nazi regime and agreed to send these perpetrators back to the countries where such atrocities were committed, “in order that they may be judged and punished [...]”<sup>102</sup> Those individuals whose crimes could not be linked to a specific country would be punished through a joint decision by the Allied Powers.<sup>103</sup> In the official communiqué published after the February 1945 Yalta Conference, the US, the USSR and the UK once more expressed their commitment to “bring all war criminals to justice and swift punishment [...]”<sup>104</sup>

Subsequently, in April 1945, during the San Francisco Conference, the US circulated a draft agreement for a trial of the Nazi leadership, which stated in Article 4 that “those responsible for the atrocities and crimes committed by the Axis Powers or any officer or agent thereof shall not escape punishment”, and which included a segment on the fair trial rights of the defendants.<sup>105</sup> It was during the San Francisco Conference that agreement on the creation of an international tribunal was reached between the US, the USSR and UK, while the state parties also agreed that France would be requested to join the subsequent negotiations.<sup>106</sup>

The powers agreed to meet in London on 25 June 1945 to start full negotiations, using the US draft agreement circulated in San Francisco as a starting point.<sup>107</sup> The London negotiations consisted of fifteen sessions,<sup>108</sup> with participants from the four Allied Powers disagreeing on a variety of issues, ranging from the purposes and aims of the trial, the law to be applied, the procedures to be followed and conflicting legal principles, to practical problems related to the collection of evidence, the

---

<sup>102</sup> Marrus, *Nuremberg Trial*, p. 21.

<sup>103</sup> *Ibid*; Taylor, *Anatomy*, 27.

<sup>104</sup> Chatham House: The Royal Institute of International Affairs, “The Crimea Conference: Declarations of the Three Powers,” *Bulletin of International News* 22, no. 4 (February 1945): 165.

<sup>105</sup> *The Avalon Project*, “International Conference on Military Trials: London, 1945 American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco, April 1945,” accessed May 12, 2018, [here](#); Marrus, *Nuremberg Trial*, 34-35.

<sup>106</sup> Marrus, *Nuremberg Trial*, 36-37; Smith, *Reaching Judgment*, 38-40.

<sup>107</sup> Smith, *Nuremberg*, 42; Smith, *Reaching Judgment*, 42-43.

<sup>108</sup> Taylor, *Anatomy*, 59.

location of the tribunal, the number of cases and the identification of defendants.<sup>109</sup> However, the last issues were finally resolved on the second of August 1945, after the leaders of the US, the USSR and the UK once more confirmed “their intention to bring these criminals to swift and sure justice” and settled their main differences during the Potsdam Conference, which took place while the London negotiations were ongoing.<sup>110</sup>

### c) *Key Outcomes*

This section will briefly outline the results of the London negotiations, which formed the legal basis for the creation and functioning of the Tribunal, before examining the characteristics of the Tribunal itself. On August 8, 1945, a week after the Potsdam Protocol was issued, the London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement) was signed by representatives of the four Allied Powers.<sup>111</sup> The London Agreement states the intention of the signatory states to create an international military tribunal to prosecute those war criminals whose crimes could not be linked to a specific location.<sup>112</sup>

Attached to the London Agreement was the Charter of the International Military Tribunal (the Charter), which constituted the founding document of the Tribunal. This Charter provided for the creation of an international military tribunal to prosecute and punish the major war criminals of the European Axis in a “just and prompt trial”.<sup>113</sup> Consisting of thirty articles, the Charter prescribed the goals, organisation, procedures and applicable law of the Tribunal. Furthermore, an additional set of eleven rules of procedure to guide proceedings before the Tribunal were adopted on 29 October 1945.<sup>114</sup>

## **5.2 *The Nuremberg International Military Tribunal***

The following section examines some of the institutional characteristics of the Nuremberg IMT and discusses the design of the Tribunal and the details of the trial itself. Secondly, substantive legal

---

<sup>109</sup> Taylor, *Anatomy*, 59-115; Smith, *Nuremberg*, 46-73; Marrus, *Nuremberg Trial*, 49-50.

<sup>110</sup> Crowe, *War Crimes*, 2014, 163; Smith, *Nuremberg*, 56-57.

<sup>111</sup> Davidson, *The Trial*, 18.

<sup>112</sup> Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, art. 1, Aug. 8, 1945, 82 U.N.T.S. 279.

<sup>113</sup> Charter of the International Military Tribunal, art. 1, Aug. 8, 1945, 82 U.N.T.S. 279.

<sup>114</sup> *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg 14 November 1945-1 October 1946, Blue Series, Volume 1* (Nuremberg: Secretariat of the Tribunal, 1947), 19-23.

matters are discussed, which relate to the types of crimes, levels of responsibility and the punishment included in the Charter. Thirdly, procedural legal matters are examined, relating to the procedures and rules which needed to be followed in the proceedings by all parties to the trial.

a) *Creation and Operation*

While the permanent seat of the Tribunal would be in Berlin, where the Control Council for Germany had its headquarters, the first trial was to take place in Nuremberg.<sup>115</sup> The 1945 London Charter was drafted by the Allied Powers and was based predominantly on the Anglo-American legal system and only partially on the continental legal system.<sup>116</sup> The law of the Charter was therefore a combination, a blend, of two pre-existing legal systems.<sup>117</sup>

The judiciary consisted of four members, one judge and one alternate judge for each party to the London Agreement, appointed by their respective states and known as members of the Tribunal.<sup>118</sup> These members were all lawyers in their respective home countries.<sup>119</sup> Every participating state was also to appoint a prosecutor.<sup>120</sup> Some of the Tribunal members and prosecutors had also been involved in the drafting of the London Agreement and the IMT Charter.<sup>121</sup> Each defendant had their own defence counsel, who were German lawyers.<sup>122</sup>

The Nuremberg IMT would only handle one case, concerning twenty-four defendants, which took place between 20 November 1945 and 1 October 1946.<sup>123</sup> The defendants were ministers and prominent members of the Nazi regime, military commanders, leaders of organisations linked to the Nazi regime, ambassadors and industrialists.<sup>124</sup> The trial ended with twelve defendants receiving

---

<sup>115</sup> 1945 IMT Charter, art. 24.

<sup>116</sup> Tessa McKeown, "The Nuremberg Trial: Procedural Due Process at the International Military Tribunal," *Victoria University Wellington Law Review* 45 (2014): 112; Hans Laternser, "Looking Back at the Nuremberg Trials with Special Consideration of the Process Against Military Leaders," in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (New York: Oxford University Press, 2008), 475; Otto Kranzbuhler, "Nuremberg Eighteen Years Afterwards," in *Perspectives on the Nuremberg Trial*, ed. Guénaël Mettraux (New York: Oxford University Press, 2008), 434-436; Davidson, *The Trial*, 31.

<sup>117</sup> Ehard, "Nuremberg Trial," 240-241; Overy, "Nuremberg Trials," 14-21; Kranzbuhler, "Nuremberg," 434-435.

<sup>118</sup> 1945 IMT Charter, art. 2.

<sup>119</sup> Smith, *Nuremberg*, 3-4.

<sup>120</sup> 1945 IMT Charter, art. 14.

<sup>121</sup> McKeown, "Nuremberg," 121; Davidson, *The Trial*, 18; Smith, *Nuremberg*, 42-43.

<sup>122</sup> *Blue Series*, 6-7; McKeown, "Nuremberg," 114; Davidson, *The Trial*, 30.

<sup>123</sup> *Blue Series*, 27-92.

<sup>124</sup> *Ibid*, 27-92.

the death penalty, seven defendants receiving prison sentences and three acquittals.<sup>125</sup> One defendant committed suicide before the trial could commence, while the charges against one defendant were dropped.<sup>126</sup>

*b) Substantive Legal Matters*

The crimes on which the Tribunal could pass judgment were crimes against peace, war crimes and crimes against humanity.<sup>127</sup> While the concept of war crimes did already exist before World War II, the crimes against peace and crimes against humanity did not. Their exact definitions were agreed upon by the parties to the London Agreement.<sup>128</sup> Crimes against peace constituted those acts which amount to planning, preparing, initiating or waging a war of aggression or a war which violates international treaties. War crimes were those acts which violated the laws of war or the customs of war. Crimes against humanity concerned inhumane acts committed against a civilian population before or during the war.

Defendants could be found guilty or innocent by the Tribunal.<sup>129</sup> In case of the former, Tribunal members would be allowed to impose a death penalty or “such other punishment as shall be determined by [the Tribunal] to be just.”<sup>130</sup> Additionally, the Tribunal could deprive any defendant found guilty of any stolen property, and demand that it would be delivered to the Control Council for Germany.<sup>131</sup>

The Tribunal focused on the individual responsibility of the defendants.<sup>132</sup> Official military positions could mitigate neither responsibility nor punishment.<sup>133</sup> However, while a defence plea of superior military orders would not exclude responsibility, such a defence could mitigate punishment if so required by considerations of justice.<sup>134</sup> Finally, leaders, organisers and instigators who took part in the drafting or execution of a plan or conspiracy to commit any of the crimes of the Charter, would carry responsibility for all acts carried out in execution of the plan.<sup>135</sup>

---

<sup>125</sup> *Ibid*, 171-341.

<sup>126</sup> *Ibid*.

<sup>127</sup> 1945 IMT Charter, art. 6.

<sup>128</sup> Overy, “Nuremberg Trials,” 14-21; Taylor, *Anatomy*, 10.

<sup>129</sup> 1945 IMT Charter, art. 26.

<sup>130</sup> *Ibid*, art. 27.

<sup>131</sup> *Ibid*, art. 6.

<sup>132</sup> *Ibid*, art. 28.

<sup>133</sup> *Ibid*, art. 7.

<sup>134</sup> *Ibid*, art. 8.

<sup>135</sup> *Ibid*, art. 6.

c) *Procedural Legal Matters*

The personal jurisdiction of the Nuremberg IMT covered those individuals who committed crimes while “acting in the interests of the European Axis countries, whether as individuals or as members of organizations”, excluding acts of the Allied Powers which might have constituted crimes under the jurisdiction of the Tribunal.<sup>136</sup> Accordingly, *tu quoque* defences and evidence, namely pleas and evidence asserting that comparable crimes had been committed by the Allied Powers, were rejected by the Tribunal.<sup>137</sup>

Both the members of the IMT and the alternates were expected to attend all sessions of the IMT.<sup>138</sup> While convictions and sentences required at least three affirmative votes, all other decisions were to be made by a majority vote, with the President of the Tribunal having the deciding vote in case of a tie.<sup>139</sup>

Proceedings were conducted in English, French, Russian and in the language of the defendant, through the use of simultaneous interpretation, while all official documents would also be produced in these languages.<sup>140</sup> The hearings of the IMT were open to the public and 250 seats were available for Tribunal staff, the press and the general public.<sup>141</sup> The final judgment of the Tribunal was required to provide the reasons behind any guilty or not guilty verdict.<sup>142</sup> The Tribunal’s judgment was final and no appeal or review was allowed.<sup>143</sup>

The trial at Nuremberg commenced with a public reading of the indictment, the guilty or not guilty pleas by the defence and the opening statement of the prosecution.<sup>144</sup> Subsequently, the members of the IMT inquired into the evidence to be submitted, which mainly involved documents collected from the German archives,<sup>145</sup> and ruled on its admissibility.<sup>146</sup> Next, prosecution witnesses and defence witnesses were questioned, after which cross-examination of witnesses and defendants by

---

<sup>136</sup> *Ibid.*

<sup>137</sup> McKeown, “Nuremberg,” 119; Smith, *Reaching Judgment*, 102.

<sup>138</sup> *Ibid.*, art. 2 and 4(a).

<sup>139</sup> *Ibid.*, art. 4(c).

<sup>140</sup> *Ibid.*, art. 25.

<sup>141</sup> McKeown, “Nuremberg,” 120.

<sup>142</sup> 1945 IMT Charter, art. 26.

<sup>143</sup> *Ibid.*

<sup>144</sup> 1945 IMT Charter, art. 24 (a), (b) and (c).

<sup>145</sup> Laternser, “Looking Back,” 475-476; Kranzbuhler, “Nuremberg,” 436; McKeown, “Nuremberg,” 126-127.

<sup>146</sup> 1945 IMT Charter, art. 24(d).

the prosecution and defence took place.<sup>147</sup> Hereafter defence counsel, as well as the individual defendants, and prosecution were allowed to address the members of the Tribunal, after which proceedings ended.<sup>148</sup> The members of the Tribunal deliberated in private, drafting a judgment which detailed the names, occupations or positions of the defendants, the alleged crimes and their role in these crimes, the verdict on guilt or innocence and the punishment.<sup>149</sup>

Both the Charter and the members of the IMT provided guidelines to ensure that the defendants would receive a fair trial. First of all, the indictment was required to be detailed in addressing the charges, translated into a language which the defendant understood and submitted to the defendant “at reasonable time before the Trial.”<sup>150</sup> Furthermore, defendants were provided the right to give explanations relevant to the charges, the right to either conduct their own defence or be assisted by defence counsel and the right to present evidence and cross-examine witnesses.<sup>151</sup> With regard to the evidence, the German archives had been taken over by the Allied Powers and all the relevant evidentiary materials were in the possession of the prosecution.<sup>152</sup> As the defence counsel was not granted access to the German archives,<sup>153</sup> defence could only review evidentiary material if it had been submitted to the Tribunal by the prosecution as evidence.<sup>154</sup> If the prosecution submitted documents to the Tribunal as evidence, defence counsel would be granted access to these files by the Tribunal. Regardless, even if such access was granted by the Tribunal, defence counsel did not always receive the relevant materials.<sup>155</sup>

---

<sup>147</sup> *Ibid.*, art. 24 (e).

<sup>148</sup> *Ibid.*, art. 24 (g), (h), (i) and (j).

<sup>149</sup> *Ibid.*, art. 24 (k) and 26; *Blue series*, 171-342.

<sup>150</sup> *Ibid.*, art. 16 (a).

<sup>151</sup> *Ibid.*, art. 16 (b), (c), (d) and (e).

<sup>152</sup> Kranzbuhler, “Nuremberg,” 436; McKeown, “Nuremberg,” 127.

<sup>153</sup> Kranzbuhler, “Nuremberg,” 436; McKeown, “Nuremberg,” 127.

<sup>154</sup> Laternser, “Looking Back,” 476; Smith, *Reaching Judgment*, 83-84; McKeown, “Nuremberg,” 127-128.

<sup>155</sup> Smith, *Reaching Judgment*, 78 and 83-84; McKeown, “Nuremberg,” 127-128; Davidson, *The Trial*, 31.

## 6. Findings II: The Beirut Tribunal and the International Commission

The following chapter examines in detail the creation, features and functioning of the Extraordinary Tribunal for Beirut (ETB) and the International Commission of Inquiry (ICoI). This chapter follows the same structure as the previous chapter on the Nuremberg IMT, starting with an examination of the creation of the ETB and the negotiations between the European powers and the Ottoman state which led to the creation of the ICoI, discussing the key actors, events and outcomes. The subsequent section describes the main institutional features of both institutions, including the organisational, legal and procedural characteristics.

### 6.1 *The Creation*

The Mount Lebanon civil war, which raged mainly between the Druze and the Maronite Christian communities, started in May 1860 and ended in mid-August 1860.<sup>156</sup> The news of the conflict had reached the Ottoman government in Constantinople in June, and the government responded by sending Ottoman troops to the region, which arrived in July.<sup>157</sup> When reports of widespread and large-scale atrocities committed by both sides but mainly attributed to the Druze reached Europe in July 1860, representatives of France, the UK, Russia, Prussia and Austria started negotiations on the fate of those responsible for the atrocities.<sup>158</sup> The following section will examine and deconstruct this period between the arrival of Ottoman troops in Mount Lebanon and the eventual creation of the ETB and ICoI. While the section on key actors examines the state parties and actors involved and their respective motivations, the section on key events examines the most crucial moments in the discussions between the states, which were defining points in time for the creation of the dual institution. The section on key outcomes details the results of the discussions and the starting point of the ETB and ICoI.

#### a) *Key Actors*

The state parties involved in the creation of the ETB and the ICoI were the Ottoman Empire, France, the UK, Russia, Prussia and Austria. The initial response to the events of the civil war led to a unified response of shock and agreement that those individuals responsible for the atrocities should be identified and punished.

---

<sup>156</sup> Farah, *Interventionism*, 557-558 and 608; Fawaz, *An Occasion*, 47-100 and 109-119; Brockman-Hawe, "Constructing Justice," 186-191.

<sup>157</sup> Fawaz, *An Occasion*, 101.

<sup>158</sup> Farah, *Interventionism*, 557-593; Brockman-Hawe, "Constructing Justice," 186 and 189-191.

The Sultan of the Ottoman Empire expressed his horror regarding the events which took place, and his “desire that all persons found guilty with respect to [the civil war] should be duly punished” and that justice should be rendered to all.<sup>159</sup> Another Ottoman official repeated this goal, stating that the atrocities constituted “a crime against humanity, which provoked a severe and immediate punishment.”<sup>160</sup> In pursuit of this aim, the Sultan sent his Foreign Minister, Fuad Pasha, to the region to end the civil war, return peace and security to the region and establish responsibility for the atrocities.<sup>161</sup>

Representatives of the European powers also expressed their horror at the events that took place. The British Ambassador to France, Henry Wellesley, stated that even if only a small part of the reports coming from the region were true, “enough has occurred to excite universal reprobation”,<sup>162</sup> while British Admiral W. F. Martin commented that “[a] most grievous wrong has been inflicted upon the civilized world [...]”.<sup>163</sup> The French Foreign Minister, Edouard-Antoine de Thouvenel, argued that measures were needed “to satisfy the principles of justice, and order”, and “to repair frightful calamities and to prevent their recurrence”, which would have to go beyond ending the conflict and signing a truce.<sup>164</sup>

#### b) *Key Events and Documents*

The key events represent moments in time which were crucial for the eventual creation of both the ETB and ICoI. These crucial moments include actions by Fuad Pasha, and the documents on which he based his actions, and correspondence of the state actors involved, in which agreements were reached. This section examines the most important actions, documents and correspondence.

In July 1860, while the civil war was still ongoing, Fuad Pasha arrived in Damascus armed with 15,000 troops and an imperial *firman*, an official decree issued by the Ottoman Sultan.<sup>165</sup> The *firman* charged Fuad Pasha with identifying those “who have been instrumental in the odious act of

---

<sup>159</sup> PASC 1860-1861, Incl., No. 12, *The Sultan to the Emperor of the French*, 16 July 1860; PASC 1860-1861, Incl., No. 74, *Aali Pasha to Ahmed Vefyk Efendi*, 27 July 1860; PASC 1860-1861, No. 153, *Bulwer to Russell*, 1 October 1860.

<sup>160</sup> PASC 1860-1861, Part II, Incl. 5, No. 40, *Communication made by Abro Effendi*, 10 May 1861.

<sup>161</sup> PASC 1860-1861, Incl., No. 51, *Firman*, 25 July 1860.

<sup>162</sup> PASC 1860-1861, No. 1, *Cowley to Russell*, 5 July 1860.

<sup>163</sup> PASC 1860-1861, Incl. 1, No. 82, *Memorandum*, 26 July 1860.

<sup>164</sup> PASC 1860-1861, No. 6, *Thouvenel to Count Persigny*, 16 July 1860.

<sup>165</sup> PASC, No. 51, 25 July 1860.

shedding human blood, and immediately punish them according to the prescriptions of my Imperial Code.”<sup>166</sup> Fuad Pasha arrived first in Damascus at the end of July 1860, and issued a public proclamation, announcing the creation of a body which was “intended also to be an extraordinary means for hearing all cases of a criminal character affecting individuals.”<sup>167</sup> Subsequently, Fuad Pasha set up an Extraordinary Tribunal for Damascus.<sup>168</sup> This Tribunal tried hundreds of Damascenes behind closed doors on the basis of military procedures.<sup>169</sup> In September 1860, Fuad Pasha travelled to Beirut and, on the basis of the same imperial *firman*, set up a second Extraordinary Tribunal for Beirut.<sup>170</sup> The British Consul-General in Beirut, Noel Moore, remarked that Fuad Pasha should receive “the highest applause for the firmness which pronounced, and the courage which carried out a sentence vindicating [...] the claims of humanity [...]”<sup>171</sup>

The proposal to create an international commission to establish the causes of the conflict, the responsibility of individuals involved, the compensation to be granted to the victims and to decide on measures which would prevent further conflicts, was first issued by the French Foreign Minister, Thouvenel.<sup>172</sup> Thouvenel argued that such a commission should ensure “that the authors and abettors in the massacres were properly punished.”<sup>173</sup>

The UK was the first of the powers to accept the French proposal, with Foreign Minister John Russell arguing that such a commission should “determine the responsibility of all persons concerned”, while it should also consider measures of compensation for victims and prevention.<sup>174</sup> Henry Bulwer, the British Ambassador to the Ottoman Empire, stated that the security and peace of the region required “a speedy, pure, and impartial administration of justice”, as impunity would cause victims to “take punishment into their own hands or rather substitute revenge for due and legal retribution.”<sup>175</sup> Russell expressed his hope that these measures “may vindicate the rights of humanity, so cruelly outraged in Syria.”<sup>176</sup> The Russian, Prussian and Austrian governments

---

<sup>166</sup> PASC, No. 51, 25 July 1860.

<sup>167</sup> PASC 1860-1861, Incl. 3, No. 65, *Proclamation*, 21 July 1860.

<sup>168</sup> PASC 1860-1861, No. 91, *Fraser to Russell*, 8 August 1860.

<sup>169</sup> PASC, No. 91, 8 August 1860; PASC 1860-1861, No. 118, *Brant to Russell*, 25 August 1860; Brockman-Hawe, “Constructing Justice,” 194.

<sup>170</sup> PASC, Incl., No. 51, 25 July 1860; PASC 1860-1861, No. 140, *Moore to Russell*, 14 September 1860.

<sup>171</sup> PASC 1860-1861, No. 139, *Moore to Russell*, 14 September 1860.

<sup>172</sup> PASC, No. 6, 16 July 1860.

<sup>173</sup> PASC 1860-1861, No 54, *Cowley to Russell*, 2 August 1860.

<sup>174</sup> PASC 1860-1861, No. 7, *Russell to Bulwer*, 17 July 1860.

<sup>175</sup> PASC 1860-1861, No. 42, *Russell to Dufferin*, 30 July 1860.

<sup>176</sup> PASC 1860-1861, No. 37, *Russell to Cowley*, 28 July 1860.

supported the French proposal as well, with Austria asserting however, that such an initiative should be sanctioned by the Ottoman government.<sup>177</sup>

After the five European powers agreed on the creation of a commission, negotiations started on the aims and role of the ICoI and its relation to the ETB. The French Foreign Minister Thouvenel argued that, in any case, the Commission members should receive identical instructions from their respective governments.<sup>178</sup> Subsequently, Thouvenel issued a draft proposal on the aims of the ICoI, which were to “examine [...] into the origin and the causes of events, to determine the amount of responsibility of the leaders of the insurrection, and of the agents of the Government[,] and [...] call for the punishment of the guilty.”<sup>179</sup> Furthermore, the French commissioner, L. Beclard, was instructed to provide Fuad Pasha with every assistance so that proceedings would “fulfil the conditions of strict and impartial justice.”<sup>180</sup> Frederick Dufferin, the British commissioner, was instructed to show the Druze the readiness of the British to do impartial justice, and that the Druze should “suffer the penalties due to their crimes.”<sup>181</sup>

These instructions were subsequently adopted by the other European States.<sup>182</sup> By the end of August, each of the five European powers had appointed their respective commissioners and had provided them with their respective instructions.<sup>183</sup> The Ottoman government accepted the creation of the Commission, arguing that, while the warring parties were Ottoman subjects and therefore were exclusively within the jurisdiction of the Ottoman Empire, because “subjects and inhabitants of Foreign Governments sustained wrong and injury”, the desire for a joint investigation was understandable.<sup>184</sup>

---

<sup>177</sup> PASC 1860-1861, No. 40, *Loftus to Russell*, 26 July 1860.

<sup>178</sup> TNA FO406/10, No. 69, *Cowley to Russell*, 2 August 1860.

<sup>179</sup> PASC 1860-1861, No. 70, *Proposed Instructions*, 11 August 1860.

<sup>180</sup> PASC, No. 70, 11 August 1860.

<sup>181</sup> TNA PRO30/22/116, *Russell to Dufferin*, 8 September 1860.

<sup>182</sup> PASC 1860-1861, No. 63, *Russell to Cowley*, 9 August 1860; PASC 1860-1861, No. 76, *Russell to Dufferin*, 14 August 1860; PASC 1860-1861, No. 77, *Russell to Dufferin*, 14 August 1860.

<sup>183</sup> PASC, No. 42, 30 July 1860; PASC 1860-1861, No. 79, *Cowley to Russell*, 14 August 1860; PASC 1860-1861, No. 93, *Fane to Russell*, 23 August 1860; PASC, No. 94, *Bloomfield to Russell*, 25 August 1860.

<sup>184</sup> TNA FO195/656, *Draft of Instructions to Fuad Pasha*, 17 September 1860.

c) *Key Outcomes*

This section will briefly outline the results of the previously discussed actions and agreements, which formed the basis for the creation and functioning of the ETB and ICoI, before examining the characteristics of this dual institution.

As stated, the ETB was set up by Fuad Pasha in September 1860,<sup>185</sup> on the basis of the imperial *firman* and as detailed in the proclamation issued at the end of July.<sup>186</sup> Proceedings of the ETB commenced before all the members of the ICoI had arrived in Beirut.<sup>187</sup> While proceedings before the ETB commenced mid-September,<sup>188</sup> the ICoI had its first unofficial meeting on 26 September, during which the Commission drafted a note to Fuad Pasha, inviting him or a delegate to meet with the ICoI.<sup>189</sup>

During the first official meeting of the ICoI, on 5 October 1860, the commissioners and Abro Efendi, the delegate of Fuad Pasha, agreed on the aim of the Commission. This aim would be to investigate the origins and causes of the conflict, to determine the responsibility of those most responsible and to punish them accordingly, to provide relief to the Christian population and to propose measures regarding the organisation of Mount Lebanon.<sup>190</sup> In order to do so, the Commission would assist in the proceedings of the ETB, by attending the proceedings, submit observations on the proceedings to Fuad Pasha, and by examining and assessing the draft judgments of the ETB.<sup>191</sup>

## **6.2 *The Extraordinary Tribunal for Beirut and the International Commission of Inquiry***

The following section examines the institutional features of the ETB and ICoI, starting with an examination of the organisation of the two institutions and the cases that the ETB and ICoI handled. Subsequently, substantive legal features related to the types of crimes, levels of responsibility and the punishment are examined. Finally, procedural legal matters that concern the procedures and rules which needed to be followed in the trial proceedings are discussed.

---

<sup>185</sup> PASC, No. 140, 14 September 1860.

<sup>186</sup> PASC, Incl., No. 51, 25 July 1860; PASC, Incl. 3, No. 65, 21 July 1860.

<sup>187</sup> PASC 1860-1861, Incl. 1, No. 141, *Dufferin to Bulwer*, 13 September 1860.

<sup>188</sup> PASC, No. 140, 14 September 1860; PASC 1860-1861, Incl. 1, No. 163, *Protocol of the First Meeting*, 5 October 1860.

<sup>189</sup> PASC 1860-1861, Incl. 2, No. 151, *Collective Note*, 26 September 1860.

<sup>190</sup> PASC, Incl. 1, No. 163, 5 October 1860.

<sup>191</sup> PASC 1860-1861, Incl. 1, No. 175, *Dufferin to Russell*, 26 October 1860; PASC 1860-1861, Incl. 3, No. 229, *Dufferin to Bulwer*, 30 December 1860; PASC 1860-1861, Incl. 2, No. 351, *Minute on the Judgments*, 24 February 1861; PASC 1860-1861, Part II, Incl. 3, No. 6, *Dufferin to Bulwer*, 23 March 1861.

a) *Creation and Operation*

The official seat of the ETB was in Beirut, and the trials were held there.<sup>192</sup> The ETB was created by Fuad Pasha on the basis of the imperial *firman* drafted by the Ottoman Sultan, which in turn was based on the Imperial Penal Code of the Ottoman Empire, which constituted the pre-existing criminal law of the Ottoman Empire.<sup>193</sup> The ICoI was also seated in Beirut,<sup>194</sup> and was created on the basis of an agreement between the five European powers.<sup>195</sup> The ICoI followed European standards for the trials,<sup>196</sup> thus creating a blend between the Ottoman and European legal systems.

The judiciary of the ETB consisted of five members and one president, namely the Governor-General of Sidon Province, Ahmed Pasha.<sup>197</sup> The members of the ETB were Admiral Mustapha Paslya, the Mufti of Beirut, Abro Efendi, an Ottoman state official, Moharabji Hamid Bey, accountant of Sidon Province, and Colonel Humy Bey.<sup>198</sup> The ICoI also had five members and one president, namely Fuad Pasha, or Abro Efendi if Fuad Pasha was absent.<sup>199</sup> The members of the ICoI were diplomats from the five European states, who had not previously been involved in the negotiations on the creation of the ICoI.<sup>200</sup> Fuad Pasha acted as prosecutor for the Ottoman government, while the ICoI acted as prosecutors “on behalf of Europe and Christianity [...]”<sup>201</sup> As the Ottoman legal system did not provide for the “institution of defence advocates”, according to Fuad Pasha, the defendants were not assisted by defence counsel.<sup>202</sup> Within the ICoI, there was disagreement among the Commission members whether defendants should receive such assistance.<sup>203</sup>

---

<sup>192</sup> PASC, No. 140, 14 September 1860.

<sup>193</sup> PASC, Incl., No. 51, 25 July 1860.

<sup>194</sup> PASC, Incl. 2., No. 151, 26 September 1860.

<sup>195</sup> PASC, No. 7, 17 July 1860; PASC, No. 40, 26 July 1860.

<sup>196</sup> PASC 1860-1861, Incl. 6, No. 175, *Dufferin to Fuad Pusha*, 25 October 1860; PASC 1860-1861, Incl. 2, No. 195, *Protocol of the Tenth Meeting*, 14 November 1860.

<sup>197</sup> PASC 1860-1861, Incl. 2, No. 142, *Tribunal appointed to try Koorshid Pasha*, 21 September 1860.

<sup>198</sup> PASC, Incl. 2, No. 142, 21 September 1860.

<sup>199</sup> PASC, Incl. 1, No. 141, 13 September 1860; Brockman-Hawe, “Constructing Justice,” 215; Fawaz, *An Occasion*, 199.

<sup>200</sup> PASC No. 42, 30 July 1860; PASC, No. 79, 14 August 1860; PASC, No. 93, 23 August 1860; PASC, No. 94, 25 August 1860; Brockman-Hawe, “Constructing Justice,” 215; Fawaz, *An Occasion*, 199.

<sup>201</sup> PASC 1860-1861, Incl. 2, No. 276, *Fraser to Dufferin*, 14 January 1861; TNAFO406/10, Incl. 5, No. 240, *Dufferin to Russell*, 4 November 1860.

<sup>202</sup> PASC, Incl. 6, No. 175, 25 October 1860; TNAFO406/10, Incl. 5, No. 240, 4 November 1860.

<sup>203</sup> PASC 1860-1861, Incl. 8, No. 182, *Protocol of the Sixth Meeting*, 26 October 1860; TNAFO406/10, Incl. 5, No. 240, 4 November 1860.

It is unclear how many cases were judged by the ETB and ICoI. While 949 Druze were arrested in one massive operation in December 1860, when the ETB had already been in operation for three months, punishment was meted out in around 306 cases during a period of seven months.<sup>204</sup> While the ETB started trials in mid-September, the ICoI had its first session on 5 October 1860 and the last session on 4 May 1861.<sup>205</sup> The defendants were both Ottoman officials and Druze chieftains, and included military commanders, governors, insurrectionary leaders, tax farmers (*mokatajis*), treasures, notables and the Supreme Head of the Druze Chiefs.<sup>206</sup> Of twelve Druze Chiefs who had voluntarily presented themselves to the ETB, one was acquitted while the remaining eleven received the death penalty.<sup>207</sup> Of the 306 convicted individuals, 58 individuals received the death penalty, while 248 individuals were sentenced to exile or imprisonment.<sup>208</sup>

b) *Substantive Legal Matters*

The crimes over which the ETB and ICoI had jurisdiction were those crimes covered by the Ottoman Imperial Penal Code. In turn, these crimes could be divided into acts of commission and omission. Acts of commission included slaughter, pillage and “devastation of country”, as well as incitement to revolt against the Ottoman government.<sup>209</sup> Other acts included participation in and directing armed attacks against civilian towns and villages.<sup>210</sup> Acts of omission included a failure to employ troops or political influence to prevent or end armed attacks, a failure to confront the leaders of the attacks and an overall failure to carry out the duties of citizenship.<sup>211</sup>

Defendants could be found guilty or innocent.<sup>212</sup> If found guilty, defendants could be sentenced to death, exile or imprisonment, while individuals could also be stripped of their official rank.<sup>213</sup> In

---

<sup>204</sup> TNA FO195/658, Incl., No. 133, *Dufferin to Bulwer*, 7 March 1861; TNA FO406/11, Incl. 14, No. 105, *Protocol of the Twenty-Sixth Meeting, Annex 3*, 26 April 1861; PASC, Incl. 1, No. 163, 5 October 1860; PASC 1860-1861, Incl. 2, No. 310, *Report of the Nineteenth Meeting*, 19 January 1861; PASC 1860-1861, Part II, Incl. 2, No. 46, *Protocol of the Twenty-Ninth Meeting*, 4 May 1861.

<sup>205</sup> PASC, No. 140, 14 September 1860; PASC, Incl. 1, No. 163, 5 October 1860; PASC II, Incl. 2, No. 46, 4 May 1861.

<sup>206</sup> PASC 1860-1861, Incl. 4, No. 229, *Judgments passed by the Extraordinary Tribunal at Beyrout*, 30 December 1860; PASC 1860-1861, No. 90, *Fraser to Russell*, 2 August 1860.

<sup>207</sup> PASC II, Incl. 3, No. 6, 23 March 1861; PASC, Incl. 4, No. 229, 30 December 1860.

<sup>208</sup> TNAFO195/658, Incl., No. 133, 7 March 1861; TNAFO406/11, Incl. 14, No. 105, 26 April 1861.

<sup>209</sup> PASC 1860-1861, Incl. 3, No. 83, *Bulwer to Moore*, 8 August 1860; PASC, Incl. 4, No. 229, 30 December 1860.

<sup>210</sup> PASC, Incl. 4, No. 229, 30 December 1860.

<sup>211</sup> PASC 1860-1861, Incl. 1, No. 173, *Fuad Pasha to Fraser*, 20 October 1860; PASC, Incl. 4, No. 229, 30 December 1860.

<sup>212</sup> PASC, No. 153, 1 October 1860; PASC 1860-1861, No. 353, *Russell to Loftus*, 13 March 1861.

<sup>213</sup> PASC, Incl. 1, No. 173, 20 October 1860; PASC 1860-1861, Incl. 2, No. 173, *Fuad Pasha to Fraser*, 20 October 1860.

some cases mercy was granted, for example due to old age.<sup>214</sup> Furthermore, property of convicted individuals could be confiscated, and its redistribution depended on a decision of the Ottoman Sultan.<sup>215</sup>

The ETB and ICoI aimed to establish the individual responsibility of the defendants, with the ICoI focusing only on “those whose hands are deeply dyed in blood.”<sup>216</sup> While official military positions could not mitigate responsibility or punishment of individuals, punishment could be mitigated by a defence of an absence of relevant superior military orders.<sup>217</sup>

c) *Procedural Legal Matters*

The personal jurisdiction of the ETB and ICoI covered individuals, either Ottoman officials or Druze, who held positions as leaders, who were instigators of the attacks, who acted in negligence of their official duties or who committed crimes on a large scale.<sup>218</sup> While acts committed by Maronite Christians were not considered by the ETB or ICoI, defendants were allowed to submit evidence of atrocities committed by Maronite Christians against the Druze to the ICoI, which would take such evidence into consideration.<sup>219</sup> Furthermore, the ICoI distinguished between those Druze who acted in self-defence against Maronite Christians, and those Druze who planned or executed the mass atrocities.<sup>220</sup>

All the sessions of the ETB and ICoI were attended by their respective members, while the ICoI sent the British Consul-General, Noel Moore, to attend the proceedings of the ETB on behalf of the ICoI and to take notes.<sup>221</sup> Decisions by the ETB and ICoI were taken on the basis of consensus and agreement and when no consensus could be reached, the decision was referred to the Ottoman Sultan.<sup>222</sup>

---

<sup>214</sup> PASC 1860-1861, Incl. 5, No. 375, *Table of Prisoners, with their Sentences*, 10 March 1861.

<sup>215</sup> PASC, Incl. 1 and 2, No. 173, 20 October 1860.

<sup>216</sup> PASC, No. 153, 1 October 1860; PASC, Incl. 2, No. 195, 14 November 1860; PASC, No. 353, 13 March 1861.

<sup>217</sup> PASC, Incl. 4, No. 229, 30 December 1860.

<sup>218</sup> PASC, Incl. 3, No. 83, 8 August 1860; PASC 1860-1861, Incl. 2, No. 190, *Dufferin to Russell*, 17 November 1860; PASC, Incl. 4, No. 229, 30 December 1860; PASC 1860-1861, Incl. 6, No. 306, *Fraser to Dufferin*, 31 January 1861.

<sup>219</sup> PASC 1860-1861, Incl., No. 258, *Fraser to Dufferin*, 10 January 1861.

<sup>220</sup> PASC, Incl. 2, No. 351, 24 February 1861.

<sup>221</sup> PASC 1860-1861, Incl. 2, No. 175, *Dufferin to Moore*, 15 October 1860.

<sup>222</sup> PASC 1860-1861, Incl. 1, No. 375, *Dufferin to Bulwer*, 7 March 1861; PRONI D1071/H/C/3/8/31, *Bulwer to Dufferin*, 23 March 1861.

Proceedings of the ETB were conducted in multiple languages depending on the person speaking. An interpreter was present to simultaneously translate what was being said into the language of the person being addressed while a clerk transcribed the proceedings.<sup>223</sup> Proceedings of the ICoI were conducted and transcribed into French by a special secretary.<sup>224</sup> While the proceedings of the ICoI were not open to the public, the trials before the ETB were attended by the general public and the press.<sup>225</sup> The final judgments of both the ETB and ICoI were transcribed and would detail the name of the defendant, his profession or position, the alleged crimes and their role in these crimes, the verdict on guilt or innocence and the proposed punishment.<sup>226</sup> While appeals or reviews of judgments was not officially provided for, the ICoI did push for a review in some instances and some of the death penalties were commuted into lighter sentences.<sup>227</sup>

The proceedings of the ETB were initiated with Fuad Pasha issuing summonses to a number of Druse Chieftains to appear before the Tribunal, and a number of Maronite Christian Chieftains, to provide evidence against the defendants.<sup>228</sup> Those Druze Chieftains who appeared before the Tribunal were confined until trial started, while those who failed to present themselves were tried in absentia.<sup>229</sup> A trial started with the President of the ETB questioning the defendant on his role in the alleged crimes, after which the other members of the ETB questioned the defendant. Subsequently, as the ETB relied predominantly on witness statements,<sup>230</sup> the witnesses gave their testimonies before being questioned first by the members of the ETB, and subsequently by the defendant. The defendant was allowed to address the Tribunal after which proceedings ended.<sup>231</sup> The members of the ETB deliberated privately, and draft judgments which were subsequently passed on to the ICoI, whose members discussed the cases and their respective judgments and passed

---

<sup>223</sup> PRONI D1071/H/C/1/1/1– 43, *Dufferin Papers*, 4 October 1860; TNA FO406/11, Incl. 1, No. 42, *Interrogatories of the Druse Chiefs*, 3 April 1861.

<sup>224</sup> TNAFO406/10, Incl. 5, No. 240, 4 November 1860; Brockman-Hawe, “Constructing Justice,” 216, fn. 103.

<sup>225</sup> Anonymous, *Souvenirs de Syrie (Expédition Française de 1860) par un Témoin Oculaire* (Plon-Nourrit: Paris, 1903), 269-270.

<sup>226</sup> PASC, Incl. 4, No. 229, 30 December 1860; PASC 1860-1861, Incl. 5, No. 229, *Tableau indiquant les Personnes compromises dans les événements de la Montagne*, 30 December 1860.

<sup>227</sup> PASC 1860-1861, Incl. 1, No. 351, *Dufferin to Bulwer*, 24 February 1861; TNA FO406/11, No. 60, *Thouvenal to Count de Flahault*, 12 April 1861; TNA FO406/11, No. 44, *Cowley to Russell*, 14 April 1861; TNA FO406/11, No. 45, *Russell to Cowley*, 14 April 1861.

<sup>228</sup> PASC, No. 140, 14 September 1860; PASC 1860-1861, Incl. 4, No. 147, *Notification*, 23 September 1860.

<sup>229</sup> PASC, No. 140, 14 September 1860; PASC 1860-1861, Incl. 2, No. 147, *Dufferin to Bulwer*, 23 September 1860.

<sup>230</sup> PASC 1860-1861, Incl. 9, No. 288, *Dufferin to Fraser*, 23 January 1861; PASC 1860-1861, Incl. 4, No. 306, *Dufferin to Bulwer*, 1 February 1861.

<sup>231</sup> BNA, “News Letters: Syria”, *Bombay Times and Standard*, 26 February 1861.

their proposed judgments on to Fuad Pasha.<sup>232</sup> Discrepancies between the ETB draft judgments and the ICoI judgments were discussed by the ICoI and Fuad Pasha, or his replacement Abro Efendi, in order to reach consensus.<sup>233</sup> If no consensus could be reached, the decision was referred to the Ottoman Sultan.<sup>234</sup>

Both the ETB and ICoI aimed to introduce safeguards to ensure that the defendants would receive a fair trial. For example, it was ensured that the defendants received the minutes of the proceedings after every day of trial.<sup>235</sup> The ICoI argued that the members of the ETB should be impartial,<sup>236</sup> that every case should be decided on its own merits, meaning that judgments should not be based on collective guilt, and should be based on all the available evidence.<sup>237</sup> When the ICoI found that the punishments of Druze Chieftains were much harsher in nature than the punishments of Ottoman officials, they demanded a revision of sentences by Fuad Pasha.<sup>238</sup> Furthermore, the British Consul Noel Moore, who attended the proceedings of the ETB on behalf of the ICoI, was instructed to report any irregularities in the proceedings to both the ICoI and the President of the ETB.<sup>239</sup> In many cases it was concluded by both the ETB and the ICoI that there was insufficient evidence to convict the defendants, in which case their release was recommended.<sup>240</sup> This lack of evidence was often caused by the fact that the majority of the witnesses refused to give testimony or provide evidence before the Tribunal.<sup>241</sup> Furthermore, in some cases it was reported that the defendants were granted insufficient time to question witnesses, while some witnesses were coerced to change their statements, and exonerating witness statements and defence statements were omitted from the minutes of the proceedings.<sup>242</sup> These issues were brought to the attention of the ICoI, which subsequently discussed these matters with Fuad Pasha to come to a solution.<sup>243</sup>

---

<sup>232</sup> PASC, Incl. 3 in No. 229, 30 December 1860; PASC, Incl. 4, No. 229, 30 December 1860; PASC, Incl. 2, No. 351, 24 February 1861; PASC, Incl. 5, No. 375, 10 March 1861.

<sup>233</sup> PASC, Incl. 2, No. 351, 24 February 1861; PASC 1860-1861, Incl. 3, No. 351, *MM. Beclard, Rehfués, Novikow, and Lord Dufferin, to Fuad Pasha*, 23 February 1861; PASC, No. 353, 13 March 1861.

<sup>234</sup> PASC, Incl. 1, No. 375, 7 March 1861; PRONI D1071/H/C/3/8/31, 23 March 1861.

<sup>235</sup> PASC 1860-1861, Incl. 3, No. 175, *Dufferin to Bulwer*, 26 October 1860.

<sup>236</sup> PASC, Incl. 2, No. 147, 23 September 1860.

<sup>237</sup> PASC 1860-1861, Incl. 6, No. 375, *Dufferin to Bulwer*, 7 March 1861.

<sup>238</sup> PASC, Incl. 3, No. 351, 23 February 1861.

<sup>239</sup> PASC, Incl. 2, No. 175, 15 October 1860.

<sup>240</sup> PASC, Incl., No. 258, 10 January 1861; PASC, Incl. 4, No. 306, 1 February 1861; PASC, No. 353, 13 March 1861.

<sup>241</sup> PASC, Incl. 2, No. 276, 14 January 1861; PASC, Incl. 9, No. 288, 23 January 1861; PASC, Incl. 4, No. 306, 1 February 1861.

<sup>242</sup> PASC 1860-1861, Incl. 4, No. 175, *Moore to Dufferin*, 23 October 1860; PASC 1860-1861, Incl. 5, No. 175, *Burnaby to Dufferin*, 23 October 1860.

<sup>243</sup> PASC, Incl. 4, No. 175, 23 October 1860; PASC, Incl. 5, No. 175, 23 October 1860.

## **7. Analysis**

The previous two chapters provided comprehensive overviews of the Nuremberg IMT and the ETB and ICoI. The first part of both chapters examined the key actors and their motivations, the key events and documents and the key outcomes, and discussed how these different elements led to the creation of the Nuremberg IMT and the ETB and ICoI respectively. The second part of both chapters studied the main features of these institutions, examining their actual creation and operation, their institutional characteristics, their cases as well as their laws and proceedings. Together, these sections provide a complete picture of the Nuremberg IMT and the ETB and ICoI. The current chapter engages in the actual comparison of the two cases, guided by the two concepts discussed in the Conceptual Framework, namely the principle of international criminal justice and the institute of the international criminal tribunal.

As stated in the Conceptual Framework, these concepts consist of several terms which together constitute the main ideas, values and practices behind ICJ and the ICT. In order to fully understand whether these institutions match the ideas, values and practices connected to these concepts, the comparison in this chapter is structured according to these terms. This entails an examination of the characteristics of the Nuremberg IMT and the ETB and ICoI discussed in the previous two chapters in light of these terms. The aim of this chapter is not only to see how well the Nuremberg IMT and the ETB and ICoI fit within these concepts and match their underlying ideas, values and practices, but also to assess the meaning of such a fit or misfit, not only for this study but also for the general research on the history of ICTs.

### ***7.1 International Criminal Justice***

As established in the Conceptual Framework, international criminal justice is a concept which aims to achieve justice by establishing international criminal accountability of individuals for mass atrocities which are so heinous that they violate universal norms and commonly shared values and affect humanity as a whole. ICJ, as a concept, consists of three essential terms, namely ‘universality’, ‘accountability’ and ‘justice’.

The word ‘universality’ refers first of all to the nature of the atrocities, to which ICJ is a response. ICJ is a reaction to large-scale and widespread atrocities which violate universal norms, and which affect and affront humanity as a whole. This section will not engage in an assessment of the atrocities

in response to which the Nuremberg IMT and the ETB and ICoI were created. Instead, what is important is how the actors involved qualified the acts, as their collective reaction is what ignited the response. The responses of states to the events of 1860 and 1939-1945 respectively are very similar in nature. With regard to the Nuremberg IMT, on numerous occasions the actors involved in the Tribunal's creation referred to the acts committed by the Nazi leadership during World War II in terms similar to mass atrocities. For example, Foreign Minister Vyacheslav Molotov spoke of "unparalleled crimes against [...] all freedom-loving people",<sup>244</sup> while the 1943 Moscow Declaration referred to "atrocities, massacres and executions", "ruthless cruelties" and "monstrous crimes".<sup>245</sup> With regard to the ETB and ICoI, both Ottoman officials and representatives of the European powers in their communications referred to the atrocities as crimes against humanity,<sup>246</sup> with one representative stating that "enough has occurred to excite universal reprobation",<sup>247</sup> and another stating that "[a] most grievous wrong has been inflicted upon the civilized world [...]".<sup>248</sup> In both cases, the actors involved were of the opinion that mass atrocities which affected humanity as a whole and violated universal norms had been committed.

'Accountability' means the criminal responsibility of individuals for the parts they played in the atrocities, with ICJ focussing specifically on the accountability of high-level perpetrators or those individuals with a large share in the crimes committed. Establishing such accountability through ICJ involves the investigation, prosecution, adjudication and punishment of the atrocities committed. Such a focus on accountability through a legal system is to be preferred over revenge, as it is less arbitrary in nature, pre-empts the desire for vengeance, allows for reconciliation and creates an independent account of events. Interestingly enough, while negotiations on the fate of the Nazi leaders for some states centred on punishment through summary executions for an extended period of time, the Ottoman and European powers started from the premise of accountability through investigation, prosecution and adjudication. With regard to the Nuremberg IMT, all actors involved agreed early on that high-level perpetrators, namely the Nazi leadership, were to be punished.<sup>249</sup> However, the different states disagreed on the appropriate means of punishment, with Prime Minister Churchill and some US state officials preferring summary executions without trial, and

---

<sup>244</sup> Ginsburgs, "Nuremberg," 13-14.

<sup>245</sup> Marrus, *Nuremberg Trial*, 21.

<sup>246</sup> PASC, No. 1, 5 July 1860; PASC, No. 37, 28 July 1860; PASC II, Incl. 5, No. 40, 10 May 1861.

<sup>247</sup> PASC, No. 139, 14 September 1860.

<sup>248</sup> PASC, Incl. 1, No. 82, 26 July 1860.

<sup>249</sup> Inter-Allied Information Committee, *Punishment for War Crimes*, 3-4; Taylor, *Anatomy*, 25; Marrus, *Nuremberg Trial*, 21; Chatham House, "Crimea Conference," 165.

France, the USSR and President Truman voting for a trial.<sup>250</sup> The idea to create a special international tribunal to punish the leaders of the Nazi regime was proposed by some of the representatives of the states involved,<sup>251</sup> while the British remained of the opinion that a trial was not a suitable option for the situation at hand.<sup>252</sup> Gradually, the term ‘to bring to justice’ was added to the phrase ‘to punish’.<sup>253</sup> The eventual 1945 Charter of the International Military Tribunal provided for the investigation, prosecution, trial and punishment of the Nazi leaders.<sup>254</sup> Nevertheless, the British did not truly have a change of heart, but were simply overpowered by the majority.<sup>255</sup> With regard to the ETB and ICoI, the Ottoman Sultan and the Ottoman state officials called for the punishment of those responsible for the war’s atrocities.<sup>256</sup> The French Foreign Minister also called for the punishment of the perpetrators, which formed the basis for his proposal to create an international commission.<sup>257</sup> The proposal was accepted by the British, who argued that peace in the region required the “speedy, pure, and impartial administration of justice”, as victims might otherwise act in vengeance.<sup>258</sup> The ETB, created by Fuad Pasha, was based on the imperial *firman*, and aimed to identify those responsible for the atrocities, to hear cases of a criminal character which concerned individuals and to punish those individuals according to the provisions of the Imperial Code.<sup>259</sup> Furthermore, the agreed upon aims of the ICoI were to examine the causes of events, determine the level of responsibility of “only those whose hands are deeply dyed in blood”, and call for the punishment of those found to be responsible.<sup>260</sup> Neither the ETB, nor the ICoI, nor any of the actors involved, at any point called for the summary executions without a trial.

The last element, ‘justice’, is a recurring element in the discussions of the various actors involved in the creation and operations of both the Nuremberg IMT and the ETB and ICoI. As stated in the Conceptual Framework, the term justice represents the idea that establishing individual criminal accountability promotes justice, towards victims and humanity as a whole, while it also requires the proceedings to be fair, impartial, free of bias and protective of the rights of the defendant. With

---

<sup>250</sup> Marrus, *Nuremberg Trial*, 23-26 and 33-35; Smith, *Reaching Judgment*, 39; Taylor, *Anatomy*, 32.

<sup>251</sup> Marrus, *Nuremberg Trial*, 19 and 27; Ginsburgs, “Nuremberg,” 15.

<sup>252</sup> Marrus, *Nuremberg Trial*, 23.

<sup>253</sup> Chatham House, “Crimea Conference,” 165; Crowe, *War Crimes*, 2014, 163; Smith, *Nuremberg*, 56-57.

<sup>254</sup> 1945 IMT Charter, art. 6 and 14.

<sup>255</sup> Taylor, *Anatomy*, 32-33; Marrus, *Nuremberg Trial*, 35-36; Smith, *Reaching Judgment*, 38-39.

<sup>256</sup> PASC, Incl., No. 12, 16 July 1860; PASC, Incl., No. 74, 27 July 1860; PASC II, Incl. 5, No. 40, 10 May 1861.

<sup>257</sup> PASC, No. 54, 2 August 1860.

<sup>258</sup> PASC, No. 42, 30 July 1860.

<sup>259</sup> PASC, Incl., No. 51, 25 July 1860; PASC, Incl. 3, No. 65, 21 July 1860.

<sup>260</sup> PASC, No. 70, 11 August 1860.

regard to the Nuremberg IMT, US state officials proposed an international tribunal which would bring the Nazi leaders to justice,<sup>261</sup> while the Allied Powers confirmed their intention and commitment to bring these perpetrators to “swift and sure justice” during both the 1945 Yalta Conference and the 1945 Potsdam Conference.<sup>262</sup> The conviction that justice had to be done was clearly there. However, the states involved disagreed on how justice was to be achieved, as some state representatives considered summary executions the most suitable form of justice. Eventually, a military tribunal was chosen by the majority as the preferred form to establish justice, even though some state parties remained unconvinced of its suitability. The term justice can also be found in the 1945 Charter, which provided for the punishment of Nazi leaders in a “just and prompt trial”, while the Charter also contained provisions aimed to protect the fair trial rights of defendants.<sup>263</sup> Nevertheless, regardless of these provisions, the trial rights of the defendants were often violated, *inter alia*, because of the absence of the possibility of appeal, the limited access to evidence, the unfamiliarity of the German defence counsel with the Anglo-American style proceedings, the inability to present a *tu quoque* defence, and the fact that some of the members of the Tribunal had been involved in the drafting of the Charter, which made them both makers and judges of the law.<sup>264</sup> With regard to the ETB and ICoI, in July 1860 the Ottoman Sultan expressed his desire to “render justice to all”,<sup>265</sup> while the French Foreign Minister, in proposing the creation of the ICoI, argued that the principles of justice and order needed to be satisfied.<sup>266</sup> The instructions provided to the European commissioners further stated that the ICoI was to assist the ETB to ensure that its proceedings would “fulfil the conditions of strict and impartial justice.”<sup>267</sup> Furthermore, one of the initial aims of the ICoI was to consider measures of compensation to the victims.<sup>268</sup> The ICoI aimed to protect the fair trial rights of the defendants before the ETB, by requesting a review of certain cases, by ensuring the defendants had translated minutes of proceedings and by reporting trial irregularities to the President of the ETB.<sup>269</sup> Nevertheless, there were still violations of the trial

---

<sup>261</sup> Marrus, *Nuremberg Trial*, 29.

<sup>262</sup> Chatham House, “Crimea Conference,” 165; Crowe, *War Crimes*, 2014, 163; Smith, *Nuremberg*, 56-57.

<sup>263</sup> 1945 IMT Charter, art. 1 and 16 (a), (b), (c), (d) and (e).

<sup>264</sup> McKeown, “Nuremberg,” 114, 119-121 and 127-128; Smith, *Reaching Judgment*, 78, 83-84 and 102; 1945 IMT Charter, art. 26.

<sup>265</sup> PASC, Incl., No. 12, 16 July 1860.

<sup>266</sup> PASC, No. 6, 16 July 1860.

<sup>267</sup> PASC, No. 70, 11 August 1860.

<sup>268</sup> PASC, No. 7, 17 July 1860.

<sup>269</sup> PASC, Incl. 2, No. 175, 15 October 1860; PASC, Incl. 3, No. 175, 26 October 1860; PASC, Incl. 1, No. 351, 24 February 1861; TNA FO406/11, No. 60, 12 April 1861; TNA FO406/11, No. 44, 14 April 1861; TNA FO406/11, No. 45, 14 April 1861.

rights of the defendants, related to the unwillingness of witnesses to testify before the ETB, the absence of defence counsel and the limited ability of defendants to question witnesses.<sup>270</sup>

## 7.2 *International Criminal Tribunal*

As established in the Conceptual Framework, an international criminal tribunal is a place where a group of actors of various nationalities and backgrounds come together to conduct proceedings which are criminal in nature, to establish whether individuals can be held accountable for committing mass atrocities which affect humanity as a whole and which violate universal norms. This definition has been broken down into the three terms which make up the international criminal tribunal, namely ‘international’, ‘criminal’ and ‘tribunal’.

The term ‘tribunal’ refers to a location, a place where a special pre-selected group of actors meet to examine specific legal problems of a particular nature, a place where trials are held. The Nuremberg IMT was a place, a court where criminal trials took place, and a gathering of actors, four judges, who examined a specific legal problem of a particular nature, namely the individual responsibility of twenty-four defendants.<sup>271</sup> The ETB and ICoI together also effectively constituted a court where criminal trials took place, which were judged by six judges and five judges respectively, who also examined the individual responsibility of hundreds of defendants.<sup>272</sup> For convictions and sentences, the Nuremberg IMT required three out of four affirmative votes,<sup>273</sup> while the ETB and ICoI made decisions on the basis of consensus.<sup>274</sup> At the Nuremberg IMT, the case was brought before the Tribunal by four prosecutors, while the defendants were assisted by defence counsel.<sup>275</sup> With regard to the ETB, the case was presented by a single prosecutor, Fuad Pasha, and while there was no official defence counsel, the ICoI effectively acted as such.<sup>276</sup> However, both Fuad Pasha and the members of the ICoI also acted as judges, assessing and amending the judgments drafted by the

---

<sup>270</sup> PASC, Incl. 4, No. 175, 23 October 1860; PASC, Incl. 5, No. 175, 23 October 1860; PASC, Incl. 2, No. 276, 14 January 1861; PASC, Incl. 9, No. 288, 23 January 1861; PASC, Incl. 4, No. 306, 1 February 1861; PASC, Incl. 6, No. 175, 25 October 1860; TNAFO406/10, Incl. 5, No. 240, 4 November 1860.

<sup>271</sup> *Blue Series*, 171; 1945 IMT Charter, art. 2 and 28.

<sup>272</sup> PASC, Incl. 2, No. 142, 21 September 1860; PASC, No. 153, 1 October 1860; TNAFO195/658, Incl., No. 133, 7 March 1861; TNAFO406/11, Incl. 14, No. 105, 26 April 1861; PASC, Incl. 1, No. 163, 5 October 1860; PASC, Incl. 2, No. 310, 19 January 1861; PASC II, Incl. 2, No. 46, 4 May 1861; PASC, Incl. 1, No. 141, 13 September 1860.

<sup>273</sup> 1945 IMT Charter, art. 4(c).

<sup>274</sup> PASC, Incl. 1, No. 375, 7 March 1861; PRONI D1071/H/C/3/8/31, 23 March 1861.

<sup>275</sup> 1945 IMT Charter, art. 14; *Blue Series*, 6-8.

<sup>276</sup> PASC, Incl. 2, No. 276, 14 January 1861; Alfred Comyn Lyall, *The Life of the Marquis of Dufferin and Ava, Volume 1* (London: John Murray, 1905), 121.

ETB.<sup>277</sup> Furthermore, none of the actors involved had received any previous legal training. While proceedings before the Nuremberg IMT were more elaborately regulated than the proceedings before the ETB or ICoI,<sup>278</sup> the proceedings of both the Nuremberg IMT and the ETB allowed for the active participation of all parties involved and were open to the public.<sup>279</sup> Both the Nuremberg IMT and the ETB and ICoI issued judgments which would declare the guilt or innocence of the defendant and provided the reasoning behind an acquittal or conviction.<sup>280</sup> The punishments which both institutions handed out were similar in nature, ranging from capital punishment, to prison sentences and confiscation of property.<sup>281</sup> However, the rules regarding the proceedings of the Nuremberg IMT were drafted in advance on the basis of long deliberations, and the proceedings itself were very structured in nature. In contrast, it is unclear which rules guided the proceedings of either the ETB or ICoI, and the proceedings of both institutions were not clearly structured, nor was the interaction between the ETB and the ICoI guided by preconceived rules.

The term ‘criminal’, within the concept of the international criminal tribunal, means that the specific legal problem which is examined by the tribunal is criminal in nature – focused on establishing the criminal accountability of individuals. This, in turn, means that the laws and procedures of the tribunal are criminal in nature. These laws and procedures can be based on pre-existing national criminal laws or procedures, or on new criminal laws and procedures developed from pre-existing criminal legal systems. The laws and procedures of both the Nuremberg IMT and the ETB and ICoI were a blend of pre-existing legal systems. The 1945 Charter was a compromise between the legal systems of the four European states involved,<sup>282</sup> even though the crimes under the jurisdiction of the Tribunal were newly defined. The laws and procedures of the ETB and ICoI blended the Ottoman criminal law with European procedural standards.<sup>283</sup>

Here, the term ‘international’ means existing, occurring, carried on or agreed on between nations. Mass atrocities affect the entirety of humanity and override the otherwise sovereign and exclusive

---

<sup>277</sup> PASC, Incl. 3 in No. 229, 30 December 1860; PASC, Incl. 4, No. 229, 30 December 1860; PASC, Incl. 2, No. 351, 24 February 1861; PASC, Incl. 5, No. 375, 10 March 1861.

<sup>278</sup> 1945 IMT Charter, art. 14-15 and 24.

<sup>279</sup> 1945 IMT Charter, art. 14-18 and 24; BNA, “News Letters: Syria”, *Bombay Times and Standard*, 26 February 1861; Anonymous, *Souvenirs*, 269-270; McKeown, “Nuremberg,” 120.

<sup>280</sup> PASC, Incl. 4, No. 229, 30 December 1860.

<sup>281</sup> *Blue Series*, 365-367; 1945 IMT Charter, art. 27; PASC, Incl. 1 and 2, No. 173, 20 October 1860.

<sup>282</sup> Ehard, “Nuremberg Trial,” 240-241; Overy, “Nuremberg Trials,” pp. 14-21; Kranzbuhler, “Nuremberg,” 434-435.

<sup>283</sup> PASC, Incl., No. 51, 25 July 1860; PASC, Incl. 3, No. 65, 21 July 1860; PASC, Incl. 6, No. 175, 25 October 1860; PASC, Incl. 2, No. 195, 14 November 1860.

power of states to respond to such acts, and therefore need to be investigated, prosecuted, adjudicated and punished by international institutions and persons. However, as the predominant actors in the international system, states are the actors which create, shape, fund and staff the ICTs. Both the Nuremberg IMT and the ETB and ICoI were international institutions, created by four and six states respectively.<sup>284</sup> Furthermore, the members of the Nuremberg IMT and the ETB and ICoI had different nationalities, as did the prosecutors and defence counsel.<sup>285</sup> These institutions were truly international in their composition.

### 7.3 *Considerations*

The previous two paragraphs engaged in a comparison of the Nuremberg IMT and the ETB and ICoI, guided by the two concepts of international criminal justice and the international criminal tribunal and its constituent elements. With regard to ICJ, the aim of both institutions, as put forward by their creators, was to establish the criminal accountability of those individuals with the highest level of responsibility for acts which were considered to be mass atrocities which violated universal norms, and which affected humanity as a whole. The institutions eventually created engaged in the investigation, prosecution, adjudication and punishment of the atrocities committed and did establish individual accountability for a number of defendants, thereby avoiding both large-scale impunity, acts of revenge and summary executions. Interestingly, the idea of establishing justice, both for victims and defendants, was much more pronounced in the case of the ETB and ICoI. Summary executions without trial were never even considered by the actors involved, while such punishment was the preferred option of some representatives involved in the negotiations on the Nuremberg IMT. However, while fair trial safeguards were provided by both institutions, the rights of the defendants were still often violated in various ways. While the fair trial standards guaranteed by the 1945 Charter would be considered insufficient today, the rights provided by the Charter were often violated during the trial, even though the members of the Tribunal aimed to protect their rights. The ETB and ICoI did not have a document containing any fair trial standards, and some trial rights were either not granted to the defendants or were violated. Nevertheless, the ICoI actively and on numerous occasions worked hard to defend the trial rights of the defendants, discussing inconsistencies with Fuad Pasha in order to instigate changes in the proceedings of the ETB.

---

<sup>284</sup> 1945 IMT Charter, art. 1; PASC, Incl. 2, No. 151, 26 September 1860.

<sup>285</sup> 1945 IMT Charter, art. 2 and 14; *Blue Series*, 6-8; PASC, Incl. 2, No. 142, 21 September 1860; PASC, No. 42, 30 July 1860; PASC, No. 79, 14 August 1860; PASC, No. 93, 23 August 1860; PASC, No. 94, 25 August 1860.

With regard to the international criminal tribunal, both the Nuremberg IMT and the ETB and ICoI fit within the definition of the ICT provided in the Conceptual Framework. The main characteristics can be discerned in both institutions, as both were international courts, locations in which actors assembled to examine and adjudicate cases concerning the criminal accountability of individuals, on the basis of a combination of pre-existing laws. Both institutions consisted of actors who acted as judges, prosecutors and defence counsel, while the laws and procedures of both institutions were a blend of pre-existing national legal systems. Finally, both institutions were inherently international in nature, which was visible in their creation, organisation and operation. However, in the case of the ETB and ICoI, the different actors involved played overlapping roles, acting as judges, prosecutors and defence counsel at the same time. Furthermore, it is unclear which rules or structures guided the proceedings of the ETB and ICoI, or their interaction, while the Nuremberg IMT had a clear set of pre-established rules of procedure.

On the basis of the previous comparison and analysis, the argument could be made that both the Nuremberg IMT and the ETB and ICoI fit relatively well within the concepts of ICJ and the ICT. They share the main features, structures, values, principles and practices which are contained in the concepts. In this sense, the conclusion could be drawn that, on the basis of this fit and on the basis of the comparison to the Nuremberg IMT, the ETB and ICoI could be considered an international criminal tribunal and thus the starting point of international criminal justice. However, two counterarguments could also be made in this regard. First of all, the fit is not perfect. The ETB and ICoI were not a textbook example of even a domestic court. The previous paragraphs identified issues regarding the fair trial standards, the organisation of the tribunal and its members, laws and proceedings. Secondly, one could argue that the fit is not perfect, even when using the broadest definitions of the concepts involved. It is true that the definitions used for the concepts of ICJ and the ICT are very basic in nature and set a limited number of very broad criteria. It may be asked whether a tribunal that does not fit perfectly within such broad definitions can truly be called an international criminal tribunal pursuing international criminal justice.

Perhaps this is the reason why international legal scholars writing about the history of ICTs do not provide or follow any specific definition of ICJ or the ICT. Perhaps these scholars are reluctant to use broad definitions which can be criticised or rejected by other scholars for being too broad or for not providing a perfect fit. Instead, these scholars seem to use invisible definitions, and an invisible standard which historical courts created before the twentieth century inexplicably fail to meet. Within the sources on the history of ICTs there is always a clean break between the discussions on

the tribunals of the twentieth century and earlier initiatives, as the latter do not compare quite perfectly to the tribunals of the twentieth century. This is clearly visible, for example, in the article by Brockman-Hawe, who, in his conclusion, dismisses the ETB and ICoI as an ICT in a few broad strokes, without defining the ICT or the criteria of assessment.

However, this argument can be challenged as well, by the simple fact that the Nuremberg IMT does not fit the concepts perfectly either, as the Nuremberg IMT was severely flawed in several aspects. Subsequently, when examining the history of ICTs and historical ICTs, one should not look for a rigid fit with modern standards. Rather, one should approach the field as displaying a linear development, starting from institutions resembling the basic structures and ideas of the concepts of ICJ and the ICT and ending at the contemporary courts and tribunals. In fact, one must ask how we came into possession of these concepts, if not through years of development. Trying to match historical institutions to modern-day tribunals disregards the idea that concepts and institutions develop over time. Instead of accepting or rejecting historical institutions on the basis of their resemblance to modern-day tribunals, these institutions could be considered as early versions of modern tribunals. In that sense, the use of very basic yet broad concepts with a limited set of criteria allows for a flexible and broad framework which can encompass a large number of different but equally important institutions. This provides scholars studying the history of ICTs and historical ICTs to work with a broad and flexible framework that is currently absent in the research field.

In this case, this means that the ETB and ICoI do fit within the broad concepts of ICJ and the ICT, albeit not perfectly, enough to consider it an international criminal tribunal which pursued international criminal justice. As such, it could be considered the first international criminal tribunal and the actual starting point of international criminal justice. Nevertheless, it will only remain so if scholars do not adopt the framework of consideration used here or a similar framework, or if they fail to identify another historical institution which fits within such a framework. Considering the plethora of historical institutions created throughout history, it is to be hoped that the ETB and ICoI will not be considered the starting point of international criminal justice for long.

## 8. Conclusion

This thesis examined whether a historical dual institution, namely the ETB and the ICoI, should be considered the first international criminal tribunal and the starting point of international criminal justice. Presently, the Nuremberg IMT is considered to be the first international criminal tribunal and the actual starting point of international criminal justice. Therefore, in order to examine whether the ETB and ICoI could be considered the actual starting point, this thesis compared the ETB and ICoI and the Nuremberg IMT, in light of the concepts of ICJ and the ICT. This examination found that the Nuremberg IMT and the ETB and ICoI were very similar, in relation to their aims, creation, operation, laws and procedures. Furthermore, both institutions fit within the definition of the international criminal tribunal provided in this thesis, and both institutions aimed to pursue the goal of international criminal justice. It can therefore be concluded that the ETB and ICoI could be considered the first international criminal tribunal and the starting point of contemporary international criminal justice.

By examining the ETB and ICoI in detail, looking at the actors, events and outcomes which led to their creation, studying their main institutional, legal and procedural features, this thesis shed light on two previously under-researched legal-historical institutions. By investigating the ETB and ICoI as a potential international criminal tribunal, this thesis has contributed to a broader understanding of the history of international criminal tribunals and added to the general knowledge on such historical tribunals. Finally, by reaching the conclusion that the ETB and ICoI could be considered an international criminal tribunal pursuing international criminal justice, on the basis of a structured comparison within the framework of two defined, yet broad and flexible concepts, this study has resulted in a structured and accessible understanding of a specific historical institution. While this constitutes a new approach towards the study of the history of ICTs, it is to be hoped that such an approach will be adopted by international legal scholars in the future.

## 9. Bibliography

### 9.1 Primary Sources

*The British Newspaper Archive:*

- BNA, “News Letters: Syria”, *Bombay Times and Standard*, 26 February 1861.

*The National Archives, Kew, London, United Kingdom:*

- FO 195 – Foreign Office: Embassy and Consulates, Turkey (formerly Ottoman Empire): General Correspondence;
- FO 406 – Foreign Office: Confidential Print Eastern Affairs;
- PRO 30/22 – Lord John Russell: Papers.

*The Parliamentary Archives, Houses of Parliament, London, United Kingdom:*

- Houses of Parliament, Parliamentary Papers, *Correspondence Relating to the Affairs of Syria 1860–1861*, Harrison and Sons, London, 1861;
- Houses of Parliament, Parliamentary Papers, *Correspondence Relating to the Affairs of Syria 1860–1861*, Part II, Harrison and Sons, London, 1861.

*The Public Record Office of Northern Ireland, Titanic Quarter, Belfast, United Kingdom:*

- PRONI D1071 – Dufferin and Ava Papers: Syria: 1860-1864.

*United Nations Treaty Series:*

- Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the prosecution and punishment of the major war criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279;
- Charter of the International Military Tribunal, 8 August 1945, 82 U.N.T.S. 279.

## 9.2 Secondary Sources

Ambos, Kai. *Treatise on International Criminal Law, Volume I: Foundations and General Part*. Oxford: Oxford University Press, 2013.

Anonymous. *Souvenirs de Syrie (Expédition Française de 1860) par un Témoin Oculaire*. Plon-Nourrit: Paris, 1903.

Babbie, Earl. *The Practice of Social Research, Thirteenth Edition*. Belmont: Wadsworth/Cengage Learning, 2013.

Balint, Jennifer. “The Ottoman State Special Military Tribunal for the Genocide of the Armenians: ‘Doing Government Business’.” In *The Hidden Histories of War Crimes Trials*, edited by Kevin Jon Heller and Gerry Simpson, 77-102. Oxford: Oxford University Press, 2013.

Bantekas, Ilias and Susan Nash. *International Criminal Law, Second Edition*. London: Cavendish Publishing, 2003.

Bass, Gary Jonathan. *Stay the Hand of Vengeance*. Princeton: Princeton University Press, 2000.

Bergsmo, Morten, Cheach Wui Ling and Yi Ping. *Historical Origins of International Criminal Law: Volume I*. Brussels: Torkel Opsahl Academic EPublisher, 2014.

Beigbeder, Yves. *International Criminal Tribunals: Justice and Politics*. Basingstoke: Palgrave Macmillan, 2011.

Bellelli, Roberto. “The Establishment of the System of International Criminal Justice.” In *International Criminal Justice*, edited by Roberto Bellelli, 5-66. Abingdon: Routledge, 2016.

Brockman-Hawe, Benjamin E. “Constructing Humanity’s Justice: Accountability for ‘Crimes Against Humanity’ in the Wake of the Syria Crisis of 1860.” In *Historical Origins of International Law: Volume 3*, edited by Morten Bergsmo, Cheah Wui Ling, Song Tianying and Yi Ping, 181-248. Brussels: Torkel Opsahl Academic EPublisher, 2015.

Bryman, Alan. *Social Research Methods, Fourth Edition*. Oxford: Oxford University Press, 2012.

Cassese, Antonio. *Cassese's International Criminal Law, Second Edition*. Oxford: Oxford University Press, 2008.

Cassese, Antonio. "Reflections on International Criminal Justice." *The Modern Law Review*, 61, no. 1 (January 1998): 1-10.

Ceretti, Adolfo. "Collective Violence and International Crimes." In *The Oxford Companion to International Criminal Justice*, edited by Antonio Cassese, 5-15. Oxford: Oxford University Press, 2009.

Chatham House: The Royal Institute of International Affairs. "The Crimea Conference: Declarations of the Three Powers." *Bulletin of International News* 22, no. 4 (February 1945): 165-168.

Cherif Bassiouni, M. *Introduction to International Criminal Law, Second Edition*. Leiden: Martinus Nijhoff Publishers, 2014.

Cherif Bassiouni, M. "International Criminal Justice in Historical Perspective: The Tension Between States' Interests and the Pursuit of International Justice." In *The Oxford Companion to International Criminal Justice*, edited by Antonio Cassese, 131-142. Oxford: Oxford University Press, 2009.

Crowe, David M. *War Crimes, Genocide, and Justice*. New York: Palgrave MacMillan, 2014.

Cryer, Robert, Håkan Firman, Darryl Robinson and Elizabeth Wilmshurst. *An Introduction to International Criminal Law and Procedure, Second Edition*. Cambridge: Cambridge University Press, 2010.

Davidson, Eugene. *The Trial of the Germans*. Columbia: University of Missouri Press, 1966.

Dixon, Peter and Chris Tenove. "International Criminal Justice as a Transnational Field: Rules, Authority and Victims." *The International Journal of Transitional Justice*, 7 (October 2013): 393-412.

Drumbl, Mark A. "Pluralizing International Criminal Justice." *Michigan Law Review* 103, no. 6 (May 2005): 1295-1328.

Ehard, Hans. "The Nuremberg Trial Against the Major War Criminals and International Law." *The American Journal of International Law* 43, no. 2 (April 1949): 223-245.

Ehrenfreund, Norbert. *The Nuremberg Legacy*. Basingstoke: Palgrave Macmillan, 2007.

Farah, Caesar, E. *The Politics of Interventionism in Ottoman Lebanon, 1830-1861*. London: I.B. Tauris, 2000.

Fawaz, Leila Tarazi. *An Occasion for War*. Berkeley: University of California Press, 1994.

Findlay, Mark and Clare McLean. "Emerging International Criminal Justice." *Current Issues in Criminal Justice* 18, no. 3 (March 2007): 457-480.

Ginsburgs, George. "The Nuremberg Trial: Background." In *The Nuremberg Trial and International Law*, edited by George Ginsburgs and Vladimir Nikolaevich Kudriavtsev, 9-38. Dordrecht: Martinus Nijhoff Publishers, 1990.

Guba, E. G. and Y. S. Lincoln. "Competing Paradigms in Qualitative Research." In *Handbook of Qualitative Research*, edited by N. K. Denzin and Y. S. Lincoln, 105-117. Thousand Oaks: Sage, 1994.

Heller, Kevin Jon and Gerry Simpson. *The Hidden Histories of War Crimes Trials*. Oxford: Oxford University Press, 2013.

Knoops, Geert-Jan Alexander. *An Introduction to the Law of International Criminal Tribunals: A Comparative Study, Second Edition*. Leiden: Brill Nijhoff, 2014.

Kranzbuhler, Otto. "Nuremberg Eighteen Years Afterwards." In *Perspectives on the Nuremberg Trial*, edited by Guénaél Mettraux, 433-444. New York: Oxford University Press, 2008.

Kirsch, Philippe. "Applying the Principles of Nuremberg in the International Criminal Court." *Washington University Global Studies Law Review* 6 (2007): 501-509.

Kuzminski, Adrian. "Defending Historical Realism," *History and Theory* 18, no. 3 (October 1979): 316-349.

Laternser, Hans. "Looking Back at the Nuremberg Trials with Special Consideration of the Process Against Military Leaders." In *Perspectives on the Nuremberg Trial*, edited by Guénaél Mettraux, 473-491. New York: Oxford University Press, 2008.

Lyll, Alfred Comyn. *The Life of the Marquis of Dufferin and Ava, Volume 1*. London: John Murray, 1905.

Marrus, Michael R. *The Nuremberg War Crimes Trial 1945-46*. Boston: Bedford Books, 1997.

McCormack, Timothy L. H. "War Crimes: A Critical Introduction". In *The Law of War Crimes: National and International Approaches*, edited by Timothy L. H. McCormack and Gerry J. Simpson, 31-64. The Hague: Kluwer Law International, 1997.

McCullagh, C. Behan. "Historical Realism." *Philosophy and Phenomenological Research* 40, no. 3 (March 1980): 420-425.

McKeown, Tessa. "The Nuremberg Trial: Procedural Due Process at the International Military Tribunal." *Victoria University Wellington Law Review* 45 (2014): 112-132.

Mégret, Frédéric. "International Criminal Courts and Tribunals: The Anxieties of International Criminal Justice." *Leiden Journal of International Law* 29 (2016): 197-221.

Mettraux, Guénaél. "Trial at Nuremberg." In *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, 5-16. Abingdon: Routledge, 2011.

- O'Reilly, Karen. *Ethnographic Methods, Second Edition*. Abingdon: Routledge, 2012.
- Osmańczyk, Edmund Jan. *Encyclopedia of the United Nations and International Agreements, Volume 2, Third Edition*. New York: Routledge, 2003.
- Overy, Richard. "The Nuremberg Trials: International Law in the Making." In *From Nuremberg to The Hague*, edited by Philippe Sands, 1-29. Cambridge: Cambridge University Press, 2003.
- Schabas, William A. and Nadia Bernaz. "Introduction." In *Routledge Handbook of International Criminal Law*, edited by William A. Schabas and Nadia Bernaz, 1-2. Abingdon: Routledge, 2011.
- Smith, Bradley F. *The American Road to Nuremberg: The Documentary Record, 1944-1945*. Stanford: Hoover Institution Press, 1982.
- Smith, Bradley F. *The Road to Nuremberg*. New York: Basic Books, 1981.
- Smith, Bradley F. *Reaching Judgment at Nuremberg*. New York: Basic Books, 1977.
- Smith, Charles Anthony. *The Rise and Fall of War Crimes Trials*. Cambridge: Cambridge University Press, 2012.
- Smogard, Danielle. "The Evolution of International Criminal Justice," *Hemispheres: Transitions & Regime Change* 35 (2012): 17-39.
- Stahn, Carsten. "Evolution, Revolution or New Culture? The Changing Anatomy of International Criminal Justice," *International Criminal Law Review* 15 (2015): 1122-1137.
- Taylor, Telford. *The Anatomy of the Nuremberg Trials*. London: Bloomsbury Publishing, 1993.
- Waites, Bernard. "In Defence of Historical Realism," *Rethinking History* 15, no. 3, (September 2011): 319-334.
- Werle, Gerhard and Florian Jeßberger. *Principles of International Criminal Law, Third Edition*. Oxford: Oxford University Press, 2014.

## **APPENDIX A: Archival Material**

### **The Public Record Office of Northern Ireland, Titanic Quarter, Belfast, United Kingdom:**

*PRONI D1071 – Dufferin and Ava Papers: Syria: 1860-1864:*

- PRONI D1071/H/C/1/1/1– 43, *Dufferin Papers*, 4 October 1860;
- PRONI D1071/H/C/3/8/31, *Bulwer to Dufferin*, 23 March 1861.

### **The National Archives, Kew, London, United Kingdom:**

*FO 195 – Foreign Office: Embassy and Consulates, Turkey (formerly Ottoman Empire): General Correspondence:*

- TNA FO195/656, *Draft of Instructions to Fuad Pasha*, 17 September 1860;
- TNA FO195/658, Incl., No. 133, *Dufferin to Bulwer*, 7 March 1861.

*FO 406 – Foreign Office: Confidential Print Eastern Affairs:*

- TNA FO406/10, No. 69, *Cowley to Russell*, 2 August 1860;
- TNA FO406/10, Incl. 5, No. 240, *Dufferin to Russell*, 4 November 1860;
- TNA FO406/11, Incl. 1, No. 42, *Interrogatories of the Druse Chiefs tried by the Extraordinary Tribunal at Beyrout*, 3 April 1861;
- TNA FO406/11, No. 44, *Cowley to Russell*, 14 April 1861;
- TNA FO406/11, No. 45, *Russell to Cowley*, 14 April 1861;
- TNA FO406/11, No. 60, *Thouvenal to Count de Flahault*, 12 April 1861;
- TNA FO406/11, Incl. 14, No. 105, *Protocol of the Twenty-Sixth Meeting of the Syrian Commission, Annex 3*, 26 April 1861.

*PRO 30/22 – Lord John Russell: Papers:*

- TNA PRO30/22/116, *Russell to Dufferin*, 8 September 1860.

### **The Parliamentary Archives, Houses of Parliament, London, United Kingdom:**

*Houses of Parliament, Parliamentary Papers, Correspondence Relating to the Affairs of Syria 1860–1861, Harrison and Sons, London, 1861:*

- PA Syria Correspondence 1860-1861, No. 1, *Cowley to Russell*, 5 July 1860;
- PA Syria Correspondence 1860-1861, Incl., No. 12, *The Sultan to the Emperor of the French*, 16 July 1860;
- PA Syria Correspondence 1860-1861, No. 6, *Thouvenal to Count Persigny*, 16 July 1860;
- PA Syria Correspondence 1860-1861, No. 7, *Russell to Bulwer*, 17 July 1860;

- PA Syria Correspondence 1860-1861, No. 37, *Russell to Cowley*, 28 July 1860;
- PA Syria Correspondence 1860-1861, No. 40, *Loftus to Russell*, 26 July 1860;
- PA Syria Correspondence 1860-1861, No. 42, *Russell to Dufferin*, 30 July 1860;
- PA Syria Correspondence 1860-1861, Incl., No. 51, *Firman*, 25 July 1860;
- PA Syria Correspondence 1860-1861, No 54, *Cowley to Russell*, 2 August 1860;
- PA Syria Correspondence 1860-1861, No. 63, *Russell to Cowley*, 9 August 1860;
- PA Syria Correspondence 1860-1861, Incl. 3, No. 65, *Proclamation*, 21 July 1860;
- PA Syria Correspondence 1860-1861, No. 70, *Proposed Instructions to the French Commissioner in Syria*, 11 August 1860;
- PA Syria Correspondence 1860-1861, Incl., No. 74, *Aali Pasha to Ahmed Vefyk Efendi*, 27 July 1860;
- PA Syria Correspondence 1860-1861, No. 76, *Russell to Dufferin*, 14 August 1860;
- PA Syria Correspondence 1860-1861, No. 77, *Russell to Dufferin*, 14 August 1860;
- PA Syria Correspondence 1860-1861, No. 79, *Cowley to Russell*, 14 August 1860;
- PA Syria Correspondence 1860-1861, Incl. 1, No. 82, *Memorandum*, 26 July 1860;
- PA Syria Correspondence 1860-1861, Incl. 3, No. 83, *Bulwer to Moore*, 8 August 1860;
- PA Syria Correspondence 1860-1861, No. 90, *Fraser to Russell*, 2 August 1860;
- PA Syria Correspondence 1860-1861, No. 91, *Fraser to Russell*, 8 August 1860;
- PA Syria Correspondence 1860-1861, No. 93, *Fane to Russell*, 23 August 1860;
- PA Syria Correspondence 1860-1861, No. 94, *Bloomfield to Russell*, 25 August 1860;
- PA Syria Correspondence 1860-1861, No. 118, *Brant to Russell*, 25 August 1860;
- PA Syria Correspondence 1860-1861, No. 139, *Moore to Russell*, 14 September 1860;
- PA Syria Correspondence 1860-1861, No. 140, *Moore to Russell*, 14 September 1860;
- PA Syria Correspondence 1860-1861, Incl. 1, No. 141, *Dufferin to Bulwer*, 13 September 1860;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 142, *Tribunal appointed to try Koorshid Pasha*, 21 September 1860;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 147, *Dufferin to Bulwer*, 23 September 1860;
- PA Syria Correspondence 1860-1861, Incl. 4, No. 147, *Notification*, 23 September 1860;
- PA Syria Correspondence 1860-1861, Incl. 2., No. 151, *Collective Note addressed by the European Commissioners to Fuad Pasha*, 26 September 1860;

- PA Syria Correspondence 1860-1861, No. 153, *Bulwer to Russell*, 1 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 1, No. 163, *Protocol of the First Meeting of the Syrian Commission*, 5 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 1, No. 173, *Fuad Pasha to Fraser*, 20 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 173, *Fuad Pasha to Fraser*, 20 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 1, No. 175, *Dufferin to Russell*, 26 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 175, *Dufferin to Moore*, 15 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 3, No. 175, *Dufferin to Bulwer*, 26 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 4, No. 175, *Moore to Dufferin*, 23 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 5, no. 175, *Burnaby to Dufferin*, 23 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 6, No. 175, *Dufferin to Fuad Pusha*, 25 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 8, No. 182, *Protocol of the Sixth Meeting of the Syrian Commission*, 26 October 1860;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 190, *Dufferin to Russell*, 17 November 1860;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 195, *Protocol of the Tenth Meeting of the Syrian Commission*, 14 November 1860;
- PA Syria Correspondence 1860-1861, Incl. 3 in No. 229, *Dufferin to Bulwer*, 30 December 1860;
- PA Syria Correspondence 1860-1861, Incl. 4, No. 229, *Judgments passed by the Extraordinary Tribunal at Beyrout on the Chief People inculpated in the late Disturbances in the Mountain*, 30 December 1860;
- PA Syria Correspondence 1860-1861, Incl. 5, No. 229, *Tableau indiquant les Personnes compromises dans les événements de la Montagne*, 30 December 1860;
- PA Syria Correspondence 1860-1861, Incl., No. 258, *Fraser to Dufferin*, 10 January 1861;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 276, *Fraser to Dufferin*, 14 January 1861;
- PA Syria Correspondence 1860-1861, Incl. 9, No. 288, *Dufferin to Fraser*, 23 January 1861;
- PA Syria Correspondence 1860-1861, Incl. 6, No. 306, *Fraser to Dufferin*, 31 January 1861;
- PA Syria Correspondence 1860-1861, Incl. 4, No. 306, *Dufferin to Bulwer*, 1 February 1861;

- PA Syria Correspondence 1860-1861, Incl. 2, No. 310, *Report of the Nineteenth Meeting of the Syrian Commission*, 19 January 1861;
- PA Syria Correspondence 1860-1861, Incl. 1, No. 351, *Dufferin to Bulwer*, 24 February 1861;
- PA Syria Correspondence 1860-1861, Incl. 2, No. 351, *Minute on the Judgments proposed to be passed on the Turkish Officials and Druse Chiefs by the Extraordinary Tribunal of Beyrout*, 24 February 1861;
- PA Syria Correspondence 1860-1861, Incl. 3, No. 351, *MM. Beclard, Rehfues, Novikow, and Lord Dufferin, to Fuad Pasha*, 23 February 1861;
- PA Syria Correspondence 1860-1861, No. 353, *Russell to Loftus*, 13 March 1861;
- PA Syria Correspondence 1860-1861, Incl. 1, No. 375, *Dufferin to Bulwer*, 7 March 1861;
- PA Syria Correspondence 1860-1861, Incl. 5, No. 375, *Table of Prisoners, with their Sentences*, 10 March 1861;
- PA Syria Correspondence 1860-1861, Incl. 6, No. 375, *Dufferin to Bulwer*, 7 March 1861.

*Houses of Parliament, Parliamentary Papers, Correspondence Relating to the Affairs of Syria 1860–1861, Part II, Harrison and Sons, London, 1861:*

- PA Syria Correspondence 1860-1861, Part II, Incl. 3, No. 6, *Dufferin to Bulwer*, 23 March 1861;
- PA Syria Correspondence 1860-1861, Part II, Incl. 2, No. 46, *Protocol of the Twenty-Ninth Meeting of the Syrian Commission*, 4 May 1861;
- PA Syria Correspondence 1860-1861, Part II, Incl. 5, No. 40, *Communication made by Abro Effendi to the Members of the Syrian Commission*, 10 May 1861.