Negotiating the Fate of War Criminals: An Analysis of the Role of Peace and Justice Interactions in Decision-making on the Establishment of International Criminal Tribunals.

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Thesis BSc International Relations & Organisations

Research question: *What role do peace and justice interactions play in the decisions of states to establish international criminal tribunals?*

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Introduction

On 8 August 1945, the four Allied powers signed the charter of the International Military Tribunal (IMT) and agreed on the prosecution and punishment of the major Axis war criminals (Kochavi, 1998). This decision was not made lightly, it was the result of many discussions both between and within the Allied governments. Throughout most of the war, none of the Allied powers seemed to have a strong preference for using legal means to deal with major war criminals. After all, using international tribunals to prosecute war criminals always entails some risk that a guilty war criminal may be acquitted on some minor legal detail.

There are, however, also concerns that are more related to the effects trials can have on peace. This is an example of an understudied phenomenon, namely the role interactions between peace and justice can play in the decision-making of states on how to deal with war criminals after a conflict. Existing research on these interactions has largely focused on the effects of interventions by international criminal tribunals on peace. Scholars have found that judicial interventions can have serious effects on peace. Some of these effects are positive, judicial interventions may deter (future) perpetrators, marginalize violent leaders and regulate desires for revenge (Bass, 2000; Kersten, 2016; Méndez & Kelly, 2015). Other effects are considered to be negative. Judicial interventions may prolong or exacerbate violence, create moral hazard problems and initiate nationalist backlash (Bass, 2000; Kersten, 2016; Milanović, 2016).

This literature has largely overlooked the role that the anticipation of peace and justice interactions may play in the decision of states whether or not to establish an international tribunal. Yet, when international interveners have to decide on how to deal with war criminals during a conflict, they may have to take these interactions into account. These are important because they may influence whether or not an international criminal tribunal will be established. Negative interactions may hinder the use of international tribunals and push the use of other means to deal with war criminals, such as (informal) amnesties or summary execution. Therefore, it is important to gain more insight into how states take these interactions into account and how they affect the eventual decision whether or not to establish an international tribunal.

This is not only an academic problem, it also has real-world significance. There is no international tribunal that has jurisdiction over all potential conflicts. There are, in fact, many

conflicts over which no permanent international tribunal has jurisdiction, such as the Syrian civil war or the situation in Myanmar. The International Criminal Court (ICC) only has jurisdiction over crimes that took place on the territory of its member states or were committed by nationals of the member states (Rome Statute for the International Criminal Court, art. 12 (2)). The jurisdiction of the ICC is thus limited. It can be expanded by the United Nations Security Council (UNSC), but this is complicated by the veto system (Rome Statute for the International Criminal Court, art. 13 (b)). Therefore, it is practically useful to know how peace and justice interactions may impact the decisions of states to establish international tribunals. These interactions may form obstacles to the establishment of international tribunals, which may be necessary to deal with atrocities in particular conflicts through legal means.

This thesis thus aims to answer the following question: *What role do peace and justice interactions play in the decisions of states to establish international criminal tribunals?* I will use a single case study of decision-making leading up to the establishment of the IMT to answer this question. This thesis proceeds as follows. Firstly, I will review the existing literature on interactions between peace and justice and the reasons states may have for establishing international criminal tribunals. Then, I will address several theories on the relationship between these interactions and international tribunals. I will also conceptualize the most important terms. The analysis of the lead-up to the IMT will form the core of this thesis. I will analyze documents related to the decision-making processes of the United States and the United Kingdom that led to the establishment of the IMT. I aim to gain insight into the role peace and justice interactions played in this process and whether they encouraged or hindered the decision to establish the IMT.

Literature Review

There currently is relatively little literature on the role peace and justice interactions play in decisions whether or not to establish international criminal tribunals. Most of the literature focuses on the decisions of already existing tribunals whether or not to intervene in a particular conflict. Therefore, this literature review will address existing literature on peace and justice interactions and the motivations of states for establishing international criminal tribunals.

Peace and Justice Interactions

Hayner (2018) describes how pursuing justice will always have some effect on peace. Hayner (2018) does, however, emphasize that many of the proclaimed effects of justice on peace are gross generalizations that are removed from the larger context. This is important to keep in mind. These effects are not set in stone and will not always occur. However, this does not mean that international interveners will not anticipate the possibility of these interactions occurring while deciding on how to treat war criminals. In some cases, peace and justice interactions may turn into peace versus justice dilemmas, where justice demands one course of action while peace demands another.

Existing literature mainly focuses on the effects of justice interventions on ongoing conflicts. Negative effects of justice interventions on ongoing conflicts include prolonging conflicts and exacerbating violence (Kersten, 2016; Snyder & Vinjamuri, 2004). Justice intervention can prolong conflicts by undermining peace negotiations, because relevant actors may be discouraged from agreeing to peace settlements if they face prosecution. Moreover, indictments by international courts may cause perpetrators to lash out against civilians in retaliation or because of feelings of embarrassment. Such indictments can also push actors to fight until the bitter end and sacrifice their own lives and the lives of their followers (Bass, 2000). Another potential negative effect of judicial interventions are so-called moral hazard problems. These occur when states decide to intervene only judicially and avoid more substantial action such as political and military engagement (Kersten, 2016).

Positive effects of justice interventions on ongoing conflict have also been identified in the literature. Interventions may deter perpetrators from carrying out even more atrocities, which is called specific deterrence (Akhavan, 2009; Kersten, 2016; Méndez & Kelly, 2015). Justice interventions can further marginalize perpetrators by stigmatizing them, thus making them

lose the support and resources they need to wage war and commit their crimes. This stigmatization may also marginalize dangerous leaders that form an obstacle to successful peace negotiations. Consequently, justice interventions may make conflict termination more likely (Akhavan, 2009; Kersten, 2016; Méndez & Kelly, 2015).

There are, however, also effects of justice interventions on peace after the conflict has ended. Positive effects include general deterrence, prosecution of international crimes may send a message to the wider international community that such crimes will not be accepted and in this way may prevent future atrocities from occurring (Kersten, 2016). Similarly, proponents of international criminal trials often stress the importance of ending impunity (Akhavan, 2009; Kersten, 2016). Ending impunity is seen by many scholars as an important step in achieving and maintaining peace. Continued impunity for perpetrators of international crimes may encourage further abuses and embolden perpetrators because their behaviour goes unchecked (Kersten, 2016). Moreover, proponents of international criminal justice argue that countries or regions cannot be stable while dangerous leaders are still free (Bass, 2000). It is often hard to prove these effects, as it is impossible to measure the atrocities that did not occur due to deterrence. Yet, critics argue there are plenty of cases where deterrence did not work and where impunity did not threaten peace (Snyder & Vinjamuri, 2004).

Another important element of international criminal trials is that they are believed to individualize guilt. Supporters of international criminal justice believe that this may squash desires for collective revenge and vengeance (Bass, 2000). Justice will be achieved through trials and not through violence (Kersten, 2016). Moreover, international criminal trials are believed to be able to help reconciliation by establishing a historical record of a conflict (Clark: 2009; Milanović, 2016). These effects have also been criticized, with many critics arguing that the record of these effects has been mixed at best (Clark, 2009; Milanović, 2016; Snyder & Vinjamuri, 2004). Especially concerning the former Yugoslavia, scholars have claimed that ethnic tensions have remained strong, or have worsened, even after the interventions of the ICTY (Clark, 2009; Milanović, 2016). Bass (2000) also mentions that foreign-imposed trials may cause nationalist backlash, which would in fact harm prospects of peace and reconciliation.

Dealing with War Criminals

International criminal tribunals are but one way of dealing with war criminals after a conflict. There are many other ways to punish defeated enemies: shooting them on sight, show trials, summary execution, deportation, banishment or just ignoring past crimes and avoiding any form of accountability. All these methods have been proposed or used at some point in history and come without the specific risks that genuine trials bring, such as acquittals, delays or evidence problems (Bass, 2000). The further presence of peace and justice interactions raises the question of why states would use international tribunals to punish war criminals.

Bass (2000) argues that some leaders support war crimes tribunals because they are led by the principled idea that it is the right thing to do. Bass (2000) terms this belief legalism. This belief is only genuinely held by a few liberal governments. Leaders of liberal countries believe in the universality of their liberal values and are thus sometimes willing to leave the fate of war criminals up to courts. Bass (2000) thus believes that states' domestic politics influence their foreign policy decisions. He does however concede that even the most principled liberal states will generally not put their own soldiers at risk in order to prosecute war criminals. Moreover, liberal states are more likely to care about war crimes committed against their own nationals than against foreign nationals. Bass (2000) also argues that liberal states are more likely to support war crimes trials if public opinion more broadly is outraged by these war crimes and not only the elites.

This view differs greatly from the general realist view. According to realists, international institutions are only a reflection of the distribution of power within the international system (Mearsheimer, 1995). Therefore war crimes tribunals are simply the result of victorious countries wanting to punish their defeated foes. They are a form of vengeance and spectacle. They are however not primarily about justice or principled beliefs because moral considerations have no role in the international arena (Dunne & Schmidt, 2017; Waltz, 1979). Moreover, most realists also believe that domestic politics and norms do not influence the behaviour of states on the international level. All states are expected to behave the same abroad, regardless of their domestic politics (Dunne & Schmidt, 2017; Waltz, 1979). All states follow their self-interest and will thus only hold these war crimes trials if they serve their self-interest, not because they hold onto principled beliefs.

However, Bass (2000) does not think realist theory applies to liberal states establishing war crimes tribunals. He argues that there is something distinctively legalistic about using trials to

punish war criminals. They are not just disguised purges of enemy leaders. If the only point was to get rid of these leaders there are many other ways to do that, which are much quicker and do not involve the unique risks of trials.

Rudolph (2017), like realist theorists, also emphasizes the role of power politics in the establishment of international tribunals. Yet, his theory seems to be situated somewhere between the general realist perspective and that of Bass. He argues that interests defined in terms of power are generally instrumental in the decision to establish an international tribunal (Rudolph, 2017). Only after this decision is made do the (liberal) principles come in. He does not argue that principles and public outcry are wholly irrelevant, he only claims that the role of power considerations is often much bigger than idealist scholars believe (Rudolph, 2017). Moreover, he also uses a relatively broad definition of power that does not only include material interests but also soft power, which is the power over public opinion. His emphasis on power politics sets him apart from Bass, while his broader definition of power and the attention he does pay to ideals and principles differ from general realist theory.

Several interactions between peace and justice have thus been identified in the literature, both negative and positive ones. Moreover, some of these interactions only relate to ongoing conflict while others relate to peace more broadly. An overview of these interactions can be found in the concept section of this thesis. Scholars have also identified a variety of reasons states may have for establishing international tribunals. Three theories have been elaborated on, ranging from realist to liberal. The subsequent theory section will build on some of these theories.

Theory

As mentioned before, there is very little literature on the role peace and justice interactions play in the decisions of states to establish international tribunals, which is exactly the gap I hope to fill. So, this section will build on theories on why states establish international tribunals, especially Bass' (2000) theory.

First of all, the timing of the decision to establish an international criminal tribunal will likely affect the role specific peace and justice interactions will play. If such a decision is made after the conflict has ended, interactions related to ongoing conflicts will likely not play a significant role. Moreover, if intervening states have already demanded an unconditional surrender, as the Allies did in WWII, interactions related to the prospect of peace negotiations will likely not play a significant role either (Balfour, 1970). After all, a negotiated peace would already be off the table. Lastly, if elections are planned for a post-conflict society, such interactions may actually play a bigger role. Post-conflict societies that are organizing elections are often seen as vulnerable and unstable (Flores & Nooruddin, 2012). Fears about renewed violence may be especially relevant then, such as interactions related to nationalist backlash.

Characteristics of the states involved in the decision-making may also influence which interactions are likely to play a significant role. According to Bass (2000), liberal states support international tribunals because of their principled belief in legalism. Non-liberal states would only support them if they can use them for show trials and propaganda purposes. Yet, Bass (2000) argues that both liberal and non-liberal states will generally not be willing to risk the lives of their own soldiers to prosecute and punish war criminals. So, I expect that peace and justice interactions related to violence against soldiers would play a significant role for all states. These will likely be the interactions related to prolonging the conflict and exacerbating violence.

Whether the states that have to decide on a tribunal have decisively won the conflict or war may also influence the role peace and justice interactions play. Once again, this would mean that the effects on ongoing conflict are largely irrelevant because the conflict has ended. Whether these states will care for the effects of justice interventions on the post-conflict society may depend on their involvement with peacebuilding, their proximity to the conflict area and possibly also on public opinion.

In cases where states are involved in a larger peacebuilding effort, of which tribunals only form a part, I would also expect that concerns related to renewed violence would play a significant role. It is unlikely that states that devote resources to building peace would be willing to spoil that by establishing a tribunal that is expected to lead to renewed violence. Therefore I expect concerns about nationalist backlash and specific deterrence to play a significant role. Moreover, arguments that trials can individualize guilt and help reconciliation may also play a big role because they claim trials can actually contribute to peacebuilding.

Furthermore, intervening states that are heavily affected by the instability and violence of the conflict are likely to care (more) deeply about renewed violence as well, even in the absence of a larger peacebuilding effort. If violence once again breaks out, these countries will likely be affected by it again. Therefore they are likely to care (even more) deeply about achieving and maintaining stability and peace. For these states concerns about nationalist backlash and specific deterrence will likely be quite important as well. Moreover, these states will likely also care significantly about the capacity of trials to individualize guilt and support reconciliation, as this can help achieve and maintain peace.

Lastly, if a democratic state has to deal with demands from its citizens for justice, this may influence its decision-making on whether or not to establish an international military tribunal. According to Bass (2000), democratic states are more likely to support tribunals if there is significant public outcry about the atrocities and strong calls for justice. In such cases, the state may already be more sympathetic towards trials and thus even more receptive towards arguments that claim positive effects of tribunals.

Concepts

International criminal tribunals in the context of this research will refer to ad-hoc tribunals that are established to deal with war criminals from a particular conflict. They are thus temporary institutions, like the International Military Tribunal (IMT) at Nuremberg or the International Criminal Tribunal for the Former Yugoslavia (ICTY). I have chosen this conceptualization because I expect that peace and justice interactions will be more important during decision-making about a tribunal related to one particular conflict than decision-making related to a permanent tribunal. After all, the establishment of a permanent international tribunal on its own is unlikely to affect the maintenance of peace. Effects of a permanent tribunal on peace are more likely to be considered when intervention in a particular conflict is proposed.

As mentioned before, several peace and justice interactions have been identified in the literature. I have categorized these along two lines, whether the proposed effects of justice on peace are positive or negative and whether the effects only take place during an ongoing conflict or not. I will use this categorization to identify specific interactions in the documents I will be analyzing. I believe categorizing and labelling these interactions will make my analysis more clear and systematic. Table 1 shows the categorizations of these interactions and also shows the number I have attached to each type of interaction. These interactions are described more elaborately in the literature review.

Table 1: Categorization of peace and justice interactions

	During conflict	**After conflict**
Negative	- Prolong conflict (1) - Exacerbate violence (2) - Moral hazard problems (3)	- Ethnic tensions (6) - Nationalist backlash (7)
Positive	- Marginalization of perpetrators (4) - Specific deterrence (5)	- General deterrence (8) - Ending impunity (9) - Individualize guilt (10) - Help reconciliation (11)

Research Design & Methods

In order to answer the research question, I will carry out a single case study of the decision to establish the International Military Tribunal (IMT) at Nuremberg and the negotiations leading up to that decision. I have chosen to analyze the lead-up to the establishment of the IMT because it is often seen as crucial to the development of international criminal law. The IMT was a part of the Nuremberg Trials, which established that international law imposes direct obligations on individuals (Henriksen, 2017). Therefore I believe this is an important case to analyze. I have chosen to focus on the establishment of the IMT specifically, and not the Nuremberg Trials more generally because it was the only truly international tribunal involved in the Nuremberg Trials. Subsequent prosecutions were carried out before US Nuremberg Military Tribunals (Peace Palace Library, n.d.).

Moreover, the definitive decision to establish the Nuremberg Trials was made after the surrender of Nazi Germany (Kochavi, 1998). These are not the most ideal circumstances for peace and justice interactions to arise. The conflict has already ended and it was not settled through negotiations but through military victory. So, if I were to find that these interactions still played a role in the decision of the Allies to establish the IMT, they are likely to play a role as well in cases where tribunals are established during an ongoing conflict or with regard to conflicts that are settled through negotiations.

I have chosen to carry out a single case study for numerous reasons. First of all, I believe that using a single case study will allow me to go more in-depth and study the establishment of the IMT in more detail than other comparative designs. The internal validity of my findings will thus be relatively high. This does mean that the external validity of my findings will be quite low, the findings will not be easily generalizable and would need to be further tested in other cases. My case selection may partially address these concerns, as it involves the choice for a ‘hard case’. Another reason for choosing a single case study is that there currently are few theories on the relationship between peace and justice interactions and the decisions of states to establish international criminal tribunals. Therefore one of the key goals of this thesis is to help generate new theories. Single case studies are generally considered to be appropriate for such a goal (Halperin & Heath, 2017). Lastly, practical considerations have also affected my decision. I believe the only way I can study the role of peace and justice interactions in the establishment of international criminal tribunals in sufficient depth during my limited time frame is through a single case study.

I will analyze documents from the American and British national archives related to decision-making on the establishment of the IMT. I have also used other sources, such as the Office of the Historian and a report by Robert Jackson, who was the Chief US Prosecutor at the IMT (Sands, 2016). In the end, I was able to find more American sources related to decision-making on the establishment of the IMT than British sources. This is likely because the American national archives had two easily accessible collections dedicated to war crimes and plans for post-war Germany. I was unable to find such collections in the British national archives and thus had to find and select each document one by one. This might create some bias in my results, as it will allow me to go more in-depth into the American considerations. Yet, there also was more internal discussion on the treatment of senior war criminals within the American cabinet, which justifies taking a closer look at it (Kochavi, 1998). This internal division may also partially explain the amount of documentation available.

I have chosen to only analyze sources from the American and British archives for practical purposes. First and foremost because these sources are available in English and therefore easier for me to analyze. Moreover, I believe it was necessary to limit the scope of this research, analyzing documents from all the countries involved in this decision-making would be undoable in a limited time frame. I will use already existing literature on the decision-making around the Nuremberg Trials to identify those primary sources that are most relevant to my research question. I will also use the search options of the archives themselves and search for key terms and persons. I also hope to use these primary sources to find other relevant documents, such as documents that are referred to in the selected sources.

I will carry out a content analysis of the selected documents. Through this content analysis, I hope to gain more knowledge of the role peace and justice interactions played in the decision-making and whether concerns related to particular interactions were more prominent than those related to others. I also hope to gain some insights into whether there was a difference between the states involved with regards to the role peace and justice interactions played in their considerations. I will rely on secondary literature to supplement and contextualize the findings from the content analysis.

Analysis

The analysis of the selected documents shows that the Americans had a greater preference to use legal means to deal with top Nazi criminals than the British, who opposed the use of legal means throughout most of the war. Instead, the British preferred execution without trial for the top Nazi war criminals. The analysis further shows that peace and justice interactions did not play a very significant role in the final decision to use an international tribunal to prosecute the most senior Nazi war criminals. In the following sections, I will describe which positive and negative interactions played a role in the decision-making. I will also address which other arguments played a role because many of the documents I analysed hardly mentioned anything related to one of the interactions. Then I will discuss these results further and address how they fit with existing theory and my own expectations.

Positive Interactions

Positive interactions are evident in some of the considerations about the use of trials. As expected, there were no mentions of the positive effects of trials on ongoing conflict, because the trials would be held after the conflict had ended. Outside of the context of the international military tribunal, however, marginalization effects are addressed with regard to a joint American and British plan to publish the names of so-called 'world outlaws', that is a list of the most senior Axis war criminals. In a draft of a telegram to Stalin by Roosevelt and Churchill, from the 17th of September 1944, they mention that publishing this list of names could isolate these senior war criminals and undermine their authority. They hope that it may set the German people up against these criminals and thus may help bring about the breakup of Germany (Eden, 3 October 1944). Interestingly, this marginalization effect is noted with regard to the publishing of a list of names of people who ought to be executed without trial while it is not mentioned regarding actual trials. This might however be explained by the fact that this list of names would be published while the war was still ongoing, while trials were always planned for after the war.

The mentions of positive effects of trials on peace are most clear in an American memorandum which was presented at the San Francisco conference, dated April 30 1945. At this point, the Americans were proposing the use of an international military tribunal to try the top Nazi war criminals (Kochavi, 1998). The most emphasized effect is the effect I have labelled general deterrence. In the memorandum, it is argued that the deterrent effect should be one of the main motivators of the punishment of war criminals. According to the

memorandum, trials are the most appropriate way to achieve this deterrent effect while not negating the ideals the Allies fought the war for. If the punishment is to lead to progress it must be regarded as progressive and consistent with the cause of the Allies. If it is seen as illegitimate or unfair, the Versailles Treaty debacle may be repeated. If the punishment is well received, however, it could help peace and security. Regarding general deterrence, the memorandum further states that punishing war criminals through legal means "will certainly induce future government leaders to think before they act in similar fashion." ("Memorandum of Proposals", 30 April 1945, p. 35).

The same memorandum also mentions that the crimes of the Nazis are so grave and violent that world security cannot exist if the perpetrators go unpunished ("Memorandum of Proposals", 30 April 1945). This argument is related to the interaction concerning ending impunity. According to the memorandum, it is important to use judicial means to condemn these actions, otherwise, they will go unchecked. The memorandum further mentions that trials could help Germans face the truth about the Nazis and their crimes ("Memorandum of Proposals", 30 April 1945). This might be related to the establishment of a historical record which often functions as a basis for reconciliation. Yet the reference does not explicitly mention the potential for reconciliation. This belief in the capacity of trials to establish a historical record is also found in a memorandum written by Secretary Stimson to President Roosevelt on 9 September 1944 and a letter to Secretary Stimson by Legal Advisor Hackworth dated 22 January 1945. Again, neither of these documents link it to reconciliation.

Stimson, US Secretary of War, claimed that punishing the arch-criminals in a civilized and dignified manner would have a positive effect on future generations and was the best method of demonstrating the abhorrence of the Nazi system and drive home to the German people that the Allies were determined to end it forever (Stimson, September 1944). Although this is not strictly related to one of the specific peace and justice interactions I have identified, it is related to the maintenance of a sustainable peace more generally. It seems to be related to the establishment of an order that is not based on violent vengeance or revenge.

There also were cases in which proposed positive effects of adequate punishment in general were emphasized, mainly to push President Roosevelt to take more action on the issue. Herbert Pell, US representative on the United Nations War Crimes Commission (UNWCC), wrote that he believed the appropriate punishment of war criminals would make the outbreak of a third war more difficult (Pell, 5 March 1945). Pell also mentions in an earlier letter to the

president, dated 27 January 1945, that it is important to provide some machinery for justice before the defeat of Germany and Japan. Otherwise, it may lead to a great deal of private vengeance. Pell believed that an appropriate machinery for justice could squash such vengeance (Pell, 27 January 1945). These arguments did not relate specifically to the use of an international tribunal for the prosecution of senior war criminals, but they do show that the effects of the punishment of war criminals on peace were taken into account.

Positive interactions did play a role in the considerations of the proponents of an international criminal tribunal. Yet this role was not very significant, other arguments were more prominent. Positive interactions did feature more prominently than negative interactions, which will be addressed in the following section.

Negative Interactions

Interestingly, negative interactions do not seem to have played any role in the decision to establish the IMT. The only related consideration in the analysed documents relates to the trials for the lower-level criminals. In June 1942, the British Foreign secretary already wrote in his minutes that such trials should be quick if they were to squash private vengeance and that longer trials may delay the return of peace in Europe (Eden, June 2 1942). Although concerns about the length of the trials were also raised with regard to the senior war criminals, in the documents I analyzed this is never linked to a delay in the return of peace.

The only other mention of negative interactions can be found with regard to the timing of the announcement on how to punish war criminals. The British Lord Chancellor wrote in his memorandum of 9 April 1945 that more detailed plans for the punishment of Nazis should only be publicized once British and American prisoners of war were safe and out of German hands (Simon, 9 April 1945). In those cases, retaliation would no longer be possible. This seems related to the concern that judicial intervention may lead to the exacerbation of violence.

Other Arguments

As mentioned before, arguments unrelated to one of the peace and justice interactions played a more prominent role in the analyzed documents. In this section, these arguments will be addressed. Firstly, I will elaborate on the arguments used by the British. Then, I will address the American arguments. In the documents I analyzed, the American discussions were more

elaborate than the British ones, likely because of the internal disagreement within the American cabinet.

The analysis shows that the British cabinet was opposed to the use of legal means to punish senior war criminals throughout most of the war. This is in line with the findings of both Kochavi (1998) and Bass (2000) on this issue. This opposition was mostly based on arguments that these trials would be long and complicated, that they could be used by the accused to challenge history and spread propaganda and may also be seen as illegitimate by the German people ("Aide-Memoire from the United Kingdom", 23 April 1945; Churchill, 9 November 1943; Eden, 22 June 1942, 3 October 1944). It was also emphasized that many of the most serious crimes of the Nazis would be hard to prosecute because they were generally thought to be outside the realm of international law ("Aide-Memoire from the United Kingdom", 23 April 1945; Simon, 3 May 1945).

The British believed that the fate of the top Nazi war criminals was a political question that demanded political action and that it could not be settled through judicial means (Eden, 22 June 1942, 3 October 1944; Simon, 9 April 1945). Another interesting argument put forward by the British government related to the danger that prosecution of aggressive war may lead to defendants basing arguments on previous wars of acquisitions which were seen as legitimate at the time (Aide-Memoire from the United Kingdom, 23 April 1945). In June, after it had become clear that both the US and the Soviet Union were in favour of establishing an international tribunal, the UK government did however accept the US draft proposal on the use of an international tribunal (Aide-Memoire from the United Kingdom, June 3, 1945; Kochavi, 1998). This is generally attributed to the fact that the UK did no longer want to obstruct the emerging consensus (Bass, 2000; Kochavi, 1998). The decision was also made easier by the deaths of Hitler and Mussolini.

The Americans were more sympathetic towards the use of a tribunal, but they remained internally divided. This division is most obvious with regard to the Morgenthau Plan and the reactions to it. In 1944 Treasury Secretary Henry Morgenthau Jr. presented a memorandum to President Roosevelt on a plan for post-war Germany. Morgenthau argued in favour of drawing up a list of arch-criminals whose guilt was generally accepted. He argued that these criminals should be executed without any form of trial (Kochavi, 1998; Morgenthau, 1944). Other war criminals were to be tried before a military commission. In his memorandum,

Morgenthau does not elaborate on why he thinks this is the most appropriate way to punish war criminals.

Secretary of War Stimson vehemently opposed Morgenthau's plans. He believed that the procedure of dealing with war criminals should be considered carefully and should at least embody the minimal safeguards of a fair trial (Stimson, 9 September 1944). Stimson thus believed that an international tribunal should be established to try the chief Nazi war criminals, because it was the right thing to do (Stimson, 9 September 1944). Stimson's legal advisor, Green Hackworth, also supported the use of legal means to punish top Nazi war criminals. In a letter he wrote to Stimson in January 1945, which was later submitted as a memorandum to President Roosevelt, Hackworth argued against execution without trial or hearing and argued in favour of using judicial means, specifically an international tribunal, to prosecute senior Nazi criminals. He argued that execution without trial would violate the most fundamental principles of justice, might make martyrs out of the criminals and also claimed that only few individuals could be punished this way. The use of the judicial method, however, would enjoy maximum public support in the present and the respect of future generations. Moreover, it would allow a record to be drawn up of the system of Nazi terror (Hackworth, 1945).

Yet, as discussed, there also was opposition in the American cabinet, especially from Secretary Morgenthau. President Roosevelt was not keen on using legal means either, he supported a British proposal to draw up a list of names of 'world outlaws' who could be executed without trial. If a tribunal was to be used President Roosevelt prefered a military tribunal with soldiers on the bench instead of judges. In a letter to the American representative at the UNWCC, Herbert Pell, he stated that he believed that civil jurists would be more cautious and that the accused might also use civil courts to delay proceedings through legalist tactics (Roosevelt, 12 February 1944). Moreover, it was also thought by both Pell and Roosevelt that setting up a civil tribunal would take a lot of time.

In the end, the US did propose the use of an international tribunal to prosecute the most senior Nazi war criminals during the San Francisco Conference. This was likely due to harsh press criticism of the Morgenthau plan, especially the proposed execution of the senior war criminals without trial, and the change in American leadership (Bass, 2000; Kochavi, 1998). President Roosevelt's successor, Harry S. Truman, was more sympathetic toward the use of a tribunal and had also been convinced that Roosevelt would have supported such a tribunal.

The American proposal was accompanied by the earlier mentioned memorandum. In this memorandum, it was emphasized that a purely political solution to the problem of Nazi war criminals, such as execution without trial, would be a violation of the concepts of justice which civilized nations embrace. According to the authors, it is a fundamental principle of justice that punishment will be inflicted by judicial action ("Memorandum of Proposals", 30 April 1945).

Discussion of Results

A few things stand out from this analysis. First of all, peace and justice interactions do not seem to have played a very significant role in the decision-making of the American and British cabinets on the establishment of the IMT. Other arguments were more prominent. When the effects of the international tribunal on peace were discussed, this was always done by the Americans. Moreover, it always referred to a positive interaction. The British never explicitly addressed the effects of a possible tribunal on peace, although they did mention the possible effects of the prosecution of lower-level war criminals on peace (Eden, June 2 1942).

As expected, peace and justice interactions related to ongoing conflict did not play any role in relation to the establishment of an international tribunal. The use of an international tribunal was only proposed for after the defeat or unconditional surrender of Germany. These interactions did however feature in relation to the timing of the announcement on how to treat war criminals and a proposed plan to publish the names of 'world outlaws' (Eden, 3 October 1944; Simon, 9 April 1945). The fear that announcements on the treatment of war criminals may lead to retaliation against British and American POWs is in line with Bass's (2000) theory that even the most liberal states would not be willing to risk the lives of their own soldiers in the name of justice.

The only positive interactions that were explicitly mentioned with regard to an international tribunal were general deterrence and ending impunity. There were references to the capacity of trials to establish a public record, but this was never linked to reconciliation. Why these interactions did feature while others did not could possibly be explained by the fact that general deterrence and ending impunity are often also central tenets of domestic criminal law systems and domestic trials. Other effects of justice on peace might not yet have been as widely known at the time, which would make them harder to anticipate. After all, research on the effects of judicial interventions on peace is often based on experiences with the ICTY,

ICTR and ICC. Yet, further research is necessary to find a more satisfactory answer to this question.

It is also interesting to note that the British opposition to the use of a tribunal was largely based on worries about legal problems and the complexity of the proposed trials. Concerns about the effects of a tribunal on the maintenance of peace did not seem to play a significant part. This seems to go against my expectation that states that are heavily affected by the conflict and are also involved in peacebuilding efforts would care more deeply about the effects of judicial interventions on peace. The US, which is much further removed from Germany, seemed to care more about the effects of the tribunal on peace. This might be because the US was already planning on being quite heavily involved in the reconstruction of post-war Germany. Still, it stands out that the document with the most references to the effects of a tribunal on peace, the American Memorandum of 30 April 1945, was prepared to be shared with the other Allies. So, perhaps the Americans thought the other Allied powers may be more interested in the effects on peace than they actually were.

The analysis further suggests that the main arguments in favour of using a tribunal to prosecute even the most senior war criminals related to the inherent fairness of such a procedure. Proponents argued that it was the right and civilized thing to do and that it would be consistent with the values the Allies fought the war for. This is in line with Bass's (2000) theory on why liberal states support international tribunals. Yet, it does stand out that only the US showed such a belief in legalism, while the UK cabinet was entirely willing to execute the senior war criminals without any form of trial until the end of the war. This also confirms Bass's (2000) finding that the UK position on the IMT is the main exception to his theory.

I further expected that liberal states who face strong calls for justice from their citizens might be more receptive to the positive interactions. This analysis suggests this might have been the case for the US. The Morgenthau plan received significant criticism in the press at the time. The controversy was so significant that it likely caused Roosevelt to drop his initial support for the plan and other plans that involved the execution of senior war criminals without trial (Kochavi, 1998). This public scrutiny of the plans for post-war Germany and the punishment of war criminals may have made US officials more interested in and receptive to the positive effects of using trials than their British counterparts.

The emphasis on the capacity of a tribunal to establish a public record of Nazi terror and the fight of the Allies against it also seems in line with some of Rudolph's (2017) findings. It

shows a desire to want to control public opinion on the behaviour of the Nazis and the response of the Allies. It also relates to Rudolph's (2017) claim that the Allies wanted Nuremberg to serve as some sort of legitimation for their participation and behaviour in the war, by establishing that the Nazis had violated international law.

Lastly, even though peace and justice interactions did not play a big role in the decision-making on the IMT, it is interesting to note that positive interactions played a bigger role than negative ones. This suggests that these interactions may not pose a significant obstacle to the establishment of international criminal tribunals. If the role of positive interactions is truly bigger than that of negative interactions, these interactions are more likely to provide motivation for using a tribunal. This is a promising finding, that may be cause for some optimism on the feasibility of new international criminal tribunals in the future. Yet, given the fact that these discussions took place more than 70 years ago, more research is necessary to find whether this truly is the case.

Conclusion

In this thesis, I investigated the role of peace and justice interactions in decision-making on the establishment of international criminal tribunals. I found that, in the case of the establishment of the IMT, these interactions did not play a very significant role in the decision-making. Other arguments were more prominent and influential. Still, references to the positive effects of trials on peace were more numerous than references to the negative effects and did play some role in the considerations of proponents of the use of trials.

These findings suggest that peace and justice interactions do not play a big role in the decisions of states to establish international criminal tribunals. The findings further indicate that peace and justice interactions are more likely to function as an argument in favour of establishing a tribunal than as an argument against it. These interactions are thus relatively unlikely to form obstacles to the establishment of international criminal tribunals.

These findings are based on a thorough analysis of numerous documents related to American and British decision-making on the IMT. I carefully analysed these documents, taking into account the broader context of the negotiations, to find out which arguments were used in favour and against the use of an international criminal tribunal and how peace and justice interactions featured in these arguments. This thesis thus provides significant insights into the role these interactions played in the decision-making of the American and British cabinets on the establishment of the IMT. In doing so, it helps fill a gap in the literature on peace and justice interactions, namely, the lack of attention to the role the anticipation of these interactions may play in decision-making on the establishment of international criminal tribunals.

Not all the findings of this research will be easily generalisable because it is only a single case study of the negotiations concerning one specific tribunal. As mentioned before, I chose this case because it was a ‘hard case’. The case did not provide ideal circumstances for peace and justice interactions to arise. The fact that positive effects on peace still played a role in the decision-making does suggest that these effects are likely to play a role in other cases as well. The absence of negative interactions in this case might be harder to generalize. These interactions may still play a role in cases where decisions on the establishment of a tribunal are made while conflict is still ongoing or has ended through a peace settlement. Yet, their almost complete absence in the analyzed documents does indicate that they may not be as influential as positive interactions.

Moreover, my analysis focused only on the decision-making in American and British governments and it is highly unlikely that I was able to identify all the relevant documentation. More research is necessary to strengthen the findings of this research. Future research could look at the considerations of other states involved in the establishment of the IMT or pay more attention to the work of the UNWCC. Other interesting topics include the establishment of more recent international criminal tribunals and/or tribunals that were active while conflicts were still ongoing, such as the ICTY or ICTR. After all, states may have gained more experience with peace and justice interactions over time, which may have increased the role these interactions play in decision-making.

The findings of this thesis have some implications for scholarship on the motivations of states to establish international tribunals, as they suggest that states may also pay some attention to the effects a tribunal will have on peace when deciding on its establishment. Moreover, the findings of this thesis do provide some reason to be slightly less pessimistic about the future establishment of international criminal tribunals. The findings do not suggest that peace and justice interactions form a significant obstacle to the establishment of international criminal tribunals. Instead, they suggest that these interactions are more likely to provide an incentive to establish a tribunal. This is relatively good news to those who advocate the establishment and use of international criminal tribunals to bring war criminals to justice.

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This section includes all the literature referred to in the thesis. It thus includes books, book chapters and academic articles. Moreover, it also includes web pages and treaties. The documents I analyzed as part of the case study can be found in appendices A and B. Appendix A includes the British documents I analyzed, while appendix B includes the American documents.

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Appendix B: American Documents

Document IV: Executive Agreement [American Draft of Definitive Proposal, Presented to Foreign Ministers at San Francisco] *(1945, April).* Included in: Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London (1945), p. 23-27.

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