Transcultural Justice: Legal Flows and the Emergence of International Justice within the East Asian War Crimes Trials, 1946-1954

Summary*

War Crimes Trials in East Asia contributed to the formation of transcultural norms of legality and legitimacy, as well as transnationally accepted notions of “justice.” The aim of this project is to examine the interaction between War Crimes trials policy in Europe and Asia after 1945. The analysis focuses on the Legal Committee of the United Nations War Crimes Commission in London and the Sub-Commission for the Far East at Chongking, as well as on selected case studies of prosecution in East Asia (Dutch/French case, Sino-Soviet legal relations).

Central Research focus of this project is to analyse the interaction of concepts of legality and justice between Asia and Europe during the War Crimes Trials program in various countries in East Asia between 1945 and 1954, taking into account the legal proceedings, the role of the United Nations War Crimes Commission, as well as the political implications emanating from Decolonization and Cold War considerations. From East Asia, especially from the Judge’s bench at Tokyo and the UN Sub-Commission at Chongking, discourse on the universality, desirability and typology of legal rule later returned into western legal debates. By focusing on the assignments of staff and judges first during the trials and secondly after the War Crimes Trials in various UN commissions and at academic positions at European universities, one hypothesis of this research group’s project is to detect the interaction and possible “flow-back” of this Asian experience to the West. The central hypothesis is that Western debates on the rule of law cannot be seen in geographic isolation, but emerged within a broader transcultural space of discourse and related movement of people and ideas between Asia and Europe.

The project supports the Cluster’s objective of studying the complex transcultural dimensions of international justice and legal jurisdiction behind the emergence of concepts and institutions in the years after the Second World War: The East Asia War Crimes trials and the UN Sub-Commission at Chongking thus served as a key experimental ground for the emergence of postcolonial ideas of international law and justice.

Single projects of the group:

- UNWCC Legal Committee (London/ Chongking)
- PhD: Dutch War Crimes Trials policy in the Far East (Tokyo/ Indonesia)
- PhD: French War Crimes Trials Policy in the Far East (Tokyo/ Indochina)
- PhD: Sino-Soviet Cooperation in War Crimes Trials: the trial at Khabarovsk („bacteriological warfare“)
- PhD: Chinese War Crimes Trials Policy and interaction with the UN Sub-Commission at Chongking, 1944-1947
- Fellow: India’s Dissenting Judgement in Tokyo and its impact on Legal Debates at Chongking
Scientific Aims of the Project:

The lineages of contemporary international law have generally been envisioned in terms of the imposition of western concepts on other parts of the world. As Research has shown, War Crimes Trials after the Second World War, in particular the International Military Tribunals at Nuremberg (IMT) and at Tokyo (IMTFE), developed under the veil of installing « justice » into a battleground for intense political and ideological struggle of the new international world order. Using a transcultural methodology, the present project offers an alternative conceptual framework for understanding the genesis of contemporary international law, since it directly focuses on the transcultural impact of Asian experiences on European legal personnel, networks and debates, and the contribution of this to the expectations of international justice. The hypothesis of this project is that it was at Chongking and within the UN Legal Committee at London, where concepts of transcultural justice and the idea of human rights were discussed, and the establishment of a permanent International Criminal Court first advocated. Hence, this project seeks to develop an over-arching theoretical framework for conceptualizing the global-historical significance of the East Asian trials, within which the different empirical case studies can be conducted.

The project supports the Cluster’s objective of studying the complex transcultural dimensions of international justice and legal jurisdiction behind the emergence of concepts and institutions in the years after the Second World War. It focusses on an intellectual history of judges and (European) legal staff and their impact on the formation of transcultural justice within the framework of transnational public spheres and debates. The East Asia War Crimes trials and the UN Sub-Commission at Chongking thus can be perceived as a key experimental ground for the emergence of postcolonial ideas of international law and justice.

The war crimes policy in East Asia constituted a multi-levelled system of commissions: the guidelines from the UN War Crimes Commission (London) on the UN Far Eastern Sub-Commission at Chongking, national war crimes agencies in every nation in East Asia, often still under colonial rule, the War Crimes Branch of the Allied Headquarters under MacArthur (SCAP) at Yokohama, and the informal contacts between British, Dutch and French authorities in the South East Asian Command (SEAC). Apart from the staff at war crimes trials conducted by the USA, China and Australia, the involvement of European Judge’s in these various bodies has to be taken into consideration to address the interaction of legal concepts between the European and the Asian theatre of war.

The United Nations, from its inception, concerned itself with questions relating to War Crimes, to which numerous resolutions testify. The establishment of a UN War Crimes Commission (UNWCC) even pre-dated the UN organization as a whole; its foundation at a conference, held at the Foreign Office at London on 20 October 1943 represents a legal milestone and precursor of UN policy. Observing that many crimes perpetrated by the Axis enemies were of a novel nature and did not fall within the hitherto accepted notion of war crimes, the call for a new definition of justice was discussed, and the need to form an internationally accepted standard in dealing with mass atrocities was advocated by the signatory nations. The Soviet Union, for different reasons, refrained from taking a seat within the UNWCC and its various commissions; it formed a competing body, emphasizing communist notions of legality. However, Soviet law scholars were amongst the first to discuss concepts of war crimes punishment and took part in framing the charter for the first International Military Tribunal at Nuremberg.
The UNWCC at London, chaired by Sir Cecil Hurst (GB), defined its objectives in three main spheres: investigation of facts and evidences regarding War Crimes, enforcement of the law respecting the punishment of war criminals, and legal opinions relating to war crimes and penal liability of perpetrators. Subsequent to its foundation, every nation formed a national War Crimes Branch and, by the end of 1944, it was agreed to form a coordinating agency for the Far Eastern theatre of war, which was named the “The Far-Eastern and Pacific Sub-Commission,” based at Chongking and chaired by Justice Dr. Wang Chung-hui. Besides China also Australia, Belgium, Czechoslovakia, France, India, Luxemburg, the Netherlands, Great Britain, USA and Poland took part in the sub-commission, whose main task was classifying charges and discussing legal questions for the East Asian theatre of war, with Chinese, Dutch, British and American representatives being their most active members; the common language of these discussions was English. Special emphasize is laid on the “flow-back” to Europe by focusing on the assignments after the War Crimes Trials in various commissions in Europe and especially within UN commissions. It can be observed that from their experiences as jurists in East Asia, many returned to Europe with a different approach towards War Crimes than they had before 1945, advocated the new insights in University seminars and in governmental commissions, and therefore framed European approaches to the emerging International Criminal Law.

The UNWCC as an organization was organized in three Committees, of which the “Legal Committee” in London gave important input for the development of contemporary international law, which also had an impact on the East Asian war crimes trials. The legal committee, chaired by the Czech representative Dr. Ecer and its secretary Dr. Schwelb, dealt with questions of principle, such as the concepts of war crimes, the criminal nature of aggressive war, and criminal acts not falling within the notion of war crimes, which subsequently became known as “crimes against humanity.” Frequent consultations were held among its members, such as Australia, China, Czechoslovakia, Denmark, Great Britain, Greece, India, Norway, the Netherlands, Poland, USA and Yugoslavia.

The UN commission thus provided the framework for very active transcultural legal debates and reflects the continuous tension between the ideas of justice and practical political considerations. Interestingly, a group of Eastern European lawyers was particularly engaged in these discussions. After the squashed hopes of exile-lawyers at London to be called to their Czech or Polish homelands in 1945 to reinstitute justice, these two bodies (the Sub-Commission at Chongking, as well as the Legal committee based at London) became an alternative place of employment. Later, many of these lawyers formulated sections of the UN charters, making use of minutes circulated at Chongking; others were even involved directly in the UN’s later Commissions at New York (e.g. the UN Committees on International Law). East Asia, it can be argued, thus served as a cradle for the development for international criminal law, with many ideas emanating from an expatriate environment in a Chinese City.

Adoption of a common line was difficult in East Asia, although the trials had been conducted under the umbrella of the UN War Crimes Commission (UNWCC). Regarding the charges, international and national law was referred to simultaneously, giving preference however to the latter. War crimes trials policy was motivated by post-war alliances in the wake of decolonization as well as ideological collaboration. It was in many cases the returning colonial powers in their capacity as sovereign ruler who brought Japanese accused of crimes to trial. This caused tensions as many (South) East Asians had not only suffered under the brutal Japanese occupation but had, in the initial phase of the war, in fact seen the Japanese as liberators from colonial rule. The political climate during the trials was thus one of ambivalence, with the roles of criminals and victims blurred.
The Soviet policy underlying the War Crimes trials programme illustrates another facet of ideologically tainted trial policy. It has often been overlooked that Soviet law scholars were amongst the first to address questions relating to International Law in the late 30s, with Moscow based scholar Aron Trainin framing a first theoretical approach as how to deal with war crimes already in 1944. In 1945, he was amongst the members of the Soviet delegation to London to formulate the principles laid down in the Charter for the first International Military Tribunal, to be held at Nuremberg, and advocated the principles of War against peace and the legal tool of conspiracy as a guideline for future prosecution of war crimes. Although Moscow’s lawyers targeted the Nazi Criminals, also general lines can be deduced from their theoretical framework. As Stalin was hesitant to give the Soviet delegation at Nuremberg enough freedom to carry on developing international law principles together with the law scholars of other Allied powers, thus, Soviet law developed in a different direction, however never completely losing touch with the initial ideas of Trainin on transnational legal principles. It is to be observed that Stalin saw the trials in first place as a way to influence politics and obtain geo-political goals.

After strong criticisms in the IMTFE trial and a negligent attitude in prosecuting Japanese War Criminals on Russian soil, the Soviet Union hastened in 1949 to open its only trial for Japanese War Crimes committed near Harbin in Manchuria, with the intention to bolster the ideological alliance with the victorious Chinese communists in a post-war world order. Given the COMINTERN policy in force until its dissolution in 1943 (but valid also later on under the heading of COMINFORM) to construct a solid Communist bloc against what was seen as the next imperialist threat in East Asia, the US, the trial at Khabarovsk should be analyzed in the light of Sino-Soviet relations and a possible Soviet interest to extend its geo-political influence onto the Far East. In a second step, this policy will be analyzed in view to possible connections with Chinese legal debates, for example between Trainin’s Law think-tank at Moscow and chief prosecutor Wang Chong-Hui and his staff at Chongking, and scrutinize the chinese input on the Soviet trial preparations at Khabarovsk. The entanglement of Communist ideas of transnational legality and Soviet “Realpolitik” in the East Asian trials offers a starting point for conceptualizing the growth of globally-oriented ideas of justice in the post-WWII period, laying emphasis on competing notions of justice and the problem of establishing an “anti-imperialist” trial policy.

To add to the overall JR groups findings, it is proposed that a short term fellowship (6 months) conducted by a post-doc researcher would analyse the case of Judge Radhabinod Pal in India and his criticism of the war crimes trials in East Asia. This fellowship project would contextualize Judge Pal within a broader landscape, examining how Indian politicians who assumed centre-stage in the post-independence years combined South Asian and Western concepts of legal morality to put forward visions of a world order which militated against European dominance.

As transitional justice was orchestrated worldwide by the Western Allies in the aftermath of 1945 defeat of Germany and Japan, apart from national legal codes the UN War Crimes Commission’s (UNWCC) papers and documents from the national war crimes branches will form the main source for all projects, linking it with existing scholarship on national war crimes policy. For all case studies, the numerous private papers and press coverage of the trials can help fill certain gaps, in order to help trace the trajectories of transcultural legal norms and map the transcultural environment of law debates at Chongking.