Epistemic Communities of Exile Lawyers at the UNWCC

Kerstin von Lingen
Professor for Contemporary History, University of Vienna, Vienna, Austria
kerstin.von.lingen@univie.ac.at

Received: 28 November 2020; Revised: 21 July 2021; Accepted: 23 September 2021
Published Online: 22 June 2022

Abstract

During the 1940s in London, exiled lawyers from Europe and Asia were among the main actors in coining one of the most known principles of international criminal law. The notion of ‘crimes against humanity’ emanated from their legal debates. This paper debates how the term surfaced in meetings of the United Nations War Crimes Commission (UNWCC) in 1944 and was taken up by the London Charter for the Nuremberg International Tribunal in 1945. Legal concepts, which previously needed to be discussed at conferences and via correspondence, developed much more quickly in the ‘breeding ground’ of the exile situation in London and were influenced by different legal traditions, here termed ‘legal flows’.

Keywords
1 Introduction

During the 1940s in London,1 exiled lawyers from Europe and Asia were among the main actors in coining one of the most known principles of international criminal law. The notion of ‘crimes against humanity’ emanated from their legal debates. The concept of crimes against humanity rules that ‘citizens are under protection of international law even when they are victimized by their own compatriots’.2 The concept evinces a universalistic approach to the law, with an emphasis on protecting individuals. In its original intention, it attempted to address state crimes prior to a state of war, as for example the persecution of political opponents, the persecution of German Jews, and the crimes committed against Czech nationals during the tensions of the so-called Sudetenland crisis at the time of the Munich Agreement in 1938, but also crimes committed upon Chinese nationals by Japanese troops in Manchuria 1931.

The first legal document using the term was the Charter of the International Military Tribunal at Nuremberg, agreed upon at the London conference on 8 August 1945. The concept of crimes against humanity was not a novelty of the tribunal at Nuremberg, but can be seen as a fulfilment of the Preamble of The Hague Peace Conferences of 1899 and 1907, the so-called Martens Clause.3

The United Nations War Crimes Commission (UNWCC) was a hub of legal thought during the war, and constituted an exile space for an epistemic community initially of European protagonists forced into exile by Nazi occupation, then backed by Chinese colleagues.4 The term ‘epistemic community’ is common in political science studies,5 but is also useful in historical research, and especially useful when dealing with intellectual history and the impact of emigrée thought on post-war planning. For this paper, I adhere to Mira

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5 See, for example, the definition given in Haas, Peter M. ‘Introduction: Epistemic Communities and International Policy Coordination’. International Organization 46(1) (1992), 1–35. 3.
Siegelberg’s assessment: ‘Émigré jurists in Britain and the United States who had turned against international law as a substitute for power politics kept up a fierce campaign to publicize the limitations of the legalist approach to international relations.’6 With ‘crimes against humanity’, the legal circles in London responded to one of the most horrific novelties of the twentieth century, the politically organized persecution and slaughter of people under one’s own control.7

2 Debating Global Justice during the Second World War

The exile situation in London8 and the engagement of exiled lawyers within the UNWCC and its forerunners was decisive for the settling of a century-long debate.9 Czech and Polish exile government representatives in particular, echoed by their Belgian and Dutch counterparts, hoped that the Nazis could be deterred from committing further crimes by the establishment of powerful legal guidelines.10 One result of these debates was the foundation of the UNWCC in 1943, which took up its duties in early 1944.11

Since they first convened in 1941, the legal circles had advocated new ideas of post-war justice within the two forerunners of the UNWCC, the International Commission for Penal Reconstruction and Development, emanating from the faculty of law at the University of Cambridge (and known as the Cambridge Commission), and the London International Assembly (LIA). When the UNWCC began functioning in early 1944, several proposals from renowned lawyers dealing with an Allied war crimes policy on legal grounds, jurisdiction

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of the courts and their possible establishment, as well as the collection of evidence, were already in existence, and were later presented to the British Foreign Office and the US State Department for approval.\textsuperscript{12} Two topics were central: first, the definition of war crimes with a view to new crimes and, secondly, the establishment of an international court.

Until 1939, legal theory had maintained that war crimes must be dealt with in military courts, or in civilian courts applying the laws of war, and could only involve cases of alleged crimes committed within a state’s own territory or against its nationals.\textsuperscript{13} But the unprecedented Nazi war of aggression and occupation of half of Europe formed the basis for a new definition from the expert circles at London.\textsuperscript{14}

The political context for the first legal think tanks to emerge was the so-called St James’s Declaration of January 1942,\textsuperscript{15} when nine European exile governments declared the punishment of war criminals a principal aim of the war effort and demanded the British and US Allies react. The Chinese representative Wunz King [Jin Wensi], who attended the meeting as an observer,\textsuperscript{16} pushed for global guidelines, and emphasized that his government wished to include crimes committed by the Japanese army prior to the beginning of the war in Europe in the list of war crimes. His initiative pointed to the annexation of Manchuria in 1931, and several incidents between China and Japan in 1937 and 1938.\textsuperscript{17} Although China at that time was still perceived as one of the four ‘big’ Allies, it was powerless to push for real change.\textsuperscript{18} Responding to the Chinese and Czech demands would have meant a much larger commitment

\begin{itemize}
\item \textsuperscript{12} Sellars, \textit{Crimes against Peace} 2013 (n. 9), 58–83.
\item \textsuperscript{14} Kochavi, \textit{Prelude} 1998 (n. 9), 3; Sellars, \textit{Crimes against Peace} 2013 (n. 9), 60.
\item \textsuperscript{15} See Julia Eichenberg’s article in this issue and Kochavi, \textit{Prelude} 1998 (n. 9), 18. A text of the St James’s Declaration can be found in ‘Inter-Allied Conference, 13 January 1942’. \textit{Bulletin of International News} 19 (1942), 52.
\item \textsuperscript{17} Kochavi, \textit{Prelude} 1998 (n. 9) 55; on China’s general attitude at St James’s, see Lai, Wen-Wei. ‘China, the Chinese Representative and the Use of International Law to Counter Japanese Acts of Aggression’. \textit{International Criminal Law Forum} 25(1) (2014), 111–132, 111.
\end{itemize}
from the Allies to war crimes policy\textsuperscript{19} than they were ready to provide, but it also required a solid legal basis.

It was therefore advantageous that the exile legal communities had already started on the endeavour. On 14 November 1941, they had met at a conference in Cambridge on ‘Rules and Procedures to Govern the Case of Crimes against International Public Order’. This conference aimed to create a criminal justice system for adoption in the armistice treaties after the conflict in Europe ended, and to arrange for continued collaboration in its legal development after the war.\textsuperscript{20} Legal scholar Hersch Lauterpacht, who had emigrated from Lemberg/Lviv in the Austro-Hungarian Empire (today’s Ukraine) to Vienna and later to Cambridge, where he gained the prestigious Whewell chair, was particularly active in fostering the debate and hosted the first meetings. Although this Cambridge Commission saw itself as a body of legal scholars and judges, and therefore chose the form of an academic conference to discuss its ideas,\textsuperscript{21} its political implications become clear. Amongst its members were several justice ministers (for example, René Cassin from France, Jaroslav Stránský from Czechoslovakia, Terje Wold from Norway), but also judges (such as Marcel de Baer from Belgium, Johannes Maarten de Moor from the Netherlands\textsuperscript{22}), and well-known university professors (like Stefan Glaser from Poland).\textsuperscript{23} The hosting scholars, who were, however, not representing their governments, also took a very active part, for example, Hersch Lauterpacht and Arthur Goodhart, who spoke about the United States of America’s legal theory.\textsuperscript{24} It should be stressed that the mixture of voices and actors who met in Cambridge was the commission’s strength.

The Cambridge Commission was interested mainly in the question of legal obstacles to trying Nazis, and the question of whether an international

\textsuperscript{19} Kochavi, Prelude 1998 (n. 9), 55.
\textsuperscript{20} Leaflet on the foundation of the International Commission for Penal reconstruction and Development, NIOD, Amsterdam, collection De Moor, archief 234 inv.no. 36. I wish to thank Lisette Schouten for this hint.
\textsuperscript{22} See the article by Sara Weydner in this special issue.
\textsuperscript{24} See their memorandum in LCO 2/2973, Papers of the International Commission for Penal Reconstruction and Development.
or national court should call for justice. One of its main achievements was the gathering of expertise by creating a questionnaire in April 1942, under the heading of ‘Committee upon Rules and Procedures relating to the Present War’, which was circulated amongst its members and collected information detailing which kinds of crimes had been reported, which groups of victims were affected, and which legal tools were already available to address these kinds of crimes. The results were promising: the majority of states were already able to prosecute all of the alleged crimes under their present jurisdiction. Only the last question, concerning crimes abroad, proved difficult. Given the nature of Nazi Germany’s heinous system of slave labour camps which involved dispatching nationals from other European countries to far-away camps throughout Europe, the last category represented the main gap to be filled.

As a kind of summary to the work of the Commission, Lauterpacht issued a 52-page memorandum on the ‘Punishment of War Crimes’, which discussed possible options to circumvent current legal problems. In this memorandum, he argued in favour of an international criminal court. This would involve, in his view, not only the ‘expansion of military tribunals by inclusion of lay judges of high standing’ and the ‘participation of neutral assessors and judges’, but also the ‘participation of enemy assessors’ and the creation of ‘quasi-international courts of appeal’. The possible establishment of a permanent international body of justice was a heated topic of debate. The failure of war crimes trials following the First World War, which were held before the Reich Court in Leipzig against German officers, made favouring an international court of justice seem appealing. Establishing such a court would, the commission argued, prevent the need for these normative discussions during future conflicts. The


26 TNA, LCO 2/2973, Papers of the International Commission for Penal Reconstruction and Development, Report of Committee concerned with Crimes against International Public Order. Answers to the Questionnaire were received from Belgium, Czechoslovakia, France, Greece, Holland, Luxembourg, Norway, Poland and Yugoslavia.


creation of such an institution would have to be accompanied by a new codification of law; as a consequence, applying this new penal law to the war criminals of the present conflict could be criticized as unjust, as *ex post facto* law. The Chairman of the Commission, Arnold McNair, therefore strongly opposed the idea. In principle, the question of establishing a permanent body of justice was passed on to another commission, which was soon to emerge.

The second pioneering body to precede the UNWCC, the London International Assembly (LIA), was founded in the autumn of 1941, on the initiative of the British peace movement the League of Nations Union (LNU), under Lord Cecil. Here, a non-governmental organization took the lead in providing a platform for debate, and pushed for publicity. Again, we have a majority of exiled actors involved: Edvard Benes, René Cassin, Jan Masaryk, J.M. de Moor and Robert Cecil, as well as experts like the Czech lawyer Bohuslav Ečer and Chinese delegate Wunsz King. In contrast to the Cambridge Commission, the number of members had increased and the Eurocentric position was abandoned, now non-European members (e.g. India and Brazil) were involved, as well as the big Allies, hinting at the global approach and political implications of this legal endeavour. In this regard, the LIA can be seen as a blueprint for the later UNWCC. The arena in which ‘global justice’ was debated also becomes clear from the fact that expertise was also welcomed from expelled German or Austrian judges of Jewish descent, who had also emigrated to London. Also remarkable is the outreach aspect: visits to British MPs, as well as newspapers, were quite frequent, and the Czech exile government, and its representatives, was especially active.

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32 See Julia Eichenberg’s article in this issue.

33 TNA, TS 26/873, London International Assembly, Reports on Punishment of War Crimes; Sellars, *Crimes against Peace* 2013 (n. 9), 53.

34 The correct Czech spelling is Ečer, but he is usually addressed and signed in English documents as Ecer; we maintain his original spelling for coherence.


In February 1942, we see first evidence from LIA’s meetings in the papers; its main aims, besides the legal debates, were to exert pressure on the British Foreign Office and raise public interest. Its chairman, the Belgian judge Marcel de Baer, framed several key questions for the debate concerning the problem of codification of international criminal law and trial procedures. It was also de Baer who, in December 1943, was sent as an envoy to New York to campaign for the necessity of an international court to punish Axis criminality. Here, the engagement of the UNWCC crossed with that of the World Jewish Congress (WJC) which also lobbied for a ‘world court’ and ‘new justice’. Judging from findings by Lewis and Weinke, the WJC’s agenda emphasized the uniqueness of the Holocaust, which in turn created a conflict with the agenda of the exiled lawyers who focused on general legal tools and were not interested in addressing special cases, as they saw the Holocaust. They agreed however on a victim-centred approach to war crimes policy.

3 UNWCC

The UNWCC brought together legal scholars from different countries in a transnational debate about ‘global justice’. It was officially founded in London, on 20 October 1943, and began functioning in early 1944. It constituted an internationally accepted advisory body and was concerned with formulating a minimum standard in dealing with mass atrocities already occurring during the ongoing conflict. It defined its objectives in three main areas: the investigation of facts and evidence regarding war crimes, the enforcement of the law with regard to the punishment of war criminals, and legal opinions relating to war crimes and the penal liability of perpetrators. Not surprisingly, given the continuity of its membership, the UNWCC – as its forerunners had already done – went beyond its mandate of simply collecting information and pushed...

37 TNA, TS 26/873, London International Assembly, Reports on Punishment of War Crimes; proposal of M. de Baer ‘Suggestions for the scope of work for the commission, provisional plan of work’, April 1942.
38 Sellars, Crimes against Peace 2013 (n. 9), 53.
for a real war crimes policy. The legal committee spearheaded the debate. Both the British Foreign Office and the US State Department had preferred that the UNWCC serve mainly as a clearing office to collect evidence, fearing widespread political implications, for example for racial or colonial practices within their own spheres of power.

Significantly, a majority of lawyers from the former Austro-Hungarian empire or central-middle European states stood out. They, like Lauterpacht or the father of the concept of genocide, Raphael Lemkin, either originated from the former Habsburg Empire and lived in Lemberg or Prague, or had studied in Vienna with Jewish law professor Hans Kelsen. It was presumably less a question of their common origin than precisely their early experience of violence and anti-Semitism there, as a high percentage of them were Jews or had experienced violence as political opponents. Their engagement is characterized by a strong personal commitment, even a ‘mission’, to advance the law with all their energy (Raphael Lemkin surely being the best-known example, although Lemkin had no known ties with the UNWCC); these legal scholars in exile were deeply marked by personal experience of persecution, and acted in the serious attempt to find a worthwhile solution to bring the criminals to trial.

In this respect, the Soviet Union was sometimes the more tempting partner when it came to war crimes policy. Czech, Yugoslav and Polish delegates were in constant exchange with Soviet scholars, and their political representatives – Czech president Beneš being the most prominent example – never hid the fact that the smaller Eastern European states were in search of justice and support

43 Sellars, Crimes against Peace 2013, (n. 9) 58; Kochavi, Prelude 1998 (n. 9), passim.
49 See Valentyna Polunina’s article in this issue on the problems, for example, Katyn.
for the war crimes issue and willing to accept help from Stalin if Washington and London hesitated.\textsuperscript{50} This attitude may have been prompted by the fact that Lauterpacht, as well as scholars like Ečer and Egon Schwelb from Prague, read Russian and were attracted by some new legal theories. In Western scholarship, only a few studies have pointed to the fact that Soviet law scholars were among the first to advocate criminal proceedings against the Nazi elite.\textsuperscript{51} Aron Trainin's theoretical work on the prosecution of war criminals included the early stages of the concept of conspiracy, the credit for which was later attributed to the US prosecution at Nuremberg.\textsuperscript{52} His book was translated into English and distributed at the Moscow Conference, a meeting of the foreign ministers of Great Britain, the US and the Soviet Union.\textsuperscript{53} Following the Moscow Conference of October 1943, the Soviet Union held a trial in Kharkow.\textsuperscript{54} Ečer was among the scholars who were attentive to the Soviet message emanating from the trial that justice for war crimes was on the top agenda of Soviet policy.\textsuperscript{55} In his booklet, ‘Lessons of the Kharkow Trial’, he praised the proceedings conducted against three German officers and one local collaborator as a model for future war crimes trials, advocating the practice of judging crimes where they occurred (\emph{lex loci}).\textsuperscript{56} In later LIA and UNWCC debates, however, ad hoc tribunals were favoured as a means of addressing similar crimes on a global scale.


\textsuperscript{53} Sellars, \textit{Crimes against Peace} 2013 (n. 9), 49.

\textsuperscript{54} On Soviet trial policy, see the overview by Penter, Tanja. ‘Local Collaborators on Trial. Soviet War Crimes Trials under Stalin (1943–1953)’. \textit{Cahiers du Monde Russe} 49(2–3) (2008), 341–364.

\textsuperscript{55} Sellars, \textit{Crimes against Peace} 2013 (n. 9), 53.

Ečer pushed for the UNWCC to take up more responsibility and envisioned it as a forerunner to an international criminal organization setting up courts to act as an instrument of international justice. He held the position that the expansive nature of the Second World War had created a new situation, for which new legal responses must be formulated.\(^5^7\) Ečer surely relied on Trainin’s theories when he wrote ‘Preparation and launching of the present war must be punished as a crime against peace’, and ‘if there are gaps in law, it is our duty to fill them.’\(^5^8\) In a memorandum submitted to the UNWCC in May 1944, Ečer followed a twofold argument. First, he underlined that it was not a transgression of competencies of the UNWCC when it suggested further handling of the war crimes problem, including broadening the whole concept, and, secondly, he advocated the use of the term ‘crimes against humanity’.

In assessing the papers of US representative Herbert Pell,\(^6^0\) it becomes clear that Pell had already used the term with the UNWCC\(^6^1\) as well as in private correspondence with Roosevelt.\(^6^2\) However, due to Pell’s difficult standing within the UNWCC as well as the US state department, the initiative of Ečer was more successful.

In assessing the historical record of Nazi crimes, Ečer stated in his May memorandum that the UNWCC had received several accounts of the planned nature of Nazi warfare, especially in Eastern Europe, which did not fall under the category of conventional war crimes.\(^6^3\) The proposed new term ‘crimes against humanity’ would, as Ečer underlined, cover these offences and draw a line to the universalist approach of the Martens Clause.\(^6^4\) Ečer recalled in his memoirs his deep personal commitment:

The atmosphere was tense, as in my opinion we discussed the whole rationale of the war in light of international law, that must necessarily

\(^{57}\) Sellars, *Crimes against Peace* 2013 (n. 9), 61.
\(^{58}\) TNA, FO 371/39005, UNWCC, Minutes of 36th meeting, 17.10.1944. See also Sellars, *Crimes against Peace* 2013 (n. 9), 63.
\(^{60}\) Ibid.
\(^{61}\) Ibid.
\(^{63}\) Ečer, Additional Note (n. 59), 2.
\(^{64}\) Ibid., 4.
lead to the victory of justice over the dark forces of evil and bring its perpetrators to the justice they deserve.\textsuperscript{65}

It seems that Ečer’s initiative focused heavily on the Holocaust crimes, which until then had been dealt with alongside the bulk of Nazi occupation crimes, an act that minimized their distinctiveness – but he was equally concerned with crimes against political opponents, as he himself was a socialist party delegate who had been imprisoned by the Gestapo in Prague in March 1938, before escaping to England.\textsuperscript{66}

Ečer’s proposal was rejected, so the only way to implement his new ideas was to form networks and circumvent the official channels of the UNWCC. Ečer, who already had strong ties with the Polish delegate Stefan Glaser, the Dutch delegate Jan M. de Moor, the Yugoslav delegate Radomir Živković, and the Belgian delegate Marcel de Baer, now turned to the Australian delegate Lord Wright, who officially backed Ečer’s motion. After Wright had spoken in favour, the Chinese UNWCC delegate Wunsz King, too, supported Ečer’s proposal (a fact that Ečer noted in his memoirs with satisfaction\textsuperscript{67}), and then Yugoslavia, New Zealand, Poland, Belgium and the Netherlands followed suit.

But the British Foreign Office still rejected the suggestion of formulating new law, as they saw it. UNWCC Chairman Sir Cecil Hurst was stuck between the Foreign Office, the War Office and his Commission, which later resulted in his stepping down. De Baer complained in a private conversation in December with Lord Wright (which has survived in the Australian papers) that perhaps siding with a Soviet commission would be the better option. Both de Baer and Ečer were especially frustrated that there had never been an official reply from Hurst to a letter Ečer had presented in October 1944, which included a concrete offer of collaboration with the Soviet commission.\textsuperscript{68} Wright’s report stated: ‘The Russians, with their organised machinery, would attract the eastern European countries now represented on the Commission in London to the Extraordinary Commission functioning at Moscow. De Baer said he ... had


\textsuperscript{66} See also Lingen, ‘Coining Postwar Justice’ 2021 (n. 4), 78.

\textsuperscript{67} Ečer, Bohuslav. \textit{Vyvoj a základem mezinárodního trestního práva} (Development of International Criminal Law) (Prague: V. Linhart, 1948), 122.

heard Ečer and Živković express sentiments that they would prefer to remain on the Commission in London, but if things went on as at present they would certainly turn to the strong Russian Commission.69

Much too late, official British offices realized the degree of frustration. In January 1945, after Hurst had stepped down, the new British representative within the UNWCC, Lord Finlay, regretted that the road had not been taken: ‘It is certainly a disadvantage not having Russia represented, but I fail to see what we can do about it’.70 The accession of Lord Wright as chairman of the UNWCC in January 1945 had a positive effect on all initiatives. The concept of crimes against humanity was endorsed and recommended by the UNWCC, and later found its way into the London Charter.

When, on 8 August 1945, the London Conference was concluded with the charter for the International Military Tribunal to be held at Nuremberg, the document contained a small revelation. Among the three charges listed was a new term: the Axis leaders would face punishment not only for war crimes, but also for crimes against peace and for crimes against humanity.71 Even today, the origination of the new term is mythically loaded.72 US envoy Robert Jackson brought it up, giving credit to ‘an eminent scholar of international law’.73 This hinted at Hersch Lauterpacht,74 then a professor at Cambridge, whom Jackson had met only a day earlier.75 The UNWCC lawyers, as a rule, had no access to the London Conference, which they deeply resented.76

69 NAA, A 2937/273, Note of Meeting with General de Baer, by Wright, 01 December 1944, 2.
71 See also Lingen, ‘Coining Postwar Justice’ 2021 (n. 4), 81.
72 Luban, ‘Theory of Crimes against Humanity’ 2004 (n. 7), 86, states that ‘no record exists of how the term crimes against humanity came to be chosen by the framers of the Nuremberg Charter.’
76 Although Falco, Jackson und Fyfe at least informally consulted with some members, especially Lord Wright, and took advice from UNWCC.
Certainly, Lauterpacht’s role in this epistemic community as intermediary in the conveying of the message from the peripheries to the really powerful bodies at the Allied conference in London was decisive for the project in developing new concepts. But the idea did not originate with him, or not him alone, as is commonly supposed.

4 Conclusion

When assessing the commitment of forerunners to the UNWCC and representatives of smaller Allied states towards the cause of international criminal justice, some general conclusions can be drawn.77

First, the commitment of smaller Allied states to framing international criminal law with regard to war crimes was crucial. Generally, the sense among these forerunners of being part of an international network was strong from the beginning. This stance mirrors the political situation of the time: we must not forget that the debates stemmed from an experience of political powerlessness; that these exiled politicians and experts keenly felt the low position their agendas and authority to punish war criminals held with their British hosts. This community of lawyers quickly sensed that the only way to achieve political action by the ‘big three’ would be to convince them with facts and expertise, while carefully including academic expertise from their host country. The surrounding intellectual debates about legal terms are therefore vital to understanding the impact of the UNWCC’s work. Some of the UNWCC’s members, such as the Czech delegates, stood out from this community of experts. The exiled lawyers’ engagement with, and facilitation of, ‘legal flows’ thus demonstrates the significant intellectual role played by marginalized academic–juridical actors in a difficult political context, in the forging of new globalized legal concepts. Furthermore, I assert that the notion of exile itself created a ‘global moment’, so to speak, an ‘exile moment’.

Second, while it was a global movement, it was strongly connected with the concerns of the European countries in exile. The fact that war crimes policy crystallized from the basis of European points of view and political concerns following the Nazi occupation and, to a lesser extent, the experience of the genocide perpetrated against the Jews – today known as the Holocaust – becomes clear upon analysis of archival documents from that time. This finding is even true with regard to the reception of academic literature from the Soviet Union, which was also in search of a globally-accepted definition of war

crimes. That the Soviet Union was still seen as an important ally of the Eastern European states, while the war raged on, and sometimes even the more tempting partner when it came to war crimes policy, should not be underplayed.

Third, the atmosphere in London legal circles during the first half of the 1940s created the framework for an ideal breeding ground for an internationally relevant and acceptable war crimes policy, and networks were crucial in bringing about their final success. Thus the exiled lawyers gathered in London during the 1940s formed an epistemic community, including some of the most renowned lawyers of the time, and established one of the first truly transnational networks. With the establishment of the LIA, the Eurocentric perspective was opened up and East Asian views and legal concerns of the Pacific War were given sufficient weight. The concept of crimes against humanity was the main outcome of these legal debates and later served as a blueprint for the London Charter, as well as enriched international criminal law.

Acknowledgments

The author wishes to thank Dirk Moses and Milinda Banerjee for commenting on the draft.

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