

New Zealanders and the International Military Tribunal for the Far East

THE RECENT DEATH of Japanese Emperor Hirohito has sparked renewed controversy as to whether or not he should have been tried as a war criminal. The comments of those New Zealanders who have offered easy and frequently grotesque solutions to this question have mostly shown complete ignorance of the legal problems surrounding the war crimes trials which were held after the Second World War, and particular ignorance of the major trial held in Tokyo from 1946 to 1948. This ignorance is by no means unique. Some years ago an American scholar writing about the Tokyo war crimes trial began his book with the sentence, 'Few Americans know much about the Tokyo trial',¹ while a more recent writer on the subject claimed that the International Military Tribunal for the Far East (IMTFE) had 'simply been swallowed up by the biggest black hole of the twentieth century'.²

There are a number of reasons for ignorance about the trial. One of them is the intimidating quantity of the material relating to it. The University of Canterbury holds one of the few complete collections of the transcript in the world. It consists of 380 volumes of, it is claimed, at least 10 million words. The majority judgment alone runs into 1200 pages.³ Moreover, apart from Premier Tojo, the names of those who were tried are now, and were then, largely unfamiliar in the West, which predictably has taken little interest in the fate of these unknowns. As the one Japanese wartime figure that many non-Japanese knew of, it is not perhaps surprising that the Emperor should have become a focus of bitterness immediately after the war. Consequently the trial lost its interest and immediate appeal for many people when the Emperor was not indicted.

When in 1946 the New Zealand government agreed that a New Zealand judge and prosecutor should participate in the trial, it was undoubtedly their wish that New Zealanders should take an interest in the proceedings. Announcing the nomination of Justice Harvey Northcroft, a judge of the Supreme Court based in Christchurch, to be the New Zealand member on the International Military

1 Richard H. Minear, *Victors' Justice*, Princeton, 1971, p.ix.

2 Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials*, New York, 1987, p.22.

3 Judge Harvey Northcroft gave his complete set of the proceedings to the library. It is one of the 12 complete sets in existence. An index to the records was compiled by K.M. Wells and published by the University of Canterbury Library in 1983.

Tribunal for the Far East and the nomination of Ronald Quilliam, barrister of New Plymouth, to serve on the prosecution staff at the trial, Walter Nash, then acting Prime Minister, said New Zealand was participating out of 'a special interest in the settlement in Japan and in the maintenance of peace and security in the Pacific'. The government wished to be identified 'in a special way' with the punishment of war criminals. The purpose of the trial, the country was told, was to ensure that wrong-doers were punished and 'to establish once again and ensure recognition for all time of the rule of law in the relations of nations and the peoples of the world'.⁴

For its part, the Department of External Affairs was also anxious to promote public awareness of the trial. Foss Shanahan, the Deputy Head, wrote in 1946: 'I am anxious if possible to develop a public opinion in support of our participation in the Tribunal and the trial proceedings. Our people are singularly apathetic to matters of this kind and, in view of the importance of the Pacific, I feel we should do everything we can to develop and stimulate interest.'⁵ The Department circulated to the press accounts of the trial written by Harold Evans, associate to Judge Northcroft, but little or no use appears to have been made of this material. The Nuremberg trial, in which the central characters like Goering and Hess were known to New Zealanders, made the headlines, but the coverage of the Tokyo trial was always thin in the New Zealand press.⁶ The New Zealand government's hope that the trial might ensure recognition for all time of the rule of law in the relations between nations could have been dismissed from the start as a vain one. But even the Department of External Affairs' modest wish that it might stimulate New Zealanders' interest in the Pacific was also to be denied.

The basis for American policy for the punishment of war criminals in the Far East was the Potsdam Declaration of 26 July 1945. This read in part: 'We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners'⁷

The establishment of an international military tribunal to try war criminals was based on this declaration. The Supreme Commander for the Allied Powers (SCAP) was given authority to set up such a tribunal and in January 1946 General MacArthur, SCAP, declared the establishment of a tribunal for the Far East and announced its Charter.⁸ The International Military Tribunal for the Far East thus derived its authority from SCAP, who acted as agent for the powers who had signed the Instrument of Surrender. As one of the powers which had signed this document, New Zealand received an invitation to nominate a judge and a prosecutor to the proposed court, and proceeded to do so.⁹

⁴ Robin Kay, ed., *Documents on New Zealand's External Relations, II : The Surrender and Occupation of Japan* (Documents II), Wellington, 1982, No.650, pp.1507-8.

⁵ Shanahan to Quilliam, 25 October 1946, Ministry of Foreign Affairs Archives (MFA), 59/2/49 Pt.1.

⁶ Interview with Harold Evans, Christchurch, August 1988; Alister McIntosh to Quilliam, 13 May 1946, MFA59/2/49 Pt.1.

⁷ Documents II, No.6, pp.11-12.

⁸ Documents II, Nos.653 and 654, pp.1511-18.

⁹ Documents II, Nos.649 and 650, pp.1505-8.

The International Military Tribunal for the Far East cannot really be understood in a vacuum. New Zealanders accepted the IMTFE as a logical development after Nuremberg, and the structure and Charter of the IMTFE owed everything to the Nuremberg model.

The Nuremberg tribunal, the first in history to try individuals for crimes against the peace of the world, derived from the American determination to employ judicial proceedings against war criminals. This determination caused heated debate between America and its allies. British preference was for executive action, or at most a 'quick short trial', with neither defence nor prosecution able to call witnesses. Churchill himself wanted the Nazi leaders summarily shot. In the Foreign Office, however, there was considerable doubt whether many Nazi transgressions could properly be described as war crimes under international law.¹⁰ In the end the British deferred to American opinion and the realities of power. A conference was held in London in June 1945 at which British, Soviet, and French representatives met with American negotiators to discuss the American proposals for a war crimes trial. The Soviet and the French delegation were in unfamiliar legal territory. In particular, the charge of conspiracy was unknown to them in law. There was a good deal of tension and resentment of American pressure for agreement, some compromises were made, and an 'Agreement' and 'Charter' were finally signed in August 1945. The trial at Nuremberg began in November and was thus well-launched by the time the Tokyo trial began in May 1946.¹¹

The Nuremberg Charter, which served as the legal foundation for the trial, contained three prosecutable offences; crimes against peace, war crimes, and crimes against humanity. The first and last of these were categories of highly uncertain status in international law. Only the second, war crimes, which referred to violations of the traditional laws of war such as mistreatment of prisoners of war, was well understood. Crimes against peace were defined as 'the planning, preparation, initiation or waging of a war of aggression . . . or participation in a common plan or conspiracy for the accomplishment of the foregoing'. The conspiracy charge, familiar only to Anglo-Saxon law, allowed rules of evidence and procedural regulations to be relaxed and enabled a wide net which would catch numerous offenders to be cast.¹² The term 'war of aggression' caused problems since it was argued, as it is still argued, that launching a war is not a crime in international law. Furthermore, the term 'aggression' could not be satisfactorily defined. Nevertheless this count was finally agreed. To achieve this it had been necessary to maintain that international conventions such as the 1928 Pact of Paris, better known as the Kellogg-Briand Pact, had established 'aggressive war' as a crime recognized by all 'civilized nations' — another term that defied definition.

Crimes against humanity included murder, extermination, and 'persecution on political or religious grounds', whether committed 'before or during the

10 Roger Buckley, *Occupation Diplomacy*, Cambridge University Press, 1982, p.108; Minear, pp.8-9.

11 See Bradley F. Smith, *Reaching Judgment at Nuremberg*, London, 1977, pp.46-58.

war'.¹³ This count was also much criticized on the ground that there was no code of law or international agreement in existence that made it illegal to persecute religions or exterminate populations, undesirable as such activities might be. The count of crimes against humanity, it was argued, amounted to an exercise in ex post facto prosecution — declaring an act to be a crime and punishing it as such after it had been committed. Furthermore, this count was so worded as to provide for the prosecution of individuals and to remove the existence of superior orders as a legitimate defence. Hitherto the prosecution of policy-makers, as distinct from perpetrators, had been an issue carefully skirted by international lawyers. Under this count both politicians and soldiers obeying the orders of their superiors could be tried.¹⁴ This much debated and much disputed interpretation of international law, accepted at Nuremberg, established a precedent for the Tokyo trial.¹⁵

There was no desire to re-examine the difficult legal and political issues raised during the formulation of the Nuremberg Charter when the creation of a tribunal for the Far East was mooted. Hence the reliance in Tokyo on the Nuremberg precedent is immediately evident. The Charter, which MacArthur issued and from which the authority of the court derived, set out the crimes for which individuals were to be tried. These were the same counts as at Nuremberg, similarly worded and justified by six broad principles of international law.¹⁶

The most obvious difference between Tokyo and Nuremberg was the greater number of states involved. There were four at Nuremberg. Ultimately there were eleven at Tokyo — the nine signatories of the Instrument of Surrender plus India and the Philippines.¹⁷ This made the bench unwieldy and added to the probability of split decisions. Given the shaky legal ground on which the Charter was based and, ultimately, the ambiguities of the indictment, these were all the more likely.

Those countries that were members of the Tribunal were invited to submit lists of the Japanese war criminals they thought should be tried. New Zealand chose not to submit a list. The government felt it had insufficient information about the Japanese wartime leadership and, rather than submitting a New Zealand list, asked merely for the right to comment on any other lists submitted.¹⁸ The published American documents for 1945 suggest that there may have been a feeling in New Zealand government circles that there should be trials of both political and military leaders in Japan and that the Emperor should be indicted.¹⁹ If this is correct, it did not become official policy. When in 1946 the press published reports emanating from Tokyo that New Zealand and Australia had both named Hirohito as the 'Number One' war criminal, this was denied in

12 Smith, pp.18-19, 58-59; Buckley, pp.112-13; Minear, pp.13-14, 37-39, 58-60.

13 Smith, pp.13-15.

14 Smith, pp.14-15; Minear, pp.60-73.

15 In Britain, prominent and distinguished individuals like Lord Hankey, former Secretary to the Cabinet, waged a long campaign against the trial. See Stephen Roskill, *Hankey, Man of Secrets*, London, 1974, III, pp.640-54.

16 Documents II, No.654, pp.1513-18; Buckley, p.119, n.54.

17 *Foreign Relations of the United States* (FRUS), 1946, VIII, pp.390, 418-20.

18 Documents II, Nos.651 and 652, pp.1508-10.

19 FRUS 1945, VI, pp.782-3.

Wellington.²⁰ At the same time Sir Carl Berendsen, the minister at the head of the New Zealand legation in Washington and its representative on the Far Eastern Commission, was informed by Wellington: 'As we see it Hirohito has served a useful purpose both with respect to the surrender and in aiding the task of the occupation forces. The nomination of him as a war criminal would we feel require the most careful consideration.'²¹

This too was Berendsen's view. He had visited Japan in January 1946 as a member of the Far Eastern Advisory Commission (later the Far Eastern Commission) and reported that General MacArthur had told the Commission that the Emperor was 'a cypher, a puppet rather than a leader'. MacArthur said that he had found nothing which led him to believe the Emperor took anything but a formal part in national decisions. Furthermore, he thought that any attempt to try the Emperor as a war criminal would lead to a violent reaction in Japan and put the whole occupation at risk. Berendsen was impressed by this argument and, although he personally felt the Emperor should qualify as a war criminal, recommended to the government that no action should be taken on this.²² Later in Washington the Far Eastern Commission as a whole voted in support of the decision not to try the Emperor.²³

In fact, by January 1946 there was no chance that the Emperor would be indicted. The United States government and the State-War-Navy Co-ordinating Committee left the decision for the retention of the Emperor to MacArthur and his opinion was quite clear. He warned Washington that any indictment of the Emperor would radically alter the whole character of the occupation and require an immense increase in the number of American troops in Japan.²⁴ The British Foreign Office had all along favoured the retention of the Emperor, and the government there had done its best to quash any suggestions in 1945 that the Emperor should be indicted. By the time the trials were held in 1946 both the British parliament and the public seem to have lost interest in the issue.²⁵ There was, therefore, positive support from the British for the proposition that the Emperor should not be tried. In Tokyo it was made clear to the prosecutors at the war crimes trial that, when the list of defendants was being drawn up, the inclusion of the Emperor's name would not meet with approval at 'higher levels'.²⁶ Discussion of the question was dropped at this meeting, which was held before the Russian prosecutor had arrived. The Soviet press had had much to say about Hirohito's war guilt. To the surprise of the other prosecutors, when the Russians arrived they did not include Hirohito's name among those they wanted prosecuted when the final list was being drawn up.²⁷ The decision to exclude the Emperor was a political one, as was generally recognized at the time. Under the

20 See *Evening Post*, Wellington, 18 January 1946; *Dominion*, Wellington, 19 January 1946.

21 Documents II, No.652, p.1510.

22 See Documents II, No.178, pp.325-6; No.651, p.1509.

23 See Report by the Secretary General, *Activities of the Far Eastern Commission*, Washington, 1947, Appendix 39, p.98.

24 FRUS, 1946, VIII, pp.395-7.

25 Buckley, pp.60-62.

26 Documents II, No.667, p.1554.

27 Documents II, No.669, p.1559.

concept of conspiracy as defined by the prosecution he could have been tried and convicted, whether or not he had been directly involved in decision-making and whether or not he had wanted war.²⁸

The list of 28 defendants was finally determined on 17 April 1946. Two of these, Shigemitsu Mamoru and Umezu Yoshijiro, had been added at Russian insistence, much to the disgust of the New Zealand prosecutor, Quilliam. These men had already been eliminated by the prosecutors as 'less culpable'. In spite of this the majority of the prosecutors now thought it advisable to make this concession to the Russians.²⁹ Both of these defendants had been notably anti-communist before the war.³⁰

The New Zealand legal team at the trials had been carefully chosen. Both the judge and the prosecutor had distinguished military records in both the First and Second World Wars. They were experienced lawyers and highly respected in legal circles. Northcroft had been on the bench of the Supreme Court since 1935. Quilliam, who had a legal practice in New Plymouth, had been an examiner in criminal law for the University of New Zealand and Deputy Adjutant General of the New Zealand army before his release at the end of 1943 when he returned to his legal practice.³¹ It is not surprising that men of this calibre and background approached their task in Japan with a high sense of duty or that they expected both 'honour and satisfaction' from their appointed roles rather than material rewards.³² Neither, of course, was expert in international law. As Quilliam commented wryly before he left for Tokyo, he had not had many clients in New Plymouth consult him on matters of international law.³³ From Tokyo Northcroft sent for a number of the established texts on international law.³⁴ It was inevitable that these New Zealanders should see themselves, not simply as part of the judicial process set up to prosecute and judge Japan's wartime leaders, but as representatives of a country steeped in British law and justice now establishing its identity as a Pacific nation with special interest in Japan. In the sense that they were 'showing the flag' for New Zealand, the New Zealand judge and prosecutor

28 See Minear, pp.110-17 for discussion of this point. The degree of the Emperor's involvement in decision-making is a matter of debate. For two contrasting views see David Bergamini, *Japan's Imperial Conspiracy*, London, 1971 and David Anson Titus, *Palace and Politics in Pre-War Japan*, Columbia University Press, 1974. Given that the Emperor was not tried, did not testify, and is now dead, the issue seems unlikely to be resolved satisfactorily. See John W. Dower, 'A Malleable Institution has Potential Dangers', *Japan Times*, Tokyo, 9 January 1989.

29 Documents II, No.669, p.1559.

30 Though 'less culpable' they were sentenced to seven years and life imprisonment respectively.

31 *Dominion*, 18 January 1946; interview with Hon. Sir Peter Quilliam, Wellington, December 1988.

32 See Alan Rix, ed., *Intermittent Diplomat: Japan and Batavia Diaries of Macmahon Ball*, Melbourne University Press, 1988, p.32.

33 *New Zealand Law Journal*, XXII, 3, 19 February 1946, p.40.

34 MFA Files 59/2/49 contain requests from Northcroft for various texts. Harold Evans recalled that the work of Professor Hersch Lauterpacht was considered particularly useful by Northcroft. Interview with Harold Evans, Christchurch, August 1988. Lauterpacht was responsible, among other things, for amendments to the *Manual of Military Law* in 1944, by which a soldier was obliged only to obey 'lawful commands'. See Roskill, p.648.

could not but be conscious of their political as well as their judicial function.

Justice Northcroft, his Associate, Flight Lieutenant Harold Evans, a lawyer with pre-war experience as a judge's associate, a returned serviceman and recent recruit to the Department of External Affairs,³⁵ and Brigadier Quilliam arrived in Tokyo on 5 February 1946. They were all shocked by the devastation of Tokyo and the numbed submissiveness of the Japanese people. 'The scene beggars description', Quilliam wrote.³⁶ Not only was the general scene in Japan depressing; equally depressing for the New Zealand party was the fact that they found very little had been done by way of preparation for the trials. Only one other judge, the Australian, Sir William Webb, with whom the New Zealanders had travelled from Brisbane, was in Tokyo. The material for the prosecutors had not been collected. It had not yet been decided who was to be arraigned. It was clear that it might be months before the court could function.

In the intervening weeks the prosecutors were very busy collating material, studying and preparing the case. Inevitably the judges were rather isolated. Northcroft sent for books, enjoyed fishing and, with Webb, played a good deal of not always amicable golf.³⁷ As the other judges arrived there were administrative matters to attend to. There was some concern that SCAP might try to give the court instructions, thus compromising its integrity, and Webb and Northcroft called on MacArthur to gain his assurance that no action by him would interfere with the 'principles of British justice'.³⁸

In February 1946 General MacArthur named Sir William Webb president of the IMTFE. Initially this appointment seems to have pleased the New Zealanders well enough. Quilliam wrote to Webb: 'He has a keen sense of justice and is well imbued with its principles and traditions.'³⁹ Quilliam thought that the choice was probably due to MacArthur's wish to pay Australia, from which he had begun his successful campaign against the Japanese, a compliment. Besides, MacArthur knew Webb well from those days. The choice of Webb also relieved MacArthur of the dilemma of whether an American or British judge should preside and, since the prosecution was American-led, Webb's appointment prevented the court being too much of an 'American show'. A recent American writer has, however, suggested more cynical motives than Quilliam allowed. He has claimed that the American nomination to the tribunal was so weak that he could not be named president, and the choice of Webb was forced on MacArthur who did not want a British president.⁴⁰ Be that as it may, Webb was president and once the court was in session both Northcroft and Quilliam became very critical of him on grounds of both his professional skills and his personality. Northcroft came to work closely with the British judge, Lord Patrick, and with

35 Interview with Harold Evans, Christchurch, August 1988.

36 Documents II, No.658, p.1527.

37 Interview with Harold Evans, Christchurch, August 1988. Among other items, Northcroft asked for a copy of Shakespeare printed 'large enough to be read by an elderly judge's ageing eyes'. Northcroft to Shanahan, 24 October 1946, MFA 59/2/49 Pt.2.

38 Documents II, No.660, pp.1529-30; No.663, pp.1541-2.

39 Quilliam to Nash, 20 February 1946, MFA 59/2/49.

40 Brackman, p.64.

McDougall, the Canadian judge. They all disapproved of Webb.

Unlike the judges, the Commonwealth prosecutors seem quickly to have developed a rapport. For most of the first year they all had accommodation at the Canadian Legation in Tokyo, and one of the advantages of this was that they had the opportunity to discuss matters relating to the prosecution 'quietly and fully'.⁴¹ They frequently acted as a group, taking their complaints about shoddy procedures to Joseph Keenan, the American chief prosecutor, and to Webb as President of the Tribunal. They were all impatient of the delays, of the lack of direction, the failure to consult, the publicity-seeking, the inefficient and frequently drunken behaviour of Keenan, an alcoholic whose antics they found increasingly abhorrent.⁴² The New Zealand prosecutor, along with the other Commonwealth prosecutors, was dependent on the Americans for documentary evidence on which to base a satisfactory prosecution and was most critical of procedures. He was worried about the inadequacy of the 'interrogations' of prominent Japanese, about the failure to give priority to examination of documents, and the general inability of the American prosecuting team to 'get down to brass tacks'. Keenan had neither the drive nor the expertise to draft the indictment which, in the end, was largely the work of Comyns Carr, the British prosecutor. His dynamism drove matters ahead and this, as Quilliam pointed out, had the effect of protecting the disgraceful Keenan. The prosecutors' meetings on the draft indictment were, Quilliam recorded, 'very difficult'. His impression was that the Chinese, Dutch, and French prosecutors did not understand some of the disputed points of law at all and the Philippines prosecutor threatened to resign unless his addition, couched 'in picturesque extravagant and loose language', was added to the original draft indictment.⁴³ Quilliam found the compromises that were made and Keenan's appeasement of recalcitrant prosecutors difficult to take.

Northcroft had other worries. He found it 'embarrassing', given that English and Japanese had been designated the languages of the court, that the Russian judge spoke not a word of English so that quite often on important matters one was not clear whether he and the other judges were discussing the same thing. The French judge and prosecutor spoke limited English only, and this too caused problems. Northcroft was tactful about his colleagues on the tribunal but clearly found the qualifications of some of them rather dubious.⁴⁴ He was not alone in this opinion.⁴⁵ Once the trial was under way and the strain of the long hours and generally poor performance of the court was felt, Northcroft's impatience grew.

Proceedings finally began on 3 May 1946. The 28 defendants were charged

41 Quilliam Diary, 10 March 1946, in possession of Hon. Sir Peter Quilliam, Wellington.

42 Documents II, Nos.661 and 662, pp.1532-41; No.664, pp.1543-5; No.666, pp.1551-3; Quilliam Diary, 12, 14 March 1946.

43 Documents II, No.669, pp.1560-1; Quilliam Diary, 18, 19 April 1946. For comments on Comyns Carr and his draft of the indictment see Meirion and Susie Harries, *Sheathing the Sword*, London, 1987, pp. 118-24.

44 Documents II, No.668, pp.1557-9; No.681, p.1613.

45 See Brackman, p.71, on the view of the judge from the Netherlands. For further criticisms see Minear, pp.81-83.

in the period from 1 January 1928 to 2 September 1945 with planning, preparing, initiating, and waging wars of aggression in violation of international law and treaties, committing wholesale murder, and instigating numerous 'crimes against humanity' in a 55-count indictment.

While the New Zealanders had no doubts about the justification for and legality of the trial, they were extremely critical of the legal process. This led both the judge and the prosecutor at different times to ask the government for permission to resign. Both Northcroft and Quilliam were shocked by the 'unseemly' behaviour and limited abilities of many of the American defence counsel, a number of whom, Quilliam thought, were out simply to obtain as much notoriety from the trial as possible. Keenan, the chief prosecutor, Northcroft considered, showed 'every sign of being an incompetent lawyer'. Northcroft was critical of the 'Hollywood' atmosphere of the trial and thought the Americans made 'a very bad job' of conducting it.⁴⁶ Part of the problem was that the prosecuting team was predominantly American and generally not of as high calibre as the legal representatives sent from other countries. In addition, as some of the defence lawyers were later to admit, the defence was frequently obstructive, dragging out the trial in the expectation that the allies would eventually fall out among themselves and their clients' claims would be enhanced.⁴⁷ The patience of the judges was frequently sorely tried. For the New Zealanders, for whom little or no personal, and certainly no financial, mileage was to be gained from involvement in the trial, the protracted and disorganized proceedings were exceedingly frustrating.⁴⁸

But the standard of the prosecution and defence lawyers was only part of the problem. Soon after the trial began, both Northcroft and Quilliam became critical of Webb as President of the Tribunal. Quilliam thought that 'time and again' Webb demonstrated his 'unfitness' for his admittedly difficult task.⁴⁹ No excuse could be found for his bullying of witnesses and defence counsel, for his demonstrations of bias, or for his inept interventions. One of the problems was that Webb alone had the microphone and could control proceedings. Within a short time Northcroft reported that he thought 'there was not one member of the bench' who was not 'thoroughly disheartened' by the inadequacies of the president.⁵⁰ The difficulties were compounded by the fact that this was no ordinary court where standard practices were normal to all judges and dissatisfaction with the president could be dealt with as a 'domestic matter'. The judges had no common concept of what the president's role should be. Northcroft came to feel that Webb had 'an indifferent knowledge of the rules of evidence', was 'unreliable', vain, and stupid too.⁵¹ For Northcroft, a judge of more than a decade's experience, Webb's deficiencies were all the more difficult to take since, not without reason, he felt himself better qualified than Webb to act as

46 Documents II, No.681, pp.1610-15.

47 Brackman, pp.24, 61, 70-71; Documents II, No.676, p.1594; No.681, p.1613.

48 See Documents II, No.692, p.1638-9, and n.1 for the New Zealanders' rates of pay.

49 Documents II, No.710, pp.1675-6; No.713, p.1685.

50 Northcroft to Shanahan, 28 August 1946, MFA 59/2/49 Pt.2.

51 Northcroft to Sir Michael Myers, 18 May 1947, MFA 59/2/49 Pt.2.

resident of the Tribunal and was also inevitably associated with Webb as member of the bench.⁵² Northcroft found Webb's behaviour so unsatisfactory that, after the trial had been under way for a year, he asked the Prime Minister's permission to resign. He indicated that the British and Canadian judges were equally dissatisfied and were also communicating with their governments.⁵³

Faced with Northcroft's request, the Prime Minister sought an opinion from the recently retired Chief Justice of New Zealand, Sir Michael Myers. Myers was firmly of the opinion that the resignation of the judge this far into the trial might have serious consequences, by giving the defendants a legitimate sense of grievance.⁵⁴ If the announced ground for resignation was to be Northcroft's failure to agree with the president, both Northcroft and Webb seemed likely to be enveloped in criticism and derision and the tribunal as a whole brought into contempt. In addition, a scandal of this kind would inevitably affect detrimentally New Zealand's relations with both Australia and the United States.⁵⁵ Northcroft, whose sense of duty to his country and to the law was strong, stayed on. It seems, however, that at the Commonwealth conference on a Japanese peace treaty which was held in Canberra later that year, Peter Fraser, New Zealand's Prime Minister, complained to the Australian Prime Minister about Webb's behaviour. In October Webb was summoned back to Australia, ostensibly because of 'important' proceedings forthcoming in the Queensland Supreme Court. He was away two months, his return being engineered, apparently, by MacArthur who was considerably embarrassed by the absence of the President of the Court at this late stage of the trial. In the interim an acting president had to be appointed. Ironically, Northcroft was the next most senior judge but MacArthur thought him unsuitable in view of 'the insignificance of New Zealand as a world power'. The American judge, General Cramer, was appointed, although MacArthur admitted later that, from the standpoint of experience and knowledge of jurisprudence, Cramer was not really suitable.⁵⁶ It was not a situation designed to increase Northcroft's happiness with his lot.

Quilliam's problems were different from those of Northcroft, but he was equally frustrated by the inefficient way the trial was run and by the way in which matters were allowed to drift. Within a month of the trial's opening he was recording 'all sense of urgency has gone'.⁵⁷ Full of righteous indignation, he was regularly in the forefront of various unsuccessful attempts to have Keenan removed as chief prosecutor, and he frequently cited and protested about various irregularities which, in other circumstances, might have led to calls from the defence for a mistrial.⁵⁸ Although the competence of his work was welcomed by the judges,⁵⁹ Quilliam had not endeared himself to Keenan and had the

52 Interview with Harold Evans, Christchurch, August 1988.

53 Documents II, p.1668, n.2. Lord Patrick's dissatisfaction with Webb is clear from the British files. See, for example, material cited by Harries, pp.166-7.

54 The original American judge resigned after less than two months and this had already caused the court some embarrassment.

55 Documents II, No.707, pp.1667-8.

56 Harries, p.168.

57 Quilliam Diary, 20 June 1946.

58 Documents II, No.678, pp.1601-4; No.680, pp.1606-9.

impression that he and the other British prosecutors were being side-tracked.⁶⁰ By the end of 1946 Quilliam was considering resigning. He left Tokyo in November 1947, by which time he felt he had done all he could usefully do in the trial as a prosecutor and by way of representing New Zealand.

In the meantime, Northcroft's life had been made somewhat easier by the arrival, in June 1947, of Quentin Quentin-Baxter, a young lawyer from Christchurch, to join the New Zealand team. He came as a result of a request made by Northcroft in July 1946, after the trial had been running a bare two months, for an assistant with legal training to compile summaries of the mountain of evidence which was accumulating. By that time, Northcroft reported, 197 exhibits had already been filed and the record was already 2294 pages of typescript. The prosecution was, he said, in effect 'hurling masses of material at the court, leaving the court to do the best it can with it'. The court sat from 9.30 am to 4.30 pm, a transcript of the day's proceedings could not be produced before 8 pm, and there was therefore no time for a judge to maintain a current summary of the case under its various headings. Northcroft asked for someone who 'has a clear analytical and enterprising mind, one who is industrious and, if at all possible, one who has assisted in a good office or with counsel in a substantial practice in preparation of case for trial'.⁶¹ The 'wilderness' of evidence and exhibits of which Northcroft complained multiplied alarmingly in the 11 months it took to find and deliver Quentin-Baxter to Tokyo, but miraculously he fulfilled all Northcroft's requirements. He was a graduate in law and philosophy from Canterbury University College (as it then was), a Senior Scholar in law, had practical experience including two years' court work in a leading Christchurch firm, and was highly recommended by his employers for his intelligence and diligence. In making this appointment, Shanahan of the Department of External Affairs commented, prophetically as it happened: 'We have some possibility, if the young man turns out well, of getting some benefit, even if only indirectly, for New Zealand.'⁶²

Quentin-Baxter later described how he spent his first 12 months in Tokyo reading the accumulated evidence. This in itself was a Herculean labour. Like most of those involved in this trial, Quentin-Baxter had no background in Japanese history or politics, yet his task was so formidable that he made a conscious effort not to clutter his mind by reading anything about Japan except the evidence before him. He explained: 'It was my duty to assist the judges of the Court by studying the facts adduced in evidence, and the application of the law to those facts.'⁶³ He began to make notes for Northcroft and in particular to

59 Documents II, No.696, p.1674; Northcroft to Quilliam, 21 October 1946 (private letter in possession of Hon. Sir Peter Quilliam).

60 Quilliam Diary, 14 October 1947; Quilliam to Shanahan, 20 January 1948, MFA 59/2/49 Pt.3.

61 Northcroft to MacIntosh, 16 July 1946, MFA 59/2/49 Pt.2.

62 Shanahan to Northcroft, 1 April 1947; Shanahan to Quilliam, 9 April 1947, MFA 59/2/49 Pt.3. Quentin-Baxter became one of New Zealand's leading experts in international and constitutional law. For a summary of his distinguished career as a diplomat, academic, and international lawyer see Christopher Beeby, 'Obituary', *New Zealand Law Journal*, 21 December 1984, pp.390-1.

63 Robert Quentin Quentin-Baxter, Curriculum Vitae, 17 January 1949, in possession of Alison Quentin-Baxter.

evaluate the evidence as it related to the charge of conspiracy.⁶⁴ Northcroft was insistent in his praise of this unremitting toil.⁶⁵

At Tokyo the contest was between defence lawyers, who adopted a strict interpretation of international law, and prosecution lawyers, who employed the Nuremberg claim that the sources of international law were much wider. The defence argued that the wider interpretation amounted to retroactive legislation. It questioned whether existing international law could be applied to individuals rather than to states and whether, if offences were judged to have been committed, the court had the right to enact punishments. Defence arguments were accepted entirely by the Indian member of the Tribunal, Justice Pal, who wrote an erudite and lengthy dissenting judgment. He held that the IMTFE Charter had insufficient authority to try the accused.⁶⁶ The majority, however, accepted that the IMTFE had a basis in international law and was bound by the directions of the Charter, from which it derived its jurisdiction. The Nuremberg Tribunal was claimed as a precedent. The Court had sat for two years and was, in effect, conducting the trials of twenty-odd persons on a large number of alleged crimes. Judgment had to be reached. In May 1948 Northcroft wrote: 'Some of us are working very hard in preparation for the judgment of the tribunal. This is a long business The tremendous width of the topics canvassed before us and which in turn we must discuss in our judgment, together with the mass of evidence which it is necessary to examine, prevents the task being done, if properly, quickly.'⁶⁷

He reported that Quentin-Baxter was working 'tremendously hard' giving assistance to him and to the other judges with whom Northcroft was collaborating. He explained that the writing of the judgment was really being done by a very small group of three or four people. They submitted portions of the work as they were completed from time to time to a larger group who, though not active themselves, were in general agreement with the active group. When this conference had taken place and the separate parts had been settled, these parts were then distributed to the rest of the judges who, Northcroft felt, would, when the final day came, accept their work. 'Indeed', he commented, 'there will be nothing else for it, because no other work is going forward but ours, with the exception of one judge who, apparently, will write a dissenting judgment on the whole matter.'⁶⁸ Northcroft's account seems, if not entirely to refute, at least to modify and qualify a recent claim that the majority judgment was reached without discussion by the whole bench.⁶⁹ It also explains why part of the judgment can be recognized by those who know his style well as the work of

64 Interview with Alison Quentin-Baxter, Wellington, August 1988.

65 Northcroft to Shanahan, 13 August 1947, 18 March 1948, 21 May 1948, MFA 59/2/49 Pt.3.

66 R. Pal, *International Military Tribunal for the Far East*, Calcutta, 1953. See pp.697-701 for his recommendations. The whole book is a closely argued exposition of his case. Pal was the only judge with particular expertise in international law. He was a member of the International Law Association. See Minear, p.86, n.29.

67 Northcroft to Shanahan, 21 May 1948, MFA 52/2/49 Pt.3.

68 Northcroft to Shanahan, 22 June 1948, MFA 52/2/49 Pt.3.

69 Brackman, p.365.

Quentin-Baxter.⁷⁰ He was, if not technically one of the 'active' group, a valued associate of those judges. Quentin-Baxter wrote later: 'I had the opportunity to work in close association with the judges of the court and, under their direction, to take a substantial part in the preparation of the opinion of the Court.'⁷¹

It took seven months to write the majority judgment to which the New Zealand judge and seven other judges, from Australia, Britain, Canada, China, the Philippines, the Soviet Union, and the United States respectively, were parties. Of these eight, Webb of Australia and Jaranilla of the Philippines filed separate but essentially concurring opinions. Webb argued that, since the Emperor had not been tried, it would be inappropriate to hand down death sentences since the men on trial, who had been his ministers and advisers, were essentially lesser criminals. If they were guilty of crimes committed unknown to them by their subordinates, then so also was their Emperor. Jaranilla, for his part, argued that some of the penalties imposed by the tribunal were too lenient. In his dissenting opinion, the judge from France also argued that the Emperor should have been indicted, and cited this as one of the reasons for his opinion that all the accused should be acquitted on the grounds that the procedure of the IMTFE had been invalid. The judge from the Netherlands wanted five of the accused acquitted of all charges, including Hirota, a career diplomat and former Prime Minister and Foreign Minister, and Shigemitsu, one of the 'less culpable', also a career diplomat and former Foreign Minister. Judge Pal of India, as had been noted, dissented from the majority view entirely and accepted the arguments of the defence.⁷² The disunity among the judges soon became widely known, although only the majority judgment was read out in court. This did nothing to convince the Japanese and some others that this court had been an instrument of justice.

The majority judgment, upheld by General MacArthur,⁷³ prevailed in spite of an appeal by the condemned Doihara and Hirota to the Supreme Court of the United States. The Supreme Court ruled that it had no authority to review the sentences of a Tribunal set up by General MacArthur as an agent of the Allied Powers.⁷⁴ Of the nine Supreme Court judges, one abstained, one died before stating his reserved opinion and a third, Justice Murphy, dissented without recording his reasons. In a concurring but critical opinion, Justice Douglas found the Tokyo trial to be a political forum, not a judicial action. 'It took its law,' he wrote, 'from its creator and did not therefore sit as a judicial tribunal to adjudge the rights of petitioners under international law It was solely an instrument of power.'⁷⁵

70 Interview with Alison Quentin-Baxter, Wellington, August 1988. This apparently is especially clear in the case of Count 1, the conspiracy charge.

71 Quentin-Baxter, *Curriculum Vitae*, 17 January 1949. Quentin-Baxter cited Lord Patrick, the British Judge, and Northcroft as the judges to whom he was closest and as his preferred referees. He stated that Cramer, the American Judge and McDougall, the Canadian Judge, would also be willing to act as referees. These seem likely to have been Northcroft's 'active' group.

72 Minear, pp.31-32, 160-3; Harries, pp.164-70.

73 Documents II, No.733, pp.1726-7.

74 Documents II, No.734, pp.1727-31; Minear, pp.169-70.

75 Quoted in Minear, p.171.

Nevertheless, seven of the accused were sentenced to death. They were General Tojo, five other generals, Doihara, Itagaki, Kimura, Matsui and Muto, and one civilian, Hirota. Sixteen were sentenced to life imprisonment and two, Shigemitsu and another career diplomat, Togo, to lesser terms of imprisonment.⁷⁶

Northcroft and Quilliam both believed the trial was justified and its legality undoubted. But inevitably both were painfully aware of the real legal, political, and logistical problems associated with it. Defending the Tribunal against the allegation that it had made improper use of its power, Northcroft contended that it 'conducted an historical inquiry into the actions of Japan, and it traced the proximate causes. There is set upon its findings a seal of authority and, I trust, impartiality which cannot attend the work of any historian of recent events, for the Tribunal's decision was reached upon all the available evidence and after the fullest opportunity had been afforded for the presentation of opposing views.'⁷⁷ The sincerity of the judge is not in doubt, though 40 years later neither historians nor jurists would be inclined to make this claim so confidently. Nevertheless Northcroft was quite aware that a potentially dangerous precedent had been established. He therefore argued for the setting up of a permanent international criminal court as a matter of urgency. Such a court would remove one of the objections to both the IMTFE and the Nuremberg tribunals, that they were not impartially constituted.⁷⁸ In the Cold War atmosphere that prevailed by the end of 1948 when the trial closed, however, the creation of an international criminal court was not a realistic option.

Like Northcroft, Quilliam was convinced that the trial was legal and its outcome proper. As a prosecutor he had, however, particular concerns. He noted the serious difficulties in international law of the charge of 'crimes against peace', and in particular of the charge that waging 'aggressive war' was a crime in international law. He recommended that should such trials be held in future, serious consideration should be given to the wisdom of laying this charge.⁷⁹ Quentin-Baxter was optimistic about the Tribunal and its results. He believed that it had 'established a chain of reasoning and a standard of objective enquiry which refutes the allegation that the nations which established this Tribunal have made improper use of their power'. He concluded a speech to the New Zealand Law Conference in April 1949: 'The judgment of the Tokyo Tribunal does not purport to absolve the Japanese people from the responsibility for their country's conduct, but it does show where that responsibility chiefly lies. In so doing, it makes a constructive contribution to the task of rehabilitating the Japanese nation.'⁸⁰

76 Lord Hankey and others tried to save Shigemitsu. See F.S.G. Piggott, *Broken Thread*, Aldershot, 1950, pp.382-6.

77 Northcroft, Memorandum for the Prime Minister, 17 March 1949, Papers of the IMTFE, University of Canterbury. An extract from this memorandum is to be found in Documents II, No.739, pp.1736-7.

78 See Minear, pp.74-86, for the case that the court was not impartial.

79 Documents II, No.722, pp.1702-7.

80 Documents II, No.740, pp.1745-7. The speech is also reported in the *New Zealand Law Journal*, XXV, 7-10, 7 June 1949, pp.133-8.

By 1948, when the judgment was announced, however, few New Zealanders were much interested in the esoteric niceties of international law or the outcome of the trial in Tokyo, or indeed in the rehabilitation of Japan. Certainly the trial could hardly be said to have given New Zealanders a greater awareness of their international obligations and of the importance to them of all matters relating to Japan and the Pacific, the original justifications for participation in the trial. In fact, in the long run, participation had simply associated New Zealand with a 'sorry affair'. The lack of unanimity among the judges over the verdicts and the appropriate sentences tended, furthermore, to cast a dubious light on proceedings and by 1948 there was no disposition by the New Zealand government to take part in any further trial.⁸¹ When in 1950 a Soviet proposal to try Emperor Hirohito surfaced in the Far Eastern Commission, Alister McIntosh, Secretary for External Affairs, described the charges as 'vague, irresponsible and mischievous'. The Department's view was that the allegations against the Emperor, even if fully substantiated, would not justify a decision to put him on trial. In any case, it was considered highly undesirable on political grounds to agree to a trial of the Emperor.⁸²

From the point of view of the New Zealand government, participation in the war crimes trial had been an expression of New Zealand's willingness to participate with its allies in shouldering the responsibilities of the post-war world, and in particular a demonstration of New Zealand's interest in the future of the Pacific. To that extent New Zealand's participation in the trial was worthwhile. As a demonstration of the operation of the 'principles of justice' the trial itself and the lack of unanimity among the judges had scarcely been convincing. Respect for 'the rule of law in the relations between the nations and peoples of the world'⁸³ is a desirable goal. The experience of the IMTFE seems to demonstrate, however, that this goal is unlikely to be achieved by a war crimes trial of the kind to which some Japanese politicians, diplomats, and military leaders were subjected in Tokyo in 1946.

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81 Documents II, No.729, pp.1719-21.

82 Documents II, Nos.452 and 453, pp.1124-35.

83 Statement by Walter Nash, Documents II, No.650, p.1508.