

William Patrick and “Crimes Against Peace” at the Tokyo Tribunal, 1946-1948

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A. INTRODUCTION

After the Second World War, the victorious allies convened the International Military Tribunal for the Far East to punish Japan’s leaders for crimes against peace and other war-related crimes. The crimes against peace charge had proved controversial at the Nuremberg Tribunal, and the sponsoring powers

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made considerable efforts to ensure that the Tokyo judgment reinforced the Nuremberg determination on it, thereby investing it with greater legal credibility.

The scope and significance of these efforts has been largely unacknowledged, as has the central role in them of the British member of the court, William Patrick, a Senator of Scotland's College of Justice. Although he was a pivotal figure in the debates about the validity of crimes against peace, Patrick did not dwell on his experience in Tokyo. His *Who's Who* entry made no mention of the Tribunal, and obituaries in *The Times*, *Glasgow Herald* and the *Royal Society of Edinburgh Year Book* either overlooked it or referred to it only in passing.¹ It is not unreasonable to conclude that, having been put in an invidious position during the trial, he wished to put the matter behind him.

Patrick's role demands closer examination, however, because it proved crucial to the judgment at Tokyo. He campaigned for unalloyed support for the main tenets of the Nuremberg Judgment, and when that support was not forthcoming, helped to forge a majority faction to ensure that they were not abandoned. Finally, and most importantly, he insisted that crimes against peace and conspiracy to commit them were retained as the central elements of the majority's judgment.

B. "JUST AND PROMPT TRIAL"

After Japan's surrender on 15 August 1945, General Douglas MacArthur, the Supreme Commander of the Allied Powers, and his eponymous occupation administration (SCAP) took control of the country. In September the US State-War-Navy Coordinating Committee gave the go-ahead for the establishment of a Tribunal to try Japan's war leaders, and the following month the US State Department distributed policy papers to the eight other Allied signatories of the Instrument of Surrender. Finally, on 19 January 1946, MacArthur issued a Special Proclamation declaring the establishment of the Tribunal. He invoked two sources of authority: the Potsdam Declaration, which had decreed among other things that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners";² and the Instrument of Surrender,

¹ "Patrick, Rt. Hon. Lord", *Who's Who* (1966) 2365; "Lord Patrick: Senator of College of Justice", *The Times* 18 Feb 1967; "Lord Patrick: Court of Session judge for 24 years", *Glasgow Herald* 18 Feb 1967; J Cameron, "The Rt. Hon. Lord Patrick" 1968 Royal Society of Edinburgh Year Book 32.

² United States Department of State, *Foreign Relations of the United States: Diplomatic Papers. The Conference of Berlin (The Potsdam Conference) 1945* (1960) vol 2, 1476.

which invested the Supreme Commander with the power to effectuate the justice stipulated by the Potsdam Declaration.³

The Charter accompanying the Proclamation announced the formation of the court for “the just and prompt trial and punishment of the major war criminals in the Far East”.⁴ This was amended three months later to accommodate new members – India and the Philippines – and to refine some provisions. Notably, MacArthur issued the Charter on behalf of the other prosecuting powers – at final count, Australia, Canada, China, France, India, the Netherlands, New Zealand, Philippines, the Soviet Union, and the United Kingdom – instead of basing it on an agreement between them. And it was only after the event that the Americans invited the Far Eastern Commission (the inter-Allied body established in 1945 to coordinate occupation policy in Japan and Allied policies for the Far East) to endorse the Proclamation. These arrangements arose from Washington’s desire to avoid the conflicts over crimes against peace and other matters that had dogged the London Conference that had preceded the Nuremberg Tribunal.

In other respects the Tokyo Charter drew heavily on the Nuremberg Charter’s ordering and wording of the charges: first, crimes against peace, then war crimes, and then crimes against humanity. The focus on crimes against peace in both charters was not motivated solely by a desire to promote peace and security. As some observed at the time, the Americans were interested in criminalising the Germans and Japanese for starting the war in order to justify, respectively, breaching their own neutrality against Germany, and succumbing to military defeats at the hands of Japan. As Bernard Röling, the Dutch judge at Tokyo, later stated:⁵

In Nuremberg [US Chief Prosecutor Robert] Jackson wanted to vindicate American deviations from, if not the actual violations of, the laws of neutrality. In Tokyo MacArthur wanted to avenge the attack on Pearl Harbor, and in doing so, to take the blame off the American government and the American military commanders. So at the roots of both trials you can find reasons that had no relation whatsoever with the idea that starting an aggressive war is an international crime for which individuals may be punished.

Aside from the shackling of the trials to certain political agendas, the focus on crimes against peace at Tokyo also served a highly significant and undeclared *legal* purpose: to shore up the Nuremberg Judgment on aggressive war. When

³ International Military Tribunal for the Far East [ed R J Pritchard], *The Tokyo Major War Crimes Trial* (1998) vol 2, Special Proclamation, 1.

⁴ International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 2, First Charter, 1.

⁵ B V A Röling and Antonio Cassese (eds), *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (1993) 81.

Tokyo opened, the crimes against peace charge had already attracted criticism on grounds of its retroactivity and selectivity. The Allies knew it was an innovation, and, sensitive to the scepticism of sections of the legal and political establishment, they hoped that the Tokyo Judgment would confirm Nuremberg's determinations on aggressive warfare and so lay the debate to rest.

Significant measures were taken to ensure that Tokyo backed Nuremberg over this troublesome charge, from British Associate Prosecutor Arthur Comyns Carr's overwrought Indictment, which attempted to buttress the crimes against peace charge with the conspiracy and murder charges, to American Chief Prosecutor Joseph Keenan's attempts to keep the focus on aggression and expedite the trial by reducing the time allocated to war crimes. There was no gainsaying the importance of all this effort: as the Foreign Office's senior legal advisor Eric Beckett minuted, a failure to win the case on aggression "would *inter alia* mean that the Tokyo tribunal was saying that the judgment of the Nuremberg tribunal was based at any rate in part upon bad law, and that the Allies had been guilty of infringing the principle 'nulla poena sine lege', which is supposed to be one of the fundamental principles of justice".⁶

The Tokyo judges were thus doubly bound: by the strictures of the Charter and by the obligation to produce a judgment that would buttress the Nuremberg determination on its most contentious charge. This obligation diminished the judges' autonomy and exacerbated the tensions that at the time seemed to threaten the entire enterprise.

C. THE APPOINTMENT OF THE BRITISH JUDGE

Whatever the difficulties over crimes against peace, British officials were far more favourably inclined towards a trial of the Japanese than they had initially been towards a trial of the Germans. Throughout the war, they had argued for the political disposal of the Axis leaders in order to avoid the problems associated with the Leipzig trials after the First World War, and to encourage the rapid return to peace after the Second World War.⁷ Up until June 1945, they had particularly objected to American proposals to bring charges of crimes against peace, which they maintained would entail the enactment of *ex post facto* legislation.⁸

The Americans overrode these objections, and by the time the State Department mooted the Tokyo Tribunal in October that year, there was less resistance to the idea. Despite some quibbles about the organisation and scope

6 National Archives, UK (hereafter NA): FO 371/66552: Beckett, 5/5/47.

7 NA, LCO 53/78: Eden, "Draft Cabinet paper: treatment of war criminals", c June 1942.

8 NA, FO 371/51019: Dean, 26/4/45.

of the trial, Whitehall officials believed that participation in it would enhance Britain's prestige in the Far East. As Foreign Secretary Ernest Bevin explained: "This trial is of considerable significance to us, because of the important role which we play in the Far East, and also because of the tremendous effect which the Pacific war had on large numbers of British subjects and on important British territories."⁹ When Whitehall received the American call to propose a British judge, a discussion ensued about suitable candidates.

The Attorney-General Hartley Shawcross toyed with various possibilities: they might perhaps appoint an "Indian" judge such as Sir Gilbert Stone, or the UK-domiciled judge Harold Morris, or "some retired Colonial Judge"—just so long as British prestige vis-à-vis the Americans was maintained.¹⁰ But the Lord Chancellor William Jowitt, mindful of the additional demands placed upon the English judiciary as a consequence of Geoffrey Lawrence and Norman Birkett serving at Nuremberg, suggested instead that they "explore the possibility of Scotland".¹¹

To this end, Jowitt sounded out Hugh Macmillan and Lord Thankerton on suitable members of the Outer House of the Court of Session: "Their first choice," Jowitt reported back to Shawcross, "would be McIntyre—now Lord Sorn[,] as a second choice Lord Keith and a third choice Lord Patrick".¹² Shortly after, Jowitt wrote to Wilfrid Normand, the Lord President, asking if he, Jowitt, could nominate any on the list to "play... the part which Lawrence is playing at Nuremberg".¹³ Normand agreed with alacrity, stating that it was "entirely fitting" that Scotland should provide a judge to try the Japanese, and that it would be possible to carry on the court's work for some months if a judge were made available for that purpose.¹⁴ He suggested that Patrick, as a bachelor, would be more able than those with dependents to manage a long absence abroad, and that between Patrick and Keith, the former would make a "better member of a team".¹⁵

In the event, Jowitt chose to nominate William Donald Patrick. Born on 29 June 1889 in Dalry, Ayrshire, Patrick attended Glasgow High School and then Glasgow University, where he acquired an MA and then an LLB.¹⁶ He

9 NA, LCO 2/2986: Bevin to Patrick, 7/2/46.

10 NA, LCO 2/2986: Shawcross to Jowitt, 11/1/46.

11 NA, LCO 2/2986: Jowitt to Shawcross, 14/1/46.

12 Ibid.

13 NA, LCO 2/2986: Jowitt to Normand, 14/1/46.

14 NA, LCO 2/2986: Normand to Jowitt, 16/1/46.

15 Ibid.

16 "Biography of Captain William Donald Patrick", in *The University of Glasgow Story*, at <http://www.universitystory.gla.ac.uk/ww1-biography/?id=4523>.

was called to the Scottish bar in 1913, just before the First World War, during which time he served in the Royal Flying Corps and Royal Air Force. He reached the rank of flight commander (with seven air battle victories ascribed to him between 24 October 1917 and 15 March 1918)¹⁷ before being shot down over German lines at Messines in April 1918, and then interned at the Holzminden prisoner-of-war camp. After his return to Scotland after the war he built up a successful junior practice, being appointed counsel for Scotland's Department of Agriculture and Advocate Depute in the Sheriff Court. His career was interrupted in 1930, however, when he suffered a bout of tuberculosis that confined him to a sanatorium for at least a year.

Patrick recovered and took silk in 1933, thereafter appearing in a number of notable cases, such as the Clune Moor grouse case, the Inverailort deer-stalking action, and the Bute right-of-way case.¹⁸ It was testimony to the regard in which he was held that he was unanimously elected Dean of the Faculty of Advocates in 1937. Two years later he was elevated to the bench, and during the Second World War, arbitrated in industrial disputes and decided on war compensation claims.¹⁹ One colleague, John Cameron (Lord Cameron), wrote that: "To a wide knowledge of law and of legal principle he added a calm and balanced mind... Though patient and courteous he did not... permit the time of the court to be wasted in discussing irrelevancies and he was quick to spot the fallacies of an unsound argument".²⁰ He also noted that Patrick possessed the gifts of lucidity, meticulousness, and a quiet sense of humour²¹ – all qualities that would be much in demand in Tokyo.

D. THE AGGRESSION CHARGE JUSTIFIED

Before Patrick's departure for Japan on 1 March 1946, Ernest Bevin invited him to London to confer with Hartley Shawcross, who as well as being Attorney-General, was also the British chief prosecutor at Nuremberg, and responsible for the conduct of the crimes against peace component of the case.²² While in London, Patrick also would have had discussions with senior figures from the

17 Ibid.

18 "Lord Patrick: Senator of College of Justice", *The Times* (n 1).

19 "Lord Patrick: distinguished judge", *Scotsman*, 18 Feb 1967.

20 Cameron (n 1) at 32.

21 Ibid at 33.

22 Bevin (n 9). Shawcross delegated the day-to-day running of affairs in Nuremberg to his deputy, David Maxwell Fyfe, but in mid to late February 1946, when the discussion with Patrick must have taken place, he would have been particularly sensitive to the problems associated with the charge. This was because he was embroiled in a behind-the-scenes flap in London over the likelihood that German defence lawyers would raise crimes against peace countercharges against the British and French over

Foreign Office, the department primarily responsible for matters relating to the Tribunal, and with Frederick Garner of its War Crimes Section, who would attend to his practical needs while he was in Japan.²³ These ministers and officials would have doubtless impressed on him how important it was that the Tribunal should uphold the charge of crimes against peace.

As part of his preparation for the trial in Japan, Patrick would have studied Shawcross's opening speech for the prosecution on crimes against peace that had been delivered a few months earlier at Nuremberg. This exposition, drafted by Hersch Lauterpacht and Foreign Office official James Passant, was designed to set the terrain for the crimes against peace charge while simultaneously foreclosing the argument that it was a retrospective enactment. The exposition addressed the issue in two stages: first, aggression was a crime; and second, individuals could be held responsible for it.

On the first issue, Shawcross maintained that the unrestricted right of states to wage war had been partly eradicated by the League Covenant, and was all but abolished by the 1928 Pact of Paris which, he claimed, had prohibited war as a permissible means of enforcing or changing the law and established that aggression was "illegal and a crime".²⁴ On the second issue of individual liability, he stated that the Charter's authors had refused "to reduce justice to impotence by subscribing to the outworn doctrines that a sovereign state can commit no crime and that no crime can be committed on behalf of the sovereign state by individuals acting in its behalf".²⁵ Drawing together the threads of his argument, Shawcross stated that although some aspects of the Nuremberg Charter were novel, the criminalisation of aggression was "not in any way an innovation"²⁶ but simply a logical development of the law as it stood.²⁷

This reasoning, which was then being advanced by the prosecution at Nuremberg, seemed to provide the model for Patrick's own approach. In early 1947, for example, he set out his views in a letter to Lord Normand. It is notable that the construction of his argument and the examples he used owed as much, if not more, to Shawcross's speech as it did to the Nuremberg Judgment: "The essence of the Charter of this Tribunal, as of that which sat at Nure[m]berg, is (first) its declaration that the planning or waging of a war of aggression is a

their joint plans to invade Norway in breach of its neutrality in spring 1940. (See K Sellars, "*Crimes Against Peace*" and *International Law* (PhD thesis, University of Aberdeen, 2009) 164-174.)

²³ Bevin (n 9).

²⁴ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* (1949) vol 3, 103.

²⁵ At 104.

²⁶ At 94.

²⁷ At 104.

crime, and (second) its declaration that there shall be individual responsibility for what used to be considered acts of state, for which there was no individual responsibility.”²⁸ He continued: “I thought there was sufficient justification for the declarations in the Charter in the series of pronouncements of the nations which began with the Treaty of Versailles [of which the League Covenant was a part] and culminated in the Pact of Paris.”²⁹ This opinion was highly questionable – neither treaty proposed individual liability for international aggression – but Patrick had concluded otherwise, and would now use all the resources at his disposal to persuade his colleagues to take the same view.

E. THE VALIDITY OF THE CHARTER

The International Military Tribunal for the Far East opened on 3 May 1946 in the auditorium of the former Imperial Army Officers’ School in Tokyo. The prosecution accused the twenty eight defendants – former prime ministers, cabinet ministers, military leaders, diplomats and ideologues – of being members of a militarist clique that had perpetrated a huge conspiracy, dating from 1 January 1928 to 2 September 1945, to secure “the military, naval, political and economic domination of East Asia, and of the Pacific and Indian Oceans”.³⁰

Some ten days later, on 13-14 May, defence lawyers submitted three motions challenging the court’s jurisdiction and the validity of crimes against peace. At this time only nine of the eleven judges had arrived in Tokyo – the Indian and Filipino judges were still on their way – and they unanimously decided to dismiss the motions. In Patrick’s view, the court’s Australian President, William Webb, could then have firmed up this consensus by immediately producing a document setting out the reasons for this decision. But Webb was apparently unsure of his own position on the Charter and he procrastinated, stating that reasons would be “given later”.³¹ Then the final two judges joined the others, and one of them, Radhabinod Pal from India, almost immediately raised objections to the crimes against peace charge.³² This altered the dynamic between the judges, and Bernard Röling, who had earlier voted with the others, also began to express scepticism about elements of the Charter.³³ The prospect of unanimity evaporated.

28 NA, LCO2/2992: Patrick to Normand, c January 1947.

29 Ibid.

30 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3), vol 2, Indictment, 2.

31 Vol 2, 319.

32 Patrick (n 28).

33 Ibid.

Three of the British Commonwealth judges – William Patrick, the Canadian Stuart McDougall and the New Zealander Harvey Northcroft – observed this development with dismay. In their view, the Charter and its central tenet, crimes against peace, was not a matter for discussion. The only reason for setting up what Patrick called “this portentous institution” was to declare that war was a crime and that individuals could be held responsible for it; after all, those accused solely of war crimes could have been tried by an ordinary military commission.³⁴ Summarising their collective viewpoint, Northcroft explained: “We think the Charter declares the law and that we are merely a fact finding body. If the law of the Charter is bad we are not empowered to review it... If any of us had disagreed with the law of the Charter we should have declined to accept office under it.”³⁵ The fact that some members had accepted office and were now questioning the Charter was, in Patrick’s view, neither legally nor morally defensible, and involved “rank dishonesty”.³⁶

The French judge Henri Bernard disagreed, however, stating that the idea that judges, having accepted appointment, could not then deny the validity of Charter rules, was “without foundation”.³⁷ He argued that although a judge might make it a personal rule to accept work only under an authority whose approach to substantive law he approved, this rule “is in no place written into the law and its centralized application would jeopardize any proper administration of justice”.³⁸ In his view, the Tribunal was obliged to scrutinise the substantive provisions of the Charter, and “if it found them to be beyond the competence of their author, to refuse to apply them”.³⁹ Radhabinod Pal and Bernard Röling also contested the three Commonwealth judges’ view of the Charter.

Meanwhile, the President William Webb waited until he had seen the Nuremberg Judgment before starting work on a draft statement of reasons. In the event, this statement – which was influenced by Lord Robert Wright’s naturalist writings and drawn up by two assistants and a Catholic academic – did not impress his fellow judges. It was, Patrick wrote, “an extraordinary document” containing 20 pages of quotations from the ancient Greek philosophers through to the modern neo-Kantians, which, although they “differed radically in content”, were mobilised to justify the declarations of law in the Charter “largely upon the

³⁴ Ibid.

³⁵ National Archives of New Zealand, Wellington (hereafter NANZ): AAOM 7130 ACC W4676 Box 1: Northcroft to O’Leary, 18/3/47.

³⁶ Patrick (n 28).

³⁷ International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 105, Bernard, 9.

³⁸ Ibid.

³⁹ Ibid.

ground that they were in accord with the so-called 'Law of Nature'."⁴⁰ Harvey Northcroft added that this document "read like a student's not very good essay on international law".⁴¹

Stung by the critical reception, Webb began work on a second draft, this time inviting suggestions from the other judges. But although further defence motions raised questions about the Charter and charges, it was by then impossible for the judges to agree on either reasons or conclusions. The document that had earlier been promised "for later" was never delivered.

The judges, who hailed from both common and civil law traditions, inevitably had different approaches to and opinions about the charges to hand. As Patrick explained to Normand in early 1947:⁴²

The President will sustain the Indictment upon a special ground of contract, useless as a precedent for the future, the Frenchman will sustain it as being in accord with his "bon coeur". Russia will sustain it because of Japan's dastardly attack on democracy. The Philippines will sustain it on I know not what grounds. And Holland and India will deliver a detailed attack on the grounds of the Nur[em]berg judgment.

Patrick was among those who were particularly unsettled by Radhabinod Pal's dissentient stance: "He has made his position quite clear since first he was appointed," he wrote, "so why the Government of India ever nominated him... is difficult to see".⁴³

What then, were Pal's arguments? His starting point was that the criminalisation of aggression was premature because it presupposed the existence of an international community capable of offering alternatives to war as a method of resolving disputes. In the absence of this community, states would continue to pursue their partisan national interests by force of arms.⁴⁴ It was therefore important to approach the idea of international crime with great caution, and adhere closely to existing law. For this reason he regarded the Allies' motives in creating the charge of crimes against peace as highly suspect—especially considering their own history of violence towards the non-Western nations.⁴⁵ Instead of promoting universal values, these nations were perhaps deploying the charge for their own narrow interests, such as maintaining the *status quo*⁴⁶—"the very *status quo*", he noted, "which might have been organized and hitherto

⁴⁰ Patrick (n 28).

⁴¹ Northcroft (n 35).

⁴² Patrick (n 28).

⁴³ Ibid.

⁴⁴ R Pal, *International Military Tribunal for the Far East: Dissentient Judgment of Justice RB Pal* (1953) 114.

⁴⁵ Pal, *Dissentient Judgment* (n 44) 33.

⁴⁶ Pal, *Dissentient Judgment* (n 44) 112.

maintained only by force by pure opportunist ‘Have and Holders’.⁴⁷ If this were so, then there was good reason to be concerned about the implications of the crimes against peace charge for the “dominated” (colonised) nations. He noted that at Nuremberg, the American Chief Prosecutor Robert Jackson had stated that, “whatever grievances a nation may have, however objectionable it finds the status quo, aggressive warfare is an illegal means for settling those grievances or for altering those conditions”.⁴⁸ Jackson was thus effectively calling for the paralysis of international affairs, and by implication the criminalisation of the struggle against colonialism. Pal believed that an end to war should not be sought at all costs, because the dominated nations “cannot be made to submit to eternal domination only in the name of peace”.⁴⁹

As well as advancing general criticisms of the Allies’ motives for bringing the charge, Pal also challenged their interpretation of the evidence. Following the same line as the defence lawyers, he concluded that the Japanese leaders had believed their nation to be in peril, and had therefore acted in self-defence. In arriving at this conclusion, he was accepting the premise of crimes against peace – namely, that wars could be divided into two categories, aggressive and defensive. Instead of refusing to recognise this polarity, as an orthodox positivist might have done, Pal submitted to it, by attempting to shift Japan’s wars from the “aggressive” to the “defensive” side of the equation. All the same, Pal’s abhorrence of colonialism and his radical re-conceptualisation of international affairs signalled the arrival of a third-worldist perspective on international law.

F. DISSENT FROM NUREMBERG

These differences of opinion came to a head in late March 1947, when the three Commonwealth judges – Patrick, McDougall and Northcroft – wrote letters to their respective governments to explain the divisions on the bench and propose suitable actions. Each pinned the blame on William Webb, who, they maintained, had failed to act when early unanimity might have been consolidated; whose unsteadiness over the Charter had prevented him from leading from the front; and whose irascibility, stubbornness and unwillingness to collaborate had soured relations with some of the other members. (Patrick was moved on one occasion to describe Webb as a “turbulent, quick-tempered bully”).⁵⁰

47 Pal, *Dissentient Judgment* (n 44) 115.

48 International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* (n 24) vol 2, 149.

49 Pal, *Dissentient Judgment* (n 44) 114.

50 Patrick (n 28).

Aside from the personal tensions, more significant matters were at stake. As Northcroft explained in a despairing letter to his Chief Justice, Sir Humphrey O'Leary:⁵¹

... I fear the result of this long trial will be futile and valueless or worse. This court will not speak with a clear voice upon any topic whether of law or fact. If a Court of this standing is seriously divided, and I feel sure it will be, then the modern advances in international law towards the outlawry of war may suffer a serious setback... Varying opinions from this Court including sharp dissent from Nuremberg must be disastrous. This I feel sure will happen.

In consequence, Northcroft asked Wellington to accept his resignation, and McDougall hinted to Ottawa that he might be recalled. But Patrick adopted a more detached approach. In a letter to Thomas Cooper, Normand's successor as Lord President, he suggested three possible courses of action: that the United Kingdom stick with the trial to the end even though the outcome would be regrettable; that it withdraw from the trial and jettison the chance to mobilise support for the Nuremberg line; or that it ask Australia to withdraw Webb, "who sets us all by the ears".⁵² Patrick clearly favoured the latter course because he assumed that Webb's replacement would be the senior judge, Northcroft, who, he estimated, would be able to rally eight to ten of the eleven judges around the Nuremberg position.

The threat of resignations and withdrawals caused consternation back in London. While the judges had emphasised the legal implications, the officials also drew political conclusions. The failure of the trial, wrote Assistant Under-Secretary Esler Dening, would be "little short of disastrous",⁵³ because the prestige of the prosecuting powers, already damaged by military debacles at Pearl Harbor and Singapore, risked being further eroded, especially in the recently reclaimed Asian and the Pacific colonies, where their authority was being challenged by burgeoning independence movements. "Here we have a predominantly Western tribunal sitting in the Far East to try Japanese war criminals," wrote Dening. "If the tribunal fails to fulfil its task, Western justice will become the laughing-stock not only of Japan but of the Far East in general."⁵⁴ Frederick Garner concurred, stating that it would deliver "a shattering blow to European prestige" and "proclaim to the world that Japanese militarism had been justified since we had tried to convict it and failed".⁵⁵

51 Northcroft (n 35).

52 NA, LCO 2 /2992: Patrick to Cooper, 29/3/47.

53 NA, FO 371/66552: Dening to Sargent, 30/4/47.

54 Ibid.

55 NA, FO 371/66553: Garner, 20/5/47.

In response, officials in London immediately began to cast around for a formula that would both buttress Nuremberg and resolve the crisis in Japan. Drawing on Patrick's scenarios, they decided that the withdrawal of the three judges would exacerbate the very problem they were trying to solve, and that calling on Australia to withdraw Webb posed too great a risk to inter-Dominion relations. The remaining option, therefore, was to see the trial out to the end.

The Foreign Office's Permanent Under-Secretary Sir Orme Sargent and a number of departmental officials met to discuss the issue at a meeting on 8 May 1947. Paying scant heed to the principle of judicial independence, they produced two ideas. The first was to instruct Alvary Gascoigne, the head of the United Kingdom's Liaison Mission in Tokyo, to take up the matter of the friction between the judges with Douglas MacArthur "who, as Supreme Commander for the Allied Powers, is responsible for the trial and appointed the judges and the President".⁵⁶ The second idea was to send out Lord Robert Wright, the English jurist and chair of the United Nations War Crimes Commission, to Japan "to see what he could do to iron out the differences between the judges".⁵⁷

Six days later, these proposals were put before a top-level inter-departmental meeting attended by, among others, Attorney-General Hartley Shawcross, Lord Chancellor William Jowitt, Orme Sargent of the Foreign Office and Eric Machtig of the Dominions Office. These senior political and legal figures were also prepared to override the court's independence, and agreed that MacArthur should be approached and Wright should be sent to Tokyo to "take the line that the Judges ought not to impugn the Charter" and to "persuade Webb to handle the Tribunal differently".⁵⁸

The Foreign Office thereafter drafted instructions for Alvary Gascoigne in Tokyo: "We would like you to emphasise to General MacArthur the dangers of a verdict being given which would stultify the Nuremberg judgements and to point out that the [Tokyo] Charter... defines a war of aggression as a crime."⁵⁹ Echoing the Lord Chancellor's comments at the meeting, it continued: "The judges must be taken to have accepted the validity of the Charter when they accepted their appointments... and it is absurd therefore that some of them should contemplate a finding that the preparation or waging of aggressive war is not a crime according to international law."⁶⁰ Finally, it suggested that Gascoigne consult Patrick on this legal question before going to see MacArthur.

56 NA, FO 371/66552, Garner, 12/5/47.

57 Ibid.

58 NA, LCO 2/2992; "Minutes of a Meeting... 14 May, 1947".

59 NA, FO 371/66552: FO to Gascoigne, 16/5/47.

60 Ibid.

In the event, all these plans came to nought. Gascoigne sounded out Patrick on how he should approach MacArthur, and even showed him the Foreign Office telegram bearing his instructions, but Patrick recoiled from these attempts to influence the outcome of the trial. He thought the idea of prevailing on MacArthur to take action was dangerous because, under the Charter, he was the court's reviewing authority, and so any attempt to influence the situation would be tantamount to "interfering to influence the proceedings of the Tribunal whose sentence it was ultimately to review".⁶¹ Moreover, he stated that, "it would be improper for the reviewing authority to be informed of any differences existing between judges, save only those which might ultimately be expressed in the latter's final judgment".⁶² He advised Gascoigne that if he (Gascoigne) had to have a discussion with MacArthur, he should stress that it was informal and for personal information only.⁶³

Patrick was equally dismissive of the idea of dispatching Lord Wright to Tokyo. He said that all the judges, including himself, would greatly resent the intrusion, seeing it as an attempt to interfere with a final judgment "which should not be influenced by any outside sources".⁶⁴ In particular, he thought Webb would "blow off the handle".⁶⁵ But although Patrick highlighted the impropriety of the schemes emanating from London, he was nevertheless prepared to discuss with Gascoigne another approach to the problem: namely, "a further campaign which he [Patrick] will open immediately to try to convert his colleagues to the vital necessity of their pronouncing judgment on the basis of the Nuremb[e]rg findings".⁶⁶ This seemed to offer a way out of the impasse, and after Gascoigne had communicated the substance of their discussion to the Foreign Office, Whitehall abandoned the proposals involving MacArthur and Wright.⁶⁷

This did not prevent British officials from trying to exert influence on the judges by other means, however. As well as the Foreign Office's contacts with Patrick, the Dominions Office proposed to "get the Canadian Govt to instruct the Canadian judge to back up Lord Patrick's campaign". (The Canadians demurred, wanting more time "to study the matter").⁶⁸ They also kept tabs on non-Commonwealth judges. In May 1947, for example, Esler Dening informed Jonkheer van Vredenburch, his opposite number at the Dutch Foreign Office,

61 NA, LCO 2/2992: Gascoigne to FO, no. 703, 19/5/47.

62 Ibid.

63 NA, LCO 2/2992: Gascoigne to FO, no. 702, 19/5/47.

64 Ibid.

65 Ibid.

66 Ibid.

67 NA, LCO 2/2992: Sargent to Jowitt, 30/5/47.

68 NA, FO 371/66553: Garner, 11/6/47.

that Bernard Röling was likely to enter a dissenting judgment. After making enquiries, van Vredenburch told Dening that there was a commission of four jurists “responsible for controlling the activities of the Dutch judge in Tokyo” and that “though they themselves were somewhat dubious about the validity of the charter, they were unlikely to allow the Dutch judge to challenge it in his judgment”.⁶⁹

G. DIFFICULTIES IN SCOTLAND

In Edinburgh, meanwhile, Lord Cooper had concerns of a different nature. In June 1947, he wrote to Jowitt to ask when Patrick might return to Scotland, as he faced the problem of staffing the courts in the session commencing in October. The strain of continuing without him was beginning to tell and Cooper explained that it would soon become a question of whether they could carry on without appointing another judge.⁷⁰ In his reply, Jowitt offered little comfort, stating that because of the important work Patrick was doing in attempting to convert his colleagues to the Nuremberg line, there was no prospect of his immediate return.⁷¹

After that, Cooper wrote to the Scottish Secretary Joseph Westwood to seek the appointment of another judge to cover for Patrick. His absence, he explained, had coincided with the reintroduction of jury trials, a heavier load of ordinary litigation, and an increase in divorces in Scotland from 800 cases a year before the war to 3,000 cases a year since the war. (He noted that in England, “the comparable increase in load was met not by a 20% reduction of the number of judges but by additions to the strength of the Probate Divorce and Admiralty Division”).⁷² In Scotland the session had ended with 45 ordinary actions of Procedure Roll unheard, and with an estimated 10 to 12 substantial cases partly heard and carried forward. “Nothing like this has happened for many years, and it is not creditable to the Courts nor consistent with the public interest,” wrote Cooper.⁷³

As it transpired, Westwood did not have the power to appoint another judge, and Cooper was compelled to cut the time devoted to divorces. The situation worsened, and seven months later, he turned again to the Scottish Secretary – this time Arthur Woodburn, who had succeeded Westwood. He explained that Lords

69 NA, FO 371/66553: Dening, 21/5/47.

70 NA, LCO 2/2992: Cooper to Jowitt, 16/6/47.

71 NA, LCO 2/2992: Jowitt to Cooper, 24/6/47.

72 NA, FO 371/66553: Cooper to Westwood, 28/6/47.

73 Ibid.

Carmont and Blades were absent through illness, and that with the approach of the Valuation Appeal Court and other tribunals such as the General Claims Tribunal which required the attendance of Lord Sorn, it was quite probable "that one of the Divisions of the Court will be put out of action not for lack of work, of which there is abundance, but for lack of *quorum*".⁷⁴ In consequence, he continued, "it seems certain that we shall close this session with larger arrears than at any time for many years".⁷⁵ But Cooper's request for Patrick's return was rebuffed by the Foreign Office, which stated that the national interest left it with no alternative but to keep him in Tokyo.⁷⁶

H. MacARTHUR AND THE ACTING PRESIDENT

Back at the Tribunal, more controversies were brewing. In November 1947, the Australian government temporarily recalled William Webb, ostensibly because he was required for High Court duties related to the nationalisation of the Australian banks.⁷⁷ Douglas MacArthur, incensed by Australia's "deplorable" abandonment of its international duties, attempted to countermand the recall.⁷⁸ Canberra's action also angered Patrick, who complained that Webb, while away on his High Court duties, would miss important parts of the case, and should be prevailed upon to resign.⁷⁹ He wrote that the absence of Webb, along with that of Pal, who had returned to India to tend his sick wife, constituted "the gravest blot that had yet stained the honour of the Court".⁸⁰

Webb's departure was a fact that had to be faced, however, and his colleagues assumed that the senior member, Northcroft, would assume the Presidency while he was away. But MacArthur had other ideas. He was of the view that Northcroft's nation, New Zealand, and his court, the Supreme Court, were too insignificant to merit the position,⁸¹ and he decided to appoint Patrick instead.

This process began without Patrick's knowledge on the morning of 7 November 1947, when SCAP distributed a press release announcing the United Kingdom judge's appointment as Acting President. Then, in the afternoon, SCAP's Chief of Staff, Major-General Paul Mueller, met with Patrick and instructed him to take the job. This Patrick declined to do, on the grounds that

⁷⁴ NA, FO 371/69831: Cooper to Woodburn, 26/1/48.

⁷⁵ Ibid.

⁷⁶ NA, FO 371/69831: FO (unsigned) c late January / early February 1948.

⁷⁷ NA, FO 371/63820, Gascoigne to FO, 11/11/47.

⁷⁸ Ibid.

⁷⁹ NA, FO 371/63820: Gascoigne to FO, 10/11/47.

⁸⁰ Ibid.

⁸¹ Gascoigne (n 77).

his health was poor. Mueller then indicated that MacArthur had ordered the appointment and that Patrick should discuss it with him. This Patrick also refused to do, as he was free to turn down the job if he so wished.⁸² Informed of this, MacArthur then sent for the American judge, Major-General Myron Cramer, and instructed *him* to assume the Acting Presidency. Cramer, out-ranked, did what he was told.

The British representative Alvary Gascoigne found out about these events afterwards from the local press, and he was not at all happy about what had transpired. While solicitous about Patrick's health—describing him as “not at all strong”—Gascoigne also regretted his refusal to take the job, arguing that it “would have given a much needed fillip to the United Kingdom prestige here”.⁸³ When they discussed it a few days later, Patrick defended his decision, alluding not only to his health but also to his campaign to underwrite Nuremberg. As Gascoigne reported him saying, “he could hardly be expected to proceed with work of framing judgments on Nuremb[e]rg lines, only to have them quashed by Webb on his return”.⁸⁴ For all that, Gascoigne thought that Patrick should have conferred with him first, as did Maurice Reed, Shawcross's legal secretary, who minuted: “While one has every sympathy with Patrick in his extremely difficult position, he does seem to get a little pompous at times—he should have consulted Gascoigne.”⁸⁵

General MacArthur, meanwhile, informed Gascoigne that he was “dumbfounded” by Patrick's refusal and that he should have “risked sudden death in court rather than turn down the appointment”.⁸⁶ He added that he felt Patrick's selection would have been especially welcome in Britain given “the trials and set backs which United Kingdom was now undergoing all over the world”.⁸⁷ These comments did not go down well in the Foreign Office. John Killick wrote that MacArthur's “patronizing remarks... about the United Kingdom, & his rather callous attitude towards Lord Patrick, & his action in issuing a press release without first consulting Lord Patrick have done nothing to improve a delicate situation”.⁸⁸ Legal advisor Gerald Fitzmaurice agreed: “You can't just order judges about.”⁸⁹

⁸² Gascoigne (n 79).

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ NA, FO 371/63820: Reed to Shawcross, 21/11/47.

⁸⁶ Gascoigne (n 77).

⁸⁷ Ibid.

⁸⁸ NA, FO 371/63820: Killick, 13/11/47.

⁸⁹ NA, FO 371/63820: Fitzmaurice, 14/11/47.

Myron Cramer did not greatly distinguish himself as Acting President of the court. He had joined the bench some two months into the trial following the resignation of the first American judge, John Higgins – a switch that prompted complaints to Washington from London and Wellington – and thereafter, he had kept a low profile in court and chambers. Northcroft, perhaps not unbiased after being passed over by MacArthur, did not have a particularly high opinion of him: “He never quite catches up with what is happening, tends to follow Patrick’s lead in the frequent votings and relieves his confusion or exasperation by repeated muttering of ‘Oh heck! I expect it will mean in practice that Patrick will have to make all impromptu decisions f[o]r Cramer to pronounce.”⁹⁰

I. THE DRAFTS OF THE JUDGMENT

Webb returned to Tokyo on 18 December 1947 and resumed his duties as President, but he never recaptured his former authority over his colleagues. The other Commonwealth judges – Patrick, McDougall and Northcroft – assumed that Webb would fail to produce an adequate judgment by himself, and accepted that the dissenters could not be drawn into the pro-Nuremberg fold, so they decided to write a judgment themselves. As the French Associate Prosecutor Robert Oneto reported back to Paris, “At the beginning of the deliberations, the President was preparing a draft which he thought would be the final judgment. Then five other judges (Canadian, British, American, New Zealander, Filipino), under the direction of the first of them, decided to prepare their own draft.”⁹¹ This move, Northcroft later explained, was prompted by Webb’s faltering leadership: “Naturally we would all like to see one judgment, but I am afraid none of us have [sic] sufficient confidence in the President to leave it to him, and from past experience we know he will not accept any advice or suggestions. Because of this, some of us are working independently on the judgment.”⁹²

This move had been a long time coming; indeed, there had been portents of alternative actions as far back as May 1946, when Webb had failed to produce reasons for rejecting the defence motions.⁹³ Even so, it was a high-risk strategy because these judges could not have predicted Webb’s response, and their faction was initially in the minority. Originally made up of William Patrick,

90 NANZ, AAOM 7130 ACC W4676 Box 1: Northcroft to O’Leary, second letter, 10/11/47.

91 Archives du Ministère des Affaires Étrangères, Paris, (hereafter, AMAE) Nations Unis et Organisations Internationales, Secretariat des Conférences (Crimes de Guerre: Extreme-Orient), Box 100: Oneto (Tokyo) to Broustra, 9/12/48.

92 NANZ, AAOM 7130 ACC W4676 Box 1: Northcroft to O’Leary, 18/3/48.

93 NANZ, AAOM 7130 ACC W4676 Box 1: McDougall to St Laurent, 19/3/47 and Northcroft (n 35).

Stuart McDougall, Harvey Northcroft, Myron Cramer and Delfin Jaranilla – it was only later, when Mei Ju-ao of China and IM Zaryanov of the Soviet Union joined them, that the faction was transformed into a majority. On 17 March 1948, a month before the prosecution and defence completed the presentation of their cases, Patrick and McDougall produced a draft on the law, and on 24 March, Webb bowed to the inevitable and conceded that they could prepare their own judgment “not only as to the law but also as to the facts”.⁹⁴

The drafts of the majority judgment, written by Patrick, McDougall, and Northcroft plus one or two other members and their assistants, was discussed by a seven-member drafting committee presided over by Myron Cramer. Although these judges shared a common objective they did not always share a common approach, which meant that some legal issues continued to excite debate. The discussion of conspiracy to commit crimes against peace dragged on for almost a year. After lengthy discussions between the common and civil law judges, Patrick tried to write a template based on the English Common Law conception of conspiracy. He explained that under that jurisdiction, conspiracy was made up of two elements: *naked* or unexecuted conspiracy (a conspiracy to commit a crime that was not actually carried out) and *executed* conspiracy (a conspiracy to commit a crime that was carried out).⁹⁵ He reminded his fellow judges that both the Charter and the Indictment explicitly referred to an *executed* conspiracy and reassured them that in dealing with executed conspiracies they would be applying rules of responsibility common to all their legal systems.

Yet if this were the case, why then consider naked (unexecuted) conspiracy at all? Mei Ju-ao asked whether it was absolutely necessary or feasible to evoke “the technical Anglo-American doctrine” with regard to naked conspiracy, given that all the accused were also charged with the execution or waging of an aggressive war.⁹⁶ Northcroft later took the argument a step further, suggesting that “where conviction for waging [war] was justified, we should avoid convicting for conspiracy”.⁹⁷ He explained that the crimes of initiating and waging an aggressive war should not be treated separately because the initiation of an aggressive war necessarily involved the waging of such a war. The waging was the substantive crime, he opined, whereas “its preparation and planning

⁹⁴ Australian War Memorial, Canberra (hereafter AWM), Webb papers, 3DRL 2481 Series 4/8/19: Webb to Tribunal members, 24/3/48.

⁹⁵ AWM, Webb papers, 3DRL 2481 Series 1/2/14: Patrick: “‘Planning’ and ‘conspiracy’ in relation to criminal trials, and specially in relation to this trial”, 30/1/48.

⁹⁶ AWM, Webb papers, 3DRL 2481 Series 4/7/4: Mei to Webb, “Draft judgment no 4.” 11/3/48.

⁹⁷ AWM, Webb papers, 3DRL 2481 Series 4/8/19: Northcroft to Webb, “Conviction for conspiracy and for waging aggressive war,” 18/8/48.

are not separate crimes but only incidental steps in the commission of the crime".⁹⁸

Outside the ranks of the majority, Webb and Pal also directed criticism at the concept of conspiracy. Indeed, even before Patrick had advanced his argument for naked conspiracy, Webb had already expressed his disquiet about the charge, and had even done so in court. In September 1947, for example, his response to comments by the American defence lawyer Ben Blakeney suggests that he was as troubled by the scope of the charge as Blakeney was:⁹⁹

Mr Blakeney:... If the law is that men who merely travel converging roads until perhaps in ignorance of each other's existence they arrive at the common destination are conspirators, then of course we are wholly at the mercy of chance.

The President: Mr Blakeney, neither you nor I are responsible for the definition of conspiracy or for its scope. Conspirators need not know each other, they need not know of each other's existence, let alone exchange words.

After Patrick proposed the idea of naked conspiracy, Webb petitioned the majority judges on three occasions to drop the concept, and when he failed to sway them, he returned to the issue in his separate opinion on the majority judgment.¹⁰⁰ In this he wrote: "International law, unlike the national laws of many countries, does not expressly include a crime of naked conspiracy."¹⁰¹ He continued: "The national laws of many countries may treat as a crime naked conspiracy affecting the security of the state, but it would be nothing short of judicial legislation for this Tribunal to declare that there is a crime of naked conspiracy for the safety of international order."¹⁰²

The arguments presented by Mei, Northcroft and Webb on naked conspiracy were potent enough, but Patrick vigorously opposed them – to the extent, Northcroft recounted, of threatening to dissent on this matter from the majority Judgment.¹⁰³ Although there was no principle preventing conviction of separate crimes arising from the same transaction, Patrick regarded the conspiracy to wage aggressive war as more serious even than the waging of war, because "those who conceive and develop the purpose of waging an aggressive war are much more blameworthy than those who later participate on the waging".¹⁰⁴ The concept of

98 AWM, Webb papers, 3DRL2481 Series 4/8/19; Northcroft: "Further notes on the indictment", c 1947-8.

99 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 59, 28279.

100 N Boister and R Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (2007) 213.

101 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 109, Webb, 8.

102 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 109, Webb, 8-9.

103 Northcroft (n 97).

104 *Ibid.*

naked conspiracy was retained in the majority judgment, possibly because of the force of Patrick's argument, and certainly because some of the defendants would have been acquitted had they not been implicated in the conspiracy.¹⁰⁵

J. THE HISTORICAL ANALYSIS

By May 1948 the majority drafting committee had agreed a draft judgment setting out the historical framework for Japan's activities, which they then circulated to the other judges. The Frenchman Henri Bernard, an advocate of natural law, scrutinised this document and produced a long memo drawing attention to the various anomalies and unsupported conclusions within it.¹⁰⁶ He was particularly concerned that some of the evidence heard at the trial was either being contradicted or ignored.

One example he picked out from the draft (and which also appeared in the majority Judgment, as reproduced here) related to the causes of the 1904-05 Russo-Japanese War:¹⁰⁷

Following the Anglo-Japanese Treaty of Alliance, which she concluded on 30 January 1902, Japan began negotiations with Russia in July 1903 concerning the maintenance of the Open Door Policy in China. These negotiations did not proceed as desired by the Japanese Government; and Japan, disregarding the provisions of the Convention for Pacific Settlement of International Disputes signed by her at The Hague on 29 July 1899, attacked Russia in February 1904. In the fighting that raged in Manchuria, Japan expended the lives of 100,000 Japanese soldiers and 2 billion gold yen. The war ended with the signing of the Treaty of Portsmouth on 5 September 1905.

¹⁰⁵ The disagreements between the judges at Tokyo over the relationship between conspiracy and crimes against peace were preceded by similar debates between the judges at Nuremberg. There, the American judge, Francis Biddle, and the French judge, Henri Donnedieu de Vabres, both expressed reservations about the conspiracy charge. The latter suggested that instead of making a finding on this count, the Tribunal should state that the substantive charge, crimes against peace, "absorbs the conspiracy". (B Smith, *Reaching Judgment at Nuremberg* (1977) 123.) But the Soviet and the British judges argued for its retention—the British on the grounds that its elimination would remove the heart of the case because from the beginning (as Biddle recalled them saying) "the Nazis had planned and worked for war". (F Biddle, *In Brief Authority* (1962) 468.) Nevertheless, the weight of evidence of the German defendants' responsibility for substantive crimes enabled the Nuremberg judges to interpret conspiracy restrictively—they insisted that it applied only to crimes against peace and had to be "clearly outlined in its criminal purpose" and "not be too far removed from the time of decision and of action". (International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* (n 24) vol 1, 225.) At Tokyo, the evidence of the defendants' responsibility was far less compelling, so while the judges followed Nuremberg in stating that conspiracy applied only to crimes against peace, the majority succumbed to Patrick's forceful insistence that they interpret conspiracy expansively.

¹⁰⁶ AWM, Webb papers, 3DRL 2481 Series 4/7/4: Bernard to Tribunal members, "Remarks suggested by draft of judgment," 10/5/48.

¹⁰⁷ International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 101, 48459-48460.

"I cannot possibly agree to the redaction of this paragraph," Bernard protested. "It places blame on the behaviour of Japan and remains silent regarding the facts set forth by the [League's] Lytton Commission: the occupation of Manchuria by Russia in 1900; . . . the arrival in 1902 of Russian troops at the mouth of the Yalu River, and several other facts which convinced Japan that Russia had decided upon a policy which was a menace to her interests, if not to her very existence."¹⁰⁸ Nor did he let pass the reference to the Hague Convention. The fact that Japan had disregarded it, he wrote, "was not discussed nor proven before the Tribunal and, if I remember correctly, was denied by [defence counsel] Mr. Blakeney. On the contrary, the fact that Russia adopted a policy which was a menace to the interests of Japan is proven."¹⁰⁹

In Bernard's view, the judges were not only presenting a tendentious reading of history; they were also deciding upon events about which they had expressly prohibited debate during the trial. On Japanese colonisation, for example: "we do not have the right to evaluate the merit of the annexation of Korea—which is the case in view of our repeated refusal to allow the parties to explain the events preceding 1928".¹¹⁰ And on Japan's Open Door Policy, judgment was passed on facts "concerning which we did not allow discussion and which the Defense therefore was not able to explain".¹¹¹ These comments were certainly relevant, but the majority judges did not change the aforementioned sections to meet Bernard's objections.

In the final stages of the drafting and production process the majority stopped consulting the remaining judges altogether. This provoked sharp remonstrations. Bernard Röling had not yet seen the final document when he read in the *Stars & Stripes* newspaper that the majority had already sent it to the translators. He made a formal protest, stating that the judgment had been decided "without some members even knowing its final contents", and that in his opinion, "this procedure is in violation of the Charter".¹¹² Henri Bernard partially dissented on the same grounds.¹¹³ The will of the majority prevailed nevertheless, and as Robert Oneto observed, their draft necessarily became the judgment of the Tribunal.¹¹⁴

108 Bernard (n 106).

109 Ibid.

110 Ibid.

111 Ibid.

112 AWM, Webb papers, 3DRL 2481 Series 4/8/15: Röling to Tribunal members, "Final judgment", 29/7/48.

113 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 105 Bernard, 1.

114 Oneto (n 91).

K. ONE JUDGMENT, SIX OPINIONS

The judges divided over the central question of responsibility for the Asia-Pacific war, and consequently made, not one, but six determinations on the cases before them. As well as the judgment of the majority faction, there were five separate opinions: two concurring (Webb and Jaranilla), two partially dissenting (Bernard and Röling) and one dissenting (Pal). The majority judgment was read aloud in court at the end of the trial; the other opinions were not.

The majority judgment did not offer any new interpretations of international law. Instead, it carefully and deliberately duplicated the Nuremberg Judgment's pronouncements, sometimes word for word, with the aim of reinforcing the earlier determination. As was explained: "In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions."¹¹⁵

Tokyo therefore followed Nuremberg on the essential points, stating; that the Charter was "the expression of international law existing at the time of its creation"; that the 1928 Pact of Paris "necessarily involves the proposition that such a war is illegal in international law" and those that planned and waged war in contravention of it were "committing a crime in so doing"; that *nullum crimen sine lege* was "not a limitation of sovereignty but is in general a principle of justice"; and that "authors of these acts cannot shelter themselves behind their official position".¹¹⁶ The only important opinion not carried over from Nuremberg (and this on the insistence of Tokyo's Soviet judge IM Zaryanov) was that "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".¹¹⁷

The judgment's drastic simplification of the multitudinous charges can also be seen as not merely an attempt to simplify the charges, but also as an attempt to move closer to Nuremberg's four-charge model.¹¹⁸ Of the 55 counts listed in the Indictment, 45 were jettisoned, mostly on the grounds of redundancy

¹¹⁵ International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 101, 48439.

¹¹⁶ Ibid 48437-48438.

¹¹⁷ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal* (n 24) vol 1, 223.

¹¹⁸ See, for example, US diplomat William Sebald's comments at NARA, RG59, Records Relating to Japanese War Crimes, 1943-46, Box 21: Sebald (Tokyo) to State Department, 23/11/48.

or lack of jurisdiction. With regard to conspiracy, the Tribunal argued that the subsidiary conspiracy charges (Counts 2-5) and "planning and preparation" charges (Counts 6-17) were part and parcel of the main conspiracy charge. It also followed Nuremberg's lead by ruling only on conspiracy to commit aggression; in consequence, the charges of conspiracy to commit murder (Counts 37-38) and war crimes (Counts 44 and 53) were not considered.

With regard to the substantive charges, the Tribunal stated that the "initiation" charges (Counts 18-26) and murder charges (Counts 39-43, 45-52) were both covered by the charges relating to the "waging" of war. It also ruled that the charge of aggression against China (Count 28) was covered by the previous count; that the charge of aggression against the Philippines (Count 30), then an American colony, was covered by the charges against the United States; that the charge of aggression against Thailand (Count 34) was unproved; and, finally, that the independent status of Mongolia (mentioned in Counts 26 and 36) was undecided.

On crimes against peace, the majority judgment agreed with the prosecution that the aggression charges were at the heart of the trial, stating that "no more grave crimes can be conceived of than a conspiracy to wage a war of aggression or the waging of a war of aggression, for the conspiracy threatens the security of the peoples of the world, and the waging disrupts it".¹¹⁹ It did not to express an opinion on the Indictment's murder charges, which alleged that by initiating aggression, the accused were responsible for the killing and murder of "all such persons... as might happen to be in the places at the times of such attacks".¹²⁰ The judges reasoned that if the war were legal, then the murder charges would fall, but that if the war was illegal, then the charges should have covered *all* wartime killings (not just those specified in the Indictment). Instead of dropping the murder charges altogether, the judges decided to absorb them into the charges on "waging" war – thereby, they stated, making it "unnecessary to determine" on the matter.¹²¹ Finally, the majority judgment found the charge of criminal conspiracy to wage wars of aggression to be proven, but (following Nuremberg) it did not consider conspiracy to commit the other crimes listed. It is nevertheless notable for placing far greater stress on conspiracy than had the Nuremberg Judgment. This was because the lack of evidence linking individuals to specific plans for or acts of aggression compelled the judges to adopt an indirect

119 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 103, 49769.

120 Ibid vol 2, Indictment, 9.

121 Ibid vol 101, 48453.

approach, first by establishing an individual's connection to the conspiracy, and then by using membership of the conspiracy to signal personal responsibility for crimes against peace.

L. CRITICS OF THE AGGRESSION CHARGE

The divisions on the Tokyo bench over crimes against peace did not destroy Nuremberg's legacy, as had been once feared, although a number of judges addressed the charge in their dissenting or separate opinions. In the most detailed critique, Radhabinod Pal raised his aforementioned suspicions that the Allies had created the charge in order to perpetuate the status quo and criminalise the struggle against colonialism before rejecting the authority of the Tribunal *in toto*. He concluded that all the charges brought against the accused were illegitimate, and that "Each and every one of the accused must be found not guilty of each and every one of the charges"¹²² – thus apparently confirming Stuart McDougall's view that Pal had come to Tokyo with the express aim of "torpedoing" any judgment against the defendants.¹²³

Henri Bernard, on the other hand, was more concerned with the Tribunal's methods of establishing guilt for crimes against peace. From his perspective, the Tribunal did not meet the stringent criteria necessary for the exercise of justice: "Essential principles, violations of which would result in most civilized nations in the nullity of the entire procedure... were not respected."¹²⁴ One aspect of this problem was the court's failure to prove the personal guilt of those accused of crimes against peace: given that international lawyers had failed to reach a conclusive answer about the criminality of war, did Japan's leaders *know* that they were committing the crime of aggression during the period covered by the Indictment? Only formal proof that the leaders had decided that their actions were definitely criminal and had proceeded on their course nonetheless, "could disperse this doubt and permit the condemnation of the Defendants".¹²⁵

Meanwhile, in his partial dissent, Bernard Röling dismissed the crimes against peace charge as premature, maintaining that the criminalisation of aggression would only become meaningful when *all* nations, motivated by either brotherhood or fear, submitted to the pacific settlement of disputes. At the same

¹²² Pal, *Dissentient Judgment* (n 44) 697.

¹²³ NA, DO 35/2938: Gascoigne to Dening, 25/11/48.

¹²⁴ International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 105, Bernard, 18.

¹²⁵ Ibid 21.

time, he hesitated when confronted with the responsibility of pronouncing on the fate of the accused on this charge – an issue over which he executed a *volte face* as the Tribunal progressed. His first position, set out in January 1947, was that trials should *not* be used to eliminate those who might endanger the future peace because that would entail “the mixing up of justice and expediency, and would frustrate both”.¹²⁶ By 1948, when writing his partial dissent, Röling had changed his mind. He now claimed that crimes against peace under international law could be equated to political crimes in domestic law, and that the victors of a *bellum justum* “have, according to international law, the right to counteract elements constituting a threat to that newly established order, and are entitled, as a means of preventing the recurrence of gravely offensive conduct, to seek and retain the custody of the pertinent persons”.¹²⁷

Leaving aside the dubious provenance of the concept of preventive incarceration, Röling’s reasoning was unconvincing. In the unlikely event that the Allies had believed that Japan’s defeated wartime leaders still represented a threat – and there is little evidence that they did – they had in any case established the Tribunal to try the crimes of the past, not crimes of the future. Röling was aware of this, of course, but unlike his colleagues he was prepared to openly endorse the legal prerogatives of the victor.

Why, then, did he reject the legal premise of the aggression charge while admitting the right of the Allies to exercise their political rights on this issue by judicial means? In the absence of any obvious alternative explanation, and in the presence of some circumstantial evidence, it is possible to surmise that Röling succumbed to pressure from The Hague to avoid dissenting completely from the Judgment. In 1947, Hendrik N Boon of the Dutch Ministry of Foreign Affairs visited him in Tokyo and let it be known that a dissent would offer succour to Axis war criminals and undermine the Netherlands’ commitment to the furtherance of international law, such as its support for the UN’s 1946 resolution on the “Nürnberg Principles”.¹²⁸ Responding to this pressure, Röling might well have decided to retain his arguments about the invalidity of crimes against peace while simultaneously asserting the court’s authority to dispense punishment based on the charge.

126 AWM, Webb papers, 3DRL 2481 Series 1/2/10: Röling, “Interpretation of the Charter”, c 23/1/47, 23.

127 B Röling and C F Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East* (2 vols, 1977) 1059.

128 L van Poelgeest, “The Netherlands and the Tokyo Tribunal” (Aspects of the Allied Occupation of Japan, pt 2) (Suntory-Toyota International Centre for Economics and Related Disciplines, London September 1991) 38-39.

Finally, Webb advanced a separate opinion in which he highlighted the Allies' failure to indict the Emperor Shōwa for crimes against peace. He argued that because the un-indicted Emperor was the "leader in the crime" for the part he played in the starting and ending of the war, his indicted subordinates should not be sentenced to death.¹²⁹ These remarks, which cast doubt over an important element of American occupation policy, infuriated MacArthur, who privately accused Webb of "playing cheap politics" by appealing to anti-Hirohito sentiment in Australia.¹³⁰ Foreign Office officials were also unimpressed: "It is unfortunate," noted EJF Scott, "that he should... have decided to express opinions about the Emperor, which can only cast doubt on the equity of the trial over which he has presided."¹³¹

M. THE FINAL VERDICTS

When the sentences were handed down in December 1948, the Tribunal found all twenty-five Japanese leaders guilty of conspiring to wage wars, waging wars, and presiding over war crimes.¹³² Seven of the accused were condemned to death. Sixteen more were given life sentences. No defendant was acquitted. Twenty-two of the accused were found guilty of crimes against peace, almost twice the number found guilty of that crime at Nuremberg. No death sentences were passed for planning or waging aggressive war alone: all the men sentenced to death were also found guilty of ordering, authorising or permitting atrocities, or disregard of the duty to secure observance of the laws of war. Chief Prosecutor Joseph Keenan's assertion that crimes against peace were the "vilest" of the international crimes was not reflected in the sentences.¹³³

The judges' votes, which were promptly leaked to the press,¹³⁴ partially reflected the schism on the bench. Most of the death sentences were passed by the less-than-resounding majority of seven to four. Hirota Kōki was sent to the gallows on the strength of just a single vote (five to six). It can be surmised that those who voted against capital punishments were Webb, Pal, Bernard and Zaryanov (the Soviet Union having temporarily abolished capital punishment).

129 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 109, Webb, 18.

130 W Sebald and R Brines, *With MacArthur in Japan: A Personal History of the Occupation* (1967) 164.

131 NA, FO 371/69833: Scott, 15/11/48.

132 Of the original twenty-eight inditees, Nagano Osami and Matsuoka Yōsuke had died, and Ōkawa Shūmei had been declared insane.

133 International Military Tribunal for the Far East, *The Tokyo Major War Crimes Trial* (n 3) vol 82, 38965.

134 F White, "How trial judges voted", *Nippon Times*, 10 Dec 1948.

The prosecuting powers were concerned by the press leak: the British thought that it might create suspicions in Japanese minds "that the guilt of the accused was not clearly established and that the legality of the trial was not above question".¹³⁵

Before the sentences were carried out, Henri Bernard wrote a private letter to his fellow judges to seek mercy for the defendants. "I ask you, honourable Gentlemen," he wrote, "if this justice that has been served... is really *the* justice that we want to show as an example to the historians of future generations."¹³⁶ He advised a compassionate approach, both for the sake of the protagonists, for human lives "do not belong to men but to God", and for the sake of mankind, for generosity "remains in the sacred corners of our soul... be it of an individual or of nations".¹³⁷ He argued that there was only one real distinction to be made when considering wars: not between aggressive and defensive wars, but between winners and losers.¹³⁸

To my mind there is no war of aggression or another war. There is war. And nothing else. War is a violent mean[s] to attain one's goal. Whoever wins a war benefits by it and there is nobody to send him before a court. Whoever loses: as Brennus said three centuries before our era "Vae Victis" woe to the defeated...

N. A TRIAL OUT OF TIME

In the period covered by the Nuremberg and Tokyo trials, the political map was redrawn. In August 1945, when the prosecuting powers had agreed to charge the German leaders at Nuremberg for crimes against peace, the façade of Allied unity was still intact. By the time the Tokyo Tribunal opened in May 1946, the first major cracks had appeared, and by the time it adjourned more than two years later, the alliance had broken apart. With the advent of Cold War and the Asian colonies in tumult, the Western powers began to regard Japan as a new ally that could shield the Eastern Pacific region from the Soviet Union and act as a counterweight to China. By the end of the trial, the time for prosecuting old enemies had passed. As Alvary Gascoigne wrote to a colleague in the Foreign Office in December 1948: "we feel that these trials have lasted long enough, and that the slate should now be wiped clean".¹³⁹

135 NA, FO 371/69834: Chancery (Tokyo) to FO, 13/12/48.

136 AMAE, Nations Unis et Organisations Internationales, Secretariat des Conférences (Crimes de Guerre: Extreme-Orient), Box 103: Bernard, "Statement," 22/11/48.

137 Ibid.

138 Ibid, original punctuation.

139 NA, FO 371/76250: Gascoigne to Scarlett, 31/12/48.

The Tribunal had been, in the words of one British official, a “political failure”,¹⁴⁰ and the sponsoring powers were swift to distance themselves from it. They did not publish the majority Judgment in English, one of the court’s two main working languages, and they soon abandoned its central charge, announcing in February 1949 through the Far Eastern Commission that no more Japanese leaders would be tried for aggression.¹⁴¹ With this, the door closed on further prosecutions for crimes against peace.

William Patrick too would have wished to put the experience behind him. On a professional level, he had produced the desired result, but it ultimately proved to be of little effect. On a personal level, his final months in Tokyo turned out to be a great ordeal. Just after the majority’s assumption of control in spring 1948, he had succumbed to phlebitis and other circulatory troubles affecting one of his legs. He was admitted to hospital in Japan in late March and stayed there for six months, although he continued to perform what duties he could from his bed until the majority judgment was handed down. Patrick’s health was of grave concern to Lord Cooper in Edinburgh, who appealed to Jowitt to allow him to travel home on the troopship *Lancashire*, which was transporting the remaining British military remnants (including medical personnel able to tend Patrick) back to the United Kingdom. Although civilians were usually prohibited from travelling on troopships, War Secretary Emmanuel Shinwell made the necessary arrangements, and Patrick finally departed Japan on 19 November 1948.¹⁴²

Patrick was lucky to have survived this experience, which, according to Charles Shaw (Lord Kilbrandon), “nearly killed him”.¹⁴³ He was in very poor health on his return to Scotland, and spent a considerable time afterwards convalescing in a nursing home. While doing so he was in 1949 elected a Privy Councillor in honour of his work at Tokyo, a rare accolade for a judge who had not assumed his position through the Crown Office.¹⁴⁴ The following year, he was elected a Fellow of the Royal Society of Edinburgh. He eventually resumed his duties as a judge, moving from the Outer House to the Second Division, and thereafter chaired the Lands Valuation Appeal Court. He retired in early January 1964 to his much-loved Scottish countryside, but his health continued to decline, and according to John Cameron, his recreation was much curtailed: “gardening at the Crook Inn

140 NA, FO 371/69834: Scott, 23/12/48.

141 FEC 514/8, “Trial of Japanese war criminals,” 28/2/49.

142 NA, LCO 2/2986: Cooper to Jowitt, 22/9/48 and Shinwell to Jowitt, 6/10/48.

143 C J D S, “Lord Patrick: distinguished judge”, *Scotsman* (n 19).

144 “Lord Patrick: Court of Session judge for 24 years”, *Glasgow Herald* (n 1).

[in Tweedsmuir]... occupied the hours in the open air which in his earlier and fitter days had been devoted to his rod and gun".¹⁴⁵ He died in Edinburgh on 17 February 1967.

O. THE LIMITS OF THE LAW

In 1944, Hersch Lauterpacht cautioned victorious powers against overreaching themselves when contemplating the punishment of crimes of war. A victor should, he wrote, "make it abundantly clear by his actions that his claim to inflict punishment on war criminals is in accordance with established rules and principles of the law of nations and that it does not represent a vindictive measure of the victor resolved to apply retroactively to the defeated enemy the rigours of a newly created rule".¹⁴⁶ The Allied powers did not heed this advice. Propelled by political interest and moral indignation they attempted to criminalise the initiation of the Second World War, but in the course of doing so they failed to posit either the Pact of Paris or public conscience as a substitute for established law, and they failed to carry the argument that individual leaders should be held personally responsible for embarking upon war. They did not persuade the sceptics of the validity of the crimes against peace charge, nor did they persuade themselves. Had they done so, they would not have felt the need to use the Tokyo Judgment to buttress that of Nuremberg.

Even at the height of the brief period of legal assertiveness in the mid-1940s, warnings were being issued about the novel uses and inflated expectations associated with international law. A few critics of the charge of crimes against peace suggested that had the Axis leaders been tried for war crimes and crimes against humanity alone, then this would have achieved the same ends with greater legal credibility.¹⁴⁷ Others questioned whether international law was an appropriate instrument for bringing about peace.¹⁴⁸ As James Brierly stated in 1944:¹⁴⁹

I suppose that, if we ask ourselves why it is that we are so dissatisfied with international law as we have it at present, most of us would say, because it has failed to produce a peaceful world. If that is the feeling at the back of our minds, I would point out that

145 Cameron (n 1) at 33.

146 H Lauterpacht, "The law of nations and the punishment of war crimes" (1944) 21 British Yearbook of International Law 80.

147 See, for example: G A Finch, "The Nuremberg trial and international law" (1947) 41 AJIL 24; E Hula, "Punishment for war crimes" (1946) 13 Social Research 17 and M Radin, "Justice at Nuremberg" (1946) 24 Foreign Affairs 381-82.

148 H Leonhardt, "The Nuremberg trial: a legal analysis" (1949) 11 Review of Politics 474.

149 J L Brierly, "International law: its actual part in world affairs" (1944) 20 International Affairs 386.

we are asking of law something that of itself it can never give us. "Law and order" is a familiar phrase, but really it inverts the true order of priority. For it is never law that creates order... always order has to exist before there can even be a soil for law to take root and grow in.

If Tokyo proved anything, it was that international law has its limits. With the "crime of aggression" back on the international legal agenda, it remains to be seen whether this lesson is heeded.