

**THE TRIAL WITHIN:
NEGOTIATING JUSTICE AT THE INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST, 1946-1948**

by

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Abstract

This dissertation explores the inner-workings of the International Military Tribunal for the Far East (IMTFE). Commonly known as the Tokyo trial, Tokyo tribunal, or Tokyo IMT, the IMTFE brought Japan's wartime leadership to justice for aggression, crimes against humanity, and war crimes committed during World War II. Using rare sources in three languages from public and private collections in eight countries, this dissertation presents a multi-perspective experiential history of the IMTFE in operation. By placing the court in a distinct international moment that produced the United Nations, the Nuremberg trial, the Genocide Convention, and the Universal Declaration of Human Rights, among other outgrowths of global community, this work explores the IMTFE as both a groundbreaking judicial undertaking and a pioneering multilateral institution. Other scholars use overly reductive and judgmental constructs based on outside-looking-in perspectives to assess the court's legal or moral legitimacy without appreciating or detailing its nuance and complexity. This dissertation prefers an inside-out view to explain the trial, not judge it. It describes the IMTFE as a collective endeavour and experience behind the scenes. Chapters review the personal, emotional, administrative, logistical, legal, political, and global dimensions of internationalism in action. Justice emerged as a contested encounter inside an involute web of intimate and external factors; transitional and transnational forces. Outside pressures – including postwar idealism, decolonisation, and the Cold War – meshed with and filtered through the intrinsic elements of 'being international' on the ground: social interaction, personal responses, and professional engagement. This 'trial within' influenced every aspect of IMTFE processes and outcomes, and the complexity of its internal dynamics best explains enduring criticism and memory of the court as a political trial or manifestation of victors' justice. Although a unique historical moment, the IMTFE reveals basic, foundational truths about the essence of all international organisations and other modes of ambitious global governance. Ultimately, this dissertation uses the IMTFE to reinterpret modern internationalism as a complex, messy, and negotiated encounter rather than a staid set of promises and ideals: a process and experience that ultimately – inevitably – compromised principles for politics, and form for function.

Preface

Portions of this dissertation appear in modified form in various publications. It reproduces no published piece *verbatim*. Collateral publications based on broader research not specifically linked to the dissertation share some findings with this project.

Papers arising from work presented in and research for the dissertation:

- Sedgwick, James Burnham. “Brother, Black Sheep, or Bastard? Situating the Tokyo Trial in the Nuremberg Legacy, 1946-1948.” In *The Nuremberg Trials and Their Policy Consequences Today*, edited by Beth Griech-Polelle. Baden-Baden, DE: Nomos Verlagsgesellschaft, 2009: 63-76.
- Sedgwick, James Burnham. “Memory on Trial: Constructing and Contesting the ‘Rape of Nanking’ at the International Military Tribunal for the Far East, 1946-1948.” *Modern Asian Studies* 43, no. 6 (September 2009): 1229-54.
- Sedgwick, James Burnham. “A People’s Court: Emotion, Participant Experiences, and the Shaping of Postwar Justice at the International Military Tribunal for the Far East, 1946-1948.” *Diplomacy & Statecraft* 22, no. 3 (September 2011): 480-99.

Chapter 1 is a much expanded and detailed iteration of my *Diplomacy & Statecraft* article “A People’s Court Emotion, Participant Experiences, and the Shaping of Postwar Justice at the International Military Tribunal for the Far East, 1946-1948.” Many of the chapter’s arguments differ from the published piece to help it fit more completely into the overall dissertation narrative and argument.

Some parts of the section “Sight and Seeing: Administration, Optics, and the Perception of Victors’ Justice” in Chapter 2 build on my *Modern Asian Studies* article “Memory on Trial: Constructing and Contesting the ‘Rape of Nanking’ at the International Military Tribunal for the Far East, 1946-1948.” However, the arguments and source details differ significantly.

Check the first pages of these chapters to see footnotes with similar information.

Ethical Issues

The research presented in this dissertation was carried out in accordance with the standards of the University of British Columbia Behavioural Research Ethics Board, certificate # H06-03727, “The Trial Within.”

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List of Abbreviations

| | |
|----------|--|
| ANZ | Archives New Zealand |
| ANZAC | Australian and New Zealand Army Corps |
| ATC | (US) Army Transport Corps |
| AWM | Australian War Memorial |
| BCOF | British Commonwealth Occupation Force (Japan) |
| BDIC | <i>La Bibliothèque de documentation Internationale contemporaine</i> |
| BL | British Library |
| BRICOSAT | British Commonwealth Sub Area, Tokyo |
| CIA | Central Intelligence Agency (United States) |
| FEC | Far Eastern Commission |
| FO | (British) Foreign Office |
| GEACPS | Greater East Asia Co-Prosperity Sphere |
| GHQ | General Headquarters (of Supreme Commander for the Allied Powers) |
| GI | Colloquially “General Infantry” (Member of the United States Army) |
| ICC | (Permanent) International Criminal Court |
| IDS | International Defence Section |
| IMT | International Military Tribunal |
| IMTFE | International Military Tribunal for the Far East |
| IPS | International Prosecution Section |
| IWM | Imperial War Museum |
| JBJB | British War Crimes Executive in London |
| LAC | Library and Archives Canada |
| MP | Military Police |
| NAA | National Archives of Australia |
| NAN | <i>Nationaal archief den nederlands</i> |
| NARA | National Archives and Records Administration (of the US) |
| NAUK | National Archives of the United Kingdom |
| NGO | Non-Governmental Organisation |
| NLA | National Library of Australia |
| OSS | Office of Strategic Services (precursor to CIA) |
| POW | Prisoner(s) of War |
| PX | Post Exchange (colloquialism for military shop and supply post) |
| RNZAF | Royal New Zealand Air Force |
| SACSEA | Supreme Allied Commander, South East Asia |
| SCAP | Supreme Commander for the Allied Powers |
| SEAC | South East Asia Command |
| SHAFR | Society for Historians of American Foreign Relations |
| UKLIM | United Kingdom Liaison Mission (Tokyo) |
| UN | United Nations |
| UNESCO | United Nations Educational, Scientific and Cultural Organization |
| UNRRA | United Nations Relief and Rehabilitation Administration |
| UNWCC | United Nations War Crimes Commission |
| UK | United Kingdom |
| US | United States |
| USDS | United States State Department |
| USSR | Union of Soviet Socialist Republics |

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INTRODUCTION: The Trial Within: Historiography, Methodology, and Outline

MECHANIC'S BAY, AUCKLAND, NEW ZEALAND – Wednesday 30 January 1946: At 6:30 am, on a fine summer day, Flight Lieutenant Harold J. Evans boarded an RNZAF Catalina flying boat bound for Brisbane, Australia. With him came nearly 130lbs of luggage and a mounting weight of expectation and excitement. The 29 year old son and grandson of Solicitors General of New Zealand, Evans was a rising star in the Wellington establishment. His assignment in Tokyo befitted his promise: assistant to Associate Prosecutor for New Zealand Brigadier-General Ronald H. Quilliam; associate to his country's representative to the International Military Tribunal for the Far East, Justice Erima H. Northcroft; and pro tem officer of the Prime Minister's Department in Japan.¹ After "an absolutely perfect trip" across the Tasman Sea, Evans and his fellow passengers – including Quilliam and Northcroft – were treated to excellent views of the Queensland coastline before touching down on the Brisbane River at 1:30 pm local time. Met by an honorary agent of the New Zealand government and the resident officer of the Australian Department of External Affairs, the party was then driven to the Lennon Hotel, erstwhile wartime residence of General Douglas MacArthur – "A very fine hotel" in Evans' estimation. The following three days passed with a 'hurry-up-and-wait' quality that came to dominate the next two-and-a-half years of his life. Thursday included a scenic drive to Lone Pine Koala Sanctuary, several hours of packing, extensive flight preparations for departure – including a film explaining emergency proceedings for 'ditching' over water –, and a flight aborted en route due to engine failure. The party spent Friday quietly awaiting re-embarkment before the flight was cancelled entirely. Anticipating a multiple-day delay, Evans and his supervisors enjoyed "a most pleasant way of spending the afternoon" by watching a South Australia vs. Queensland cricket test from the official box of Sir Leslie Wilson, Governor of Queensland. During the match, the company were given unexpected news that the next leg of their journey would begin that night.

After a hasty re-packing job, the New Zealanders returned to Eagle Farm Airfield where they met up with other trial employees – Sir William F. Webb (Australian judge), Alan J. Mansfield (Associate Prosecutor, Australia), and Alastair MacDonald (Associate to Justice Webb) – and prepared for departure. At 10:30pm that night, Saturday February 3, the party boarded a US Army Transport Corps (ATC) C-54 Skymaster en route to Manila. With the plane's interior arranged "military fashion" with two long rows of seats facing each other, and sufficient space not taken up with baggage to allow some individuals to lie down at full length on the floor, the passengers enjoyed a comfortable start to the flight. Although Webb and Northcroft, as judges, were "naturally obliged" to remain somewhat apart from the rest, how well the ANZAC contingent to Tokyo got along together immediately struck Evans: "I think it is remarkable what a very happy family we are all." Amid the bonhommerie, Evans enjoyed spectacular views of the New Guinea landscape – rugged mountains, dense jungle, and sediment-yellowed rivers – in the descent to Biak for a three-hour layover. After an "entirely ample" American-style breakfast of stewed prunes, oat cakes, maple syrup and coffee, and a "much needed wash and shave," the party re-boarded the Skymaster, donned Mae West inflatable vests – despite the stifling heat – to await a smooth departure for the Philippines. At 5:30 pm local time, the Skymaster touched down at Nichols Field, Manila. Feeling distinctly relieved to find all their baggage intact, Evans and his companions drove in the fading light of a dramatic Manila Bay sunset – "a most glorious sight" – to the Admiral Hotel where they were "waited on hand and

¹ Evans' roles were reduced soon after his arrival in Japan. For most of the tribunal, he served only as the associate to Justice Northcroft.

foot by the Filipinos” until drifting off into deep, rewarding, slumber. A brief tour of the city’s core the next morning immediately dispelled the party’s idyllic image of Manila. “We soon realised,” wrote Evans to his family, “that Manila is not a pleasant place to look at. The destruction . . . is on a very large scale.”

Okinawa, the next stop on his journey, brought more reminders of the war home to Evans. Arriving at Kaha Airfield at 1:30 pm (Japan time) on Monday February 4, Evans found Okinawa “very much cooler . . . the desolate looking country no doubt made more so by a realisation of the grim part that was played out on the island . . . Here and there could be seen openings in the cliffs where the Japanese had entrances to their caves. After our meal we drove back . . . this time in the dark, and one felt it was not the sort of place where one would like to linger.” The party left Okinawa at 7:30 pm that night, arriving at Atsugi Airfield outside of Yokohama at 1:00 am Tuesday February 5.

The 40 mile drive into Tokyo confirmed Evans’ mounting disquiet about his role in Japan and his growing awareness of the moral ambiguity of the war. “It was a rather eerie experience arriving in Japan in this fashion. The fact of cold and of winter gave one a definite feeling of being an outsider and this was confirmed as we drove through village after village on the way to the city, each blacked out as if on purpose, only the headlights from the cars showing up the shop fronts and other signs of human habitation. Then as we came nearer to Yokohama war damage began to appear. There were gaps and twisted electric-power poles and burnt out tramcars. Finally, when we entered Yokohama proper, there was little to be seen in the dark at all, except for shell of buildings here and there which had withstood the fire. The rest was mostly devastation at ground level.” At about 3:00 am, the comfort, warmth, and security of New Zealand far away, Evans and his companions arrived at the Canadian Legation in Tokyo. For Evans, much remained uncertain. The Legation was a temporary lodging, office space had not been assigned, and work duties remained unclear. Unbeknownst to him at the time, Harold Evans had arrived at the threshold the most formative two-and-a-half years of his life – personally, professionally, and psychologically.²

DETROIT, MICHIGAN – 5 March 1946: At 5:30 pm, Walter Ingles McKenzie, Referee in Bankruptcy for the Eastern District of Michigan, boarded a train bound for Washington, DC. His final destination was Tokyo to take up an important position as an Assistant Prosecutor at the International Military Tribunal for the Far East. Born in 1888 to parents of pioneer stock, McKenzie lost his father at seven. To help his widowed mother support their family, McKenzie entered the work force at just nine years old. Before finally settling into a career in law in 1915, he worked as a fruit-picker, factory worker, teacher, clerk, waiter, and school principal. By 1946, McKenzie had risen from modest roots to establish himself as a well known criminal prosecutor, an active member of the American Bar Association, a force in civic and charitable affairs, and a prominent Democrat. McKenzie’s drive, diligence, and political connections led to his appointment in Japan. His journey to Japan would be a long one; he had come far already.

² Harold Evans’ journey is reconstructed from: Harold Evans Papers – MB 1559, Macmillan Brown Library, University of Canterbury, Christchurch, New Zealand (Hereafter “Evans Papers”); and Harold J. Evans, Interview with author (20 June 2004), Christchurch, New Zealand (Hereafter “Evans Interview”).

The train arrived in Washington at 8:30 am on March 6. Met at the station by Otto Lowe, the personal stateside representative of Chief Prosecutor Joseph B. Keenan, McKenzie was taken immediately to the Pentagon – “That is some building” – to be photographed and fingerprinted by War Department officials. At 2:30 that afternoon, he met with Colonel Telford Taylor, a prosecutor at the Nuremberg IMT, to discuss lessons from his experiences in Germany. In the evening, McKenzie attended a teletype conference with members of the International Prosecution Section in Tokyo, before exhaustedly settling into a “beautiful room” at the Wardman Park Hotel. This pace of events set the tone for the next eight months.

McKenzie spent the next three days waiting for his passport to process and discussing the upcoming trial with various dignitaries including Attorney General John C. Clark, Dean Acheson – then Undersecretary of the United States Department of State (USDS) – and Joseph W. Ballantine, then Director of the USDS’ Office of Far Eastern Affairs, as well as Special Assistant to the Secretary of State. Although enjoying the prominence of his position, on Friday, March 8, McKenzie concluded a letter home dispiritedly, “I am getting lonesome already for all of you”: A common early sentiment which developed over his time in Tokyo into profound dislocation and dissatisfaction with international work.

At 5:20 am, Saturday March 9, a phone call woke McKenzie telling him to report to the Air Transit Corps Terminal by 7:35 am. With top priority – “my name first in the list of passengers” – McKenzie boarded the C-54 Skymaster at 9:20 am for a 9:30 departure. For the first three hours, the plane flew up over soft white clouds that reminded McKenzie of “drifted snow.” Although strong headwinds made the ride “a little rough at times,” the Skymaster touched down for a stopover in Topeka Kansas on time at 2:30 pm local time. After dinner and a “long wait” playing pool, McKenzie’s party re-boarded the plane for their next leg, departing at 8:55 pm for Hamilton Field, California. Sitting in the front seat, McKenzie found it difficult to sleep with the door to the pilot’s compartment slamming periodically. Instead, he passed the time marvelling at the moon and stars outside his window. He was especially impressed by the lights of the towns and cities below. Reno, Nevada, he told his family, “looked like a big diadem with rubies and orange jewels in the center.” Sacramento, too, was “very pretty.”

After a long day, McKenzie’s flight touched down at Hamilton Field at 3:25 am local time. Utterly exhausted, – “I have had so little sleep and I need it badly” – McKenzie made for the Visiting Officer’s Quarters, where, shortly after writing a quick letter home, he fell into a deep but brief sleep. The next day proved a difficult one. After an 8:00 am breakfast, he reported to the ATC terminal for a final check up and medical clearance. There he received immunisation shots for triple typhoid, typhus, cholera, and small pox. After breaking the frame on his glasses and getting locked out of his quarters, McKenzie called home only to learn that his father-in-law had passed away at 2:30 am on March 9. McKenzie’s disjunction from family mounted: “I was so sorry to hear about Dad . . . especially since I am not there with you.”

At 8:00 am, Monday March 11 McKenzie reported to the Hamilton Field ATC Terminal. After breakfast, weighing in, and a safety briefing, McKenzie boarded another Skymaster for the next leg of his journey. Still a top priority passenger, he noted immediately that the plane was a step down from his previous flight: “a ‘bucket’ job – long seats along side with webbed canvas seats.” Almost 11 hours and over 2000 miles later, McKenzie landed at Hickman Field, Hawaii at 9:35 pm local time. In Hawaii for just over 24 hours, McKenzie occupied himself with errands: purchasing a rain jacket at the base’s PX, getting his

glasses repaired, and trying unsuccessfully to rendezvous with a friend based in Honolulu. Already feeling worn out, the next phase of the journey would further push McKenzie's comfort zone.

At 10:50 pm, March 12, Flight #51 left Hickman Field bound for Kwajalein in the Marshall Islands. After a brief refuelling stop on Johnston Island in the North Pacific, McKenzie's excitement grew. Enjoying an in-flight lunch of Bologna sandwiches, he happily noted in his diary that it was a "beautiful day – sun shining prettily on fluffy white clouds." Having crossed the International Dateline, the flight landed at Kwajalein at 11:55 am on March 14, where McKenzie noted "much evidence of fighting." During a sixteen hour layover, an exhausted and hot McKenzie showered, put on pyjama pants, and stayed in the "dirty" barracks provided for rest. Called at midnight for the next leg, McKenzie ate a quick meal of a Tuna-Pea sandwich and coffee before heading for the ATC Terminal at 1:00 am. The initial flight took off at 2:20 am but was forced to return 10 minutes later due to engine trouble. The second attempt proved more successful. McKenzie's party took off for Guam at 6:07 am on Friday March 15.

Arriving on Guam at 1:35 pm local time, a weary McKenzie spent the day listlessly. Too tired to go to the show provided on base, he retired early to bed at 7:45 pm. Unable to get much sleep during flights, McKenzie's stay on Guam was no more successful. In a 100-bunk barracks, he was awoken during the night by the entrance of three separate groups of travellers. During his three-day stay on Guam, an exhausted McKenzie noted little other than dense jungle, a rough – and long – coral path to wash facilities, and the heat, especially the heat: "My winter clothes may be OK in Tokyo, but they were very uncomfortable in California, more so in Hawaii, worse in Kwajalein and worst in Guam. With the temperature 80° to 90° or more in the shade and much more in the sun, I have done as little running around as possible and have tried to sleep when I could." With the fatigue of travel growing, McKenzie began increasingly to look forward to his upcoming IMTFE assignment: "I'll be glad to get to Tokyo, where we will have permanent quarters, and I hope more convenient ones."

Monday, March 18, after the first decent sleep in days, McKenzie woke at 6:00 am. He washed, packed, and breakfasted by 7:30. Checking into the ATC Terminal shortly thereafter, McKenzie was pleased to meet a colleague: W. G. F. Borgerhoff-Mulder, Dutch Associate Prosecutor for the IMTFE. The party departed Guam in another Skymaster at 9:11 am bound for Tokyo. The flight was not a smooth one. The weather over Tokyo became so bad – snow, rain, and sleet – that it forced McKenzie and company to land at Iwo Jima. Despite the delay, McKenzie and his new companion Borgerhoff-Mulder remained in good spirits. On Iwo Jima, they were met by Colonel Warner Gates, commanding officer of the island, who then escorted the two prosecutors to his personal quarters on a bluff overlooking the ocean. McKenzie and Borgerhoff-Mulder were given a nice room with twin beds, private shower and toilet. That afternoon, a much-refreshed McKenzie toured the island with Colonel Gates and Borgerhoff-Mulder. That evening, they watched the official film of the battle for Iwo Jima – "Being on the ground and having seen it all, it was very realistic and very terrible" – had dinner, drinks, and then retired to bed after midnight.

Spirits rising, McKenzie woke the next day – March 19 – at 6:30 am. After a shave, and a large breakfast of pineapple juice, bacon, eggs, toast, and coffee, he and Borgerhoff-Mulder hurried to the airfield for a 9:35 am departure for Tokyo. The party arrived at Atsugi Airfield at 1:15 pm. A staff car then drove them to their respective billets: Borgerhoff-Mulder to the Imperial Hotel, and McKenzie to the Dai Iti Hotel. Like

many others, McKenzie's first impression of Tokyo was shock at the destruction. "For mile after mile all the buildings were destroyed on both sides of the road either by fire or bombing. Big factories were mere shells, at other times only a smoke stack would remain standing. The people have gathered the scrap sheet metal and had built all manner of sheds in which to live. It is terrible and pitiable."

Wednesday, March 20. McKenzie's first day on the job was a hectic one. After a breakfast of fried spam, cornmeal, toast, jam, coffee, and orange juice, he reported to the office of Carlisle Higgins, personal assistant to Chief Prosecutor Keenan. After meeting several new colleagues, he spent the rest of the day jumping from one place to another. First to the Civilian Affairs branch to register his arrival, then five interviews after lunch, a trip to the Finance Office to request travel pay, and a visit to the IPS offices on the 7th floor of the Meiji Building overlooking the Imperial Palace. That night, settling into his small, dark room McKenzie wrote to his wife: "I miss you and the children and Margaret more than I can tell you. I am still too busy to have time to get lonesome, but I think a few more nights alone here in my room will do it" . . . Realisation of the scope of his assignment and its distance from his home began to set in.³

SAN FRANCISCO, CALIFORNIA – Friday, 29 March 1946: Elaine B. Fischel, a 25 year old from Los Angeles, prepared to leave for a life-changing professional and personal experience. The younger of two daughters to a widowed mother, Fischel had always been intrepid. Leaving an anxious mother behind, Fischel felt excited by the prospect of helping bring Japanese war criminals to justice. She was less enthusiastic about her position as a legal stenographer. With bigger dreams of one day becoming a lawyer, Fischel hoped to convince her supervisors to let her work as a court reporter once she arrived in Japan. These were matters for a later date, however. When she awoke that day, she felt only anticipation; for life abroad and for the trip through exotic locales en route to Tokyo.

That morning, after picking up a \$13.50 per diem, Fischel and Daphne Spratt, a fellow stenographer, checked out of the Hotel Carlton and headed to the in-town ATC Terminal to pick up tickets for their flights. Once there, ATC personnel arranged additional transportation on a Greyhound Bus to the Hamilton Field airbase some 60 kilometres away. Upon arrival at Hamilton field, Fischel and Spratt spent another three hours "processing" before being shown to their quarters. Although given "Number 1 Priority" they were warned that it would be a few days before the next stage of their voyage. Cooped up in a comfortable but spare room, looking outside at a persistent rain, a dismayed Fischel wrote home to her mother: "dinner was good but [I] can't quite say things are gay. Everyone, I guess, is waiting for a ride and are kind of disgusted." Unfortunately for Fischel, the next few days provided little more excitement.

On Sunday, March 31, Fischel's boredom broke when she received orders to report to the ATC Terminal for a flight bound for Hickman Field, Hawaii. Eager for warmer climes, Fischel boarded the C-54 Skymaster with some relief at 6:30 pm. The moment she got on the plane, things "picked up." Although unable to sleep, Fischel quickly discovered that being a young, attractive, and single woman had its perks on male-dominated military flights. The pilot, "Benny," made it his special task to ensure her comfort. In exchange

³ Walter McKenzie's experiences are pieced together from diary entries, letters home, and other personal correspondence. Walter I. McKenzie Papers, Bentley Historical Library, University of Michigan, Ann Arbor, MI. Hereafter "McKenzie Papers."

for helping her practise dictation, other male passengers allowed Fischel to teach them to knit. Flattered by the attention, Fischel also revelled in the chance to rub shoulders with “VIPs” including the president of a large New York importing business, several ATC pilots, and a Major-General in the ‘Pineapple Army’ – the 100th Battalion, a Hawaiian division of the US Army made up primarily of Japanese-American soldiers .

The plane touched down at Hickman Field at 4:45 am local time on April 1. Hopes of a Hawaiian holiday were dashed almost immediately when Fischel was informed that they would re-embark in just three hours. “You may believe me when I say I am more than somewhat disappointed,” she wrote her mother. “They let us sweat it out at Hamilton Field for 2 days and then they rush like mad.” Intending to at least take the opportunity to freshen up with a shower, Fischel and Spratt ended up touring the base with an army major who approached them almost as soon as they got off the plane. On their return from the tour, “Benny” – the pilot for their flight from Hamilton Field – was waiting with a “buddy” to treat Fischel and Spratt to “a big glass of Hawaiian pineapple juice, and a hamburger.” Although not the tropical relaxation she had envisioned, Fischel at least found herself entertained.

At 7:45 am, the party re-boarded their Skymaster bound for Guam. Once again, Fischel found the flight, and the attention from other passengers and crew, enjoyable. The pilot was “the most charming man” she had ever met. Equally taken with Fischel, the pilot, “strictly against regulations” let her sit in the cockpit as they landed briefly on Johnston Island – “just a strip out in the ocean.” Back in the air, the co-pilot let Fischel fly the C-54 for about half hour. “I didn’t do so hot. My flying was smooth but had trouble keeping on course.” In the good graces of the crew, Fischel was allowed to stretch out on the floor to sleep. Save for a brief layover in Kwajalein spent playing ping-pong for two hours; Fischel slept the rest of the flight to Guam. At 3:00 am local time on April 3 (having crossed the International Dateline), the Skymaster touched down at Guam. Upon arrival, Fischel and Spratt were met by a Special Service Officer from Beverly Hills. Feeling refreshed, Fischel accompanied the Officer on a tour, while the other members of the party rested. From the top of one of the highest hills on the island, Fischel spent over an hour enjoying the sunrise, a cooling breeze, and the panoramic view of the surrounding jungle. When plans to swim were cancelled by the threat of a tidal wave, Fischel instead “went walking in the rain and it really was super.”

The final leg of the journey began with an 8:15 am departure for Tokyo. For Fischel, it became just as fascinating as previous legs, but significantly less comfortable. At Guam, her party was split up. For the remainder of the journey, Fischel was one of only three passengers on a cargo ship loaded with sacks of mail. Despite the clear demotion in priority and status, Fischel and fellow stenographer Audrey Davis made the most of the flight. While the third passenger, an older male court reporter also bound for Tokyo, remained aloof, Fischel and Davis worked to befriend the crew. “Each member entertained us hours on end so there wasn’t a dull moment. Audrey and I both flew the plane and it was one happy family.”

At around noon on April 3, the flight landed at Iwo Jima for a brief layover. After lunch, Fischel and her party were treated to ice cream in a small building facing Mount Suribachi. Looking out at the site of one of the bloodiest battles of the war, and Joe Rosenthal’s famous Raising the Flag on Iwo Jima, a photograph which defined the Pacific War for many Americans, the magnitude of her assignment hit Fischel. “Suddenly, I realized I was over 7,000 miles from home and in four more hours I would be in Tokyo, Japan. From the moment we left Hamilton Field I had been literally and figuratively up in the air, having the time of my life.

The long hours of flying time had been so rapidly consumed in fascinating conversation, sleeping between landings and stops at the various islands, it never occurred to me how each passing hour took me further and further away from my homeland. So far, this whole experience reminded me of an airplane ride at an amusement park rather than the beginning of a new and exciting venture. Finally, on the island of Iwo Jima, the realization came to me how, like Dorothy in the Wizard of Oz, I was ‘not in Kansas anymore.’”

Landing at Atsugi Airfield at 5:45 pm on Wednesday April 3 finalised Fischel’s perception shift. Over sixty years later, Fischel remembers her first impressions of Tokyo as a series of contrasts. She was struck first by the destruction: “The streets were flat. It had been bombed completely. That was the biggest impression; to see the devastation.” Amid the rubble, Japanese people she had been taught to hate, lined the road smiling, waving as the US Army bus drove by. The Japanese she saw presented a contrast. Welcoming, helpful, they were also destitute. After settling into her quarters at the Kanda Kai Kan – YMCA – building, Fischel went out for lunch. Sitting in a nearby GI Mess Hall, Fischel was struck by the incongruent prominence of Americans and the comforts of ‘home’: “The first place we went when we got to Tokyo . . . we had hamburgers! So you felt like you were back in America.” Still unhappy with her menial role – “I didn’t fly 8,000 miles to be in the typist pool” – Fischel nevertheless understood that whatever she did would be life-altering – and part of something momentous.⁴

International criminal law is evolving at an unprecedented rate. Recent decades have witnessed an array of *ad hoc* international and domestic proceedings dealing with atrocities in the former Yugoslavia, Rwanda, Sierra Leone, Cambodia, and elsewhere. In 2002, this progression culminated with the establishment of a permanent International Criminal Court which announced its first conviction in April 2012. Yet, international jurisprudence moves forward with an incomplete knowledge of its origins based on a genesis story mistakenly structured around the Nuremberg International Military Tribunal (1945-1946) as the lone progenitor of modern international legal principles, practise, and precedent. The presumptive sourcing of justice to Nuremberg underplays the importance of its counterpart International

⁴ The recreation of Elaine Fischel’s travels is based on published and private sources. Elaine B. Fischel, Interview with author (31 August and 1 September 2009), Los Angeles, California (Hereafter “Fischel Interview”); Private Papers of Elaine B. Fischel, Los Angeles, California (Hereafter “Fischel Papers”); and Elaine B. Fischel, *Death among the Cherry Blossoms: Memoirs of the World War II War Crimes Trials* (San Diego: CSN Books, 2008).

Military Tribunal for the Far East (1946-1948)⁵ – not to mention earlier antecedents.⁶ Canonising Nuremberg is doubly obscuring because no matter how flawed, the messy model of internationalism and justice developed in Tokyo presaged future institutions in ways its more conventional German counterpart did not. With its greater legal, cultural, administrative, and political complexity, the IMTFE announced a new, often unsatisfying, era of global governance. The problems faced in Tokyo, therefore offer a more suitable lens through which to understand the challenges of modern internationalism, and hold significant instructive potential for helping the international community refine current institutional approaches to global crimes and crises. However, rather than outline prescriptive lessons from the past, this dissertation provides historical perspective on what the tribunal *was*, not what it should have been, or what its foundations could become. Like all similar enterprises, the IMTFE emerges in this study as a dynamic encounter, complex institution, negotiated process, and lived experience. The perspective gained on internationalism in action shatters stultified notions of global community as either a utopian fantasy, ‘realist’ impossibility, or an indefectible panacea.

Beyond its legal dimensions, therefore, the IMTFE formed a collective endeavour, an experience. It must be recognised not just as an international tribunal but also as a functioning multilateral institution and complex social encounter. The opening travel vignettes of three very different IMTFE participants highlight this dissertation’s unique approach, perspective, and arguments. Walter I. McKenzie, Harold J. Evans, and Elaine B.

⁵ For stylistic reasons, this dissertation uses several contractions to refer to the International Military Tribunal for the Far East. The “IMTFE,” the “Tokyo tribunal,” the “Tokyo IMT,” or simply “the tribunal,” “the court,” and “the trial” are used interchangeably throughout the study.

⁶ Patricia Heberer and Jürgen Matthäus, *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln: University of Nebraska Press, 2008), Alan Kramer, "The First Wave of International War Crimes Trials: Istanbul and Leipzig," *European Review* 14, no. 04 (2006): 441-55, John C. Watkins and John Paul Weber, *War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond: Cases, Materials, and Comments* (Durham, NC: Carolina Academic Press, 2004), James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, CT: Greenwood Press, 1982).

Fischel showcase the broad spectrum of experiences that defined the Tokyo IMT. They represent a cross-section of the tribunal's personal, professional, and organisational divisions. Individuals of different ages, genders, and nationalities from a range of social, cultural, and political backgrounds converged to shape justice in Tokyo. Participant roles varied from judges, attorneys, law clerks, court reporters, historical advisers, analysts, and economists to secretaries, technicians, stenographers, press officers, translators, photographers, security guards, mimeographers, drivers, cooks, and custodians. Justice in Tokyo negotiated a complex web of personal rivalries, conflicting national politics, cultural misunderstandings, incompatible legal systems, divergent philosophies, and administrative difficulties. My research represents a new, more nuanced, outlook. Using unique sources, for the first time I place the IMTFE alongside other postwar efforts to shape a global community and reveal in greater detail how individual actors managed the inherent challenges of international organisation and justice in Tokyo. The experiential history of the IMTFE presented in this dissertation introduces a rich multifaceted way to envision and understand internationalism in action that is missing in most works. By advancing knowledge of the intimate and internal dynamics of international justice in Tokyo, this dissertation captures the complex essence⁷ and experience of modern global governance in ways that more reductive explorations of internationalism neglect. Only by acknowledging the 'trial within' multilateral processes, can we begin to form a complete understanding of what it means – and meant – to be international in Tokyo and beyond, and how these inner processes created conditions for later criticism in memory and history.

⁷ This dissertation uses "essence" to suggest an elemental, in-depth, and multi-faceted understanding of internationalism. It does not use the term to suggest a "most significant" or "ultimate" guiding force or set of forces. For example, Chapter 1 argues that personal experiences formed *part of* the essence of global governance. It pointedly does not contend that emotions became the only, most powerful, or determinant of Tokyo justice. A composite of many levels of interaction and encounter, the IMTFE embodied the complex experience of being international in the modern world: too complicated to be reduced to a singular "essence."

Historiographical Foundations and Space

This project finds analytical and methodological salience in the evolution of international history as a discipline. Traditionally, historians of international relations have written macro-level assessments of the geopolitical dictates, national proclivities, and economic drivers of major international powers. Generally, these works hinge on or presuppose an order *versus* justice / realism *versus* idealism axis.⁸ Although works on great power relations remain influential,⁹ over the last two decades scholars have added greater theoretical nuance and topical range to the field. Akira Iriye, with his call for including “culture” – intellectual faculties, moral considerations, social forms, customary beliefs, racial constructs, and other normative dynamics – and the role of transnational agents (and agencies) in international history, has probably been the most consistent catalyst of this paradigm shift.¹⁰ The “cultural turn” advocated by Iriye has helped innovative historians like John Dower identify deeply social roots and racial dimensions of empire and aftermath in Japan’s Pacific War¹¹ and encouraged a widening array of Americanists to consider the personal and societal forces that shape US foreign relations.¹² Scholars have been slower to

⁸ For a survey of the Order-Justice paradigm see: Rosemary Foot, John Lewis Gaddis, and Andrew Hurrell, *Order and Justice in International Relations* (New York: Oxford University Press, 2003).

⁹ For example: Robert Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (London: Atlantic Books, 2003), Niall Ferguson, *Colossus: The Rise and Fall of the American Empire* (New York: Penguin Books, 2005), Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (New York: Knopf, 2003), Paul M. Kennedy, *The Rise and Fall of the Great Powers: Economic Change and Military Conflict from 1500 to 2000* (New York, NY: Random House, 1987).

¹⁰ First articulated in his SHAFR presidential address in 1978, Iriye’s call for the injection of culture into international history has coloured much of his work since. Akira Iriye, “Culture and Power: International Relations as Intercultural Relations,” *Diplomatic History* 3, no. 2 (1979): 115-28, Akira Iriye, *Cultural Internationalism and World Order* (Baltimore: Johns Hopkins University Press, 1997). Iriye is also one of the most prolific writers on transnational agencies. See: Akira Iriye, “A Century of NGOs,” *Diplomatic History* 23, no. 3 (1999): 421-35, Akira Iriye, *Global Community: The Role of International Organizations in the Making of the Contemporary World* (Berkeley: University of California Press, 2002).

¹¹ John W. Dower, *War without Mercy: Race and Power in the Pacific War* (New York: Pantheon Books, 1986), John W. Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: W.W. Norton & Company, 1999).

¹² For example: Frank Costigliola, “‘Unceasing Pressure for Penetration’: Gender, Pathology, and Emotion in George Kennan’s Formation of the Cold War,” *The Journal of American History* 83, no. 4 (1997): 1309-39, Frank A. Ninkovich, *Modernity and Power: A History of the Domino Theory in the Twentieth Century* (Chicago: University of Chicago Press, 1994), Emily S. Rosenberg, *Spreading the American Dream: American Economic and Cultural Expansion, 1890-1945* (New York: Hill and Wang, 1982).

respond to Iriye's call for studies of "global community" but recent works in the history of scientific, humanitarian, and environmental organisations demonstrate that this too is changing.¹³ In his presidential address to the Society for Historians of American Foreign Relations (SHAFR) in 2003, for example, Michael J. Hogan asserted that "transnational forces and their human elements are the stuff of a new international history and should not escape our attention."¹⁴ In recent years, international historians have fruitfully applied this "new" approach to diverse topics including the Paris Peace Conference 1919,¹⁵ the Cold War,¹⁶ and world population control.¹⁷ Through these works and others, scholars have come to conceive international relations as a complex interaction of formal and informal forces rather than a closed arena of power and politics.

Two books illustrate the promise of applying the tools of Hogan's "new international history" perspective to post-World War II efforts to shape a global community. Elizabeth Borgwardt's *A New Deal for the World* (2005) uses techniques from legal, diplomatic, economic, geopolitical, ideological, intellectual, and cultural history to trace two themes – the "New Deal" and "Human Rights" – in postwar efforts to establish freer trade, collective

¹³ Works on international scientific organisations include: Matthew Connelly, "Population Control Is History: New Perspectives on the International Campaign to Limit Population Growth," *Comparative Studies in Society and History* 45, no. 1 (2003): 122-47, Matthew Connelly, *Fatal Misconception: The Struggle to Control World Population* (Cambridge, MA: Belknap Press, 2008), Sagarika Dutt, *UNESCO and a Just World Order* (New York: Nova Science Publishers, 2002), Joseph Manzione, "'Amusing and Amazing and Practical and Military': The Legacy of Scientific Internationalism in American Foreign Policy, 1945-1963," *Diplomatic History* 24, no. 1 (2000): 21-56, Perrin Selcer, "The View from Everywhere: Disciplining Diversity in Post-World War II International Social Science," *Journal of the History of the Behavioral Sciences* 45, no. 4 (2009): 309-29. Studies of the history of humanitarian and non-governmental organisations include: Tom Buchanan, "'The Truth Will Set You Free': The Making of Amnesty International," *Journal of Contemporary History* 37, no. 4 (2002): 575-97, Iriye, "A Century of NGOs," 421-35. Examination of environmental organisations and diplomacy include: Ramachandra Guha, *Environmentalism: A Global History* (New York: Longman, 2000), Anna-Katharina Wöbse, "Oil on Troubled Waters? Environmental Diplomacy in the League of Nations," *Diplomatic History* 32, no. 4 (2008): 519-37.

¹⁴ Michael J. Hogan, "The 'Next Big Thing': The Future of Diplomatic History in a Global Age," *Diplomatic History* 28, no. 1 (2004): 1-21.

¹⁵ Erez Manela, *The Wilsonian Moment: Self-Determination and the International Origins of Anticolonial Nationalism* (Oxford: Oxford University Press, 2007).

¹⁶ Jeremi Suri, *Power and Protest: Global Revolution and the Rise of Detente* (Cambridge, MA: Harvard University Press, 2003).

¹⁷ Connelly, *Fatal Misconception*.

security, and rule-of-law orientation. Borgwardt uses a series of case studies on the Atlantic Charter (1941), the Bretton Woods conference (1944), the San Francisco conference (1945), and the Nuremberg trial (1945) to reveal how the lived experience of the Great Depression and a brutal, global war stiffened policymakers' resolve to avoid the mistakes of the past and made populations receptive to the idea of a 'new' world order. Borgwardt's ability to capture the moment of each case study is particularly impressive. Drawing on a range of sources, she recognises each institution as both the component of an international movement, and a localised nexus of personal foibles (and abilities), political power plays, competing ideals, and differing worldviews.¹⁸ Although framed as a biography of Eleanor Roosevelt, Mary Ann Glendon's *A World Made New* (2001) likewise crosses genres in history to explore the drafting of the Universal Declaration of Human Rights.¹⁹ Presenting a masterful behind the scenes account of the Drafting Committee, Glendon balances her micro-history and biography with a fine grasp of the era's international economic, social, and political climate. In particular, Glendon is noteworthy for acknowledging the truly international effort put into researching and drafting the Universal Declaration. By treating the postwar period as a product of what came before, and not a spontaneous shift to international organisation in 1945, both Borgwardt and Glendon make a crucial, yet often missed, historiographical intervention.²⁰

Borgwardt and Glendon's works influence both the thematic make-up and methodological approach of my study. Thematically, their example provides a constructive reminder to explore the IMTFE from both an immediate institutional perspective *and* a

¹⁸ Elizabeth Borgwardt, *A New Deal for the World: America's Vision for Human Rights* (Cambridge, MA: Belknap Press of Harvard University Press, 2005).

¹⁹ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

²⁰ David Reynolds and James Willis also emphasise continuity between pre and post World War II worlds. David Reynolds, *From World War to Cold War: Churchill, Roosevelt, and the International History of the 1940s* (Toronto: Oxford University Press, 2006), Willis, *Prologue to Nuremberg*.

broad international and intellectual level. Although both Borgwardt and Glendon show a fine eye for detail, they never forget the ‘big picture.’ For instance, along with the International Monetary Fund, the World Bank, and the United Nations, Borgwardt includes Tokyo and Nuremberg as part of a “New Deal” for the world predicated on human rights ideals articulated in the Atlantic Charter. Similarly, Glendon positions Nuremberg, Tokyo, the Genocide Convention, and the Universal Declaration together as complementary pillars in an emergent postwar human rights regime. Methodologically, I emulate Borgwardt and Glendon’s impressive use of archival sources to present ground-level assessments of multilateral institutions in operation. Borgwardt’s success in portraying the Nuremberg IMT as a “pragmatic administrative pastiche – an innovation in international organization, as well as international law,” in particular, informs my project.²¹ My approach to writing the history of the Tokyo tribunal is also inspired by Glendon’s treatment of the linguistic, cultural, political, and personal difficulties met – and overcome – by the Drafting Committee that produced the Universal Declaration of Human Rights. To further ground my work in the IMTFE’s intellectual and legal context, I also rely on the growing body of international human rights and international criminal law literature.²²

This dissertation also speaks to the rapidly expanding – but fractious – historiography of human rights and humanitarianism. Two problems taint this literature. First, the field remains ideologically polarised between uncritical celebrants and determined sceptics. Second, the field cannot agree on when “human rights” crystallised as both an idea and an operative international norm. Champions of the human rights revolution typically

²¹ Borgwardt, *A New Deal for the World*, 238.

²² G. J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000), Yves Beigbeder, *Judging Criminal Leaders: The Slow Erosion of Impunity* (New York: Martinus Nijhoff, 2002), Antonio Cassese, *International Criminal Law* (New York: Oxford University Press, 2003), Philippe Sands, *From Nuremberg to The Hague: The Future of International Criminal Justice* (New York: Cambridge University Press, 2003).

emphasise the movement's long history. Paul Gordon Lauren and Micheline Ishay trace the roots of human rights through "ancient" religious and philosophical texts.²³ Lynn Hunt's more focused account places the "birth" of human rights in the French Revolution.²⁴ Glendon and Borgwardt extol a post-World War II genesis of modern rights regimes. Postwar innovations and institutions, including the IMTFE, contributed to a "new" world order based on universally recognised rights and international accountability.²⁵ This celebratory wing of the historiography portrays a gradual erosion of state sovereignty by the inexorable tidal surges of international justice, human rights, and global governance. On the other end of the spectrum, research by Samuel Moyn, Kenneth Cmiel, Mark Mazower, Tara Zahra, and others presents a more skeptical perspective. Moyn argues that human rights – the "last utopia" – failed to coalesce as a political contingency until the 1970s. Even then, human rights remained at best an inconstant global concern.²⁶ Cmiel is more cynical still. His work suggests that rights "talk" *never* truly manifested in effective enforcement.²⁷ Mazower and Zahra object to idyllic depictions of post-World War II internationalism. Both scholars assert that the war's end triggered a deliberate reification, not surrender, of sovereignty and state nationalism by the great powers.²⁸

This dissertation finds analytical ground between both factions of the human rights historiography. Lauren, Ishay, Hunt, Borgwardt, Glendon, and others are correct to

²³ Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 2003).

²⁴ Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton & Company, 2007).

²⁵ Borgwardt, *A New Deal for the World*, Glendon, *A World Made New*.

²⁶ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Belknap Press of Harvard University Press, 2010).

²⁷ Kenneth Cmiel, "The Emergence of Human Rights Politics in the United States," *The Journal of American History* 86, no. 3 (1999): 1231-50, Kenneth Cmiel, "The Recent History of Human Rights," *The American Historical Review* 109, no. 1 (2004): 117-35.

²⁸ Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton, NJ: Princeton University Press, 2009), Tara Zahra, *Kidnapped Souls: National Indifference and the Battle for Children in the Bohemian Lands, 1900-1948* (Ithaca, NY: Cornell University Press, 2008), Tara Zahra, *The Lost Children: Reconstructing Europe's Families after World War II* (Cambridge, MA: Harvard University Press, 2011).

emphasise the long normative genealogy of human rights and international justice. The immediate post-World War II period indeed emerged as a particularly international moment. However, as a whole, the school overstates the extent and effectiveness of the human rights revolution, despite attempts by some scholars like Borgwardt and Glendon to acknowledge the movement's shortcomings and to underscore the aspirational significance rather than absolute finality of the new institutions and principles. To wit, the international system continues to struggle under the weight of its responsibility to protect international peace and human security to this day. On the other hand, Moyn, Cmiel, Mazower, Zahra, and likeminded scholars are equally mistaken in viewing human rights and justice ideals as little more than political window-dressing. This dissertation reveals that states regularly attempted to co-opt multilateral institutions like the IMTFE to assert sovereignty and geopolitical agendas. However, this work also proves that the experience of internationalism behind the scenes and on the ground often undercuts and transcends national divides. Moreover, the fact that great powers and other states re-entrenched sovereignty after the war did not and could not change the truth that a monumental international shift was taking place. The immediate postwar era saw both a reassertion of state-bound nationalism *and* a growth of rights and justice-based internationalism. Institutions like the IMTFE stood firmly in the middle of these conflicting currents.

This dissertation's synthetic approach contains potential pitfalls. Arguing many perspectives, for example, may undermine overarching argument or narrative cohesion. Moreover, some scholars, particularly some international historians, remain unconvinced by personal and ground level analysis of world affairs. The concerns of such skeptics rest on three flawed assumptions: 1) that it is always possible to identify singular or dominant reasons for historical outcomes; 2) that only direct causal links are historically important;

and 3) that intimate dynamics cannot have serious effects. First, by imagining unnaturally direct causal linkages within history and international relations scholars share the mistake of the institutions themselves. Many if not most such international spaces presuppose a level of idealistic credulity: An oversimplified conviction that problems in world systems and other global issues can be *solved*. The assumed righteousness of legal and humanitarian endeavours only exaggerates this reductive vision. Such institutions invariably outreach their promises in the same way that scholars can overextend analytical frameworks by fixating on causality in attempts to explain events. This unhealthy, unsatisfying preoccupation becomes worse when historians seek not only causation, but *prime* causation – the one root or most powerful driver of events. Inevitably, researchers ignore or overlook other forces at play when striving to establish a principal cause.²⁹ Although direct results-based connections are difficult to discern at times in this dissertation’s narrative, at the end of the day, the entire institutional experience produced and shaped outcomes, not one conveniently researched causal root. Secondly, questioning the “importance” of issues that do not fit neatly into the cause-effect paradigm imposes unnecessary limits on the accrual of historical knowledge. Even if what is learned or what happened in Tokyo did not have immediate or obvious impacts, my approach builds a more complete understanding of both the trial itself and internationalism more generally. To ignore the ‘trial within’ impoverishes historical understanding of the processes of being international in Tokyo and elsewhere. Finally, this dissertation *does* find and illustrate connections between IMTFE experiences and outcomes.

²⁹ Acrimonious debate in US foreign relations scholarship about what really caused the Cold War exemplifies the problem with seeking prime causation in international history. For decades, historians struggled to outdo each other in establishing the origins of American-Soviet friction. Deep discursive factions competed over whether or not domestic politics, the military-industrial complex, inter-bureaucratic rivalry, ideology, geopolitics, economic greed, Soviet evil, American chauvinism, or clashing personalities created and entrenched a bipolar world system. Although a rich historiography developed, at best, the literature resolved predictably that the conflict had many causes. A similarly fruitless and embittered divide rages over what impels US power, and what to call its global extension of authority (empire, hegemony, and dominance; through suasion, soft power, capitalism, formal and informal processes, etc.).

In fact, the dissertation demonstrates that a multi-faceted experiential approach to history serves as an especially apt device for exploring institutions of global governance. Within internationalist spaces, internal and personal dynamics *are* important. Emotions matter. Interpersonal relations matter. Logistics matter. Legal sensibilities matter. Cultural presumptions matter. Social dynamics matter. International symbolism matters. To be sure, as I also argue, political issues, power relations, geopolitics, and external global movements *also* shaped the internationalist experience. However, at its core, in its essence, the entire constellation of internationalism filters through a lens of on-the-ground structural, institutional, and individual considerations.

The IMTFE Literature

Until very recently, two works, Richard Minear's *Victors' Justice: The Tokyo War Crimes Trial* (1971)³⁰ and Arnold Brackman's *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (1987),³¹ dominated Western scholarship on the IMTFE.³² It would be difficult to find two works more diametrically opposed in outlook, and the polarity they represent exemplifies the reductive binaries that permeate the literature.

From the first utterance of his uncompromising thesis to “demolish the credibility of the Tokyo Trial and its verdict,”³³ Minear makes it clear that he finds no redeeming qualities in the tribunal. Minear bases his critique on impressive source depth. His research at the

³⁰ Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971).

³¹ Arnold C. Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trials* (New York: Morrow, 1987).

³² In Japan, authors such as Awaya Kentarō, Higurashi Yoshinobu, Ōnuma Yasuaki, and Ushimura Kei have presented a varied academic debate of the IMTFE. See for example: Kentarō Awaya, *Tōkyō Saiban Ron* (a Treatise on the Tokyo Trial) (Tokyo: Ōtsuki shoten, 1989), Higurashi Yoshinobu, *Tōkyō Saiban No Kokusai: Kokusai Seiji Ni Okeru Kenryoku to Kihan* (International Relations of the Tokyo Trial: Power and Norms in International Politics) (Tokyo: Bokutakusha, 2002), Yasuaki Onuma, *Tōkyō Saiban Kara Sengo Sekinin No Shisō E: Zōhoban*, (from the Tokyo Trial to the Concept of Postwar Responsibility, Expanded Edition) (Tokyo: Tōshindō, 1987), Kei Ushimura, *'Bunmei No Sabaki' O Koete: Tainichi Senpan Saiban Dokkai No Kokoromi* ('Beyond the Judgment of Civilization': An Interpretation of War Crimes Trials against the Japanese) (Tokyo: Chūō kōronsha, 2000).

³³ Minear, *Victors' Justice*, ix.

Library of Congress, the Japanese Justice Ministry, Yale Law School, and the Law Faculty of Kyoto University, for example, has yet to be repeated. Minear uses this source base to build a detailed account of the IMTFE from founding to finish, concentrating specifically on problems relating to international law, procedural shortcomings, and errors in the tribunal's findings regarding the history of Japanese imperialism and World War II. Unfortunately, however, Minear's prevailing cynicism unbalances *Victors' Justice* to the point of myopia. The book lambasts every component of the IMTFE as misconceived, amoral, unfair, ineffective, and even illegal. In fact, Minear's most positive concession is, "The Tokyo trial is a failure that can instruct us."³⁴ Although Minear's opinion of the IMTFE moderated somewhat in later scholarship, he remains a steadfast critic of the tribunal.³⁵ Aside from distracting both author and audience, Minear's misguided fixation on political vengeance asks the wrong set of questions from an inherently flawed outlook. By judging the IMTFE in hindsight, Minear's analysis rests on an artificial notion of objectivity. Unintentionally ahistorical, *Victors' Justice* assumes that the IMTFE in operation and in history can be reduced to a simple morality play. Though it appreciates neither the inherent messiness of internationalism nor the experiential complexity of operational justice in Tokyo, Minear's work endures as one of the default historiographical fallbacks for students of the tribunal. Thus, his victors' justice critique continues to dominate memory and research of the court.

In contrast, Arnold Brackman finds the IMTFE virtually faultless. His celebration of the court encourages the false polarity that skews popular and academic views of the IMTFE. Indeed, one of his only criticisms is that tribunal prioritised legal thoroughness over

³⁴ Ibid., xiv.

³⁵ Richard H. Minear, "Justice Tempered with Politics," *The Review of Politics* 57, no. 4 (1995): 767-68, Richard H. Minear, "In Defense of Radha Binod Pal," *Japan Interpreter* XI, no. 3 (Winter 1977): 263-71.

theatrical value.³⁶ Like Minear, Brackman's book builds on extensive access to tribunal sources. Aided by the author's personal involvement in Tokyo as a media correspondent, Brackman constructs a narrative around private notebooks, official and unofficial documents, his original United Press stories, along with interviews and correspondence with trial participants, including Aristides Lazarus, Frederick Mignone, Justice B. V. A. Röling, Beverly Coleman, Valentine Deale, Robert Donihi, George Furness, Osmond Hyde, Carrington Williams, and George Yamaoka. Also like Minear, however, Brackman's one-sided portrayal of the proceedings misuses his research material. Motivated by historical amnesia about the tribunal – "hardly anyone remembers it, or attaches much importance to it."³⁷ – Brackman aims to "set the record straight on what actually happened" at the IMTFE.³⁸ Regrettably, Brackman's version of "what actually happened" proves unsatisfying. *The Other Nuremberg* prioritises storytelling over analysis. As a result, lurid details, sensationalism, and exaggeration dominate the account. Brackman fixates particularly on the larger than life personae in Tokyo, such as President of the Tribunal William Webb, Chief Prosecutor Joseph B. Keenan, and defendant Tōjō Hideki. He misses the gradations of trial personnel, perspectives, and experiences. Brackman also accepts and propagates an IMTFE version of history. Although he recognises the "vigorous fight" put up by Japanese and American defence attorneys, he regurgitates prosecution arguments wholesale.³⁹ Because of

³⁶ Brackman lamented the trial's legal doldrums: "The drama inherent in the situation was often dissipated in a blur of legalistic maneuvers [sic]." Brackman, *The Other Nuremberg*, 23. Sociologist Mark Osiel offers a more serious discussion of how the IMTFE missed a cathartic opportunity by underplaying the tribunal's theatrical potential. Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, NJ: Transaction Publishers, 1997).

³⁷ Brackman, *The Other Nuremberg*, 19.

³⁸ Ibid., 27.

³⁹ Ibid., 75. Brackman often echoed historically suspect IPS arguments which, though not entirely misplaced, strained credulity. "The Allied prosecution eventually proved the chain of causation between the accused at Tokyo and the mass inhumanities," he argued. "These terrible events were not isolated incidents – all wars have isolated incidents, and war itself is an atrocity – but were part of the Japanese militarists' overall strategy of rule by terror." Brackman, *The Other Nuremberg*, 20-21.

its prose and power, *The Other Nuremberg* remains influential in IMTFE historiography. Its outmoded style and standpoint, however, limit the work's future relevance.

The polarised field dominated by Minear and Brackman changed in 2008 with the publication of three books on the IMTFE by major presses and important scholars. The result has been the emergence of a deeper, more nuanced field. Neil Boister and Robert Cryer's *The Tokyo International Military Tribunal: A Reappraisal* offers a legal analysis of the IMTFE. Overall, they argue that though imperfect, the tribunal generally operated as a legitimate endeavor with appropriate intentions. The authors also call for greater historical study of the IMTFE and contend that the tribunal warrants research because its shortcomings provide "salutary lessons" for modern international trials.⁴⁰ Yuma Totani's impressive work, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (2008), argues that the IMTFE embodied a justified and successful attempt to document and assign responsibility for Japanese war crimes. Although Totani's book includes deep archival research and insightful descriptions of trial processes, its overriding purpose serves to assess the IMTFE's social, political, and historical legacy in Japan.⁴¹ In *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Madoka Futamura also focuses on Japanese reaction to the IMTFE. Generally a presentist work in international relations (rather than historical) scholarship, Futamura's book examines whether or not the modern "peace through justice" paradigm of international law has roots in Nuremberg and Tokyo. Futamura concludes that the IMTFE failed as a tool for reconciliation because it concentrated on establishing individual responsibility and producing a historical record of

⁴⁰ Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: Oxford University Press, 2008).

⁴¹ Yuma Totani, *The Tokyo War Crimes Trial: The Pursuit of Justice in the Wake of World War II* (Cambridge, MA: Harvard University Press, 2008).

crimes rather than promoting “healthy social transformation.” Futamura uses the failings of the IMTFE to criticise the effectiveness of international war crimes trials in general.⁴²

Articles and book chapters published on the tribunal reflect the topical and thematic focuses of larger studies by Boister, Cryer, Totani, and Futamura. A number of scholars explore the tribunal’s role in shaping collective and historical memory of the war, especially in Japan.⁴³ Others debate the IMTFE’s place in international law, its judicial legacy, and its legal procedures.⁴⁴ A small, specialised subfield tries to explain and contextualise the very vocal dissent of Indian Justice Radhabinod Pal.⁴⁵ A larger historiographical division presents

⁴² Madoka Futamura, *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy* (New York: Routledge, 2008).

⁴³ Timothy Brook, "The Tokyo Judgment and the Rape of Nanking," *The Journal of Asian Studies* 60, no. 3 (2001): 673-700, Maria Hsia Chang and Robert P. Barker, "Victor's Justice and Japan's Amnesia: The Tokyo War Crimes Trial Reconsidered," *East Asia: An International Quarterly* 19, no. 4 (2001): 55-84, Yasuaki Onuma, "Beyond Victors' Justice," *Japan Echo* XI (1984): 63-72, Yasuaki Onuma, "Japanese War Guilt and Postwar Responsibilities of Japan," *Berkeley Journal of International Law* 20 (2002): 600-20, R. John Pritchard, *An Overview of the Historical Importance of the Tokyo War Trial* (Oxford: Nissan Institute of Japanese Studies, 1987), R. John Pritchard, "The International Military Tribunal for the Far East and Its Contemporary Resonances (Nuremberg and the Rule of Law: A Fifty-Year Verdict)," *Military Law Review* 149 (1995): 25-35.

⁴⁴ Jonathan A. Bush, "'The Supreme... Crime' and Its Origins: The Lost Legislative History of the Crime of Aggressive War," *Columbia Law Review* 102, no. 8 (2002): 2324-424, Allison Marston Danner, "Beyond the Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism," *Virginia Journal of International Law* 46 (2005): 83-130, R. May and M. Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha," *Columbia Journal of Transnational Law* (1998): 725-66, Kayoko Takeda, "Interpreting at the Tokyo War Crimes Tribunal," *Interpreting: International Journal of Research & Practice in Interpreting* 10, no. 1 (2008): 65-83, E. J. Wallach, "Procedural and Evidentiary Rules of the Post-World War II Crimes Trials: Did They Provide an Outline," *Columbia Journal of Transnational Law* (1998): 851-84.

⁴⁵ Elizabeth S. Kopelman (Borgwardt), "Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial," *New York University Journal of International Law and Politics* 23, no. 2 (1991): 373-444, Ashis Nandy, "The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability," *New Literary History* 23, no. 1 (1992): 45-67, Latha Varadarajan, "From Tokyo to the Hague: A Reassessment of Radhabinodh Pal's Dissenting Opinion at the Tokyo Trials on Its Golden Jubilee," *Indian Journal of International Law* 38 (1998): 233-47.

snapshot national histories of non-American contingents at the IMTFE.⁴⁶ These short studies necessarily lack this dissertation's depth and detail, as well as its recognition of the court's negotiated complexity and experiential nuance. Moreover, with the possible exception of Yuki Takatori who has had remarkable success uncovering new sources material, most of these articles are based on sources which provide relatively conventional insight to the IMTFE experience. The Tokyo literature also includes several book chapters in larger works by noted scholars of postwar Japan. This small subfield includes several interesting positions. Herbert Bix and David Bergamini both advance knowledge about the decision not to put Emperor Hirohito on the stand in Tokyo.⁴⁷ John Dower explores issues of race at the IMTFE and, along with Susie and Meirion Harries, criticises the lack of Vietnamese, Malaysian, Indonesian, and Korean representation on the bench.⁴⁸ The limited scope of these chapters makes them ultimately unsatisfying, however, and their general negativity contributes little to building a balanced understanding of the IMTFE.

A number of theses and dissertations have also been completed on the IMTFE. Specific topics range, but most graduate research falls into two categories. The first focuses narrowly on contributions by individual countries and personalities in Tokyo, consciously or unconsciously underplaying the transnational, multilateral, and global dynamics of IMTFE

⁴⁶ Jean Esmein, "Le Juge Henri Bernard Au Procès De Tokyo," *Vingtième Siècle. Revue d'histoire*, no. 59 (1998): 3-14, John Stanton, "Canada and War Crimes: Judgment at Tokyo," *International Journal* 55, no. 3 (2000): 376-400, John Stanton, "Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal," *Journal of American and Canadian Studies* 17 (Summer 1999): 61-87, Yuki Takatori, "Justice Tempered by Realpolitik: Canada's Role in the Tokyo Trial," *International Journal of Canadian Studies* 32 (2005): 45-66, Yuki Takatori, "'America's' War Crimes Trial? Commonwealth Leadership at the International Military Tribunal for the Far East, 1946-48," *Journal of Imperial & Commonwealth History* 35, no. 4 (2007): 549-68, Ann Trotter, "New Zealanders and the International Military Tribunal for the Far East," *New Zealand Journal of History* 23, no. 2 (1989): 142-56, L. van Poelgeest, "The Netherlands and the Tokyo Tribunal," *Japan Forum* 4, no. 1 (April 1992): 81-90.

⁴⁷ David Bergamini, *Japan's Imperial Conspiracy* (New York: Morrow, 1971), Herbert P. Bix, *Hirohito and the Making of Modern Japan* (New York: HarperCollins Publishers, 2000).

⁴⁸ Dower, *Embracing Defeat*, Meirion Harries and Susie Harries, *Sheathing the Sword: The Demilitarisation of Japan* (London: Hamilton, 1987).

justice. Jay Hancock, for instance, explores Canada's role in the IMTFE⁴⁹ while Galen Irvin Johnson reviews the work of John Brannon and other American defence attorneys.⁵⁰ T. Hewton and Dayle Kerry Smith examine Australian President Webb's impact on Tokyo justice.⁵¹ Other theses and dissertations rely on published trial material such as the judgment and court proceedings to explore the legal dimensions of specific incidents and crimes. Galen C. Fox analyses IMTFE findings on the Nomonhan Incident in Outer Mongolia and Frank J. Primozych considers the tribunal's investigation of the Changkufeng Incident in the Korean-Siberian borderlands.⁵² More technically, Robby L. Kraft details the treaty background of Japanese aggression, Lawrence J. Wadsworth probes trial procedure in Tokyo, and Walter Lee Riley discusses the legal implications of the IMTFE's majority and minority judgments.⁵³ A small body of graduate work sits outside these two major schools. These more distinct studies include Evan Moore's intriguing study of the IMTFE role in "abnormalising" Japanese culture and history, Yuma Totani's rich historiography, and my own account of international media and academia coverage of the tribunal.⁵⁴ These works have added to specific knowledge of certain dimensions of the IMTFE, contributing

⁴⁹ Jay Hancock, "Determined Victor: Canada's Role in the Prosecution of Class A Japanese War Criminals" (MA, Royal Military College of Canada, 2002).

⁵⁰ Galen Irvin Johnson, "Defending the Japanese Warlords: American Attorneys at the Tokyo War Crimes Trial, 1946-1948" (PhD, University of Kansas, 1998).

⁵¹ T. Hewton, "Webb's Justice: The Role of Sir William Flood Webb in the Tokyo Trial, 1946-1948: An Examination of the Influence of an Australian Judge on a Political Trial" (BA Honours, University of Adelaide, 1976), Dayle Kerry Smith, "The Tokyo War Crimes Trial: USA & Or's v. Koki Hirota & Or's" (PhD, University of Queensland, 1989).

⁵² Galen C. Fox, "The Nomonhan Conflict in the Tokyo International War Crimes Trial" (MA, University of Oregon, 1965), Frank J. Primozych, "The Changkufeng Incident in the Tokyo International War Crimes Trial" (MA, University of Oregon, 1953).

⁵³ Robby L. Kraft, "The Treaty Background of Japan's International Commitments as Disclosed by the Final Judgment of the Military Tribunal for the Far East" (MA, University of Washington, 1951), Walter Lee Riley, "The International Military Tribunal for the Far East and the Law of the Tribunal as Revealed by the Judgment and the Concurring and Dissenting Opinions" (PhD, University of Washington, 1957), Lawrence W. Wadsworth, "A Short History of the Tokyo War Crimes Trials with Special Reference to Some Aspects of Procedure" (PhD, The American University, 1955).

⁵⁴ Yuma Totani, "The Tokyo War Crimes Trial: Historiography, Misunderstandings, and Revisions" (PhD, University of California, Berkeley, 2005), James Burnham Sedgwick, "Western Reaction to Allied War Crimes Operations in the Far East, 1945-1951: Apathetic and Insignificant?" (MA, University of Canterbury, 2004), Evan Moore, "The Trial of Japanese Modernization: The Tokyo War Crimes Trial" (MA, The American University, 2001).

piecemeal to the IMTFE mosaic. However, none of the existing theses or dissertations treats the tribunal as a broad, shared, and dynamic experience. Their narrow focuses blind the reader to the complexity of being international in Tokyo, and how the involute ‘trial within’ made the IMTFE an inherently contested and contestable court and institution.

The IMTFE historiography is more extensive than usually acknowledged. Boister, Cryer, Futamura, and Totani in particular have reinvigorated and transformed the field. Yet limitations persist. For example, Boister and Cryer’s legal analysis only scratches the surface of the IMTFE’s personal, diplomatic, and cultural dimensions. Likewise, by focusing on the tribunal’s legacy in Japan, both Futamura and Totani neglect its broader international context. Similar deficiencies typify the field’s article-length contributions. My research does not fundamentally attack existing works. Instead, it complements the literature by introducing novel, more layered, ways to view the court in order to take the historiography to unprecedented depths, analytically and empirically. Using new sources filtered through a fresh outlook, this dissertation draws broad conclusions about the lived experience and essence of international justice and organisation in Tokyo. Balancing macro and ground-level assessments forms the backbone of this analysis. Thus, alongside highly personalised examinations of emotional responses to life and work in Tokyo, this dissertation also considers grand external forces which also created the IMTFE experience. For example, the study explores the court’s symbolic valence as a racially diverse multilateral body in a world undergoing decolonisation and reconfigured imperial realities. Similarly, I examine the IMTFE’s oscillating place in the emerging Cold War system, and expose the fundamental and unappreciated internationality of a court which is still typically dismissed as a unilateral and imposed American enterprise. In other words, this dissertation explores multiple dimensions of the IMTFE experience: emotional, personal, administrative,

legal, political, international, and global. Its sustaining contribution is a wealth of sources and a variety of perspectives unified by a very intimate, personalised, and on-the-ground analysis of the tribunal as a deeply social and cultural encounter.

To date, all works on the Tokyo IMT share a fundamental weakness: they *look back to* the IMTFE when assessing its legacy. Based on artificially fixed notions of morality, legitimacy, justice, and internationalism, the literature continues to assess the tribunal on an either-or schematic. It was right or wrong; just or unjust; cynical or ingenuous; boon or bane; forgettable or extraordinary. In contrast, my study *looks forward from* the tribunal as it was, by using unique participant sources to present a ‘trial’s-eye-view’ of the IMTFE as a functioning international organisation. This approach is important because by identifying overlooked details and exploring the deep inner workings of the IMTFE this dissertation extends beyond over-simplified past constructs of hypocrisy, vengeance, and petty politicking in Tokyo. Recalibrating and fine-tuning the scope of research and historiography in this way strips bare the court, its functioning, and its place in history. In addition to building our understanding of the tribunal itself, this behind the scenes picture of IMTFE processes reveals wider, messier truths about internationalism and shows how unavoidable inconsistencies poison historical views of ambitious, idealistic institutions. The next section outlines the methodologies and sources that make this approach possible.

Research Methods and Sources

This dissertation bridges a number of historiographical and methodological approaches. A personalised viewpoint of the IMTFE in action forms the study’s core – an on-the-ground analysis and experiential understanding absent in other works. When fixed on the long-view horizon, scholars miss the intricate and immediate channels and currents below the surface. When determined to prove victors’ justice, for example, scholars see only examples of Tokyo injustice. They overlook events and individuals who contradict this

narrative, neglect the structural issues which exaggerated the appearance and reality of bias at the court, and even ignore the deeply social, cultural, and personal considerations which helped create existing prejudices. Building on the models of Glendon, Borgwardt and others, framed by human rights and international criminal law literature, and addressing voids in the existing IMTFE historiography, my dissertation presents a “new international history” of the Tokyo IMT. “New” international histories blend “‘high’ and ‘low’ political and cultural analysis”⁵⁵ of “transnational forces and their human elements,”⁵⁶ to broaden our understanding of the many dimensions of international ideas and institutions beyond the realms of power and politics. In 1997, Zara Steiner, a prominent historian of Europe and the US, argued that international history was entering a “golden age.” She wrote:

We have learned to look through the telescope from both ends and to use the microscope as well. Historians have broadened their focus not only to look at the foreign policies . . . but also to assess their place in the larger dynamics of the international system. They have looked beyond the state to the transnational institutions and global movements that have affected the modes of international behaviour in the past as they do in the present. At the same time, international historians have narrowed their focus to study how national actors operate within the constraints of their domestic situations and the limits of their own personalities and experiences.⁵⁷

New international history has grown as a methodology since Steiner’s call. Yet, international courts and other related institutions have escaped analysis from the “new” perspective. Moreover, although new international histories posit multi-perspective research, the systematic and synthetic depths reached by this dissertation remain rare.

This work also represents a social history of internationalism. Influenced by prosopography – the exploration of “common background characteristics of a group of

⁵⁵ Elizabeth Borgwardt, "Review: A 'New International History' of the 1960s," *Reviews in American History* 32, no. 2 (2004): 255-61.

⁵⁶ Hogan, "The 'Next Big Thing'."

⁵⁷ Zara Steiner, "On Writing International History: Chaps, Maps and Much More," *International Affairs* 73, no. 3 (July 1997): 544-45.

actors in history”⁵⁸ – it reconstructs linkages among the personally, professionally, socially, culturally, nationally, and politically diverse core of IMTFE participants who broke legal and multilateral ground in Tokyo. Insight from this approach to social understanding and history informs this dissertation’s exploration of how the collective IMTFE experience fit in a broader postwar international moment. The war produced a “common background” which profoundly altered social and communal engagement on local and international levels and set the conditions for imagining and implementing postwar international justice in Tokyo. My approach to the IMTFE also adds to political science and international relations discourse on “epistemic communities.”⁵⁹ These “networks of knowledge-based experts” influence state actions by “framing the issues for collective debate, proposing specific policies, and identifying salient points of negotiation.”⁶⁰ Whereas international relations scholars emphasise the normative and ideological sameness inside such communities and trace direct causal chains within their aims and advocacy, my dissertation employs a more inclusive conception of both episteme and community. Rather than detailing formal “networks” and structurally linked “experts,” the developments explored here reveal a community not necessarily predicated on official connections, preset sensibilities, or even complementary trial objectives. Instead, a diverse community developed based on shared experience and participation in a powerful international moment. The epistemic community which emerged in Tokyo did not frame debate in the distant capitals of participating governments; rather the group of “knowledge-based experts” – IMTFE participants –

⁵⁸ Lawrence Stone, "Prosopography," *Daedalus* 100, no. 1 (1971): 46.

⁵⁹ Emanuel Adler and Peter M. Haas, "Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program," *International Organization* 46, no. 1 (1992): 367-90, Peter M. Haas, "Introduction: Epistemic Communities and International Policy Coordination," *International Organization* 46, no. 1 (1992): 1-35, G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton, NJ: Princeton University Press, 2001).

⁶⁰ Haas, "Epistemic Communities," 2.

negotiated the boundaries and functions of their own experiences on the ground and behind the scenes reflecting a vast range of social, cultural, political, and personal variance.

This dissertation is the first work to apply a truly multi-perspective and interdisciplinary analysis to the IMTFE. The resulting research is both broader and more specific than previous works. It is broader because it situates the tribunal in the wider *zeitgeist* and international systems of the era. It is more specific because it presents a micro-history of the IMTFE as an operating institution surfeit with logistical obstacles, conflicting worldviews, and inter-personal challenges. Using oral histories, private collections, and official records the following chapters shed new light on the application of international criminal law in its formative stages. This dissertation opens exciting avenues of discourse in a growing field by weaving together analytical threads to produce an experiential history of a very social, political, legal, and international body. In so doing, this work expands historical understanding of the tribunal itself, advances knowledge of international criminal justice and organisation more generally, and reveals how the processes of internationalism often subsume its loftier principles and promises.

Given the wealth of available material, the historiography employs a surprisingly narrow set of sources. Indeed, much of what we know and understand about the tribunal rests on a limited selection of archives, published primary sources, and participant observations. To date, the views of only a small fraction of IMTFE employees have framed understandings of the tribunal and we have an incomplete handle on the range of experiences behind the scenes in Tokyo. This lack of depth represents probably the most fundamental weakness in the literature. To address this oversight, my research concentrates on material outside the circle of archives and individuals that have shaped how the IMTFE is remembered, recorded, analysed, and judged. Looking ‘within’ the IMTFE – through either

end of Steiner's "telescope" – becomes impossible without access to the thoughts of trial participants. My research draws from archival sources, publications by participants, private collections, and oral histories to create as complete an internal picture of the tribunal as possible. With some reason, scholars often portray the IMTFE as an example of the shortcomings of retributive transitional justice.⁶¹ However, as my in-depth view proves, the Tokyo model can be blamed only so far for the court's disruptive legacy. This dissertation uses an array of sources to deconstruct and transcend limiting suggestions of victors' justice, show trialism, and power politics by recognising the inherent complexities of internationalist endeavours. Wide research in public archives and private collections reveals a diverse cast of individuals who played integral roles in shaping the tribunal's judgment and proceedings. Using unmatched research scope and variety of sources, this dissertation challenges monolithic assumptions about IMTFE justice revealing instead a negotiated interaction among agents and actors from various cultures, beliefs, backgrounds, and languages.

Multi-archival research provides the foundation for this project. Government archives establish 'official' views of the tribunal and provide insight into the personal thoughts of prominent trial participants. My findings are based on fourteen government repositories, including: Archives New Zealand (ANZ) in Wellington; Library and Archives Canada (LAC) in Ottawa; *nationaal archief den nedelands* (NAN) in The Hague; the National Archives and Records Administration (NARA) in College Park, Maryland; the National Archives of Australia (NAA) in Canberra; and the National Archives of the United Kingdom (NAUK) in Kew. Collections housed at a number of other government-affiliated institutions also proved central to this work, particularly the Sir William Webb Papers

⁶¹ Futamura's *War Crimes Tribunals and Transitional Justice* and my own article in *Modern Asian Studies* focus on the IMTFE's inherent ineffectiveness in post-conflict resolution. Futamura, *War Crimes Tribunals and Transitional Justice*, James Burnham Sedgwick, "Memory on Trial: Constructing and Contesting the 'Rape of Nanking' at the International Military Tribunal for the Far East, 1946-1948," *Modern Asian Studies* 43, no. 6 (September 2009): 1229-54.

housed at the Australian War Memorial (AWM) Archives in Canberra; the records of French judge Henri Bernard at *La Bibliothèque de documentation internationale contemporaine* (BDIC) in Nanterre; the Indian Office Records in the Asia, Pacific and Africa Collection of the British Library (BL) in London; internal memoranda from the British contingent in Tokyo from the Imperial War Museum (IWM) archives in Duxford; and SCAP files at the General Douglas MacArthur Memorial and Archives in Norfolk, Virginia. Smaller government collections of IMTFE material include: the Olive Marshall Papers at the Auckland War Memorial Library; correspondence files at the Harry S. Truman Library and Museum; and the papers of David Sissons and Sir John Latham at the National Library of Australia (NLA). Of this selection of government-run archives, only holdings at the ANZ, the AWM, the IWM, the MacArthur Memorial, the NARA, the NAA, and the NLA have been used in other major works on the IMTFE.⁶² No other author has employed such a diverse range of government sources.

University holdings make up this dissertation's second archival base. My home institution, the University of British Columbia's Rare Books and Special Collections library holds the Robert D. Conde Papers (Reuters reporter at the trial), the E. Herbert Norman fonds (head of Canadian Legation in Tokyo during the tribunal), and a near-complete set of official IMTFE documents. I also use a number of US collections, including the Walter I. McKenzie (prosecutor) papers at the Bentley Historical Library of the University of Michigan; the Joseph B. Keenan papers at Harvard University; the Roy L. Morgan

⁶² Boister and Cryer use collections at ANZ, AWM, and NLA. Brackman cites AWM and NARA. Totani's work is based on AWM, NARA, and NAA. Futamura uses the MacArthur Memorial. Minear uses the MacArthur Memorial and the NARA. In his acknowledgments, James MacKay thanks staff at ANZ, IWM, and NAA, but does not provide any specific citations. Moreover, he has a history of plagiarism and his claims about accessing these archives are unreliable at best. James MacKay, *The Allied Japanese Conspiracy* (Edinburgh: Pentland Press, 1995). For allegations regarding MacKay's academic practices see: Gregory Hadley and James Oglethorpe, "Mackay's Betrayal: Solving the Mystery of the 'Sado Island Prisoner-of-War Massacre'," *Journal of Military History* 71, no. 2 (2007): 441-64, Ralph Blumenthal and Sarah Lyall, "Repeat Accusations of Plagiarism Taint Prolific Biographer," *New York Times* (21 September 1999): 1.

(interrogator), Frank S. Tavenner (prosecutor), and Carrington Williams (defence attorney) collections at the University of Virginia; the professional papers of John Brabner-Smith (prosecutor) at the Regent University in Virginia Beach; the Otto Lowe (personal representative of Joseph Keenan in Washington) collection at the College of William and Mary in Williamsburg; the Owen Cunningham Papers at the Gordon W. Prange Collection of the University of Maryland, College Park; and the Frances Guthrie collection at the University of North Carolina, Wilmington. Farther afield, I also worked with Justice Delfin Jaranilla's papers at the University of the Philippines in Quezon City, and the Justice E. H. Northcroft and Harold J. Evans collections at the Macmillan Brown Library of the University of Canterbury in Christchurch, New Zealand. In total, this study uses materials from ten universities. Only three of these collections have been used by other scholars.⁶³

My research is also built around several unique oral histories and rare private collections. Earlier studies of the IMTFE benefited from the insight of a number of surviving trial participants. The best examples of participant-influenced scholarship are works by Arnold Brackman, Robert Butow, Meirion and Susie Harries, Richard Minear, and John Pritchard. The oral histories conducted by these authors constitute important pieces of research. However, the participants consulted in the early historiography came from a common group of prominent tribunal employees who lived into the 1970s and 1980s. As a result, many of the literature's foundational narratives have roots in the recollections of a relatively small, overlapping sample of employees.⁶⁴ This dissertation uses oral histories from some of these 'usual suspects.' It relies in particular on the Marlene J. Mayo Oral

⁶³ Boister and Cryer use the holdings at the University of Virginia and the University of Canterbury. Richard Minear uses the material at Harvard University.

⁶⁴ George Furness, for example, was interviewed by Robert Butow, Arnold Brackman, Richard Minear, and John Pritchard. Likewise, Robert Donihi shared his thoughts with Brackman, Meirion and Susie Harries, and Pritchard. Justice Röling was interviewed by Brackman and Pritchard. A series of discussions between Röling and international criminal jurist Antonio Cassese were published widely. B. V. A. Röling and Antonio Cassese, *The Tokyo Trial and Beyond: Reflections of a Peacemonger* (Cambridge, UK: Polity Press, 1993).

History Collection at the University of Maryland, College Park which includes transcripts of interviews with Beverly Coleman, Carrington Williams, Denzel Carr, George Furness, Valentine Deale, and Robert Donihi. I have likewise procured a video recording of an interview with Robert Donihi from the Robert H. Jackson Center in Jamestown, NY. However, my research also includes in-person oral histories with IMTFE participants who have never been interviewed before. One, Arthur Menzies, served as acting chief of the “Japan Desk” for the Canadian Department of External Affairs during the tribunal. The second individual, Robert J. Crozier, worked as a file clerk at the Tokyo tribunal, a position shared by Morris Gamble, my third interview subject. I also met with Basil Buchko, a special legal analyst in Tokyo. The fifth person I interviewed, Elaine B. Fischel, served as a secretary to two prominent defence attorneys, John Brannon and William Logan. In addition, I use transcripts from several interviews with Harold Evans conducted while researching my MA thesis. These interview subjects represent normally overlooked tribunal positions and experiences which give insight to both the variety and intricacy of IMTFE internationalism. Oral histories from these individuals therefore provide novel perspectives to the IMTFE as a functioning international body and social encounter.

Private, un-published IMTFE material further augments this dissertation’s source foundations. My research uncovered 18 personal collections including diaries, photographs, scrapbooks, memorabilia, and sound recordings. Specifically, I have procured a copy of New Zealand Prosecutor R. H. Quilliam’s diary; a photo-scrap book from John Brabner-Smith (prosecutor); a diary from G. Osmond Hyde (prosecutor); and interrogation notes from Richard H. Gilliland (interrogator). Several interview subjects also shared their private holdings. The photos, personal letters, and internal memoranda supplied by Elaine Fischel, Robert Crozier, Morris Gamble, and Basil Buchko proved especially invaluable. In addition

to the substantial personal sources listed above, smaller collections have also been contributed by relatives of Bill Terzis (Joseph Keenan's driver), Peter Booras (photographer), Guido Pignatelli (prosecutor), Virginia Sunderland (secretary), Walter Dubenetsky (mess supervisor), and Williana Abrams (clerk).

A number of IMTFE participants wrote memoirs, commentaries, and legal treatises about their time in Tokyo. Published works are generally less candid than private sources. However, historical theorists and critics such as George Egerton, Jacques Le Goff, and Pierre Nora have created the methodological framework for using political memoir effectively.⁶⁵ Published primary works are also important sources for this study. Such works include books and articles by IPS employees Brendan F. Brown, Arthur S. Comyns-Carr, Robert Donihi, Rowland W. Fixel, Philip Kapleau, Joseph B. Keenan, Solis Horwitz, Christmas Humphreys, James T. C. Liu, Alan J. Mansfield, Walter McKenzie, Frederick A. Mignone, and Daniel N. Sutton. Works by IDS members are also important, especially those by Benjamin Bruce Blakeney, George F. Blewett, Owen Cunningham, Richard De Martino, Elaine Fischel, George Furness, and Carrington Williams. Publications by members of other tribunal divisions include works by Justices Röling (Netherlands), Radhabinod Pal (India), and Mei Ju-ao (China); and judicial assistants Harold Evans and Quentin Quentin-Baxter.

Chapter Outlines

This project employs unparalleled access to IMTFE sources, unique in perspective, variety, and scope. The resulting dissertation is made up of a collection of relatively autonomous segments, each exploring a distinct level of interaction at the IMTFE. Since few issues or incidents in Tokyo stemmed from only one of the chapter fields, the choice to focus on topically-rooted chapters hold the potential to hurt overall narrative cohesion and

⁶⁵ George W. Egerton, *Political Memoir: Essays on the Politics of Memory* (London: F. Cass, 1994), Jacques Le Goff and Pierre Nora, *Faire De L'histoire* (Paris: Gallimard, 1974).

flow. For example, homesickness and dissatisfaction may have caused numerous participant resignations, but emotional motivations rarely represented the sole factors in departures. My approach may be stylistically disruptive compared to more prosaically convenient chronological and teleological approaches, but any resulting confusing only illustrates the myriad challenges faced by IMTFE participants. Justice in Tokyo was not a linear, constant, or consistent encounter, and it should not be presented as such. The shifting stories told here mirror the complexity of the Tokyo experience. Participants could not compartmentalise one type of issue at a time without hindering job performance. IMTFE justice formed an undulating, varied, and negotiated process inside a tangled nexus of competing and conflicting forces. This dissertation's multiple-motif approach suits the subject in hand. The result reconstructs a historical mosaic of the IMTFE. Uncovering all the pieces of this mosaic is not possible, but by sampling from as wide a range of sources as possible, this dissertation presents the most complete picture available of the collective IMTFE experience. From this more complete picture, this dissertation reveals the daedal circuitry inside internationalism and justice in Tokyo, a complexity that determined most trial outcomes.

I rely on thematic, topical, and personnel continuity to hold this *mélange* together. First, a single argument and discursive thread binds this collection of studies: the "Trial Within" (i.e. how dissonance at various levels of interaction behind the scenes influenced the IMTFE's operation, findings, and legacy). I argue that a pattern of clash and compromise shaped every aspect of IMTFE processes. The result was a form of justice negotiated through emotional, personal, administrative, legal, diplomatic, and cultural obstacles. Second, a recurring set of incidents and issues further binds the dissertation's disparate thematic chapters. These include the resignation and replacement of representatives and the question of judicial and political bias. Other common topics include behind the scenes

interaction regarding the production of the judgment, differing internal legal opinions, and the writing and conceptualisation of the indictment and opening statements for the Defence and Prosecution. Several chapters also delve into the relations within trial divisions, in-court controversies, and various pervasive logistical challenges (such as faulty air-conditioning, courtroom technology, and security). Bigger topics include General Douglas MacArthur's part in the tribunal, the IMTFE's position in a larger Occupation project, the court's connection to other post-World War II international organisations, as well as the transnational scope, multicultural dimensions, international relations, and global contexts of the IMTFE's ambitions, administration, and era.

Third, a central cast of characters ties this dissertation's narrative together. It is not possible to give voice to every IMTFE participant. However, my research draws from an unmatched selection of sources to explore the stories of a number of tribunal individuals. From their experiences, we learn how people behind the scenes shape the processes and even outcomes of such institutions. The reader meets colourful judges like the mercurial President William Webb of Australia, the austere Erima H. Northcroft of New Zealand, the dissident Indian Radhabinod Pal, the passionate Dutch member B. V. A. Röling, the more detached Henri Bernard from France, the reserved British Lord Patrick, the unassuming yet respected Canadian E. Stuart MacDougall, the oft-overlooked but astute Justice Mei Ju-ao from China, the underrated and judicious American Myron C. Cramer, the severe Justice Delfin Jaranilla from the Philippines, the ebullient while rigorous Russian I. M. Zaryanov, and the transitory first US judge John P. Higgins. The work also details the contributions of several American and Japanese defence lawyers, as well as both high-level and junior prosecutors. Wherever possible, this dissertation complements other IMTFE scholarship by bringing forth less-acknowledged voices such as assistants, administrators, clerks, and

stenographers; translators and language authorities; investigators and interrogators; analysts and consultants; and security staff members.

Also for the first time, this work highlights the role of women at the IMTFE, both because their story remains untold, and because of their central role in building and running the complex Tokyo apparatus. We meet prominent administrators like Evelyn Alexander (secretary to Chief Prosecutor Keenan) and Elaine Fischel (secretary to first lead defence counsel Beverly M. Coleman, and later to influential attorneys John Brannon and William Logan). Readers learn the tragic experiences of Margaret McKinney (née Moose), a stenographer who married prosecutor Worth E. McKinney shortly before he died suddenly in the Ichigaya⁶⁶ justice complex, alongside the groundbreaking accomplishments of Grace Kanode Lewellyn (according to President Webb, the “first woman [ever] before an IMT.”⁶⁷). Several other female jurists became integral to the IMTFE machine, including Frances C. Morris (researcher in the Office of President Webb and co-author of a two-volume “Study on Prosecution’s Phases on Japan’s ‘Aggressive’ War”), and Betty E. Renner (an American lawyer who helped build Webb’s preliminary judgment on jurisdiction). Although not solely a social history, this dissertation represents in part a collective biography of the IMTFE experience. These individuals provide a relatable and insightful lens through which to appreciate the challenge, complexity, and core of modern internationalism.⁶⁸

This dissertation starts with the highest magnification of Steiner’s historical “microscope.” It begins with the most intimate minutia of the IMTFE experience and

⁶⁶ Ichigaya is a district in central Tokyo that contains a massive Ministry of Defence complex. Because the IMTFE courtroom and much of its administration was housed in the War Ministry Building, Ichigaya became synonymous to the tribunal itself.

⁶⁷ R. John Pritchard, Sonia M. Zaide, and Donald Cameron Watt, *The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East in Twenty-Two Volumes* (New York: Garland Publishing, 1981), 1690. Hereafter “*Transcripts*.”

⁶⁸ Listing all participants mentioned in this dissertation presents a stylistic impediment. Please refer to “Appendix IV: Cast of Characters – IMTFE Personnel in this Dissertation” for a comprehensive list of individuals, prominent and otherwise, who figure in this account. The scope and variety of personages who appear in this dissertation is unmatched by other scholars.

gradually expands scale until the final chapters discuss broad political and international matters. Chapter 1 examines a rarely acknowledged aspect of the IMTFE: the personal experiences of the tribunal's participants. Previous works examine the contributions of a select few individuals, generally the 'big players' in Tokyo. The result forms a narrow top-down perspective of life and work at the tribunal. Based on unique source material, my first chapter explores a much broader cross-section of personal experiences at the IMTFE. It provides neither a traditional elite-focused diplomatic history nor a purely social history concentrating on subaltern actors. Instead, this chapter exemplifies a new approach to international history that promotes a holistic and experiential understanding of multilateral institutions. To this end, it explores how the personal experiences of tribunal employees shaped the outcomes of justice in Tokyo on a number of levels, and how working at the tribunal, in turn, affected them.

Many employees struggled to adapt to life in Japan. After a long war, civilians and military personnel alike found separation from 'home' emotionally difficult. Demanding, unconventional work conditions in an unfamiliar setting presented personal and professional challenges. Reconciling the lofty ideals and expectations of international justice with frustrating on-the-ground realities drove personnel to despair. Interpersonal acrimony increased the emotional burden of IMTFE employment and created rifts within trial divisions. These issues had a direct impact on the tribunal, causing long absences from the court, resignations by judges and lawyers, and the entrenchment of biases. However, working at the IMTFE also formed a turning point that irrevocably shaped the futures of many participants. Some individuals, such as defence counsel Ben Blakeney and George Blewett, spent the rest of their professional lives in Japan. For others the opportunity had more profound, psychological effects. New Zealander Harold Evans, for example, felt so

affected by the suffering that he witnessed in Hiroshima and Nagasaki that he later became instrumental in a global effort to criminalise nuclear weaponry. Similarly, Philip Kapleau – a court reporter in Nuremberg and Tokyo – emerged so emotionally scarred by recording wartime atrocities that he experienced a spiritual breakdown in Tokyo. Turning to Buddhist tenets, Kapleau became a monk and later one of the foremost Western interpreters of Zen. How tribunal employees responded to their assignment in Tokyo fundamentally shaped both the administration of justice in Tokyo and the IMTFE’s long-term legacy.

This study’s second chapter examines the administrative and organisational challenges met in Tokyo. Even in ideal circumstances, the specialised demand for personnel (highly regarded judges, talented trial attorneys, trained legal clerks, competent translators, experienced court reporters, etc.) and the volume of equipment and material needed to run the IMTFE would have presented supply problems. Postwar Japan hardly represented an ideal operational setting. First, working in “enemy” territory bred a culture of perceived insecurity and secrecy among many participants. Resulting safety protocols increased the IMTFE’s administrative burden. Second, as an international court, the tribunal necessarily became transnational operation. Participants scoured the globe for evidence resulting in monumental demands on personal and transportation costs. Third, the IMTFE formed only part of a much larger Occupation project intent on overhauling and restructuring all aspects of Japanese government, society, and history. The IMTFE competed for resources with a multitude of SCAP institutions pursuing disarmament, demobilisation, liberalisation, land reform, constitutional democratisation, educational reordering, reformatted labour standards, and other transitional ventures. Meeting the tribunal’s institutional demands became an ongoing negotiated process. Despite concerted efforts, the IMTFE never had optimal staffing, which resulted in an inconsistent and often unequal sharing of personnel between

the prosecution, defence, and secretariat. Technical difficulties – e.g. with translation machinery and air conditioning – also delayed and obstructed the tribunal. These ostensibly mundane aspects of running an IMT in war-ravaged Japan left indelible marks on the application of justice in Tokyo, both in court and out. This chapter provides unique insight to how unavoidable administrative challenges influenced the IMTFE’s effectiveness and helped create the enduring perception of victors’ justice in Tokyo.

This dissertation’s third chapter probes clashes of legal philosophies, practices, and cultures at the IMTFE. The law in Tokyo hinged on a principle-and-practice fulcrum which grew out of and exaggerated preformed formalist and pragmatist legal sensibilities. The tribunal’s role as a pioneer in international jurisprudence made it an inherently improvised proceeding. International law held just enough uncertainty to allow enormous judicial latitude, and political expediency and public pressure gave plenty of motivation to cut corners. Focusing on behind the scenes legal debates regarding precedent, “conspiracy” and “murder” charges, evidentiary procedures, and IMTFE jurisdiction, this chapter explores the interplay of personal legal sensibilities and structural considerations in international justice. Intellectual openness and willingness to compromise in the face of on-the-ground conditions (legal, political, logistical, and otherwise) emerged as the determining factor of IMTFE jurisprudence. This ideological and personal mix filtered through a kaleidoscope of differing philosophies of law and national legal cultures, including Anglo-American common law practices, civil and continental law tenets, the hybrid Philippines legal system, and the Socialist law of the USSR. At the end of the day, however, willingness – or not – to accept the IMTFE’s underpinnings created international law in Tokyo. Law on paper differed greatly from law on the ground in Tokyo. Shared interest in getting the trial “done” and united commitment to the broad principles of IMTFE justice, forced pragmatically-inclined

Tokyo judges and lawyers to find common ground and make binding legal decision despite their differences. Social interaction and personal receptivity therefore played a meaningful role in forming IMTFE judicial legacies; although more formalist inclined jurists proved by nature less susceptible to informal influences. The IMTFE in operation lived and died on judicial compromise. Regrettably, the inevitable concessions of international justice have poisoned the tribunal's judicial and historical afterlife.

Chapter 4 looks beyond Tokyo to establish the IMTFE's place in, relationship with, and significance to contemporaneous international affairs. The tribunal took place in a uniquely transitional period of global history. The court's proceedings bridged three dramatic sea changes: a surge of postwar idealism, the entrenchment of Cold War tensions, and the first wave of massive decolonisation. This chapter reveals that while the IMTFE was never entirely subject to these movements, all three nevertheless shaped the tribunal. First, it positions the IMTFE within the broader context of expanding international organisation and global governance of the postwar era. The "Never Again"-idealism birthed during and after World War I,⁶⁹ re-emerged in the post-World War II era, and helped crystallise international legal and human rights norms. In spite of enormous political and personal variance, most Tokyo participants believed strongly in these ideals; a commitment to internationalism which influenced their work. Regardless of the cynicism which pervades the tribunal's later history and historiography, during its operation the IMTFE evolved as a distinctly idealistic venture. The Cold War cast an erratic shadow in Tokyo. The courtroom provided a stage for propaganda and grandstanding from all parties of the developing conflict. On the other hand, the day-to-day operations behind the scenes created friendship and professional relationships among participants which overcame even the most deeply entrenched national political rivalries. As a result, the IMTFE as a multilateral institution largely transcended the Cold

⁶⁹ G. Lowes Dickinson, *The Greek View of Life* (New York: Doubleday, Page & Company, 1919).

War. The tribunal had a more complicated colonial context. Its indictment represented an *anti*-colonial document. Though rarely phrased in this way at the tribunal, the Japanese “aggression” alleged in the indictment was essentially empire gone awry. The imperial powers sitting in judgment at Tokyo could not, and did not, miss the irony. The IMTFE also embodied the new *de*-colonised world. With judges and prosecutors from Burma, India, and the Philippines, the court became one of the first institutions to welcome former colonised people to the global community. On the other hand, the IMTFE also furthered a *neo*-colonial agenda both as part of quasi-imperial Occupation of Japan, and because some of its participant governments continued to build and consolidate empires.

The IMTFE constructed internationalism, a gritty interface of politics and processes. Representatives from eleven countries arrived in Tokyo, each with distinct sets of political objectives. Reconciling such diverse national agendas formed the tribunal’s backdrop. This study’s final chapter examines international relations on several levels of interaction in Tokyo. Because the IMTFE became in many ways the first truly international court, the pattern of international legal engagement established in Tokyo became the model, or at least the harbinger, of future courts. To establish the tribunal’s internationality, this chapter begins by dismantling the dominant historiographical notion that the IMTFE formed an “American trial.” Focusing on General MacArthur’s role, this section proves that though superficially unilateral, in practise the IMTFE become a distinctly multilateral institution. The so-called “Empire Bloc” of British Commonwealth countries represented the main challenger to US dominance. The second part of this chapter explores how individual representatives from the Empire bloc exerted political influence at the IMTFE. However, the tribunal emerged as more than an American and British institution. This chapter’s final section emphasises the role played by personalities and politics from “other” countries –

China, France, India, the Netherlands, the Philippines, and the USSR – in Tokyo. By asserting national interest, representatives from these countries took the tribunal to an unprecedented level of internationality. It became both an important symbol of a new era of multilateralism, an actual embodiment of internationalism in action. The chapter demonstrates that no one state achieved all of its aims in Tokyo, because every state and individual negotiated on-the-ground realities and outside forces which typify modern global governance. In this analysis, internationalism emerges as a verb and noun, a practise, process, and idea. The system of clash and compromise behind the scenes at the IMTFE reveals the intrinsic and endemic difficulties that make it so difficult for institutions of global community to live up to their principles and promise. The inevitable disappointment and frustration haunts memory and history of Tokyo and elsewhere.

CHAPTER 1: A People's Court: Emotion, Acrimony, and the Participant Experience of International Justice¹

On 3 May 1946, the IMTFE opened to great ceremony in Tokyo. "Cameras clicked, reporters wrote madly, V.I.Ps. were duly impressed," a British prosecutor later recalled, "even the hard-boiled lawyers realised that this, whatever else it was, was history."² The tribunal represented a monumental undertaking.³ Eleven judges from Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, and the United States brought Japanese leaders to justice for crimes against peace, crimes against humanity, and conventional war crimes committed during World War II. Nearly two and a half years later, after what newspapers dubbed the "Longest trial in history,"⁴ the IMTFE issued a more than 1,500-page judgment. The tribunal found all accused guilty and sentenced seven to death. Sixteen received life sentences, and two were assigned shorter prison terms.⁵

As discussed previously, scholars often study large institutions on correspondingly broad interpretive levels, including geopolitics, ideology, socio-economics, diplomacy, culture, law, and ethics. Applying such analyses to the IMTFE has merits, but this chapter introduces a

¹ Portions of this chapter have been published as: James Burnham Sedgwick, "A People's Court: Emotion, Participant Experiences, and the Shaping of Postwar Justice at the International Military Tribunal for the Far East, 1946-1948," *Diplomacy & Statecraft* 22, no. 3 (September 2011): 480-99.

² Christmas Humphreys, *Via Tokyo* (London: Hutchinson & Company, Ltd., 1948), 83.

³ The IMTFE was a judicial undertaking unmatched in size and scope. For more on the court's institutional and administrative scale see Chapter 2: Trial through Fire: Logistics and Victors' Justice in Tokyo.

⁴ "Tojo Gets Death Penalty for Japan's 'Murder of Millions'-- 6 Other Leaders Will Also Hang," *Vancouver Sun*, 12 November 1948, 1, "Japan Guilty," *New York Times*, 5 November 1948, 24.

⁵ The twenty-five accused who received verdicts from the IMTFE were: Araki Sadao (Life Imprisonment), Doihara Kenji (Death by Hanging), Hashimoto Kingorō (Life Imprisonment), Hata Shunroku (Life Imprisonment), Hiranuma Kiichirō (Life Imprisonment), Hirota Kōki (Death by Hanging), Hoshino Naoki (Life Imprisonment), Itagaki Seishirō (Death by Hanging), Kaya Okinori (Life Imprisonment), Kido Kōichi (Life Imprisonment), Kimura Heitarō (Death by Hanging), Koiso Kuniaki (Life Imprisonment), Matsui Iwane (Death by Hanging), Minami Jirō (Life Imprisonment), Mutō Akira (Death by Hanging), Oka Takazumi (Life Imprisonment), Ōshima Hiroshi (Life Imprisonment), Satō Kenryō (Life Imprisonment), Shigemitsu Mamoru (7 Years Imprisonment), Shimada Shigetarō (Life Imprisonment), Shiratori Toshio (Life Imprisonment), Suzuki Teiichi (Life Imprisonment), Tōgō Shigenori (20 Years Imprisonment), Tōjō Hideki (Death by Hanging), and Umezū Yoshijirō (Life Imprisonment). The tribunal originally arraigned three others who did not receive sentences. Nagano Osami and Matsuoka Yōsuke died during the proceedings, and Ōkawa Shumei was deemed mentally unfit. See: "Appendix III: Defendants at the IMTFE."

different scale for understanding the tribunal in operation. IMTFE participants from manifold backgrounds carried out wide-ranging roles behind the scenes in Tokyo. Each participant experienced and participated in the tribunal differently. Together, these individual encounters created a collective IMTFE experience. This chapter first explores how working in Tokyo affected the health, psychology, and temperament of a selection of IMTFE participants.⁶ It then suggests how participant responses, in turn, influenced the tribunal's proceedings, findings, and legacy. Of course, the personal and emotional dynamics described herein formed only part of the IMTFE experience. As later chapters in this dissertation demonstrate, logistical issues, legal matters, political considerations, global developments, and other factors also shaped justice in Tokyo. Nevertheless, the personal responses identified herein were common and emotions configured job performance, individual temperaments, and overall competencies. Ultimately, this chapter argues that emotion, acrimony, and other deeply personal responses had profound consequences on IMTFE participants, proceedings, even outcomes. In international Tokyo, personal satisfaction and happiness helped determine professional effectiveness. Under intense public scrutiny, even the smallest faults magnify into glaring weaknesses. The emotional rigours of the IMTFE experience caused many participants to underperform, exacerbated personal vices, and prompted widespread resignations. The resulting perception of incompetence and disinterest feeds into misconceptions about the IMTFE, especially reductive assumptions of victors' justice. Using Tokyo as a model, this chapter suggests that international organisations are only as effective as the contributions of the people involved. By acknowledging multiple participant experiences in Tokyo, it reveals heretofore-overlooked social, emotional, and personal

⁶ The participants explored in this chapter are selected to reflect a range of IMTFE divisions and experiences. The twenty-three individuals focused on here would be an important and under-examined dimension of the IMTFE even if they were the only participants to experience the tribunal in the ways described. Based on collateral research, however, I believe they suggest a much wider and consequential pattern of international justice in operation in Tokyo and elsewhere.

dimensions to international organisation and justice. In so doing, it builds knowledge of the essence of modern global governance and helps explain some of the internal matters which complicate the high promise of internationalism when put into practise.

Emotion, Law, and International History

This chapter brings together several emerging trends in the fields of international history and legal studies. In so doing, it fills an important discursive space between two fields that should – but typically do not – intersect.⁷ First, it contributes historical depth to important recent legal scholarship exploring the tricky relationship between emotion and the law.⁸ Second, this chapter complements innovative work by Frank Costigliola, Richard Immerman, Barbara Keys, and others on how the emotions and psychology of policymakers influence international relations.⁹ More fundamentally, it responds to calls by Zara Steiner, and Michael Hogan for research “beyond the state” on the “transnational” and “human” contingencies that affect multilateral bodies and world affairs discussed in detail last chapter.¹⁰ Marc Gallicchio’s work on US military extension in Japan following the war also informs this chapter. As one reviewer

⁷ Elizabeth Borgwardt suggests, “Historians willing to engage in a transdisciplinary dialogue with legal scholars might potentially make a huge contribution to the study of multiple dimensions in the field of human rights—politics, ideas, institutions, and culture.” Elizabeth Borgwardt, “A New Deal for the Nuremberg Trial: The Limits of Law in Generating Human Rights Norms,” *Law and History Review* 26, no. 3 (2008): 705.

⁸ Terry A. Maroney, “Law and Emotion: A Proposed Taxonomy of an Emerging Field,” *Law and Human Behavior* 30, no. 2 (April 2006): 119-42, Oliver R. Goodenough and Kristin Prehn, “A Neuroscientific Approach to Normative Judgment in Law and Justice,” *Philosophical Transactions: Biological Sciences* 359, no. 1451 (2004): 1709-26, Richard L. Wiener, Brian H. Bornstein, and Amy Voss, “Emotion and the Law: A Framework for Inquiry,” *Law and Human Behavior* 30, no. 2 (2006): 231-48, Olga Tsoudis and Lynn Smith-Lovin, “How Bad Was It? The Effects of Victim and Perpetrator Emotion on Responses to Criminal Court Vignettes,” *Social Forces* 77, no. 2 (1998): 695-722.

⁹ Costigliola, “‘Unceasing Pressure for Penetration,’” 1309-39, Frank Costigliola, “‘I Had Come as a Friend’: Emotion, Culture, and Ambiguity in the Formation of the Cold War,” *Cold War History* 1, no. 1 (August 2000): 103-28, Frank Costigliola, “‘Mixed up’ and ‘Contact’: Culture and Emotion among the Allies in the Second World War,” *International History Review* 20, no. 4 (December 1998): 791-805, Frank Costigliola, “After Roosevelt’s Death: Dangerous Emotions, Divisive Discourses, and the Abandoned Alliance,” *Diplomatic History* 34, no. 1 (January 2010): 1-23, Richard H. Immerman, “Psychology,” *The Journal of American History* 77, no. 1 (1990): 169-80, Barbara Keys, “Henry Kissinger: The Emotional Statesman,” *Diplomatic History* 35, no. 4 (September 2011): 587-609, Frank Costigliola, *Roosevelt’s Lost Alliances: How Personal Politics Helped Start the Cold War* (Princeton: Princeton University Press, 2012).

¹⁰ Hogan, “The ‘Next Big Thing,’” 14, Steiner, “On Writing International History,” 544-45.

noted, Gallicchio's *Scramble for Asia* demonstrates how the behaviour and mentality of "ordinary" people in "far from ordinary situations" abroad "influence or frustrate the plans and assumptions of the highest level policymakers who are the normal subjects of traditional diplomatic history."¹¹ This dissertation argues that justice in Tokyo formed a negotiated process that must be understood on both macro *and* micro levels.

This chapter begins at the micro scale to look deep into the IMTFE in action. It does not challenge macro views of international history or law; rather, it complements existing studies by focusing on a particularity: the people behind the processes in Tokyo. By adding a targeted perspective on postwar accountability, this chapter contributes to a richer, more complete, understanding of past, present, and future international justice and organisation. Using multi-archival research, it explores an overlooked aspect of the IMTFE: personnel, the tribunal's effect on them, and the impact of their experiences on the tribunal itself. Angus Calder famously labelled World War II a "people's war."¹² This chapter reveals that it also became a people's *post-war*. Citizenry, thinkers, activists, and politicians emerged from the war determined to effect change, and their experiences shaped the postwar world in Tokyo and elsewhere. Personal issues became important because they affected a key international court during a transformative era. The very novelty of the Tokyo experience shaped personnel responses. Its promise became its peril; its importance their impatience; its experience their exasperation; its processes their pain. This chapter reveals that in complex, complicated scenarios built on grand ideas and ideals, individuals respond with heightened emotional force based in part on exaggerated expectations. Elevated emotive conditions, in turn, feed personal attitudes, complicate internal processes, and

¹¹ Ronald Spector, "Review: Rarely out of the Sound of Gunfire: Asia in the Wake of World War II - Review of Marc Gallicchio, *Scramble for Asia: US Military Power in the Aftermath of the Pacific War* (2008)," *Diplomatic History* 34, no. 5 (November 2010): 941-44.

¹² Angus Calder, *The People's War: Britain 1939-1945* (New York: Pantheon Books, 1969).

amplify already high stakes. Thus, participant experiences and emotions become crucial influences within magnified international spaces, perhaps especially in raw and intimate encounters with post-conflict justice and transition.

This chapter's approach and findings produce an awkward line of argument and set of questions for the related field. Scholars of human rights and mass violence have little patience for the incidental emotional distress of observers, advocates, and jurists. With some justification, they assume that researching second-hand trauma implicitly equates tertiary suffering to the true, horrific, experiences of victims and survivors. Apart from the few works mentioned earlier, legal scholars likewise skirt questions of affect, falsely secure in the law's inviolability from both corporeal issues and spiritual biases. Instead, legal works analyse only the law created, interpreted, and passed on by international courts, not the people behind processes. Meanwhile historians, especially international and diplomatic historians, maintain an uncomfortable relationship with ostensibly petty conditions and contingencies like emotions and sensibilities. On the long, broad plane of history, personal matters seem impossibly trivial, particularly when compared to the grand forces of politics, power, even culture. Because history is – or purports to be – an open, receptive discipline, historians know that affect and other “minutiae” (e.g. the administrative and logistical issues explored in the next chapter) *should* be acceptable research avenues. Yet, in practise, conventional tropes pervade which assume that lesser is lesser, minor is minor, and can never be more. The fact that this project needs to address the “so what?” test, and justify methods that really should be as accepted as any other, reflects how deeply entrenched assumptions about politics, power, rationality, and knowing are in history and historiography. Even pioneers like Frank Costigliola feel compelled to prove and explain the value of emotional

history in every publication.¹³ In contrast, proponents of so-called ‘real’ drivers rarely face pressure to articulate why geopolitics and other such forces ‘matter.’ The unacknowledged double standard, of course, is that historians of purportedly ‘rational’ and ‘knowable’ forces such as power and politics base their assessments as much around personal intuitive assumptions as their supposedly less rigorous colleagues who study affect. It may be easier to assess and “prove” clear causality by conventional means and sources, but easier is not necessarily truer. Moreover, conventional questions rest on artificial assumptions of structure, reason, and consistency in international affairs and relations. As Costigliola argues, “Claims of causal relations in complex historical developments are often overstated. Historical proof about large issues is almost never proof or even demonstration, but rather a matter of convincing, showing, and suggesting.”¹⁴ However regrettably, this imbalance dominates the field, despite inroads by social and cultural historians of international relations. Rather than construct a competing but equally reductive narrative, this chapter accepts the IMTFE as a fluid and malleable encounter complicated by both its international scope and the scope of its internationalism.¹⁵ This chapter proves that within this complex space participant experiences mattered alongside considerations of politics and power. Personal and intimate considerations, therefore, form a core component of how institutes of global governance function in the modern world.

¹³ In 2004, Costigliola defended affective history, while concurrently lamenting reductive demands for causation. “In our own lives, most of us acknowledge, at least deep down, that emotions – whether compelling anger or dislike, underlying moods of satisfaction or discomfort, or predispositions based on personal predilections or past experiences – condition, but of course do not determine, how we approach issues, make decisions, and evaluate what is important. Furthermore, scholars, like elite decisionmakers, generally operate within discourses that privilege ostensibly rational evaluation. Regardless of our gut level reaction to a scholarly article or conference presentation, we generally need to package our praise or criticism as a rational argument in order for it to carry weight with other scholars.” Frank Costigliola, “‘Like Animals or Worse’: Narratives of Culture and Emotion by U.S. And British POWs and Airmen Behind Soviet Lines, 1944-1945,” *Diplomatic History* 28, no. 5 (November 2004): 754.

¹⁴ Ibid.

¹⁵ Daniel Wickberg helpfully warns against treating emotions as an entirely distinct analytical and discursive notion. “The problem with the history of emotions is its tendency to separate emotion from cognition, to treat emotions as if they were a discrete realm rather than seeing them as linked to larger characterological patterns involving modes of perception and thinking as well as feeling.” Daniel Wickberg, “What Is the History of Sensibilities? On Cultural Histories, Old and New,” *American Historical Review* 112, no. 3 (2007): 682.

The Participant Experience: Unsettled, Unhappy, Uncomfortable, Under Pressure

International justice entails just that: administering justice in an international setting. Tokyo personnel faced both the difficulties of breaking legal ground and the challenge of working in a distant, foreign land away from friends and family. Participants sacrificed much to work in Tokyo. The resulting dislocation affected job performance, personal commitment, and general satisfaction, shaping the IMTFE in the process. Seemingly mundane participant experiences remain an unexplored yet crucial dimension of the tribunal which help explain how IMTFE processes failed to match its principles, a contradiction that feeds dominant tropes of victors' justice. In some ways, the Tokyo experience may well have exceeded the expected functioning of any similar international body. The scope of personal difficulties, the distance personnel ended up from home, the cultural difference they encountered, and the judicial as well as logistical challenges they faced certainly proved more disruptive than Nuremberg equivalents. However, the *kinds* of problems met by IMTFE personnel remain endemic to all related international bodies, judicial or otherwise.

Japan felt like a strange place to most participants, an unfamiliarity which promoted divisive discourse. Many struggled to adapt to life abroad. Dutch Justice B. V. A. Röling exemplified the cultural disconnect forced by working in postwar Tokyo. Röling became a double-outsider: not 'insider,' not 'other.' He never penetrated the predominantly Anglo-American inner sanctum which formed the tribunal majority.¹⁶ Yet, as a European, Röling never fully became 'othered' by the Occupation establishment either, unlike his Indian confrere Pal or the Japanese public. Separated from family, Röling's idiosyncratic existence inspired musings on the liminality of life in Japan. In May 1946 he explained to a friend, "Time goes here different from at home; is just slipping through your fingers as worthless grains of sand. And you wonder,

¹⁶ All non-Anglo-American judges wrote separate opinions except for Mei Ju-Ao (China) and I. M. Zaryanov (USSR).

what is reality here, and what a dream. For it is like a dream here . . . It is a strange country.”¹⁷

Röling continued:

So we go on . . . feeling as a civilian in this generals-hotel, between all those stars, a bit as a cloudy night. It is a very interesting world. But often I am thinking of good old Zeeland, of quiet Walcheren with its far-away clouds and wide horizons, as of a lost paradise.¹⁸

Röling’s eloquent reflections on IMTFE life revealed an intensely emotional displacement. “You can walk here and be amazed,” Röling wrote in August 1947. “But, in the long run, you cannot get in touch with your surroundings. They are spiritually ‘off limits.’ . . . you go through it as a spectator, who does not share the game, and at least feels a bit lonely and unhappy.”¹⁹ Elsewhere, Röling described the peculiar challenge of multilateralism on the ground: “More or less we are living in a world apart, an international society which does as all international societies do.”²⁰ Feelings of otherworldliness were not limited to ‘outsiders’ like Röling. Indeed, this type of experience cut across trial divides. American interrogator G. Osmond Hyde, for example, shared Röling’s sense of disjunction despite being well positioned within the Occupation establishment. “This is a strange New Years Day but we are in a very strange land,” he recorded in his diary in 1946.²¹ Like Röling, Hyde found solace in correspondence from friends and family. Letters from home, he confided, “bring me back to earth and put me in a live world again.”²²

After a long war, Röling, Hyde, and other IMTFE personnel found separation from home particularly difficult. The resulting dislocation manifested itself in different ways. Otto Lowe, a personal assistant to Chief Prosecutor Joseph B. Keenan, mentally refused to accept relocation to

¹⁷ B. V. A. Röling to Donald Nisbet (6 May 1946), Archief van B. V. A. Röling - 2.21.273, *Nationaal Archief Den Hague, Bestanddeel 27*. Hereafter “Röling Papers.”

¹⁸ B. V. A. Röling to Donald Nisbet (6 May 1946), Röling Papers, Box 27.

¹⁹ B. V. A. Röling to Patricia Daly (27 August 1946), Röling Papers, Box 27.

²⁰ B. V. A. Röling to Hans von Hentig (28 August 1947), Röling Papers, Box 27. Borgwardt encapsulates the “bizarre eccentricity” of international justice in Nuremberg. Borgwardt, *A New Deal for the World*, 202.

²¹ Entry: 1 January 1946, G. Osmond Hyde Diary, Private Collection. Hereafter “Hyde Diary.”

²² Entry: 16 January 1946, Hyde Diary.

Japan from his home in Cape Charles, Virginia. “If you asked him the time of day,” fellow prosecutor Robert Donihi later recalled, “he always would say, ‘Well, in Cape Charles . . .’ His watch always had the Virginia time on it!”²³ Lowe eventually returned to the US to work as Keenan’s stateside representative. Walter I. McKenzie, a prominent member of the International Prosecution Section (IPS) became a prolific correspondent. His personal papers reveal a palpable yearning for family and a reluctance to accept Japan as “home” in any way – no matter how temporary. When referring to his Tokyo residence, McKenzie often added a question mark. On 4 September 1946, for example, he wrote to his wife about a long day in the office saying, “It was after ten before I reached *home (?)* It was 11:30 before I was unpacked and ready for bed.”²⁴ Likewise, he apologised to his daughter Peggy on 15 September 1946 for not sending her birthday present on time, explaining that it would be “dark when I get *home (?)*” and therefore too late to catch the mail ship.²⁵ Unwilling or unable even linguistically to accept life abroad, McKenzie’s felt profound dislocation. Perceived failures in family duties compounded the issue. In less than a year, McKenzie missed his four daughters’ birthdays, became a grandfather, and lost both his father-in-law and mother-in-law. On their thirtieth wedding anniversary, McKenzie wrote dejectedly to his wife, “You can’t know how much I miss you and how lonesome I get at times. You are home with our family and your friends; I am alone among strangers in a foreign land.”²⁶ A later letter was more direct: “It doesn’t seem right for me not to be there now.”²⁷

²³ Robert Donihi Interview with Kay Dove Part I (30 November 1978), Andrews Air Force Base. Hereafter “Donihi Interview Part I.” Transcript available in the Marlene J. Mayo Oral History Collection in the Gordon W. Prange Collection, University of Maryland, College Park, MD. Hereafter “Mayo Collection.”

²⁴ Walter McKenzie to Connie McKenzie (4 September 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - September 1946 [emphasis added].

²⁵ Walter McKenzie to Peggy McKenzie (15 September 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - September 1946 [emphasis added].

²⁶ Walter McKenzie to Connie McKenzie (4 July 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family – July 1946.

²⁷ Walter McKenzie to Connie McKenzie (26 September 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - September 1946.

Many other participants shared McKenzie's dislocation and loneliness. Associate Prosecutor for New Zealand R. H. Quilliam felt the strain of missing important family occasions. After the difficult birth of a grandson, Quilliam fretted about the well-being of both baby and mother, writing, "It is trying that I do not know for certain and can only speculate as to what has happened."²⁸ Feelings of familial inadequacy burdened IMTFE participants to the point where some decided to leave or contemplated leaving Tokyo. Losses in Carrington Williams' family precipitated the defence attorney's premature departure. After the sudden death of both his father and sister-in-law, Williams asked permission "to come back and to be with my family as soon as possible" in August 1947. During a later interview, Williams admitted that he left "earlier than I otherwise would have" because of the strain.²⁹ Likewise, prosecutor Amos W. W. Woodcock returned home in February 1946 because his sister and only surviving relative took ill.³⁰ After only a few months in Japan, British prosecutor Arthur Comyns Carr grew unsettled by the lack of word from his family in England. The agitated prosecutor told London that he had accepted the assignment "on [the] clear understanding that mail came twice weekly in special bag." Unless the service improved, Comyns Carr announced, he would "seriously consider returning home."³¹ Osmond Hyde also struggled with lack of word from home, though it did not push him to quitting. After arriving in Tokyo, Hyde became vexed by "One month and two days of enforced silence from home." When his "first mail" arrived on 4 January 1946, the interrogator exhibited palpable relief. "I do not remember any letter that was ever more welcome," he

²⁸ Entry: 27 April 1946, R. H. Quilliam Diary, Private Collection. Hereafter "Quilliam Diary."

²⁹ Carrington Williams, Interview with Kay Dove (30 January 1980), Fairfax, Virginia, Mayo Collection. Hereafter "Williams Interview."

³⁰ Woodcock's associate Osmond Hyde noted the departure with sadness, "He is a splendid man, a good lawyer, and a real friend of mine. I am going to miss him." Entry: 22 February 1946, Hyde Diary.

³¹ A. S. Comyns Carr to Attorney General, London (13 April 1946), Imperial War Museum and Archives, Duxford, United Kingdom. FO 648, Box 152, Folder 3. Hereafter "IWM Papers."

remarked.³² Dislocation formed an undeniably common experience. McKenzie, Williams, Woodcock, Comyns Carr, Hyde, and others knew that working at the IMTFE would mean serving far from home. However, few anticipated just how difficult they would find conditions on the ground or the intensity of the resulting emotional disconnect.

Losses in Tokyo also distressed participants. In September 1946, a plane crashed carrying Rex Davies, a member of the British prosecuting team, and Colonel Cyril Wild, a British war crimes investigator and recent IMTFE witness. The news hit British Commonwealth representatives at the IMTFE particularly hard. “You can imagine what a shock it was to us,” confided Harold Evans to his parents.³³ R. H. Quilliam bleakly admitted to his diary, “We are all very depressed about it.”³⁴ Another dramatic death also unsettled personnel. On 24 January, Frank Tavenner found fellow prosecutor Worth E. McKinney lying dead in a corridor of the War Ministry Building (which housed the IMTFE courtroom). Only 48 years old, McKinney’s loss felt doubly tragic because he had only recently married a member of the IPS administrative pool (Margaret McKinney née Moose). The death affected even participants who had already returned home. Brendan F. Brown in Washington mourned the “terrible tragedy.”³⁵ Back in Detroit, Walter McKenzie expressed “deepest and sincerest sympathy” to McKinney’s widow. “I realize it was a great shock to you to be left alone in a foreign land after so short a married life, but I know you have the strength of character and courage to stand up under your loss.”³⁶ Margaret

³² Entry: 4 January 1946, Hyde Diary.

³³ Harold Evans to Parents (29 September 1946), Evans Papers, Box 16, Item 1.

³⁴ Entry: 27 September 1946, Quilliam Diary.

³⁵ Brendan F. Brown to Walter McKenzie (5 February 1947), McKenzie Papers, Box I, Folder: Correspondence – January-February 1947.

³⁶ Walter McKenzie to Margaret McKinney (29 January 1947), McKenzie Papers, Box I, Folder: Correspondence – January-February 1947.

left Japan shortly after her husband's death.³⁷ On a cold administrative level, personnel losses of any kind proved disruptive to trial divisions who already felt chronically under-staffed. Davies and both McKinneys had to be replaced, and finding suitable replacements took time. In the meantime, the extra work increased the burden on associates and overstretched individuals usually meant diminished job performance. Aside from personnel decrement and structural hurdles, however, the human dynamics of sudden deaths muddied the emotional waters of the IMTFE experience. The unique international space carved out by the IMTFE in Tokyo heightened loss and anxiety. In an unfamiliar setting, many participants felt peculiarly vulnerable, exposed, and isolated. Shocking violent deaths like Davies' or sudden, intimate passings like McKinney's, fed the general and growing sense of unease and dissatisfaction in Tokyo.

The IMTFE project's high stakes and lofty expectations made it especially difficult for personnel to adjust to the on-the-ground realities and frustrations of international justice in Tokyo. As Chapter 4 details, many participants arrived in Japan with a near messianic conviction in the IMTFE's power to change history. Envisioning a newer, better, internationalism to guarantee future world peace, behind the scenes in Tokyo, personnel faced demoralising, infuriating, even harmful conditions instead. "The fact that this International Military Tribunal was to be one of the first, and certainly the most comprehensive military tribunal in history, rather intrigued me," Walter McKenzie confided to a friend. "It was the belief that some new and vital principles of International Law would be developed from these trials that induced me to leave my 'happy home.'"³⁸ Osmond Hyde embodied the spirit of the occasion. "As each day I continue with my work I am mindful of the considerations inherent in this enterprise. I appreciate

³⁷ Details about McKinney's death are gleaned from unlabelled newspaper clippings in the Otto Lowe Papers, College of William and Mary, Special Collections Research Center, Williamsburg, Virginia, MSS 65-J24, Box III, Item 8. Hereafter "Lowe Papers."

³⁸ Walter McKenzie to Estes Snedecor (12 July 1946), McKenzie Papers, Box I, Folder: Correspondence – July 1946.

how great our duty and responsibility is,” he wrote. “I am trying hard to make certain that my part is being done well,” Hyde continued. “There are chapters written in the lives of people. I do hope that this chapter in my own life will be all that the circumstances affords.”³⁹ Living up to such elevated expectations also affected defence lawyers. During an in-chambers conference on how to expedite proceedings in June 1947, for example, defence attorney William Logan spoke to the competing strains of emotional dissonance. “Many of us, practically all of us want to get home, and we have our businesses and our families to go back to. It is a sacrifice being over here and conducting this trial,” Logan began. Yet, “we would be very derelict in our duty if we quit and go home . . . We feel that when the lives of twenty five men are at stake, it seems imperative that time should take really a secondary place to fairness.”⁴⁰ Many participants developed a deep emotional connection to the tribunal and its symbolism. When the practise of internationalism failed to live up to its promise, some participants felt a sense of loss, anxiety, and frustration incommensurate with the ostensibly superficial and predictable personal difficulties of work in Tokyo. Many felt hurt and betrayed when the tribunal faltered. Their inflated response shaped personal performance at the court, and the lingering disenchantment seeped into public views of the IMTFE in history. Poor performances created the appearance of incompetence, while bitterness about the court fed developing perceptions of ineffective victors’ justice.

Confronting the moral contradictions of modern ‘total’ warfare impelled a very different yet equally profound emotional disruption for tribunal personnel, especially the young and inexperienced. Over sixty years later, Elaine B. Fischel (secretary to various defence lawyers)

³⁹ Hyde expanded on his sense of duty. “All this is indeed a situation that certainly I never ever dreamed of when in the fall of 1939 I was sitting by a radio, with Sherman Pobst, in our hotel in Grand Junction, Colorado, listening with utter contempt as news dispatches regarding the march of the German armies were being read. Little did I then realize that in the future I would be matching wits with some of those war lords in a prison in Tokyo, Japan, in an effort to ascertain who should be punished for waging the world wide conflict that was then only starting.” Entry: 23 February 1946, Hyde Diary.

⁴⁰ Record of Conference on Matters in Relation to the Expedition of the Trial (24 June 1947), IWM Papers, FO 648, Box 153, Folder 5.

remembered her first impressions of Tokyo as a series of contrasts. As described in this dissertation's prologue, the extent of Allied bombing struck her first. In the midst of the "devastation," Fischel saw a friendly but tragically destitute Japanese people. The poverty and starvation that Fischel witnessed in Japanese quarters did not taint Occupation establishments. Indeed, at times, she enjoyed more 'home' comforts in Tokyo than her mother did back in Los Angeles.⁴¹ The "eerie" experience of seeing Japan's vast destruction in person also shook New Zealand judicial assistant Harold J. Evans. He was especially troubled by the "surprising" speed with which, "you get used to seeing [destruction], and how quickly you become adjusted to expecting to see it." "In a matter of days," he continued, "you no longer feel those first feelings of dumbfoundedness or sadness or depression."⁴² The atomic bombings posed a similar emotional and ethical dilemma for even the staunchest IMTFE personnel. Prosecutor James J. Robinson recounted the shock of seeing Hiroshima in late 1945:

From a plane over Hiroshima fifty days after the atomic bomb was dropped there, one saw a flat carpet of gray-red dust and rubble, divided in squares by empty streets and canals. For block after block and mile after mile, no sign of life, no living human being or other creature or tree or other vegetation was seen. There was the feel of death, of the instantaneous ending of almost a hundred thousand human lives with all their earthly possessions and surroundings. The silence of the dead city seemed to rise and press into the plane and to leave speechless and motionless all of us who were staring down at those great areas where there had been at one moment a busy city of a quarter of a million people, and then in a blinding flash of flame and a soaring cloud of smoke and dust, leaving only a lifeless, silent checkerboard of flat and littered earth.⁴³

⁴¹ Fischel Interview.

⁴² Harold Evans to Family and Friends (20 June 1946), Evans Papers, Box 16, Item 1.

⁴³ James Robinson to Walter McKenzie (10 April 1947), McKenzie Papers, Box 1, Folder – Correspondence – April 1947.

The atomic silence noted by Robinson over Hiroshima was matched in the Ichigaya courtroom by judicial silence regarding the nuclear attacks, a hypocrisy which troubled many participants.⁴⁴

The destruction wrought by Japan during the war also rattled participants. Osmond Hyde admitted the “terrible” destruction in Tokyo: “Words cannot describe how awful it is – one has to see it.” However, the rubble also made him feel patriotic and even gratified. To Hyde and others like him, the bombings symbolised Japan’s just deserts for the war. “The almost total devastation of proud Tokyo for another day is indeed a silent reminder of the folly of these misguided people. . . . Our boys really did a job.”⁴⁵ Walter McKenzie’s work made him “very hot under the collar,” especially “when you get into the details of crimes against prisoners of war and civilian populations, it makes your blood run cold.”⁴⁶ Survivor guilt and personal vengeance also shaped participant experiences. In his diary, Osmond Hyde admitted to being “delighted” to work on the prosecution’s conspiracy to commit aggression phase. “Had such a conspiracy not existed possibly my brother Reed . . . might be alive today,” Hyde wrote. “I have a burning desire to bring to justice all who had any part in such conspiracy.”⁴⁷ Revulsion at Japanese crimes became Hyde’s sustaining purpose. “Some days I get blue, low, and very discouraged,”

⁴⁴ “If the killing of Admiral Kidd by the bombing of Pearl Harbor is murder, we know the name of the very man whose hands loosed the atomic bomb on Hiroshima,” asserted Defence counsel Benjamin Bruce Blakeney. “We know the Chief of Staff who controlled the Army which he was a part, we know the chief of the responsible state. Is murder on their conscience?” Benjamin Bruce Blakeney, “International Military Tribunal: Argument for Motions to Dismiss,” *American Bar Association Journal* 32 (1946): 477. Justice Röling later argued, “The atomic bombings were illegal because they were attacks on the civilian population. They were not directed against military targets.” Röling and Cassese, *The Tokyo Trial and Beyond*, 112. Borgwardt puts the quandary neatly: “The Rooseveltian synthesis of legalism and moralism produced what were in effect twin symbols of American exceptionalism for the postwar era: Nuremberg and Nagasaki.” Borgwardt, *A New Deal for the World*, 217. Other IMTFE personnel felt less disturbed by the devastation that surrounded them. Chief Prosecutor Keenan took an optimistic line. “It is much more pleasant because of the cleaning up process that is going on,” he told his wife in September 1947. “There is less evidence of death and destruction and more evidence of life and hope among the people.” Joseph B. Keenan to Charlotte Keenan (30 September 1947), Joseph B. Keenan Papers, Harvard Law School Library, Cambridge, MA. (<http://pds.lib.harvard.edu/pds/view/11916053>, Accessed 3 April 2012). Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe - Krould. Sequence 746-748). Hereafter “Keenan Papers.”

⁴⁵ Entry: 20 January 1946, Hyde Diary. Borgwardt observes how the “deep substratum of horror . . . underpinned the eccentric atmosphere at Nuremberg.” Borgwardt, *A New Deal for the World*, 242.

⁴⁶ Walter McKenzie to A. J. Berris (23 July 1946), McKenzie Papers, Box I, Folder: Correspondence – July 1946.

⁴⁷ Entry: 15 February 1946, Hyde Diary.

he admitted to his diary, particularly when “we are simply going around in circles and not getting any place.”⁴⁸ At these “low” points, Hyde found inspiration in the brave exploits of compatriots. On one memorable occasion, dinner with a POW camp survivor proved a “tonic” for his soul. “He [the former POW] knew what real discouragement was – and he came thru [sic] it all. Certainly, then, I can take a little now – and not let it get me down.”⁴⁹ At times a motivating rather than obstructive emotion, righteous anger formed an indelible part of IMTFE experiences.

The emotional arithmetic⁵⁰ of international justice proved less straightforward for others. “The remarkable part of it is that there is a dearth of malice or bitterness towards these men,” Chief Prosecutor Keenan noted to his wife. “Instead of this experience making one hard and calloused to the gentle things of life, it really has a remarkably softening tendency. Prosecutions are never pleasant. Punishment to right-minded human beings is always a sad and disagreeable affair.”⁵¹ Elaine Fischel felt conflicted about defending those responsible for the death of loved ones during the war. “It’s a crazy world,” she wrote to her mother, “when you think about fighting these people for 3 years and hating them and here I am knocking myself out for them.”⁵² Defence attorney Carrington Williams recalled a similar disjuncture. “The people who had been victims of the Japanese were so bitter towards them it was hard to be calm and objective,” he explained. “It was hard for those of us who had to defend them sometimes, too, because we had no sympathy with what we had to defend on occasion until we looked into it carefully to see if there was real substance.”⁵³ The surreal juxtaposition of atrocity and glamour unsettled Justice Röling. During the tribunal’s longest, bleakest points, Röling exchanged poetry with Indian

⁴⁸ Entry: 16 January 1946, Hyde Diary.

⁴⁹ Entry: 16 January 1946, Hyde Diary.

⁵⁰ This term is borrowed from Matt Cohen’s novel of the same name. Matt Cohen, *Emotional Arithmetic* (Toronto: Lester & Orpen Dennys, 1990).

⁵¹ Joseph Keenan to Charlotte Keenan (16 December 1947), Keenan Papers, Box 2, Folder 6 (Igoe - Krould. Sequence 746-755).

⁵² Elaine Fischel to Sister (25 June 1946), Fischel Papers.

⁵³ Williams Interview.

judge Radhabinod Pal. “It is one of the strangest contrasts,” he told a friend, “one ear is concerned with the Rape of Nanking and all the horrible things involved – the other hears a slow, dark voice, reciting what translated means: ‘I shall come when you will smile at me,’ or ‘when you are not with me no poem develops in my heart.’”⁵⁴ Few participants, young or old, anticipated the emotional impact of firsthand exposure to the war’s brutality.

Uncomfortable and demanding work conditions also caused emotional distress. A prominent IPS member, Walter McKenzie, saw his responsibilities multiply to include preparing a trial brief, presenting the case against Japan’s Manchurian incursion, pursuing the individual prosecution of General Itagaki Seishirō, bolstering prosecution arguments on jurisdiction, and helping to compose Chief Prosecutor Keenan’s opening statement. As early as July 1946, McKenzie admitted, “Perhaps it has been the nervous strain, but I have not eaten much the last few days.”⁵⁵ No wonder McKenzie told his stateside supervisor, “I have found the work here interesting, although it has been very strenuous.”⁵⁶ He complained more directly to his wife, “I have been working very hard . . . but they keep adding things.”⁵⁷ Elaine Fischel was more hyperbolic: “I can’t hardly write this letter as I’ve been working so hard my mind isn’t clear. I’m not killing myself or anything but there are six deals going at once so it takes a while for my mind to clear up.”⁵⁸ Like McKenzie, Harold Evans had multiple assignments. In addition to being sole assistant to his country’s prosecutor and judge, Evans also functioned as *pro tem*

⁵⁴ B. V. A. Röling to Patricia Daly (27 August 1946), Röling Papers, Box 27.

⁵⁵ Walter McKenzie to Connie McKenzie (2 July 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family – July 1946.

⁵⁶ Walter McKenzie to Ernest O’Brien (11 July 1946), McKenzie Papers, Box 1, Folder: Correspondence – July 1946.

⁵⁷ Walter McKenzie to Connie McKenzie (26 September 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - September 1946.

⁵⁸ Elaine Fischel to Mother (17 June 1946), Fischel Papers.

officer of the New Zealand Prime Minister's Office in Japan.⁵⁹ Serving several masters proved arduous. "The job – or rather the jobs – keep me going pretty continuously," he wrote his mother in April 1946.⁶⁰ Even though "still so damn busy" Evans found he accomplished "damn little."⁶¹ This latter aggravation became common in Tokyo. Personnel exerted so much but got so little. Promised a new world order, instead they found delays, distractions, and day-to-day frustrations. Indeed, with its irreconcilable combination of exuberant ideals and unavoidable operational challenges, international justice on the ground in Tokyo seemed designed to discourage participants. R. H. Quilliam's complaint in August 1947 of "a very trying and strenuous" schedule with unsatisfying results became commonplace. "A full week for me in Court," he wrote, "[With the] rate of progress still too slow."⁶² Exerting effort for naught also frustrated defence members. "Today was a hell of a day," defence lawyer Norris H. Allen remarked on 28 May 1946, "I am disgusted. All morning was spent on trivia and no work was done."⁶³ Despite "burning some midnight oil,"⁶⁴ overextended workers rarely felt satisfied with progress. The resulting frustration affected the emotional wellbeing of participants, which, in turn, resulted in poor job performance, caused general malaise, and contributed to staff depletion. Along with other challenges, this array of personal-cum-structural issues complicated an already difficult job in Tokyo. The un-fulfillment of the IMTFE's inflated promises created a deepening spiral of disenchantment among participants and observers. This sense of failure and injustice turned contemporary opinion, collective memory, and historical views against the tribunal as much as its many actual imperfections.

⁵⁹ Prime Minister's Office, Wellington to Harold J. Evans (24 January 1946), Archives New Zealand, Wellington, New Zealand. EA2 1946-31A 106-3-22 Part 2. Hereafter "NZ Archives."

⁶⁰ Harold Evans to Mother (10 April 1946), Evans Papers, Box 16, Item 1.

⁶¹ Harold Evans to Mother (24 April 1946), Evans Papers, Box 16, Item 1.

⁶² Entry: 10 August 1947, Quilliam Diary.

⁶³ Entry: 28 May 1946, Norris H. Allen Diary, Fischel Papers. Hereafter "Allen Diary."

⁶⁴ Walter McKenzie to G. M. Read (5 June 1946), McKenzie Papers, Box I, Folder: Correspondence – May-June 1946.

Personal acrimony and rivalry added to the emotional burden of the IMTFE experience. Participants contended with not only their own private challenges but also confronted the caprice of fellow participants. A site of intense interpersonal encounter, employment in Tokyo forced interaction regardless of disposition or personnel. The resulting discord influenced the IMTFE and its participants, as interpersonal discord became both a destabilising force and morale sapper. Lack of cooperation within the International Defence Section (IDS), for example, became an interpersonal irritant and inner-personal thorn. Aristides G. Lazarus, a colourful figure, exemplified the problem.⁶⁵ In March 1947, Lazarus directed the IDS' case regarding aggression in China. From this position, he urged colleagues to help out, even if their specific clients were not implicated. "I send a plea to offer to help, even if it be only to stand by in court and answer objections of the prosecution to our affidavits, or to read affidavits for us and to strike out irrelevant passages," Lazarus wrote in an internal memorandum. "If we cave in, we all get blamed for it, not just attorneys with clients named in the China counts of the indictment. LET'S GO!!!!"⁶⁶ After weeks of limited response, Lazarus' messages grew beseeching. Also involved in the Russian Phase, he sent an "earnest" appeal for input. Mindful of the slow responses regarding his work on the China arguments, Lazarus pressed for help "NOW" on a "VERY

⁶⁵ Lazarus later wrote a letter to the *Far Eastern Economic Review* taking almost singlehanded credit for protecting Emperor Hirohito during the IMTFE. He claimed President Truman sent a "high-level official" to ask Lazarus "to save Hirohito because his trial and execution would cause Japan to descend into chaos. I accepted the mission, though I was warned the US would disown me if the details were publicly discussed." Lazarus explained that through his client Hata Shunroku, he "arranged that the military defendants, and their witnesses, would go out of their way during the testimony to include the fact that Hirohito was only a benign presence when military actions or programmes were discussed at meetings that by protocol he had to attend." Lazarus went so far as to allege, "with a little subterfuge" he convinced Tōjō to take the fall. "He carried out the mission perfectly and submitted to the hangman's noose with his lips sealed – an officer, a gentleman and a patriot to the end." Aristides George Lazarus, "Letters," *Far Eastern Economic Review* 145, no. 27 (6 July 1989): 3.

⁶⁶ Aristides G. Lazarus to All American and Japanese Counsel RE: Plans of Trial for Third Phase, Assignment of Japanese and American Counsel, and List of Documents Ready for Each Subdivision (31 March 1947), Carrington Williams Papers, Special Collections, Arthur J. Morris Law Library, University of Virginia, Charlottesville, Virginia. MSS 78-4 Box I, Folder 1: Defense Counsel Memoranda. Hereafter "Williams Papers."

IMPORTANT!” part of the defence. “Please, please cooperate!!!” he implored.⁶⁷ Evidently, his colleagues felt unmoved. By April’s end, Lazarus angrily resigned from the China Phase because of a “complete lack of cooperation and a wilful refusal on the part of many counsel to assist in the preparation and presentation of subdivisions which they had undertaken to prepare.”⁶⁸ Although he continued with the Russian phase, Lazarus was clearly unhinged. On 14 May 1947, he asked his colleagues “for the last time” to “please cooperate” by sending suggestions for the China section’s opening statement. Lazarus’ plaintive postscript reveals exasperation, “To those of you who have read down to here. Thanks for your cooperation; to all the rest of you, ‘Nuts’ and big razzberry!”⁶⁹ Such examples of what Frank Costigliola terms “screaming-out-loud intensity” represent more than simple outbursts of anger.⁷⁰ Though voiced as a petty personal issue, Lazarus’ torrent grew from deep despair with IDS impotence, which shaped, but did not determine, his actions. His anger embodied wider frustration which hurt defence effectiveness.

The prosecution in Tokyo also faced personnel challenges. Chief Prosecutor Keenan was a man who attracted colourful monikers. Alternately referred to as a “gang-buster,” “King maker,” or “Joe the Key,” Keenan was well connected in Washington. Though appointed by Truman, he had been a close associate of President Roosevelt. A career of political intrigue left a mark on Keenan’s psychology. He suspected conspiracies everywhere. His letters home conveyed a tendency to feel surrounded by plotters and a back-against-the-wall attitude grounded

⁶⁷ Aristides Lazarus to All Defense Counsel, American and Japanese, RE: Russian Phase, Division IV (15 April 1947), Williams Papers, Box I, Folder 1: Defense Counsel Memoranda.

⁶⁸ Aristides Lazarus to All American and Japanese Counsel RE: China Phase (30 April 1947), Williams Papers, Box I, Folder 1: Defense Counsel Memoranda.

⁶⁹ Aristides Lazarus to All Defence Counsel, American and Japanese, RE: Russian Phase (14 May 1947), Williams Papers, Box I, Folder 1: Defense Counsel Memoranda.

⁷⁰ Costigliola, “After Roosevelt’s Death,” 5.

on the assumption he was the only person who got things right.⁷¹ Inept interpersonal skills exacerbated Keenan's expectations of disloyalty. One member of his staff explained, "He was impossible in dealing with staff. His staff relations were terrible . . . he should have left it to some staff administrator and stayed away from the staff. He had people hating him."⁷² The "hatred" inspired by Keenan exacerbated existing institutional, national, and cultural rivalries. "When we got to Tokyo, we split into respective groups," Donihi remembered. "The Department of Justice Group . . . accustomed to working as a team, knew each other, knew their leadership, and were competent in putting a case together quietly in low profile and getting the job done." The other pole constituted a group of "high-powered names that came in because they were friends of Keenan's: people who'd been active in the American Bar Association."⁷³ John Darsey, an experienced lawyer and administrator, led the Justice Department group. "Keenan did not like Darsey, that was clearly apparent," recalled Donihi. The suspicion and acrimony engendered by this divide coloured how IPS members interpreted events and performed assignments.

The friction also took a physical and emotional toll on personnel. Robert Donihi recalls how a member of Darsey's group almost came to blows with Keenan over his treatment. "The split was occurring; the Justice people were sort of sliding away. Val[entine] Hammack, I remember, nearly had a fist-fight with Keenan on one occasion. He came out of the office virtually in tears." Hammack yelled at Keenan, "I'm getting very tired of being the dog that you kick around every time you're in a bad temper. From now on, you can just be sure that I'm going

⁷¹ Keenan's "I told you so" attitude is apparent regarding the accused Kido. "Marquis KIDO was the leader of this group," he wrote to his wife. "In the early stages, I took a vote of all the prosecutors as to whether or not he would be included among the twenty-eight chosen defendants. The prosecutors from other nations all voted in the negative. In that instance, I told them that my vote was the weightiest, and we put him in the dock. The history of this case will show him as the arch criminal, and he should be convicted, and will be unless there be resentment on the part of the court that they did not see the point quick enough themselves." Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6 (Igoe - Krould. Sequence 746-755).

⁷² Donihi Interview, Part I.

⁷³ Donihi Interview. Part I.

to fight back.” Participants developed coping mechanisms that often added to the physical and emotional dissonance. Chief Prosecutor Keenan, for example, drank heavily. Numerous scholars have used Keenan’s intemperance to critique the tribunal as a whole without any attempt to explore the inner trial processes which led to or exacerbated the chief prosecutor’s drinking.⁷⁴ Even those who saw him as a “great” man could not overlook his weakness for alcohol. “I don’t want to say he became an alcoholic, but pretty close to it,” remembered Donihi. “I really don’t want this to sound too bad on Keenan . . . but Evelyn [Alexander] was Keenan’s secretary and she was frequently in tears. . . If he got up on the wrong side, as the saying goes, he really would make things very miserable. That’s the kind of reputation he had, generally with the staff.”⁷⁵ Other members of the IMTFE felt more critical. Language specialist Denzel Carr, for instance, alleged, “Keenan was a stiff drunk most of the time,” an “alcoholic” who would “prime” himself for court performances.⁷⁶ New Zealand prosecutor Quilliam’s dissatisfaction with Keenan became symptomatic of a deeper affliction. Like other associate prosecutors, Quilliam lost respect for Keenan early and never gained it back.⁷⁷ Keenan’s rival Darsey also struggled to cope with the stress of IMTFE employment, especially when poisoned by interpersonal acrimony. “Darsey, I remember, broke out with sties in his eyes and boils,” recalled Donihi. “He was just a terribly nervous man, living very much alone, very concerned as to whether or not he’d be sent

⁷⁴ Bergamini, *Japan's Imperial Conspiracy*, 176, Brackman, *The Other Nuremberg*, 116, John S. Brownlee, “The Tokyo Trial Fifty Years Later,” in *Japan at Century's End: Changes, Challenges and Choices*, ed. Hugh A. Millward and James Morrison (Halifax, NS: Fernwood Publishers: Saint Mary’s University, 1997), 12, Takatori, “‘America's War Crimes Trial?,” 554, Eiji Takemae, Robert Ricketts, and Sebastian Swann, *Inside GHQ: The Allied Occupation of Japan and Its Legacy* (New York: Continuum, 2002), 169. Borgwardt notes a similar “pronounced tendency to drink excessively” in Nuremberg. Borgwardt, *A New Deal for the World*, 202.

⁷⁵ Donihi Interview, Part I.

⁷⁶ Denzel Carr, Interview with Marlene Mayo (5 June 1981), El Cerrito, California, Mayo Collection. Hereafter “Carr Interview.”

⁷⁷ For example, Quilliam’s diary describes a party in May 1946 attended by VIPs, including Lord Wright (British Chief of the United Nations War Crimes Commission), Colonel Alva Carpenter (head of SCAP’s Legal Section), and Chinese prosecutor Hsiang Che-Chun. Keenan, who was also in attendance, “succumbed to his weakness within 30 minutes of arrival, and was not able to go to the table.” Entry: 6 May 1946, Quilliam Diary.

out home in limbo before he could leave in a respectable way.”⁷⁸ The interpersonal upset the inner-personal in Tokyo and both shaped the tribunal by contributing to the court’s tarnished reputation and by exacerbating internal and structural difficulties.

The emotional duress of unfamiliar living and trying work conditions affected IMTFE personnel in profound and overlooked ways, causing widespread disenchantment with the court, and hindering effective job performance. In part, disjuncture grew out of inherent institutional and emotional challenges of operational global governance. Participants responded differently to the challenges of international justice in Tokyo, but each response influenced the tribunal in some way. The remainder of this chapter explores specific examples of how participant experiences shaped the tribunal’s proceedings, findings, and legacy.

Who’s Left and Who’s Leaving: Departure, Disruption, and Disorder in Tokyo

Individual reactions and deeply personal responses to the IMTFE profoundly affected the collective functionality of the prosecution and defence teams. The resignation of discontented personnel proved particularly damaging. While many participants left for routine reasons,⁷⁹ a notable cohort, in quantity and consequence, resigned on largely personal grounds. The talent that withdrew disrupted IMTFE circles and cumulative staffing depletion upset both IDS and IPS stability. Even when resignations and the experiences that precipitated them had no overt impact on the trial’s outcomes, emotional wellbeing formed the prism through which participants processed the IMTFE and the backdrop for how they carried out their work. By helping to create a sense of dissatisfaction and by complicating in-court and behind the scenes trial operations, the participant experience helped establish the court’s fractured place in law and history.

⁷⁸ Donihi Interview, Part I.

⁷⁹ Some enlisted men and women earned enough service ‘points’ to return home or were reassigned to different Occupation departments. Robert Crozier, Interview with author (28 June 2009), Battle Creek, Michigan; and Morris Gamble, Interview with author (7 November 2009), Charlotte, North Carolina. Hereafter “Crozier Interview” and “Gamble Interview” respectively.

The experiences of several prosecutors illustrate how participant satisfaction can influence the outcomes of even the most prominent international institutions. The tribunal's duration weighed on participants who generally expected an expeditious trial. Prolonged separation from families heightened anxiety and hindered job performance. Because prosecutors typically felt more convinced of Japanese 'guilt,' and because their phases came first, IPS members became particularly impatient. Quilliam's diary presents a catalogue of declining commitment and escalating aggravation with the inevitable delays of operational international justice. As early as June 1946, he admitted, "All sense of urgency has gone."⁸⁰ The personal acrimony he developed for Chief Prosecutor Keenan and other associates exacerbated Quilliam's unhappiness. In one of many diatribes against Keenan, Quilliam concluded exasperatedly, "What a scandal it is that this irresponsible incompetent should be in this job."⁸¹ When complaining about "extraordinary delays and frustrations" to the New Zealand government, Quilliam also lamented the calibre of assistant prosecutors "allotted" to him. "Some of these have proved to be incompetent and lazy, and others have been most uncooperative. After some time I discovered that some of them were afraid that I would steal the limelight from them."⁸² Pride proved toxic to IMTFE effectiveness. Being assigned work and colleagues that he considered beneath him by a supervisor whom he loathed hurt Quilliam's ego. Quilliam first requested resignation in January 1947.⁸³ By allowing his wife to visit Japan, the New Zealand government managed to placate its prosecutor temporarily, but by August, Quilliam reached the end of his rope. "Another futile week at Trials has convinced me that there is no reason why I should have to stay on here," he

⁸⁰ Entry: 20 July 1946, Quilliam Diary.

⁸¹ Entry: 29 November 1946, Quilliam Diary.

⁸² R. H. Quilliam to A. D. McIntosh, Secretary of External Affairs, Wellington (17 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁸³ On 24 January 1947, Quilliam wrote in his diary, "I wrote to [Wellington] To-day asking to be relieved. The Judge fully approves and will write supporting my request." Entry: 24 January 1947, Quilliam Diary.

noted.⁸⁴ On 14 September 1947, Quilliam wrote that he had been, “[h]opeful for a brief period that [the] Tribunal would do something effective to expedite proceedings, but hopes are now fading.”⁸⁵ Quilliam pushed for permission to resign throughout the late summer and early fall of 1947 until his government finally relented. He returned home at the end of October 1947.

Other prosecutors shared Quilliam’s personal frustrations. Whereas the New Zealander exhibited a relative slow-boil from dislocation to acrimony to dissatisfaction to resignation, fellow prosecutor John Fihelly underwent the transition in a manner of moments. Fihelly served as a specialist interrogator and trial lawyer brought to Tokyo to cross-examine and prosecute Japan’s “No. 1 war criminal,” Tōjō Hideki. On his big day in court, however, Chief Prosecutor Keenan usurped Fihelly’s role through a combination of ignorance, egotism, and gumption. The slight stung. “Jack [Fihelly] worked very hard putting together everything that he did,” Robert Donihi remembered. “He knew Tōjō’s mind, and Tōjō knew his. He could anticipate what Tōjō’s answers were going to be. He knew perfectly how to cope with it.” It was Fihelly’s day to shine, but Keenan took that away. “Poor fellow,” recalled Donihi.⁸⁶ There is no indication that Keenan and Fihelly butted heads before the incident. In fact, Fihelly belonged to Keenan’s inner-circle.

⁸⁴ Entry: 16 August 1947, Quilliam Diary.

⁸⁵ Entry: 14 September 1947, Quilliam Diary.

⁸⁶ Donihi Interview, Part I.

Nevertheless, after Keenan's slight, Fihelly collected his papers, stormed from the courtroom, and left Tokyo immediately.⁸⁷ No record suggests that he and Keenan resumed their friendship.

Unlike Quilliam and Fihelly, Walter McKenzie felt little ill will for IPS colleagues. He was, however, eager to get out of Tokyo. During his last few months, McKenzie fixated on home. Mounting guilt about being away caused a corresponding drop in productivity. His papers recorded a greater frequency of recreational activity. Days filled with travel, golf, fishing, and shopping instead of work. On 21 August 1946, he boasted to his wife, "I am on the loose now."⁸⁸ The next week he apologised for having "so little time to write since I turned 'butterfly' – gone

⁸⁷ "I should tell you what happened about the cross-examination of Tōjō by the Prosecution," recounted Harold Evans. "This was to have been done chiefly by Mr. Fihelly, one of the American counsel. It is understood that he was specially sent from the United States for the purpose of preparing the cross-examination – and, presumably, conducting it himself. Mr. Keenan . . . anxious to 'make an appearance' himself at this important stage of the trial, secured the agreement of the defence to the cross-examination being conducted by himself and Mr. Fihelly. The consent of the defence was necessary because there is a standing ruling of the Tribunal that only one counsel shall examine or cross-examine in each interest. When, however, Mr. Keenan put this to the Tribunal on rising to begin cross-examination, the Tribunal decided it would not allow a deviation from the practice established by the earlier ruling, and Mr. Keenan had to decide between handing over immediately to Mr. Fihelly, who was with him in Court, or doing the whole job himself. He decided, without hesitation, to do the latter. Mr. Fihelly was exceedingly annoyed, was not a little disrespectful, and the whole thing was something of a 'scene.' Mr. Fihelly absented himself from the Court there-after." Harold Evans to A. D. McIntosh (9 January 1948), Evans Papers, Box 16, Item 2. Owen Cunningham's unpublished memoirs recount a similar tale: "John Fihelly, Assistant United States District Attorney, of Washington, D.C. examined Tōjō over a hundred times. He devoted the greater part of two years time in preparation for the cross-examination of Tōjō. He flew from Washington D. C. for that special purpose just before Tōjō took the stand. He was refused permission to conduct the cross-examination. Mr. Keenan had asked Tōjō a few preliminary questions and was about to turn the witness over to Mr. Fihelly, when Sir William Webb announced that 'only one counsel for each party may cross-examine a witness.' I had told Mr. Keenan in advance that it would be agreeable with the Defense if Mr. Fihelly took over the cross-examination. To the amazement of everyone the President made this announcement. . . . Mr. Fihelly picked up his questions, walked out of the room, went to Shanghai for a vacation, then returned to the States." Untitled Book Manuscript, Owen Cunningham Papers, Gordon W. Prange Collection, University of Maryland, College Park, MD, Box 4, Folder 45. Hereafter "Cunningham Papers." In early versions of his manuscript, Cunningham criticised Fihelly. "[He] walked out of the court in a huff, took a short vacation in Shanghai and went back home . . . He didn't not (sic) even stay long enough to give Mr. Keenan what assistance he could. As a result Mr. Keenan was hopelessly unprepared for the task." Fihelly "owed it to his country, his profession, his chief and to himself to assume the secondary role and make the best of it." Manuscript drafts, Cunningham Papers, Box 4, Folder 50.

⁸⁸ Walter McKenzie to Connie McKenzie (21 August 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - August 1946.

every week-end.”⁸⁹ Mentally disengaged from the IMTFE for weeks, McKenzie formally returned home in November 1946.⁹⁰

Quilliam, Fihelly, and McKenzie’s resignations expose the disorder caused by emotionally fuelled personnel departures. Without Fihelly, the cross-examination of Tōjō became a disaster for the prosecution. Before Tōjō took the stand, Keenan assured his wife that the testimony “will not be spectacular.”⁹¹ *New York Times* correspondent Lindesay Parrott disagreed, labelling Tōjō’s time in court “probably the biggest news event of this year.”⁹² Unfortunately, for the tribunal’s reputation, at the time and since, Parrott’s prediction proved accurate. Keenan was unprepared and ill suited to the task and his performance has been universally panned. Owen Cunningham later recalled, “Tōjō had the best of the contest all the way thru [sic].”⁹³ Frank L. White of the *New York Herald Tribune* described how a packed courtroom watched “Tōjō hang Keenan.”⁹⁴ Similarly, Harold Evans reported, “It soon became clear that Tōjō was going to stand the strain far better than Keenan.” Eventually, Keenan became “entirely subject to his witness.” Even the casual observer, Evans opined, could tell that Keenan asked questions “vaguely – purposely vaguely, because he was not familiar with his

⁸⁹ Walter McKenzie to Connie McKenzie (30 August 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - August 1946.

⁹⁰ Already busy social schedules ballooned as departure dates approached. Indeed, prosecutor Christmas Humphreys claimed that the excess of farewell parties became one of the best parts about IMTFE work. Humphreys, *Via Tokyo*, 83-84. The final three weeks of Quilliam’s diary filled with social engagements with judges, IPS members, and other friends and associates. He also spent time last minute sightseeing and shopping. The result was little work done for his official position and little mention of court happenings in his diary. While entirely natural, this kind of response to impending departure affected the tribunal by upping the workload for others. No matter how socially enjoyable the “good-bye” festivities may have been, absences and resignations caused substantial disorder behind the scenes in Tokyo.

⁹¹ Joseph Keenan to Charlotte Keenan, (16 December 1947), Keenan Papers, Box 2, Folder 6 (Igoe – Krould, Sequence 756-759).

⁹² “Japanese Crowd to Hear Tōjō at Trial: Newspapers Give Half Space to Testimony!” (27 December 1947), *New York Times*, 7.

⁹³ Manuscript drafts, Cunningham Papers Box 4, Folder 50.

⁹⁴ Frank L. White, “We Made Tōjō a Hero,” (1 August 1948), *New York Herald Tribune*. Cunningham Papers, Box 4, Folder 53.

facts.” The result came to be popularly referred to as “Tōjō’s cross-examination of Keenan.”⁹⁵ This incident’s importance cannot be overestimated.⁹⁶ Indeed, an old Japan hand called the unequal contest “the greatest blow the occupation has yet sustained.”⁹⁷ The tribunal ultimately convicted and hanged Tōjō for war crimes, but the exchange developed into a public relations disaster with an enduring afterlife in IMTFE criticisms.

Individual or *en masse* departures left loose ends that both increased the workload of remaining staff and overburdened new arrivals struggling to get up to speed. Although not all left because of dissatisfaction, the rate at which IPS members left Japan increased steadily. Stress-induced resignations became part of a broader problem. Less than a year into the trial, Harold Evans protested to the New Zealand Secretary of External Affairs about “How many of the American Attorneys have already returned to the United States.”⁹⁸ Evans attached a biographical list of the prosecution noting who had left in the margins. The list marked 20 of the 32 US attorneys as “returned.” Most of the exodus (15 of the 20) were civilian personnel who left by choice. Pride and rivalry, and associated disgruntlement, incited the bulk of the first wave of departures. Members of Keenan’s rival Justice Department clique were not pushed off the ship. They jumped. The summer and early fall of 1946 saw a slew of resignations from the IPS. “A great many of the American Counsel began leaving at the same time because of their differences

⁹⁵ Harold Evans to A. D. McIntosh (9 January 1948), Evans Papers, Box 16, Item 2.

⁹⁶ Few commentators overlook Keenan’s bumbling questioning of Tōjō. Robert Butow asserts, “There is absolutely no doubt that Tōjō made the most of the opportunity. Rather than remain on the defensive, he chose to counterattack by challenging the prosecution’s contentions on a wide front.” Robert J. C. Butow, *Tojo and the Coming of the War* (Princeton, NJ: Princeton University Press, 1961), 494. Frank L. White painted the story a “shocking allied fiasco” writing, “There is no doubt that Tōjō, only surviving member of the three Axis dictators of World War II, regained ‘face’ in the Orient by his witness-stand joust with Chief Prosecutor Joseph B. Keenan.” Frank L. White, “We Made Tōjō a Hero.” Harold Evans likewise expressed concern about the effect the incident would have on the Japanese public. “The spectacle was presented of an intellectual combat in which Tōjō, the representative of modern Japanese militarism, continually came off best against the Chief Allied Prosecutor of the major war criminals of Japan,” he surmised. “The fact that the latter really had the best cards and could have made the fight at least an equal one if he had had the character and ability to use them effectively, was not known to the Japanese.” Harold Evans to A. D. McIntosh (9 January 1948), Evans Papers, Box 16, Item 2.

⁹⁷ Ibid.

⁹⁸ Harold Evans to A. D. McIntosh (27 November 1946). NZ Archives, EA2 1947-27A 106-3-22 Part 4.

with Keenan, or dislike for him,” Donihi recalled. “Most of these, I think, were Department of Justice people . . . Darsey left; Hammack came back; Sackett left; Elton Hyder left.”⁹⁹ Osmond Hyde resigned at the end of November 1946.¹⁰⁰ Acrimony became one of many personal reasons to leave. Those who left and those who stayed alike noted the alarming rate of personnel attrition. Upon return to the UK in May 1946, British prosecutor Maurice Reed rejoiced at “gradually regaining the sanity lost in Tokyo.” However, he also felt conscious of the depleting IPS contingent. “Remember me please to all who still remain alive,” Reed asked wryly.¹⁰¹ Similarly, shortly after returning to Michigan in late 1946, Walter McKenzie wrote to fellow prosecutor Brendan F. Brown, “So many of the people [have] been coming back that I do not know who is left over there.”¹⁰² Back in Tokyo, Executive Officer of the IPS Colonel Theodore Goulsby remarked in April 1947: “About the only ‘old’ lawyers left are Tavenner, Sutton, Woolworth, Horwitz, English, Mahoney, and Sandusky. The majority of our ‘old’ personnel have returned to the United States.”¹⁰³ The IPS struggled to compensate for the high turnover rate.

Although part of the problem, both Quilliam and McKenzie doubted that the IPS could cope with the personnel decrement. Upon hearing that his former colleague James J. Robinson quit, McKenzie observed, “I am afraid the prosecution is going to be in bad shape with so many of the men most familiar with the work returning to this country.”¹⁰⁴ Possibly out of spite, Chief Prosecutor Keenan installed a close associate named Robert Wiley to replace Quilliam as the lead prosecutor of former Finance Minister Kaya Okinori two weeks *before* the New Zealander

⁹⁹ Donihi Interview, Part I.

¹⁰⁰ Joseph Keenan to G. Osmond Hyde (27 November 1946), Keenan Papers, Box 2, Folder 5 (Hall - Hyde Sequence 730).

¹⁰¹ Maurice Reed to A. S. Comyns Carr (3 June 1946), IWM Papers, FO 648, Box 152, Folder 3.

¹⁰² Walter McKenzie to Brendan F. Brown (31 January 1947), McKenzie Papers, Box I, Folder: Correspondence - January-February 1947.

¹⁰³ Theodore Goulsby to Walter McKenzie (1 April 1947), McKenzie Papers, Box 1, Folder: Correspondence - April 1947.

¹⁰⁴ Walter McKenzie to James J. Robinson (14 February 1947), McKenzie Papers, Box I, Folder: Correspondence - January-February 1947.

left Tokyo. On 14 October 1947, the already disgruntled Quilliam had the interesting experience of watching his neophyte replacement in action. The outgoing prosecutor was not impressed. The lawyer “entrusted” to the Kaya case “made what was I imagine his first appearance in any court,” Quilliam vented to his diary. He added, “Another instance of the irresponsibility of Keenan who was actuated primarily by hostility towards me and wanted to keep me out of it.”¹⁰⁵ Resignations had symbolic valence as well. The IMTFE’s novelty lay in its internationality. It formed a collective effort by eleven countries to bring justice for the wrongs of the war. Wide-ranging departures contributed to the tribunal’s increasingly negative public image, and the optics of Quilliam’s resignation proved particularly undercutting. As the only Associate Prosecutor to depart during the proceedings without leaving a compatriot substitute, Quilliam’s departure represented a serious abrogation of national commitment for New Zealand to the prosecution of Japanese war criminals. Resignations by Quilliam and others present clear examples of personal feelings superseding other considerations at the IMTFE.

Resignations also affected the defence in Tokyo. As in the prosecution case, IDS withdrawals often grew out of what Costigliola calls “imperatives of pride” as much as principles or pragmatism.¹⁰⁶ The resulting staff shortages caused inconvenience and incoherence within an already stretched IDS team. The withdrawal of seven attorneys in June 1946 formed the most notable disruption. The group included acting head Beverly M. Coleman, Charles T. Young, Joseph F. Hynes, John W. Guider, Valentine B. Deale, and Norris H. Allen. A Coleman memorandum dated 31 May 1946¹⁰⁷ outlined the group’s official reasons for leaving. “The undersigned . . . is of the firm conviction that this defense panel, as presently constituted and uncontrolled, will reflect discredit on the United States, the War Department, the Tribunal, and

¹⁰⁵ Entry: 14 October 1947, Quilliam Diary.

¹⁰⁶ Costigliola, “After Roosevelt’s Death,” 6.

¹⁰⁷ Coleman’s group did not leave until mid-June but they initiated negotiations for withdrawal in late May.

the American Bar Association,” it read.¹⁰⁸ “Participation of the American Defense Panel in the proceeding may create the illusion that the accused are being properly represented, when in truth they are not.”¹⁰⁹ The group also objected to the insufficient time allotted for preparing a defence. Coleman, in particular, found the decision to leave painstaking. “Poor Bev is heartsick,” Norris Allen confided, for “letting the Japs down and seeing American justice raped.” Nevertheless, there was little choice in Allen’s opinion: “[Coleman] would be doing worse if he stayed and made it look good.”¹¹⁰

Taken at face value, the reasons for leaving given by Coleman’s group seem justified, though files uncovered in Elaine Fischel’s papers reveal that self-interest and emotional well-being played a larger role in the resignations than is generally acknowledged.¹¹¹ Stripping away the rhetoric reveals a group of individuals concerned with pride not altruism. The “rape” of “American justice” aside, the group generally believed in the defence case and the IMTFE’s foundations. John Guider conceded that he had not “the slightest qualm” about representing Tōjō Hideki, who had a “surprisingly valid story.” His Japanese co-counsel, Dr. Kiyose Ichiro, had organised a solid case of legal points, “not a one,” Guider said, “that I would not be willing to argue in good faith.”¹¹² Japanese colleagues also impressed Coleman. “They were quite superior men,” he recalled, “well qualified and good lawyers.”¹¹³ Coleman’s group accepted the concept of an American-Japanese defence, but they objected to how it *felt* on the ground and how that might reflect on their reputations. Pride, personal dislike, and power struggles instigated the

¹⁰⁸ Beverly Coleman to SCAP (31 May 1946), Fischel Papers.

¹⁰⁹ Ibid.

¹¹⁰ Entry: 5 June 1946, Allen Diary.

¹¹¹ Fischel was Coleman’s secretary at the time of his resignation. Arnold Brackman argues that interservice rivalry precipitated the departure of Coleman and his US Navy associates. Brackman, *The Other Nuremberg*, 114. R. John Pritchard suggests that language barriers and differing legal training and practice between Japanese and US attorneys frustrated Coleman to the point of resignation. Pritchard, *Overview of Historical Importance*, 25-26.

¹¹² John W. Guider to Edward B. Williams (7 June 1946), Fischel Papers.

¹¹³ Beverly M. Coleman, Interview by Kay Dove in Washington, DC 25 March 1980 and 6 May 1980, Mayo Collection. Hereafter “Coleman Interview.”

emotional cavalcade that ended with the Coleman group's resignation. "The situation is intolerable," complained Norris Allen, "few lawyers with experience and less with judgment."¹¹⁴ Most colleagues were "ineffectual . . . either inexperienced, stupid, lazy, dipsomaniacs or just plain low."¹¹⁵ Valentine Deale agreed, recalling that some of the attorneys, "were simply not worthy of the task."¹¹⁶ John Guider was blunter: "You can't make silk purses out of sow's ears . . . Every time they speak, either in meetings or in court, they establish their unfitness to participate in a proceeding of this importance."¹¹⁷ Watching the other members work proved, in Guider's words, "humiliating."¹¹⁸

The Coleman group lacked no confidence in its own abilities. "It is absolutely clear that without us the thing will look like hell," Allen wrote. "With us it will look pretty good if we rode herd on the dummies."¹¹⁹ The problem became that the others resisted influence, and Coleman's company proved unwilling to be the only ones working. John Guider protested, "We are a true 'Mexican Army' in which everybody can be a general and there are no privates."¹²⁰ Coleman later called it a "madhouse" and fulminated over how "these people turned loose over there in the situation where there could be no restraint and even their clients . . . couldn't exercise any influence on them."¹²¹ Departure "hurts my conscience," Norris Allen admitted. "But we few couldn't carry the whole load."¹²² In one of his final memoranda, Coleman expressed concern for the IDS' future because "this hurried departure upon such short notice renders it impossible to attend to all such necessary matters as completing office reports . . . and settling other

¹¹⁴ Entry: 31 May 1946, Allen Diary.

¹¹⁵ Entry: 4 June 1946, Allen Diary.

¹¹⁶ Valentine B. Deale, Interview with Kay Dove (24 March 1980), Washington, DC, Mayo Collection. Hereafter "Deale Interview."

¹¹⁷ Entry: 3 June 1946, John W. Guider Diary, Fischel Papers. Hereafter "Guider Diary."

¹¹⁸ John W. Guider to Edward B. Williams (7 June 1946), Fischel Papers.

¹¹⁹ Entry: 4 June 1946, Allen Diary.

¹²⁰ Ibid.

¹²¹ Coleman Interview.

¹²² Entry: 2 June 1946, Allen Diary.

accounts.”¹²³ The seven resignations did cause organisational “hell” for the IDS. Elaine Fischel summed up the frustration of losing Coleman and company at such a crucial point. “It’s heartbreaking in a way to be so set up and then have it fold in your face.”¹²⁴ Many of the group’s concerns about IMTFE legitimacy and fairness proved prescient. Nevertheless, personal motives precipitated their departure as much as anything. As John Guider later admitted to Elaine Fischel, “all by yourself, you were handling a bunch of prima donnas.”¹²⁵ The Coleman withdrawal and resulting public awareness of internal dissent hurt the court’s reputation from the start.

How colleagues coped with or abused life abroad deepened the divide between Coleman’s group and other attorneys. Although he protested the “stupidity,” “inexperience,” and laziness of his co-attorneys, Guider also condemned them on “more deplorable” grounds. “We have one sad case of dipsomania,” he wrote a stateside associate, “the poor fellow is on the verge of DT’s [Delirium tremens].” He continued, “Another of our distinguished colleagues has the lowest and most obscene minds I have ever encountered in a lawyer, and his personal life here in Tokyo is entirely consistent with the above characterization.”¹²⁶ Alcoholism proved a problem. Coleman later explained the surprise of mistakenly introducing an absent “Mr. So and So” to the tribunal. The man, who “obviously had been drinking,” showed up late in the afternoon. When pushed by Coleman, the attorney’s “sheepish” reply was “Oh, I went to Sugamo Prison to interview my client.” Coleman immediately exposed the gambit, “You did like hell. Your client was in the courtroom all morning.”¹²⁷ Allen’s diary corroborates Coleman’s story and reveals that Guider’s “dipsomaniac” and Coleman’s “Mr. So and So” was Charles B. Caudle, defence attorney for Shiratori Toshio. “Caudle was introduced to the court by Bev [Coleman] with the

¹²³ Beverly M. Coleman to Chief of Staff, COM NAV JAP, Fischel Papers.

¹²⁴ Elaine Fischel to Mother (18 June 1946), Fischel Papers.

¹²⁵ John W. Guider to Elaine Fischel (26 December 1961), Fischel Papers.

¹²⁶ Ibid.

¹²⁷ Coleman Interview.

rest but no Caudle was there,” Allen recorded. “He was plastered the night before and didn’t turn up till noon or one o’clock and got his court room pass after session was over.”¹²⁸

Coleman’s group had issues with other “dummies.” Along with distaste for Caudle, they loathed Franklin Warren, William J. McCormack, James N. Freeman, and Owen Cunningham. On 18 May 1946, Allen complained to his diary of hearing more “bitching” from Warren who seemed to have particular problems accepting Coleman’s authority.¹²⁹ Likewise, on 20 May 1946, Allen remarked tersely in his diary, “Meeting at War Ministry – dissension in ranks. Lt. Col. Warren questioned Coleman’s rights and conduct – I told him off in definite terms.”¹³⁰ Of course, “trouble” did not cease; it was just beginning. “Today was a hell of a day. The carping Warren and McCormack started their tactics again at the 9 o’clock meeting arguing about Coleman’s authority,” a frustrated Allen wrote in his diary 28 May 1946. “I am disgusted.”¹³¹ He and his associates simply did not think that other members of the IDS could perform to the level needed. Elaine Fischel’s letters present a unique and fascinating window to both sides of early IDS rupture. Enmity becomes a two-way street. Elaine Fischel’s papers prove that feelings were mutual. Only days after joining Coleman’s staff, Fischel “heard via the grapevine that my boss Capt. Coleman is a little chicken hearted.”¹³² Rivals believed that Coleman was “too much of a gentleman to handle this job, as all our defense attorneys are going to fight like hell to get all these war criminals acquitted.”¹³³ He did not have “enough fight to handle this case.”¹³⁴ Coleman’s favouritism towards other naval personnel further bruised competing egos and irrevocably damaged defence cohesion. Valentine Deale’s status proved particularly divisive.

¹²⁸ Entry: 3 June 1946, Allen Diary.

¹²⁹ Entry: 18 May 1946, Allen Diary.

¹³⁰ Entry: 20 May 1946, Allen Diary.

¹³¹ Entry: 28 May 1946, Allen Diary.

¹³² Elaine Fischel to Mother (1 May 1946), Fischel Papers.

¹³³ Elaine Fischel to Mother (5 May 1946), Fischel Papers.

¹³⁴ Elaine Fischel to Mother (9 May 1946), Fischel Papers.

“There’s this Lt. Deale who’s a cagey guy . . . out for himself,” Fischel described. “He just has gotten in there and gotten hold of the captain’s ear and the men all resent that . . . he makes the captain listen to him and the things he suggests are wrong and he must be wrong if there are 8 guys against him.”¹³⁵ Fischel continued to respect Coleman, but understood the concerns. “It’s funny how you’re bound to run into personality clashes no matter where or what kind of work,” she told her mother. “I wouldn’t be really surprised if they removed the captain one of these days.”¹³⁶ In the end, Coleman “removed” himself, but it is plain that he was helped out the door.

The Coleman group’s departure unsettled and disorganised the IDS from the start. The ensuing leadership void exacerbated existing divides within and between American and Japanese lawyers. By abdicating, Coleman unintentionally sanctioned the split-case approach advocated by the “dummies” he failed to “control.” Any chance at a unified legal defence vanished, and the ramifications of this strategic shift became immense.¹³⁷ The prosecution remarked on their opponent’s disunity. R. H. Quilliam noted a “civil war” within the IDS caused by “jealousy in regards [to] status and remuneration,” as well as “sharp differences of opinion” about how to

¹³⁵ Elaine Fischel to Mother (11 May 1946), Fischel Papers.

¹³⁶ Ibid.

¹³⁷ Division among the accused also prevented a united defence. On the witness stand, many accused made it clear that they were out for number one by deflecting blame to other defendants. “Old human nature asserts itself,” Keenan told his wife “They all want to live. They all attempt by vain excuse to deny and avoid the consequence of their crimes. It really is a very sorry spectacle.” The self-serving behaviour of most defendants made Keenan gain rueful respect for Tōjō. “[He is] the only one I feel that has told the truth . . . He takes all the blame and is calling no witnesses to support his own story. Even from a man who brought about so much evil, one cannot help respect the truth.” Joseph Keenan to Charlotte Keenan (16 December 1947), Box 2, Folder 6 (Igoe - Krould. Sequence 756-759). A dividing line emerged between military – particularly Army – defendant and accused bureaucrats and diplomats. Fischel remembers that she and John Brannon worried because, “as the trial progressed, it became apparent that the Japanese Foreign Office – the diplomats – would try to blame our clients [Shimada Shigetarō and Oka Takazumi] for the war and its atrocities.” Fischel, *Death among the Cherry Blossoms*, 221. Tōgō’s testimony confirmed their fears. “He actually built up the Prosecution’s case” Fischel contends. The former diplomat showed no qualms displacing war responsibility to the navy personnel on the docket. Fischel, *Death among the Cherry Blossoms*, 248. Carrington Williams did not note any particular division among defendants. “There were a limited number of conflicts. Most of the approach of the Japanese war criminals to the indictment was a common defense. They were not usually at odds with each other. That was rare in fact.” Williams’ perspective may stem from the fact that his accused (Hoshino Naoki) held a relatively neutral position in the Japanese war machine. One of only two representatives of the Finance Ministry on the docket, Hoshino belonged outside the most evident sub-divisions within the accused: the Army, Navy, and Diplomatic corps. Williams Interview.

conduct the case. Although the “abler and more reputable defence members” agreed with the prosecution on the need for an “orderly” trial, others considered the only course “one of obstruction and delay.”¹³⁸ Competing agendas and personal acrimony among IDS members played out in court. Defence staff regularly disassociated themselves from rival colleagues, especially ones who lost favour in court. The disunited front apparent in arguing individual cases for each accused – as opposed to a collective opposition to the “conspiracy” charge – protracted the proceedings, angering prosecution and Bench members sensitive to ‘unnecessary’ delays. “Unless some strict limitations are imposed by the Tribunal the time taken by each defendant and his witnesses will be excessive,” Quilliam complained. “The undue length of the proceedings is threatening to destroy the whole purpose and value of the trials.”¹³⁹ Moreover, Tokyo judges found the individual approach legally and substantively unconvincing.¹⁴⁰

The Coleman group’s resignation also formed part of a larger problem retaining personnel for the entire trial. “Through the process of attrition some few resigned,” remembered Carrington Williams. “It ended up that some of the lawyers had two and in one case I think three defendants of the Japanese to defend, which they would only do if they saw no conflict in the defense of the Japanese.”¹⁴¹ Discussion elsewhere shows that many factors undercut defence efforts in Tokyo. By undermining IDS cohesion behind the scenes, however, interpersonal and *intra*-personal responses to the IMTFE hindered the defence team’s performance in court and

¹³⁸ R. H. Quilliam to A. D. McIntosh (16 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

¹³⁹ R. H. Quilliam to Foss Shanahan (3 June 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5. Foss Shanahan became a prominent figure in New Zealand circles during the IMTFE, holding various postings within the Prime Minister’s Department and the External Affairs Department, often concurrently.

¹⁴⁰ In one exchange, President Webb pointedly identified both the extent of IDS disunity and the personal manoeuvrings and infighting that caused it. On 1 August 1946, attorney Alfred Brooks interrupted a cross-examination by Hozumi Shigetaka (counsel for Kido Kōichi and Tōgō Shigenori). “Since this is a joint trial” Brooks asked the court, “if a matter is raised by another defense counsel at the lectern isn’t it proper for defense counsel for a different defendant to get up and raise a point or ask for a ruling of the Court?” *Transcripts*, 3066. “You are not concerned with the limitations placed by this Tribunal on other cross-examining counsel,” Webb argued, “Your concern is with limitations placed on you.” *Transcripts*, 3068.

¹⁴¹ Williams Interview.

helped seal their clients' fates in an already uphill battle. Participant experiences and emotions therefore impeded the effective organisation and execution of both the IDS and IPS in Tokyo. The anger and frustration of departing personnel also bled into public consciousness of the tribunal's failings, setting the tone for decades of divisive discourse.

Justice *in absentia*: Judicial Bias in Sickness and in Health

Although the internal dynamics of defence and prosecution teams formed an important aspect of the IMTFE experience, tribunals become remembered and assessed based on what takes place in court, not incidents behind the scenes. Judges, not attorneys, weigh evidence, determine findings, and pronounce verdicts, and judgments represent the most distinct outcomes of courts. The experiences of individuals who determine the judgment therefore influence trial outcomes most directly, and exploring the personal experiences of judges remains central to understanding the IMTFE's findings and legacy as well as its on-the-ground operation. Problems in how individual judges responded to Tokyo helped create the conditions for real and apparent bias that permeates the court's historiography and jurisprudential legacy.

Judicial absences and departures directly affected IMTFE proceedings and findings. Resignations became an early issue. One judge withdrew before ever setting foot in Japan.¹⁴² More significantly, John P. Higgins' resignation as the first US judge caused a jurisdictional crisis. His departure represents one of the most overt examples of personal experiences trumping other considerations in Tokyo. According to court transcripts, Higgins resigned because his successor in Massachusetts died. President Webb explained to the court that Higgins "did not feel justified in placing the added burden of administering the affairs of a large court of thirty-

¹⁴² The original appointment letter from SCAP listed Justice Henri Reimburger (France). "Appointment of Members of the International Military Tribunal for the Far East" (15 February 1946), Röling Papers, Box 27. By April 1946, Justice Henri Bernard replaced Reimburger. "Appointment of Members of the International Military Tribunal for the Far East" (5 April 1946), Röling Papers, Box 27.

one members upon him for the period of time it will take to try this case.”¹⁴³ Higgins’ resignation letter says much the same.¹⁴⁴ Yuki Takatori’s excellent work, however, reveals that the judge resigned because of deep unhappiness and a growing conviction that the IMTFE would be a failure.¹⁴⁵ His private letters support this view,¹⁴⁶ and participant observers suggest that Higgins felt unhappy because of bruised ego and injured pride. “He came over here thinking the Trials would not last very long and that he would get considerable publicity,” opined R. H. Quilliam. “Beyond those things he has never really been interested.”¹⁴⁷ Robert Donihi saw the judge’s tenure as doomed from the start. When US authorities messaged Tokyo to announce Higgins’ appointment, Chief Prosecutor Keenan denigrated the nomination. “What Keenan did not know from any of that correspondence on the [teleconference] screen is that the choice had already been made,” recalled Donihi. En route to Tokyo “the records, which were fairly voluminous, of all our conversations were handed to [Higgins] so he could familiarize himself with the whole thing. And of course he read through this, finding the unflattering comments about himself.” This slight made quitting inevitable. “He couldn’t very well . . . leave and go right back at that particular moment. But I think his decision must have been made right about then that he would

¹⁴³ *Transcripts*, 2286.

¹⁴⁴ John P. Higgins to General Douglas MacArthur (21 June 1946), General Douglas MacArthur Memorial and Archives, Norfolk, Virginia – RG-9, Box 159 Blue Binders Series: War Crimes (WC 1-320) 12 September 1945 – 21 June 1946. Hereafter “MacArthur Memorial.”

¹⁴⁵ Yuki Takatori, “The Forgotten Judge at the Tokyo War Crimes Trial,” *The Massachusetts Historical Review* 10 (2008): 115-41.

¹⁴⁶ See: MacArthur Memorial – RG-9, Box 159 Blue Binders Series: War Crimes (WC 1-320) 22 June 1946 – 17 November 1948. See also William Webb Papers, Australian War Memorial Archives, Canberra, Australia – AWM 92, Series 4, Wallet 2. Hereafter “Webb Papers.”

¹⁴⁷ R. H. Quilliam to A. D. McIntosh, Secretary of External Affairs, Wellington, NZ Archives, EA2 1946-30B 106-3-22 Part 3.

wait a reasonable time and then go home because he felt unwelcome,” Donihi argues. “This was a situation that essentially was dynamite from the standpoint of the trials.”¹⁴⁸

Higgins’ withdrawal presented a political quandary. On 25 June 1946, Attorney General Tom C. Clark cabled Tokyo saying that he felt “surprised and disturbed” by Higgins’ request and urged him to reconsider.¹⁴⁹ To avoid stymieing proceedings, General MacArthur and the tribunal replaced Higgins with Major General Myron C. Cramer. Although expedient, this decision was legally suspect. Owen Cunningham, one of the IDS’ most vocal attorneys, protested vigorously. Although accepting Cramer’s “ability, integrity, or other qualities or character,”¹⁵⁰ Cunningham complained, “The addition of another member . . . would cause the trial to proceed clouded with a substantial doubt as to the legality, fairness, and the impartiality of this whole proceeding.”¹⁵¹ Replacing Higgins would also pose “an appreciable risk to the substantial rights of the accused.”¹⁵² Cunningham unsuccessfully called for a mistrial. Both letting Higgins go and bringing in Cramer illegitimately represent clumsy miscues by administrators more interested in timely vengeance than proper, thorough, justice. To critics, changing judges in mid-stream served as a blatant example of political expediency at a victors’ court. Though warranted to a degree, such criticisms typify a reductive view of IMTFE experiences and processes. Indeed, if anything, Higgins’ decision to leave in the face of legal, political, and personal pressure to stay offers testament to the impact emotions can have on international bodies. In this case, advancing self-interest over other concerns undermined the very legitimacy of the IMTFE.

¹⁴⁸ Donihi Interview, Part II. As discussed later, Keenan believed appointing a judge of Higgins’ middling stature would be a “distinct embarrassment.” He instead advocated for Willis Smith (President of the American Bar Association), Roscoe Pound (Dean of Harvard Law School), or Walter Armstrong (former President of the American Bar Association). Joseph B. Keenan to Tom C. Clark, Attorney General (21 January 1946), MacArthur Memorial, RG-9, Box 159 Blue Binders Series: War Crimes (WC 1-320) 12 September 1945 – 21 June 1946.

¹⁴⁹ Tom C. Clark to General Douglas MacArthur (25 June 1946), MacArthur Memorial – RG-9, Box 159 Blue Binders Series: War Crimes (WC 1-320) 22 June 1946 – 17 November 1948.

¹⁵⁰ *Transcripts*, 2342.

¹⁵¹ *Transcripts*, 2344.

¹⁵² *Ibid.*

Once fully constituted, temporary Bench absences, rather than permanent departures, disrupted the court. Personal motives underlay most of the 438 court days missed in whole or in part by judges. The cumulative effect of missed court time on the trial outcomes became significant, and judicial absences frustrated both legal teams. Owen Cunningham argued, “The privilege of absence has been so abused during this trial that it is necessary at this time that the record show protest.”¹⁵³ Prosecutor Quilliam found the periodic absences of President Webb “particularly unfortunate,” giving force to “the contention that the absence of a Judge should result in his disqualification.”¹⁵⁴ Justice Northcroft, on the other hand, had few qualms about being absent. In June 1947, he informed Webb that because of the strain of work, and “the advice of the Senior Medical Officer, BRICOSAT¹⁵⁵ . . . I propose to leave for New Zealand at once.”¹⁵⁶ Upon return, he wrote to a colleague, “I arrived back from New Zealand nearly a week late, as my air transport had been switched from one line to another, but as you know, there is an elaborate verbatim record from which I was able to pick up the threads.”¹⁵⁷ Moreover, Northcroft confided, “nothing very important happened during that week,” especially since judges E. Stuart McDougall (Canada) and I. M. Zaryanov (Russia) returned even later.¹⁵⁸

Frequent absences revealed that some judges at least put personal matters before their commitment to justice. Justice Pal partially withdrew from the IMTFE at the end of September 1947 for family reasons. President Webb told General MacArthur “because of his wife’s illness [Pal] would find it necessary to return to India, and that it was unlikely he would again appear on

¹⁵³ *Transcripts*, 32661-32662.

¹⁵⁴ R. H. Quilliam, “Report on Proceedings of the IMTFE” (4 April 1948), E. H. Northcroft Papers – MB 1549, Macmillan Brown Library, University of Canterbury, Christchurch, New Zealand, Box 210. Hereafter “Northcroft Papers” and “Quilliam, Report on Proceedings.”

¹⁵⁵ British Commonwealth Sub Area, Tokyo.

¹⁵⁶ E. H. Northcroft to William F. Webb (11 June 1947), Webb Papers, Series 4, Wallet 3.

¹⁵⁷ E. H. Northcroft to Herbert Evans (26 August 1947), Evans Papers, Box 16, Item 2.

¹⁵⁸ *Ibid.*

the Tribunal.”¹⁵⁹ Although, Pal did return to work, his wife’s health remained an issue. From that point on, he became absent from court as much as he was present. As others have pointed out, the length and vociferousness of Pal’s dissenting opinion suggested that he never cooperated with judicial brethren.¹⁶⁰ Until now, Pal’s intent has been a matter of supposition. A previously undiscovered memorandum from the Henri Bernard fonds proves that Pal announced his intention to dissent in July 1946, just days after he arrived. “I cannot induce myself to the view that the acts ascribes to the accused while functioning in the capacity of persons charged with the working of the state constitution could constitute any crime within the cognizance of International law,” Pal told his new colleagues. He added, “I am preparing a detailed judgment of my own on this point.”¹⁶¹ However, it is also clear from various sources that his wife’s health legitimately contributed to Pal’s absence, especially during the writing phase of the judgment. In August 1948, Harold Evans corroborated, “the Indian Judge is going home to visit his sick wife, with the intention of returning here early in September . . . That sounds reasonable (if one can use such a word in connection with the delays of international justice!).”¹⁶² In October 1948, Pal confided to Röling, his closest associate on the Bench, “On my arrival [home] I found my wife still in a precarious condition. She seems now to have got over the crisis. But even now her condition is such as not to hold out much promise.”¹⁶³ He continued, “I am not going to leave my

¹⁵⁹ W. F. Webb to Douglas MacArthur (30 September 1947), Webb Papers, Series 4, Wallet 3.

¹⁶⁰ Brook, “The Tokyo Judgment and the Rape of Nanking.”

¹⁶¹ Henri Bernard to W. F. Webb RE: Jurisdiction of the Tribunal Raised in the Preliminary Objections Taken by the Défense (5 July 1946), Fonds du Juge Henri Bernard: Le Procès de Tokyo, 1946-1949, *Bibliothèque de documentation internationale contemporaine* (BDIC), Nanterre, France, F°Δ rés 874-10-6. Hereafter “Bernard Papers.” Pal remained resolute in his objection to the IMTFE throughout its proceedings. This fact is evident in his letter to Röling in October 1948. “I am sincerely glad to learn that you have made up your mind to give a short dissenting opinion,” he wrote, “I have always felt that justice demands this. We are not there to minister to the moral prejudices of the world public and even at the risk of wounding such public opinion. We are not to sacrifice our own convictions.” Radhabinod Pal to B. V. A. Röling (11 October 1948), Röling Papers, Box 27.

¹⁶² Harold Evans to Parents (1 August 1948), Evans Papers, Box 16, Item 2.

¹⁶³ Radhabinod Pal to B. V. A. Röling (11 October 1948), Röling Papers, Box 27.

wife's bedside . . . until I know definitely the date fixed for delivery of the judgment.”¹⁶⁴ Given his friendship with Röling, it is unlikely that Pal acted dishonestly. Pal may have used the return to India to finish his dissenting opinion, but concern for his wife proved genuine.

Whether altruistic or not, by skipping court time, judges like Pal elevated personal motives over national and judicial responsibilities. Absences reveal an apparent prejudice against the defence. “We are determined not to allow the defense to wedge its case into the prosecution’s case,” Webb admonished the IDS in August 1946.¹⁶⁵ This policy amounted to bias when judges missed disproportionately large portions of the defence case, a fact which bolsters victors’ justice allegations. Of the 438 workdays missed by judges, 333 came during IDS phases. On 4 August 1947, William Logan protested the absence of five judges – Mei, McDougall, Zaryanov, Northcroft, and one other – for a “particularly vital” part of his arguments. “The admission of evidence more or less depends on the composition of the Court at the time the evidence is offered,” he began. “There were seven members of the Tribunal this morning and there are six this afternoon, which makes quite a difference.” Webb conceded with typical directness, “There is no principle that we must act when the Court is most favourably constituted for the defense . . . You must present your case regardless of the constitution of the Court at the time.”¹⁶⁶ In an even-handed tribunal, Webb’s response would be technically valid though somewhat curt. As Richard Minear and other critics have pointed out, the IMTFE seldom operated in an even-handed fashion.¹⁶⁷ In fact, the Bench rarely did anything “most favourable” for the IDS.

Did absences affect the outcome in Tokyo, or did they reflect an outcome that was, in some sense, predetermined? Northcroft did not think that he missed anything “important” during

¹⁶⁴ Ibid.

¹⁶⁵ *Transcripts*, 4589-4590.

¹⁶⁶ *Transcripts*, 24816-24817. The transcripts are not clear on the identity of the fifth missing judge.

¹⁶⁷ See: Dower, *Embracing Defeat*, Minear, *Victors' Justice*, Pritchard, *Overview of Historical Importance*.

his August 1947 absences. To a degree, importance is relative. However, the week Northcroft missed – August 4-10; five court days – included the opening defence statements on Axis collaboration, US-Japan negotiations in 1941, Japanese military preparation for war, Japan’s advance into Indochina, POW and civilian internee policies, and the pre-war Allied ‘encirclement’ of Japan. In other words, the week included issues at the crux of the defence case.¹⁶⁸ The concurrent absence of justices Zaryanov and McDougall is significant. With Northcroft, McDougall, and Zaryanov away, only three judges from the eventual “Majority” responsible for writing the judgment attended court during this period, General Cramer (US), Mei Ju-Ao (China), and Lord Patrick (United Kingdom). Northcroft also missed March 22 to 26, 1947 – five court days – due to illness. During this week, he missed defence summations regarding former Kwantung Army Chief of Staff Koiso Kuniaki, former Admiral Shimada Shigetarō, former Finance Minister Hoshino Naoki, as well as former Generals Muto Akira, Satō Kenryō, Suzuki Teiichi, Itagaki Seishirō, and Araki Sadao (in part).¹⁶⁹ While tribunal records were available, transcripts offer an inadequate substitute for the dynamics and nuances of in court proceedings. Along with other Majority members, Northcroft later sentenced Muto and Itagaki to death, and Araki, Koiso, Hoshino, and Shimada to life imprisonment.

Viewed narrowly, endemic judicial absences suggest a pre-determined outcome. But, interpreting the tribunal as a straightforward prejudicial process misses nuance within both bias and behaviour. For example, Pal’s truancy represented the vast majority of judicial absences in court. The greatest judicial champion of the IDS skipped most of the actual defence case. If anything, Pal’s absences reflected the opposite of victors’ justice. Convinced of the validity of defence charges, he felt little need to witness it in person. In reality, therefore, the IMTFE

¹⁶⁸ *Transcripts*, 24759-25390.

¹⁶⁹ *Transcripts*, 44647-45555.

became a much messier process than dressed up vengeance. Favouritism at the IMTFE had many roots, and prejudice did not happen exclusively because of pre-existing and presupposed assumptions about Japanese guilt. Instead, bias *developed* throughout the processes and experiences of working at the court, hearing evidence, putting together cases, and being international. Because emotional reasoning is so central and compelling to how individuals understand moral issues, intensely personal responses to the IMTFE affected how judges analysed and received arguments. Exaggerated or not, endemic absences fed the growing reputation and reality of injustice in Tokyo. By provoking many of the absences, therefore, personal issues helped entrench negative views of the IMTFE at the time and after.

Timing configured bias. By “going last” the defence argued to an audience fast tiring of the ponderous tribunal and the lengthening separation from home. The judges’ discontent therefore influenced their receptivity to arguments. Normally the lone judicial voice in court – he had the only microphone – President Webb dominated the proceedings. Because so many scholars have criticised his performance, the overbearing caricature of Webb remains unquestioned, let alone explained in the historiography, with his domineering behaviour in court dismissively chalked up to an innate tetchiness.¹⁷⁰ Webb’s moods had gradations, and it is clear that the President’s emotional wellbeing influenced his actions. Although undeniably temperamental, Webb did not act uniformly prejudiced or blindly authoritarian. He also

¹⁷⁰ See: Brackman, *The Other Nuremberg*, Minear, *Victors’ Justice*, Dayle Kerry Smith, *The Tokyo War Crimes Trial: MacArthur’s Kangaroo Court* (North Quay, Qld.: Envale Press, 1999). The image of President Webb as the singular, domineering judicial voice in Tokyo permeates the literature. A closer examination of sources reveals, however, that Webb was not the “only voice” heard from the Tokyo Bench. The tribunal became a more collaborative bench than is usually acknowledged. For example, Webb was the court’s President for most of the trial, but he was not the only judge to fill that role. US justice Cramer replaced Webb whenever the Australian was away. Since Webb missed substantial portions of proceedings, Cramer played a prominent role. Cramer was also not the only ‘other’ judicial voice in Tokyo. On a handful of occasions, Justice Northcroft presided over sessions. A special conference held in chambers on 21 November 1947 likewise challenges Webb’s reputation as the unitary judicial voice in Tokyo. First because the conference was led by two judges, and second because neither judge was Webb. Presided over by Acting President Cramer, the session also saw important contributions by Canadian Justice E. Stuart McDougall. The conference became crucial in shaping the tribunal’s final stages. “Record of Conference on Matters in Relation to the Summation” (21 November 1947), IWM Papers, FO 648, Box 153, Folder 6.

functioned more collaboratively in court than most acknowledge. Despite being the only voice heard during most sessions, Webb recognised his part in a collective body. The record reveals that the President kept track of his judicial brethren and voiced their concerns in court. On 18 June 1946, for example, Webb interrupted testimony “at the request of one of my colleagues” to push a witness to include specific dates. “That is *our* desire. *We* hear of the Meiji and things like that; and the Sino-Japanese War means a lot to the Japanese and, perhaps, to some Americans and others, but to *all of us* it is not clear.”¹⁷¹ In other cases, Webb introduced the specific concerns of colleagues. On 25 June 1946, for instance, Webb noted, “*My brother Higgins points out* that even if *we* made no rule of court [regarding document translation], you would still have the Charter, which provides that the proceedings shall be in two languages.”¹⁷²

Webb was also friendlier to lawyers than most assume. Although he often demonstrated little patience for the defence, Webb was not above complimenting them if warranted. When the defence got it ‘right,’ Webb recognised their work. On 28 June 1946, for example, he applauded Okamoto Toshio (defence counsel for Minami Jirō): “I would like to commend the Japanese counsel who has just concluded the cross-examination on the way he has handled the witness.”¹⁷³ Indeed, by trial’s end, Webb’s private opinion of the IDS’ calibre became actually quite high. In March 1948, he reported to original US judge John Higgins that the defence had “improved beyond belief. The summations on both sides reach a high standard.”¹⁷⁴ Furthermore, Webb felt aware of his moods. On several occasions, a self-conscious Webb apologised for previous abruptness. On 21 August 1946, for instance, Webb expressed contrition to Chief Prosecutor Keenan: “Yesterday I suggested you were putting to the witness something he had not said . . .

¹⁷¹ *Transcripts*, 887 (Emphasis added).

¹⁷² *Transcripts*, 1301 (Emphasis added).

¹⁷³ *Transcripts*, 1536.

¹⁷⁴ W. F. Webb to John P. Higgins (9 March 1948), Webb Papers, Series 4, Wallet 2.

Having read the record I am satisfied I was wrong and I regret that I took exception to your conduct.”¹⁷⁵ Webb also proffered apologies to IDS members who drew his wrath. On 24 July 1946, for example, he apologised to Franklin E. Warren, “Colonel, yesterday I misapprehended a question you put, and I made an adverse comment which was not warranted. I regret that.”¹⁷⁶ Webb proved most at ease and most judicious away from the stress and pressure of the public eye. While he disliked Owen Cunningham and often clashed with the attorney in court, in chambers the President’s interaction with Cunningham was more moderate. During a session in November 1946, Cunningham announced “serious objections” to Australian prosecutor Alan J. Mansfield’s arguments. A close associate of Webb’s, Mansfield usually benefited from the President’s good graces.¹⁷⁷ In open session, Webb would typically have lashed out at Cunningham. *In camera*, Webb issued a measured response, “Well, I think you have both put your views forth, both sides have put their views fully, and I will consider the matter.”¹⁷⁸ Webb’s obsession with haste and the resulting terseness also seemed muted behind the scenes.¹⁷⁹

Although more congenial and collaborative than widely assumed, Webb’s fractious personality nevertheless hurt both the IMTFE’s operation and image. The court almost certainly

¹⁷⁵ *Transcripts*, 4081.

¹⁷⁶ *Transcripts*, 2420. Likewise, on 8 August 1946, Webb apologised to defence attorney Michael Levin, “Mr. Levin, yesterday afternoon I, being under a misapprehension as to something you said, rebuked you unjustly. I regret it, more particularly as your attitude to the Court has throughout been exemplary.” *Transcripts*, 3429.

¹⁷⁷ Mansfield and Webb both served as members of the Queensland Supreme Court, but they never sat concurrently. However, they did work together on the second Australian War Crimes Commission (1945-1946) which investigated atrocities and war crimes committed by Japanese forces during World War II.

¹⁷⁸ Proceedings in Chambers (26 November 1946), Delfin Jaranilla Papers, University Archives and Records Depository, University of the Philippines – Diliman, Quezon City, the Philippines, Box 93, Folder 3. Hereafter “Jaranilla Papers.”

¹⁷⁹ Webb is often criticised for inadequately explaining hasty decisions. Commenting on the rejection of IDS arguments regarding the ‘murder’ charge, Boister and Cryer argue, “The defence raised important legal challenges to these claims. However, they were all rejected when they were first mentioned, for reasons which were only given in the final judgment. Repeated re-raising of these points during the trial did not elicit any comment on the legality of the counts from the bench.” Boister and Cryer, *The Tokyo IMT*, 164. This became different in chambers. On 22 November 1946, for example, prosecutor Solis Horwitz asked for clarification about what the Tribunal considered “unessential” when arbitrarily rejecting material. In court, this kind of remark would have set Webb off. In chambers, Webb outlined a careful list of how lawyers should act in court: “Confine it to statements of fact. Confine it to matters which are relevant to issues. Do not repeat evidence; avoid repetition.” Proceedings in Chambers (22 November 1946), Jaranilla Papers, Box 50, Folder 7.

would have been and seemed fairer with a different, more even-keeled presiding judge. The defence bore the brunt of Webb's abruptness, and his general disdain for defence tactics and personalities is evident in the language he used to refer to their work. Various aspersions of the "impertinent" IDS, whose "useless" efforts "waste the time of this Tribunal" intersperse the transcripts.¹⁸⁰ Webb's expulsion of defence lawyer David F. Smith provides a glaring example of the President at his worst, patently unable to control his emotions in court. Always an irritant, Webb lost patience with Smith on 5 March 1947. "Do not waste our time, Mr. Smith."¹⁸¹ Undeterred, Smith embarked on a series of provocative objections, including, "I want to take an exception to the undue interference of the Tribunal with the ordinary examination of the witness." Ever sensitive to the court's honour, a piqued Webb demanded that Smith "withdraw that offensive expression 'undue interference by the Tribunal.' I will not listen to another word from you until you do. And you will apologize for using the expression, and if you fail to do so I shall submit to my colleagues that they cancel your authority to appear for the accused." Smith's decision to "decline to do that" even after a thirty-five minute recess to cool tempers forced an already irate Webb over the edge. Webb announced, "The Tribunal has decided to exclude Mr. Smith from all further proceedings before it until such time as a full withdrawal of the remarks which the Tribunal considers offensive and an apology for making them is tendered to the Tribunal by him."¹⁸² In September, Smith returned to court to express "profound regret" for the incident. This second exchange reveals a pettiness common to Webb's emotional reasoning. The President rigidly opposed Smith's conciliatory actions because they did not include a direct apology and therefore did not *feel* contrite enough to Webb. "In a few words you could state the position as it should be," he griped. Webb demanded that Smith re-submit his confession during

¹⁸⁰ See respectively, *Transcripts*, 2155, *Transcripts*, 1881, *Transcripts*, 3414, and *Transcripts*, 32662.

¹⁸¹ *Transcripts*, 17765.

¹⁸² *Transcripts*, 17774-17777.

the next session, this time with a formal apology. “We would all like to see you back at the lectern,” Webb remarked, “but a certain course must be followed.” Pushed further than he could take, Smith promptly announced his official withdrawal from the case.¹⁸³

The disruptiveness of Webb’s leadership also demonstrates how situational responses mix with personality traits to configure behaviour and performance in international spaces.¹⁸⁴ Webb’s anger stemmed from the conditions of international justice and his reaction to life in Tokyo, not simply from innate brutishness. Testy at best, when under strain or otherwise discontent, Webb became close to insufferable. Unfortunately for perceptions and realities of IMTFE bias, the emotional cauldron of daily proceedings brought out the worst in the President. His overreactions set the discursive framing for allegations of victors’ justice. Under the literal and figurative heat of the IMTFE limelight, Webb’s mood often dictated what evidence was admitted by the court. Although he felt impatient from the start, Webb grew more irate by the day as the tribunal dragged on. Allied governments, Occupation authorities, prosecutors, and judicial colleagues all pushed Webb to expedite the proceedings.¹⁸⁵ Blaming “the President’s methods of conducting the proceedings,” Quilliam lamented, “In the case of some at least of the judges, the importance of an expeditious trial, as stipulated by the Charter, has been lost sight of.” After banishing IDS attorney Owen Cunningham from the court for an inflammatory speech about the IMTFE to the American Bar Association, a delay-conscious Webb vented to Australian prosecutor Alan Mansfield, “I hate these things. They take up time and engender a lot of ill

¹⁸³ *Transcripts*, 27726-27728.

¹⁸⁴ Similarly, Frank Costigliola argues that a lack of “emotional restraint” shown by Harry Truman and Averell Harriman following Roosevelt’s death helped create a “vicious circle of pride and anxiety that would soon destroy the wartime alliance.” Costigliola, “After Roosevelt’s Death,” 18.

¹⁸⁵ R. H. Quilliam to Foss Shanahan (13 June 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

feeling. Just at the stage we want complete harmony.”¹⁸⁶ Webb also felt pressure from within. The burden of separation from home became apparent in the President’s personal correspondence. “This is the longest criminal trial in history, but I did not think it would be so long,” he confided to a friend in August 1948. “I am heartily sick of the place and have been for a very long time.”¹⁸⁷ Strain from time pressures and a growing dislocation from home deepened the President’s impatience, rather than simple inborn pique.

Emotional dynamics triggered internal fissures behind the scenes. Feelings of personal, social, and ideological otherness created a community of dissent in Tokyo. The strong friendship that blossomed between Justices Pal and Röling, two of the most vocal critics of the tribunal, exemplifies this development. The two connected immediately, drawn together in several ways. Both were romantics who enjoyed poetry and philosophy. Both represented relatively ‘minor’ powers outside the Occupation establishment and separate from the Anglo-American cultural majority of the tribunal. They also sat beside each other in court. Röling’s felt evident fondness for Pal. “I showed your letter to my Indian colleague, sitting next to me here on the bench,” Röling wrote to an acquaintance. “He, as a judge, thought it fair, to answer you. So, you will receive a letter from Justice Pal, who is a poet in his heart.”¹⁸⁸ Pal held equally clear admiration

¹⁸⁶ W. F. Webb to Alan J. Mansfield (6 October 1948), Webb Papers, Series 4, Wallet 2. Distasteful or not, Webb ousted Cunningham. Justice Bernard disagreed with the expulsion. “I am of the opinion and have practically already decided to vote against the application of any sanction against Mr. Cunningham and request that my dissent be officially stated,” Bernard wrote. “The procedure followed seems to me too compendious. The proposed sanction would effect at the same time the Accused.” Henri Bernard to W. F. Webb RE: Memorandum of the President Relative to Defense Counsel Owen Cunningham (13 October 1948), Bernard Papers, F° Δ rés 874 -10-77.

¹⁸⁷ W. F. Webb to Mick J. Byrne (17 August 1948), Webb Papers, Series 4, Wallet 2. Other judges also disparaged members of these sections. Justice Patrick immortalised prosecutor Charles T. Cole in verse. In late November 1947, Harold Evans retold “You know what poor stuff in the name of cross-examination we have had from American counsel,” he began. “Well, the efforts of Commander Cole, Captain Robinson’s off-sider, in cross-examining OKA yesterday must qualify him for the wooden spoon so far . . . [Lord Patrick] thought so, for he expressed himself thus in a note he sent our Judge [Northcroft] while Cole’s performance was going on: ‘Commander Cole was a dreary soul. / As dull as dull could be. / He called for his ‘Yes’ and he called / for his ‘No’ without partialitee, / For ‘whatever the answer be’ said he, / ‘I’ll pass to my next queree.’” Harold Evans to R. H. Quilliam (21 November 1947), Evans Papers, Box 16, Item 2.

¹⁸⁸ B. V. A. Röling to Patricia Daly (27 August 1946), Röling Papers, Box 27.

for Röling. “I do not give up hopes that we may yet meet again very soon,” he wrote at trial’s end, “but even if that pleasure be denied me, I would never forget the days I could associate with you.”¹⁸⁹ Mutual criticism of the IMTFE cemented the pair’s bond, but a shared sense of dislocation and estrangement in Japan and on the Bench fortified the connection.

As the trial progressed, the community of dissent expanded to include Justice Bernard, who also developed serious doubts about the trial. All three judges formally dissented at trial’s end.¹⁹⁰ Pal fretted least about isolation. Although not openly disruptive, the Indian judge made little effort to collaborate or find common ground with his brethren. However, other dissenters experienced a less deliberate sense of estrangement. In fact, the other judges often consciously cut the Bernard, Pal, Röling trio from the loop. In December 1946, for example, Justice McDougall wrote on behalf of the majority to President Webb regarding the tribunal’s jurisdiction. “I am not circulating this draft to other members,” McDougall explained, “preferring to submit it for your consideration first, thus eliminating the spirit of competing judgments.”¹⁹¹ Both Bernard and Röling tried to work with their colleagues, but they chafed under the unwillingness of other judges to accept differences of opinion. As early as August 1946, both complained to this effect to the President. “I had the same feeling as Justice Bernard expressed in his memorandum of the 23rd of August,” Röling wrote. He continued, “In my opinion, each judge who has at the end of the trial the duty to make up his mind, has the natural right to ask questions.”¹⁹² The grouping of objectors became so fixed in the minds of their colleagues, that other judges began treating them as a collective. Northcroft, for instance, placed

¹⁸⁹ Radhabinod Pal to B. V. A. Röling (11 October 1948), Röling Papers, Box 27.

¹⁹⁰ Although Webb also submitted a partial dissent, he never identified with the community of dissent around Pal, Röling, and Bernard. He was also never fully accepted by the core of the majority, which included Northcroft, McDougall, and Patrick. His fractious personality probably explains much of this isolation.

¹⁹¹ E. S. McDougall to W. F. Webb (23 December 1946), Webb Papers, Series 1, Wallet 9.

¹⁹² B. V. Röling to W. F. Webb (26 August 1946), Webb Papers, Series 1, Wallet 10.

the opinions of Pal, Röling, and Bernard together in a separate section of his personal collection of trial material, which included a separate volume, entitled *Bernard and Röling on Judgment*.¹⁹³

Shared cynicism about the trial drew judicial dissenters to the defence cause. Röling began associating with several defence lawyers. He became particularly fond of William Logan, John Brannon, and their assistant Elaine Fischel. Behind the scenes, Röling even advocated for his friends' motions. In August 1946, the Dutch judge wrote to President Webb concerning Logan's request for a firm ruling on whether or not statements made by defendants could be used in court against other accused. "Mr. Logan asked for a ruling of the Court," asserted Röling. "The Defense Counsels [need] to know as soon as possible the opinion of the Court on this point. Their line of defense may depend on our answer to that question. Personally, I am of the opinion that we have to accept that the statement of a co-accused may be used in evidence [underlining in original]."¹⁹⁴ Similarly, in December 1947, Röling pushed Webb to clarify the IMTFE's stance on the applicability of anti-submarine warfare charges, a question directly relevant to Brannon's case. "Brannon withdrew a document in view of the statement of the Prosecution," Röling argued. "He must be sure about the question whether or not the prosecution drops a specific charge."¹⁹⁵ After the trial, Logan acknowledged Röling's assistance. "I thoroughly enjoyed your dissenting opinion and wish to take this opportunity of thanking you particularly for that part of it referring to Kido," he wrote. "I sincerely believe a grave injustice has been done to him. . . . With best and personal wishes to Mrs. Röling and you."¹⁹⁶ In his dissenting judgment, Röling held that Kido Kōichi (Logan's client) should be acquitted of all charges.¹⁹⁷ By helping to create

¹⁹³ Henri Bernard and B. V. A. Röling, *Bernard and Röling on Judgment*, Northcroft Papers, Box 330.

¹⁹⁴ B. V. A. Röling to W. F. Webb (5 August 1946), Webb Papers, Series 1, Wallet 10.

¹⁹⁵ B. V. A. Röling to W. F. Webb RE: About A Statement of the Prosecution as to Submarine Warfare (17 December 1947), Röling Papers, Box 11.

¹⁹⁶ William Logan to B. V. A. Röling (11 April 1949), Röling Papers, Box 27.

¹⁹⁷ B. V. A. Röling, "Opinion of Mr. Justice Röling, Member for the Netherlands" (12 November 1948), Northcroft Papers, Box 333: 179-249. Hereafter "Röling Dissent."

a community of dissent in Tokyo, emotional conditions helped precipitate a divided bench and divisive legacy for the court. Because it formed an ideological, legal, and social foil to the majority and produced competing narratives and judicial experiences, the group of objectors also proved complicit in producing the tribunal's contested memory.

Judicial disquiet extended beyond the community of dissent. Indeed, private stressors and personal issues pushed several Majority members to the brink of quitting. Conditions so frustrated Justice Northcroft that he tried seriously to resign on several occasions. Convinced of the IMTFE's import, Northcroft struggled with its inner dynamics. "Discomfort and embarrassment I have accepted, and, of course, would continue to accept if I thought I could advance the cause of international justice," he reported in March 1947. "Were I in this position in a Court in New Zealand and subjected without redress to humiliating treatment of this order I would certainly resign from the Court. I am afraid I see no other alternative here." The New Zealander's anger emerged from petty infighting and personal self-importance not substantive trial issues. "The dignity of this Court is prejudiced by such disturbances between Judges which cannot be kept secret," Northcroft concluded. "If it is to make a useful contribution to international law," he worried, "[the Tribunal] must be entirely or substantially of one mind. The chance to secure that, I fear, has gone." More selfishly, Northcroft also worried how the fractious legacy of a split bench would reflect on his reputation. "My own prestige as a member of the Supreme Court of New Zealand is involved," he remarked.¹⁹⁸ Northcroft's closest associates, Justices McDougall and Patrick also tried to leave their posts for personal reasons. In order to bolster his justification for withdrawal, Northcroft sent Wellington a copy of McDougall's resignation letter. The New Zealand judge also noted, "Lord Patrick has written to the same

¹⁹⁸ E. H. Northcroft to Sir Humphrey O'Leary, Chief Justice, Supreme Court, Hamilton (18 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

effect to his Lord President (the Scottish equivalent of our Chief Justice).” Both judges agreed to let Northcroft “inform you of their views.”¹⁹⁹ The lived emotional experience drove nearly every judge in Tokyo to contemplate leaving, profoundly object to the court, or both. At the bare minimum, personal contingencies provoked subversive and truant tendencies among IMTFE judges. In some cases, individual and intimate considerations proved even more consequential by impelling judicial inequity, disinterest, or resignation.

Illustration 1: B. V. A. Röling and Elaine Fischel Horseback Riding



Elaine Fischel (secretary to William Logan and John Brannon) and Dutch Justice B. V. A. Röling at Camp Drake. ©Elaine Fischel, by permission.

¹⁹⁹ E. H. Northcroft to Humphrey O’Leary (21 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

Illustration 2: John Brannon and B. V. A. Röling outside of the War Ministry Building



Defence Attorney John Brannon and Justice B. V. A. Röling share a moment outside of the War Ministry Building. ©Elaine Fischel, by permission.

The emotional weight of drafting the judgment affected Majority and dissenting judges alike. First, judgment writing proved physically and intellectually taxing. “Everybody is working very hard. Two years of evidence is a lot to digest,” Webb described. “The difficulty is not so much coming to a conclusion as in expressing the reasons within a short compass.”²⁰⁰ Pressure mounted to ‘get it done.’ “I still get about a bit,” Webb explained, “but we have reached the stage when we have to work all hours.”²⁰¹ Webb declined multiple social calls during the drafting process. “On account of the great amount of work,” he told a reporter in October 1948, “I shall have from now on to refuse all invitations. To get through in good time the judges must work day and night, either together or independently.”²⁰² Elevated workloads inflamed the emotional stress of living up to the tribunal’s grand ideals and expectations. Normal judicial conscientiousness about making the “right” decision became exaggerated when projected on the

²⁰⁰ W. F. Webb to John P. Higgins (30 June 1948), Webb Papers, Series 4, Wallet 2.

²⁰¹ W. F. Webb to John P. Higgins (9 March 1948), Webb Papers, Series 4, Wallet 2.

²⁰² W. F. Webb to Miles Vaughn (26 October 1948), Webb Papers, Series 4, Wallet 2.

world stage at a trial of historic proportions. “As a member of the drafting committee, [I] am working continuously . . . without any relief even in the evenings,” Justice Northcroft reported. “[But] our first task,” he declared, “is to produce the judgment in a manner we consider worthy and with satisfaction to our conscience.”²⁰³ Dissenting judges had the additional stress of reconciling feelings with findings. The emotional burden of weighing men’s lives on the scales of justice affected minority judges deeply. “Life is pretty difficult and unpleasant,” wrote Justice Röling in November 1948. “I sit at my desk wondering whether someone has to be hanged or to be shot, which is in the long run is rather depressive.”²⁰⁴ General MacArthur echoed Röling’s sentiments. “No duty I have ever been called upon to perform in a long public service with many bitter, lonely and forlorn assignments and responsibilities is so utterly repugnant,” read SCAP’s review the tribunal’s sentences.²⁰⁵ Privately, MacArthur confessed to a British diplomat that signing the IMTFE death sentences proved, “the hardest job of his life.”²⁰⁶

Personal issues therefore shaped Bench behaviour, performance, and views at the IMTFE. The elevated pressure and stress of meting international justice before the global eye drew out and cemented personal, interpretive, emotional, and social divisions on the Bench. The physical and emotional demands of working in Tokyo caused judges’ absences, affected judicial fairness, and influenced – if not directly shaped – the judgment-writing process. In other words, participant experiences affected not only the IMTFE’s operation but also its results. By creating apparent and actual biases in Tokyo, emotions and personal responses helped set the tone for a bad reputation and a critical historiography.

²⁰³ E. H. Northcroft to Chief Justice (13 September 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

²⁰⁴ B. V. A. Röling to “Delphine” (25 June 1948), Röling Papers, Box 27.

²⁰⁵ General Douglas MacArthur, General Headquarters, Far East Command, Public Information Office (24 November 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

²⁰⁶ Sir Patrick Shaw, Allied Council for Japan to Department of External Affairs, Wellington (15 November 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

Conclusion

The IMTFE's human contingencies have led to an interesting afterlife.²⁰⁷ By adding to the fragmentation of court proceedings and findings, emotion contributed to a disruptive legacy.²⁰⁸ Although the emotional journeys described in this chapter focus on predominantly negative experiences in Tokyo, personnel responses also had positive outcomes. Participants became active contributors to an optimistic period of internationalism, an era characterised by a renewed, idealistic determination to ensure future world peace. Beyond the evidence, the laws, the symbolism, the morality, the justice, Tokyo gave the world people: a group of individuals who emerged from the IMTFE crucible imbued with the ideals it represented. The suffering he witnessed in Japan so affected Harold Evans that he became instrumental in an international effort to criminalise nuclear weaponry. President Webb advanced the IMTFE's intellectual legacy by contributing to several prominent works on the tribunal.²⁰⁹ Justice Rölöf had an illustrious career as an international jurist and peace scholar. Walter McKenzie returned to 'normal' life in Michigan, but regularly lectured about his Tokyo experiences and the IMTFE's historical importance.²¹⁰ IDS work imprinted Elaine Fischel with a steadfast conviction in American justice. She attended law school and pursued a long – and ongoing – legal career. Even

²⁰⁷ Here I use Borgwardt's apt term. See: Borgwardt, *A New Deal for the World*.

²⁰⁸ Scholars point to the IMTFE's juridical and political flaws to explain persistent memory controversies in Asia. Brook, "The Tokyo Judgment and the Rape of Nanking," 673-700, Chang and Barker, "Victor's Justice and Japan's Amnesia," 55-84, Dower, *Embracing Defeat*, Futamura, *War Crimes Tribunals and Transitional Justice*, Sedgwick, "Memory on Trial," 1229-54, Wanhong Zhang, "From Nuremberg to Tokyo: Some Reflections on the Tokyo Trial," *Cardozo Law Review* 27, no. 4 (February 2006): 1673-82.

²⁰⁹ Webb wrote the forward to David Bergamini, *Japan's Imperial Conspiracy* (New York: Morrow, 1971). Webb also contributed source material to Butow, *Tojo and the Coming of the War*.

²¹⁰ In early 1947 alone, McKenzie gave "talks" to the Veterans of the North Russian Expedition (February 9); the Delta Theta Phi Law Fraternity (February 22); the Federal Business Men's Association (February 25); the Holy Name Society's Father and Sons Program (March 9); the Birmingham High Twelve Club (March 10); the Trenton Exchange Club (March 18); the Detroit Civic Study Club (March 24); the Oakland County Bar Association (April 14); the University of Michigan Law School (April 17); the Reserve Officers of Detroit (April 21); the Saginaw Caravan Club (May 14); and the Civitan Club of Detroit (May 21). He also published pieces in the *Michigan State Bar Journal*, the *Journal of the National Association of Referees in Bankruptcy*, and the *Red Cross' Home Service Digest*. McKenzie Papers, Box I, Folder: Correspondence – January- April 1947.

R. H. Quilliam, the embittered New Zealand prosecutor, concluded that the IMTFE was “important and indeed, even essential in the interests of international security.”²¹¹

Of course, other participants experienced Tokyo without undergoing dramatic personal transformations, let alone devoting themselves to spreading its ideals. Indeed, many, including Beverly Coleman, Norris Allen, Valentine Deale, and John Guider, left disenchanted and convinced that the tribunal formed a frustrating exercise in futility. Others lost faith later. Prosecutor Brendan F. Brown exemplified the extremes of IMTFE disillusionment. Brown’s experience with the tribunal itself did not lessen his commitment to the IMTFE, but events following the trial provoked a profound disillusionment. With Chief Prosecutor Keenan, Brown declared in 1950 that Tokyo and Nuremberg “were manifestations of an intellectual and moral revolution which will have a profound and far reaching influence upon the future of world society.”²¹² Six years later, after judicial inaction regarding the Korean war, a disheartened Brown wrote, “If all truth is relative and subjective, then all law, including international law, is in essence power, and aggressive war is whatever those who have the power choose to declare it to be at any particular time.”²¹³ Other participants found the IMTFE no serious hardship. The tribunal was just work; an assignment, a job to perform. Some enlisted men and women saw it as an undemanding assignment to earn decommission ‘points’ or to avoid a dangerous posting elsewhere.²¹⁴ Others saw IMTFE employment as an adventure, an exciting life abroad, even a dream come true. Osmond Hyde, for instance, effused, “The experience has been marvellous. At times I have thought about it in the light of past experiences and it has seemed more like a fairy

²¹¹ Quilliam, Report on Proceedings.

²¹² Joseph Berry Keenan and Brendan Francis Brown, *Crimes against International Law* (Washington, DC: Public Affairs Press, 1950), v-vi.

²¹³ Brendan F. Brown, "Red China, the Tokyo Trials, and Aggressive War," *Louisiana Bar Journal* 3 (January 1956): 153.

²¹⁴ Crozier Interview and Gamble Interview.

tale than an actuality.”²¹⁵ Still others went with distinct personal agendas unrelated to the tribunal. Christmas Humphreys, for one, saw the IMTFE as a chance to further personal studies on Buddhism, which he later used to cultivate an image as England’s ‘Buddhist judge’ and a widely published Zen scholar.²¹⁶ The IMTFE also served as a professional benchmark; a career’s bookend or an addition to burgeoning résumés.

For a core of participants, however, work in Tokyo represented a significant, even singular event. This dissertation does not examine an arbitrary or random assortment of individuals. The sample deliberately crosses personal, professional, and political boundaries because the IMTFE itself formed a transcendent encounter. Being “international” – in Tokyo and elsewhere – meant sharing a collective experience that obscured social, cultural, and political divides. This dissertation uses such a wide array of actors to draw broad strokes of experiential continuity. Despite dramatically different backgrounds, roles, and status, individuals had remarkably similar responses to life and work in Tokyo. They shared a common, often transformative, IMTFE experience. Their responses, in turn, shaped the tribunal itself. Thus, what is *inside* participants of multilateral institutions – personal mental health, frustration, happiness, rivalry, acrimony, frustration, pride, prejudice – forms an important determinant of both individual job performance and the outcomes of institutions themselves. This is a commonsense assertion, but it is also a view that is regrettably under-recognised by legal scholars and historians alike. The ostensible triviality of intra-personal and inter-personal issues may explain the paucity of scholarship. If this is the case, however, the oversight reflects a peculiarly narrow understanding of “importance” in history. This chapter and dissertation moves past strict cause and effect style history to a more holistic, experiential approach, partly because

²¹⁵ Entry: 8 March 1946, Hyde Diary.

²¹⁶ Damien P. Horigan, "Christmas Humphreys: A Buddhist Judge in Twentieth Century London," *Korean Journal of Comparative Law* 24, no. 1: 1-16.

the experiential often *is* causal. Thus, this perspective provides new shades to traditional knowledge. Exploring emotional conditions in Tokyo, for example, suggests new reasons why certain key individuals resigned from the IMTFE and explains overlooked nuances in the personal behaviour of people like President Webb and Chief Prosecutor Keenan. Yet, this chapter also proves that things normally thought of as tangential to historical moments are *not*; they form part of an experiential web behind and within international bodies. Even when *not* causal, the experiential perspective provides fresh insights to the messy personal and internal processes that embroider the rich historical tapestry of global governance.

International jurisprudence has come a long way since the bold yet incomplete first steps in Nuremberg and Tokyo. Its development continues. By opening a window on an unexplored dimension of postwar justice and international organisation, this chapter – this dissertation – reminds us that future courts should be responsive to and responsible for not just the needs of the international community at large and affected societies on-the-ground, but also for the personal experiences of participants behind the scenes who become the individual conduits of international justice. Understanding this personnel component of international justice in Tokyo is the first stage of this dissertation’s multi-tiered exploration of the essence of modern global governance. The complex, contested, processes described help explain why the IMTFE and related institutions so often fall short of expectations and achievement.

CHAPTER 2: Trial through Fire: Logistics and Victors' Justice in Tokyo¹

“Observers are impressed by the magnitude of the organization,” extolled prosecutor James Robinson. “The judges and their secretaries and assistants, the prosecuting counsel and staffs from eleven nations, the American and Japanese defense counsel and staffs, the clerk’s office and staff, the administration offices, the language and document staffs, the press sections, the military police and the service group personnel total at least six hundred persons. Several hundred rooms in the War Ministry Building are required.”² The IMTFE developed into a truly immense institutional undertaking. Other works have acknowledged administrative issues, but few authors recognise logistics as a formative force behind IMTFE justice. At best, scholars use organisational challenges to colour archetypal critiques of the tribunal’s legitimacy and effectiveness. Minear and others, for example, use translation issues as proof of incompetent and insincere “victors’ justice” in Tokyo.³ This type of analysis minimises the very real and unavoidable difficulties faced by tribunal administrators, and the concerted efforts taken to surmount such obstacles. Piecing together information from a number of unique sources, this chapter presents the IMTFE as it *was* not simply what it *did* or *should* have done. Rather than seeing only injustice and condemning only missteps, this chapter details the on-the-ground experience of administering international justice, and explains how challenging logistics hurt trial practices and helped push fair justice out of reach in Tokyo.

¹ Portions of this chapter are published as: James Burnham Sedgwick, “Memory on Trial: Constructing and Contesting the ‘Rape of Nanking’ at the International Military Tribunal for the Far East, 1946-1948,” *Modern Asian Studies* 43, no. 6 (September 2009): 1229-54.

² James Robinson to Walter McKenzie (10 April 1947), McKenzie Papers, Box 1, Folder – Correspondence – April 1947. Chief Prosecutor Keenan described the IMTFE’s machinery to the FEC. “The court building was, I think, a military building. It is a big building which has been handed over entirely to the International Military Tribunal. There are a series of corridors opening out on each other and a great many rooms where you have I don’t know how many hundreds of workers all hard at work in examining and sifting and organizing the evidence and preparing it for presentation in a convenient form to the court.” Joseph B. Keenan, Report to Far Eastern Commission (14 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

³ Butow, *Tojo and the Coming of the War*, Minear, *Victors' Justice*.

This chapter turns attention to the structural issues related to international justice which birthed many of the personal, emotional, legal, and political problems discussed in other chapters. In so doing, it argues that logistics influenced the court's operations and outcomes in unanticipated and unacknowledged ways. By protracting the trial and skewing the IMTFE's judicial image, the inherent difficulties of administering justice in a war-ravaged, defeated country created a deep and lasting perception of injustice which continues to dominate historical and public memory of the tribunal. This chapter disputes the arguments of Minear and others that victors' justice in some way created the logistical nightmare in Tokyo, and that if truly committed to the process, organisers would have 'solved' the myriad issues. Instead, this chapter proves the inverse. By exaggerating existing personal and political biases, the unavoidable administrative difficulties of international justice helped produce both the perception and reality of victors' justice in Tokyo; not *vice versa*. The previous chapter's personal analysis and this chapter's logistical perspective illustrate unquestionable biases in Tokyo. But these chapters, and this dissertation, aim to move past reductive victors' justice critiques. The point becomes not to prove that the tribunal or its personnel were innately prejudiced, but rather to identify how their feelings, what they encountered, and the experience of being international shaped individuals' actions and the tribunal itself. Participants did not intend to act prejudicially; in fact, many believed they behaved with the greatest probity. However, the maelstrom of logistics, affect, and other contingencies behind internationalism, made it difficult, even impossible, to uphold principle, implement sound procedures, and follow good practices.

These types of considerations may not appeal to scholars trained or accustomed to seeing and exploring big, "important," elements of history. Yet, within institutions, seemingly trivial issues, mundane matters, irreverent personal spats, and similar issues *become* important,

inescapable, and integral components to historical truth, experience, and research – especially in unsettled transformative and transitional eras following wartime devastation. Though hardly historiographical firebrands, trial mechanics, organisational logistics, and administrative dynamics profoundly shaped justice in Tokyo, and these overlooked issues deserve study. By exploring the quirks of transnational evidence gathering and processing, supply and secrecy issues, institutional structures, and logistic delays, this chapter identifies the IMTFE as both a contested international court in operation and a complex functioning multilateral institution rather than a staid judicial process. The scope and variety of the IMTFE’s organisational difficulties distinguish it from its Nuremberg counterpart and other judicial antecedents. Although distinct, the IMTFE’s organisational experience reveals larger truths about the fundamental nature and challenge of international organisation in not only immediate postwar settings, but everywhere, anytime. Along with politics, power, and principles, logistical and administrative issues shape and define the success and public image of internationalist processes.

Living and Working with “the Enemy”: Security, Secrecy, and the Administration of Justice

Security concerns presented logistical dilemmas in Tokyo. Conditions in postwar Japan were stable and IMTFE participants were safe; but they did not always *feel* secure. Tokyo became different in this way from Nuremberg. The heat of battle remained fresher, and a more obvious destructive legacy of the war confronted IMTFE participants. People on the streets were destitute and starving. Japan felt more foreign, the Japanese more “other.” Allied propaganda painted the Nazi foe as mechanical, ruthless, but orderly and knowable,⁴ whereas it portrayed the

⁴ James Chapman, *The British at War: Cinema, State and Propaganda, 1939-1945* (London: I. B. Tauris, 1998), Clayton D. Laurie, *The Propaganda Warriors: America's Crusade against Nazi Germany* (Lawrence, KS: University Press of Kansas, 1996), Anthony Richard Ewart Rhodes and Victor Margolin, *Propaganda: The Art of Persuasion: World War II* (London: Angus and Robertson, 1976), Steven Casey, *Cautious Crusade: Franklin D. Roosevelt, American Public Opinion, and the War against Nazi Germany* (New York: Oxford University Press, 2002).

Japanese on the other hand as barbaric, bestial, unscrupulous, and devious.⁵ Such enduring wartime images of “the enemy” coloured postwar interactions.

From an Orientalist gaze, IMTFE participants arrived *expecting* difference from the Japanese, who supposedly operated under strange and incongruous behavioural norms, cultural mores, and ethical principles.⁶ Presumed to be “inscrutable,” personnel considered the Japanese dangerous and untrustworthy. The combination of cultural assumptions and unsettling life abroad as “internationals” often engendered an alarmist perceptions of threat. When filtered through the lens of personal dislocation, racial stereotypes of “sneaky,” monochromatic, and secretive “Japs” manifested in over-exuberant security precautions. Even the most sensitive and open-minded individuals, such as budding Japanophile Elaine Fischel, struggled to overcome wartime prejudices. She explained to her mother in June 1946, “Please don’t misunderstand. When I say I like some of the Japs I mean it but I can never lose sight of the fact that 6 months ago any one of them would gladly have put a knife in your back.” Fischel continued, “We can never know what they really feel towards the Americans so I’m not being fooled by any of their exterior actions and behavior.”⁷ In contrast, the Nuremberg process never completely “othered” Germans. Indeed, the cultural affinity and shared Western heritage between many Allies and Germany, rather than alterity, dominated discourse. How could *Europeans* (like us!) commit such acts? Germans were not to be feared so much as *understood*. The Japanese were different. Necessary or not, the logistics of security became an important obstacle for trial administrators.⁸

⁵ Dower, *War without Mercy*.

⁶ To prepare civilian employees for the cultural disjuncture of Occupation employment and life in Japan, SCAP General Headquarters issued a pamphlet entitled “You in Tokyo.” McKenzie Papers, Box 2, Folder – Personal Miscellaneous. See also, “You in Tokyo,” Fischel Papers.

⁷ Elaine Fischel to Mother (6 June 1946), Fischel Papers.

⁸ Frank Costigliola points to a similar Anglo-American attitude about Soviet alterity. “Difference in others was more likely to be interpreted as evidence of malevolence or of inferiority by those Americans and British who assumed they embodied cultural and racial normativity,” he explains. Costigliola, “After Roosevelt’s Death,” 9.

In spite of suspicions, tribunal participants had to rely on local Japanese staff, interpreters, custodians, labourers, and servants to run the IMTFE machine. Allied personnel were at a premium, especially translators, and the Japanese workforce desperately needed employment. The defence had to confront the cross-cultural divides most directly and most immediately. Fostering internal defence cohesion emerged as a slow process that required building trust. Deep ideological, legal, and cultural differences split the defence, but mutual suspicion became one of the hardest issues to overcome. Following a brutal war, steeped with essentialising propaganda, both ‘sides’ of the IDS had to surmount an enmity gap.⁹ American IDS members struggled to overcome residual wartime hostility. Attorney Carrington Williams later told an interviewer that he initially balked at the idea of defending former enemies. “I really didn’t want to do it,” Williams admitted. “I was so antagonistic to the Japanese and I also wanted to come home, like everybody else.”¹⁰ US lawyers, many of them veterans of the war, found it difficult to accept their Japanese colleagues’ arguments as anything other than a shameless justification of Japan’s wartime actions. On the other side, it took time for Japanese Defence staff and their clients to accept the earnestness of their American colleagues. Attorney Alfred Brooks told an assembly on the fortieth anniversary of the IMTFE, “Mr. Koiso [Kuniaki; one of the accused] did not trust me for a long time, but finally he exclaimed, ‘I have decided. I have found a friend from the distant foreign land.’”¹¹ Similarly, Carrington Williams recollected how his Japanese counterparts, “became more and more amenable as they became convinced that we were sincerely trying to

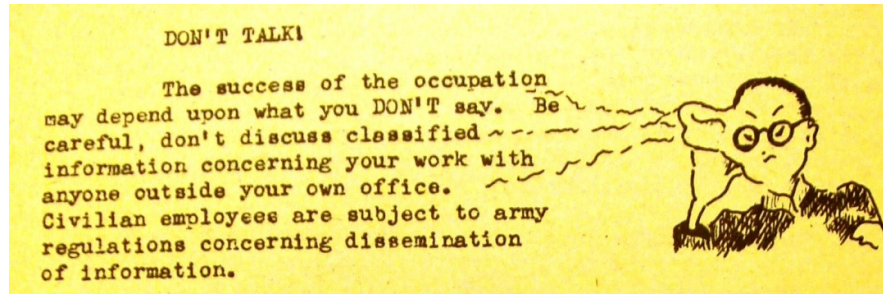
⁹ John Dower remains the most eloquent and incisive scholar of the “war without mercy” and “cultures of war” entrenched on both sides of the Japanese-US conflict. Dower, *War without Mercy*, John W. Dower, *Cultures of War: Pearl Harbor / Hiroshima / 9-11 / Iraq* (New York: W. W. Norton, 2011).

¹⁰ Ultimately, a colleague convinced Williams to stay on. “He said, ‘Look, you’re a lawyer, you’re an American lawyer, and it’s not a question of whether you like the defendant that you’re defending or not. It’s a question of his being entitled to a good defense.’ . . . that made sense to me.” Williams Interview.

¹¹ Chihiro Hosoya, *The Tokyo War Crimes Trial: An International Symposium* (Tokyo: Kodansha, 1986), 121.

defend them. I think a lot of them felt at the outset very suspicious, as indeed we would have felt under similar circumstances if they'd been occupying the United States.”¹²

Illustration 3: Don't Talk!



Excerpt from “You in Tokyo,” a guide to life in Japan published by SCAP GHQ for civilian employees of the occupation. ©Elaine Fischel, by permission.

Japanese and American counsel took active steps to break down social and cultural barriers. Despite the fact that Occupation regulations forbade US members from fraternising with Japanese citizens, both sides did. “We were not supposed to stay in Japanese homes. We were not supposed to eat Japanese food . . . we weren’t supposed to stay in Japanese hotels. Well, we violated that order with some frequency,” Carrington Williams later recalled. “We were entertained from time to time by the Japanese lawyers . . . I used to be invited to have dinner with them or into their homes.”¹³ Several prominent US attorneys became avid students of Japanese language and culture, in part to facilitate work with their Japanese counterparts. Indeed, several US attorneys developed lasting connections to Japan. Ben Bruce Blakeney, George Blewett, John Brannon, Alfred Brooks, George Furness, and Franklin Warren all applied to SCAP for permission to continue practise and to pursue business activities in Japan after their assignments to the IMTFE finished.¹⁴ Warren, Blakeney, Furness, and Blewett remained in Japan

¹² Williams Interview.

¹³ Indeed, Williams admitted to Mayo, “I got picked up by the MP’s one time for staying in a Japanese hotel. I got a delinquency report, my first experience as a delinquent.” Williams Interview.

¹⁴ National Archives and Records Administration, College Park, Maryland, RG 331 - SCAP Legal Division, Box 1029, Folder 190 – John Brannon; Box 1030, Folder 222 - George F. Blewett, Folder 224 - Alfred W. Brooks, Folder 243 - George A. Furness, Folder 283 - Alfred W. Brooks; Box 1032, Folder 407 - Ben Bruce Blakeney; Box 1034, Folder 659 - George A. Furness; Box 1035, Folder 754 - Franklin E. N. Warren. Hereafter “NARA.”

for years afterwards. Furness and Blakeney married Japanese women and settled there for love; others stayed for financial and business matters. The ongoing connection many IDS members felt with Japan reflected a cultural openness that helped grease the wheels of the IDS machine.¹⁵

The prosecution likewise could not have put forward a case without Japanese assistance. However, trusting domestic aides felt more difficult for prosecutors fixated on Japan's guilt, individuals who spent most their time researching atrocities and building evidence to incriminate Japan's wartime leadership and even condemn Japan's very "civilisation." Mistrust therefore added subconsciously and consciously to the IPS' administrative burden.¹⁶ Walter McKenzie, for example, described an unwieldy system of internal security which developed within prosecution circles. In May 1946, McKenzie complained to his wife about being on "evening duty" in Lt.-Col. Theodore Goulsby's IPS document centre. "Each of us draw this assignment from time to time," he explained. It proved a menial and frustrating task. McKenzie tried to work, but found the coming and going of staff disruptive, especially the intrusion of Japanese employees. "First 3 or 4 jap boys and men came in to sweep, then 4 jap women dusted, then 5 men came in to mop, then 1 man put some window shades, I don't know why they employ so many Japs to do simple jobs because they just get in each other's way," griped McKenzie. To a suspicious mind, the sheer quantity of Japanese employees caused concern. "It is that much harder to watch them, which is probably why they come in flocks. They go through our desks, steal candy, nuts, gum

¹⁵ Blakeney and his wife died tragically in a plane crash in Japan. Williams Interview. Furness maintained an interesting connection to the cultural scene in Japan. He acted in several Japanese films related to the IMTFE, including playing the part of President Webb for an NHK documentary and a film about Hirota Koki as well as a defense attorney in a fictional movie about a war crimes trial. George Furness, Interview with Marlene Mayo (14 May 1981, 18 May 1981), Tokyo. Mayo Collection. Hereafter "Furness Interview."

¹⁶ On trust in international relations, refer to one of several fascinating studies. Aaron M. Hoffman, *Building Trust: Overcoming Suspicion in International Conflict*, Suny Series in Global Politics (Albany: State University of New York Press, 2006), Andrew H. Kydd, *Trust and Mistrust in International Relations* (Princeton, NJ: Princeton University Press, 2005), Dean G. Pruitt, *Threat Perception, Trust and Responsiveness in International Behavior* (Newark, DE: 1964), Brian C. Rathbun, *Trust in International Cooperation: International Security Institutions, Domestic Politics and American Multilateralism* (New York: Cambridge University Press, 2012).

and cigarettes and look at all our papers,” the prosecutor alleged. The presence of soldiers and MPs (“I don’t know how many - but not enough”) did not allay McKenzie’s fears or – in his view – deter the workers. “They still get stuff as it is easy for the girls to conceal it in their clothes. We are afraid they may steal papers and documents, and the M.P. told me tonight they had caught some with documents.” Security measures were in place, but the logistics complicated the situation. “We are supposed to lock all documents in the vault before 5:00 pm but sometimes we are busy and forget, so do not reach the vault before it closes,” explained McKenzie. Because of “transportation difficulties,” the system frequently proved ineffective, and military precision had the unwanted effect of making evidence more, not less, secure. “They [military officers] are usually very prompt – sometimes premature – about locking it and leaving,” wrote McKenzie. As a result, many documents ended up unsecured overnight.¹⁷

Illustration 4: Security Screenings



MPs Warren Erickson, Beverly Knapp, and John F. Polantz search Japanese spectators for concealed weapons or cameras at the War Ministry Building on 23 July 1946. ©US Army Signal Corps, WPA-46-66441. Access courtesy of private papers of Morris Gamble, by permission.

¹⁷ Walter McKenzie to Connie McKenzie (16 May 1946), Box 1, Folder – Correspondence with Wife and Family – May-June 1946

Without alternatives to Japanese assistance, trust grudgingly developed through human interaction behind the scenes, though the tinge of suspicion never completely left IMTFE circles. Racial inequities and treatment of the Japanese as second-class participants contributed to the court's imposed, unequal feel. Correspondence between Walter McKenzie and Sada Matsusawa, the superintendent at Hattori House, highlights the trust-distrust duality common within the IPS, especially during the monumental task of translating and reproducing thousands of pages of the judgment and related documents.¹⁸ In July, authorities emptied McKenzie's former residence. In preparation for processing the IMTFE judgment, the court moved all remaining prosecutors to the Imperial Hotel. "The Hattori House was taken over as a place for translating the IMTFE verdict," Matsuzawa told McKenzie. "The place will be incommunicado until the verdict is given at the Court. The compound is bobwired [sic] all around leaving just the front entrance open. It will be guarded by 30 MPs 24 hrs daily." Along with around 30 male Japanese translators and 30 female Japanese "doing typing and mimeographing," the house also included "American language experts and maintenance officers." "All in all," Matsuzawa concluded, "[there] will be 180 persons coupled [sic] here for the time translating is done which is estimated from 6 to 8 weeks."¹⁹ On a personal level, McKenzie's closeness with Matsuzawa illustrated the bond which slowly emerged between Allied participants and Japanese counterparts. On an administrative level, the strict security protocols for printing and translating the judgment

¹⁸ The IMTFE Judgment's translation in Hattori House reflects the often too-close connection between the prosecution and the tribunal's administrative branches. McKenzie, after all, had lived in Hattori House along with many other prosecutors. This is how he knew Matsusawa. As I describe later, the indelicate link between administration and the prosecution played (and plays) into the perception of victors' justice in Tokyo. Dower, Bix, and Bergamini suggests that over-exuberant security concerns may not have been entirely misplaced. These authors do an excellent job of restoring Japanese agency in the Occupation. At the same time, however, it is difficult to escape the impression that they – especially Bergamini – overstate Japanese manipulation behind the scenes. Bix, *Hirohito*, Bergamini, *Japan's Imperial Conspiracy*, Dower, *Embracing Defeat*.

¹⁹ Sada Matsuzawa to Walter McKenzie (30 July 1948), McKenzie Papers, Box 1, Folder – Correspondence – 1948. Sequestering the judgment and its translators also helped SCAP restrict press access, an important consideration for Occupation forces conscious of the IMTFE's worth as a didactic tool and propaganda source for re-educating the Japanese public. Keeping the judgment secret helped authorities control the message.

reflected the persistent depth of distrust, but also complete dependence on, Japanese participants. Such visual and visceral examples of distrust undercut the IMTFE's credibility as a tool for reconciliation or a welcome, munificent, and even-handed judicial enterprise.

Illustration 5: The IMTFE Judgment Arrives in Ichigaya



On 4 November 1948, Japanese labourers carry the IMTFE judgment and related documents into the War Ministry Building under the ever-present and watchful eyes of a MP. ©US Army Signal Corps, FEC-48-9114. Access courtesy of NZ Archives EA2 1948-29A 106-3-22 Part 8.

Illustration 6: The Judgment Translation Team in the War Ministry Building Foyer



After six months isolated at Hattori House, the judgment's translators arrive in the Ichigaya courthouse on 4 November 1948. ©US Army Signal Corps, FEC-48-9112. Access courtesy of NZ Archives EA2 1948-29A 106-3-22 Part 8.

A later letter from Matsuzawa provided more detail about the administrative effort and security precautions put into producing a bilingual judgment. “All unnecessary furniture [was] taken away even the pictures and curtains,” Matsuzawa recounted. “The three houses were turned into a regular office for the expert translators . . . The compound was surrounded with barbed-wire fence guarded by 30 or more MPs in turn. 500 W lights lighted the inside and outside of the three houses that it was like day even the darkest nights.” The entire endeavour became by necessity a Japanese project apart from three “Americans,” six Japanese-American *Nisei* (“top notches in the language”), and the ubiquitous security staff. Because of judicial disputes and the resulting delay in judgment writing, the Hattori translating team stayed segregated for months without work. “At last the document started coming in the late part of October. In November there was a great rush. Printing Machines worked late to midnight – Papers were filed, sorted, and bound about 300 copies made every day.”²⁰ It formed an enormous task. Matsuzawa’s recollections further illustrate the complex relationship between American authorities and Japanese employees. A community developed within the walls. “All slept on GI beds, ate GI food played with American sport goods. We lived like Americans,” Matsuzawa described. Until the judgment arrived in October, Hattori detainees enjoyed life.

The days were warm and weather [was] fine . . . we enjoyed all sorts of sports both in and out. Had movies about 5 to 6 times a week and when there was no movie we had dancing parties. We had servicemen to make pleasure programs and when we had matches and games, prizes were given to us by the Americans. We had a Bingo Party one Saturday in the dining room and parlour . . . it was the first experience for many of us and we enjoyed it immensely.²¹

Matsuzawa even boasted anecdotally to McKenzie that the bright lights and security presence improved the surroundings. “I have heard afterwards,” he wrote, “that the neighbourhood was

²⁰ Sada Matsuzawa to Walter McKenzie (15 December 1948), McKenzie Papers, Box 1, Folder – Correspondence – 1948.

²¹ Ibid.

saved from robbery during the 3 months!”²² But the walls existed. “The days went by still guarded strictly by the MP day and night,” remembered Matsuzawa.

The Hattori House which processed the Judgment became a distinctly more restricted and monitored site than the Hattori House which served as prosecution residence in McKenzie’s time. Perhaps naturally, prosecutors set on punishing Japanese leaders and preoccupied with Japan’s guilt maintained a level of distance with their Japanese colleagues. To Allied prosecutors, IPS staff from Japan became necessary instruments for conducting an effective prosecution rather than integral associates and friends. In contrast, defence attorneys developed stronger and deeper ties to their Japanese colleagues, their clients, and Japan itself. This close relationship began in part from operational necessity, but for many IDS attorneys, mutual personal and professional appreciation and respect formed an enduring bond. Few, if any, prosecutors developed similarly lasting ties to the country or its people. Administrative responses to logistical necessities and perceived security threats brought out prosecution and Occupation attitudes towards the Japanese, even close and essential colleagues and assistants. The resulting disconnect enhanced the perception of externally imposed justice and political vengeance in Tokyo and in the literature.

Travel, Travails, and Transnational Evidence

The IMTFE emerged as an international encounter in every way; a negotiated process of multiple national cultures, politics, and personnel on the ground. Beyond Tokyo, the tribunal became also a *transnational* endeavour, especially regarding logistical and administrative issues. While the tribunal’s scope and objectives brought the world community to Tokyo, its organisational demands often pushed IMTFE investigations well beyond Japan’s borders. Transnational evidence formed the bedrock of Tokyo justice. The prosecution indicted Japan’s leaders for decades of crimes over a massive geographical catchment area that included Asia,

²² Ibid.

Australasia, the Americas, and even Europe. Defence and Prosecution personnel travelled the globe on fact-finding missions to interview or retrieve witnesses, consult experts, visit and observe other war crimes proceedings, and recruit staff. Conflicting logistical priorities, particularly force demobilisation and the global transition from war to peace exacerbated the inherent logistical demands of international justice. Overcoming the obstacles of transnational evidence became an inextricable and rarely noted part of the tribunal's existence and history.²³ This section corrects this oversight by using a few key examples of the IMTFE's administration to suggest a broader and more complete picture of the tribunal's organisational challenges, on the ground and abroad. Complicated logistics helped tarnish the IMTFE's image. Unavoidable delays reinforced the appearance of incompetence at the court, hurt its public standing, and damaged its internal reputation. The resulting contemporary criticism laid the bedrock for continuing assumptions of clumsy victors' justice in Tokyo.

Transnational obstacles confronted IMTFE administrators and personnel well before the trial itself began. To run an effective tribunal, the IMTFE needed buy-in from all participating Allied forces and governments. The tribunal's pull of resources, evidence, personnel, and prisoners crosscut the priorities of militaries already struggling to maintain regional security, safely repatriate enemy forces, liberate Allied POWs, and demobilise soldiers. Difficulties in rounding up evidence and prospective war criminals from the Southeast Asian arena illustrate the competing logistical challenges that beset IMTFE organisers and other Allied groups. Control over postwar Southeast Asia initially fell under the administrative umbrella of the Supreme Allied Commander, South East Asia (SACSEA), Admiral Louis Mountbatten. SACSEA faced an

²³ For facts in motion, see: Peter Howlett and Mary S. Morgan, eds., *How Well Do Facts Travel? The Dissemination of Reliable Knowledge* (Cambridge: Cambridge University Press, 2011). For the interplay and logistics of facts in international justice see: A. Combs Nancy, *Fact-Finding without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge: Cambridge University Press, 2010).

enormous and complex task. From the start, demands for international justice caused logistical headaches for this regional authority. Although not opposed to war crimes operations, Mountbatten and his staff prioritised more immediate local responsibilities of demobilisation, disarmament, and the suppression of budding anti-colonial uprisings. In SACSEA's view, stability trumped ideals and legalism. The competing agendas of order *versus* justice coloured early diplomatic exchanges. In October 1945, for example, the British Secretary of State for Dominion Affairs defended the slow pace of war crimes operations in Mountbatten's sphere. Although "anxious" to see the trial begin and war criminals apprehended with the "least possible delay" the Secretary explained, "[There is] very heavy strain on forces at disposal of SACSEA since [the] end of hostilities." He observed how "limitations of legal organisation" under Mountbatten's command had resulted in "severe difficulties." Cautioning patience, the Dominion Affairs Secretary assured a New Zealand counterpart, "We are taking urgent steps to supply increased legal personnel with view to earliest possible commencement of trials."²⁴ SACSEA's logistical problems did not disappear, nor did their impact on the IMTFE.

The tribunal's biggest SACSEA dilemma involved custody of captured war criminals. In early 1946, British prosecutors in Tokyo requested the extradition of Kimura Heitarō and Itagaki Seishirō, two key proposed IMTFE defendants. The two Japanese generals finished the war in SACSEA captivity and Mountbatten hesitated before honouring the IPS request. Britain's top prosecutor, Arthur Comyns Carr, grew impatient after several weeks of SACSEA inaction. Eventually, on 20 March 1946, Comyns Carr sent a terse protest note. "ITAGAKI was on the list of major, repeat major, war criminals originally provided by the Foreign Office and all, repeat all, Prosecutors here are agreed on his inclusion in the Indictment," stressed the prosecutor. "Delay

²⁴ Secretary of State for Dominion Affairs, London to Minister of External Affairs, Wellington (24 October 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

[is] causing extreme embarrassment and request you reply in a matter of great urgency.”²⁵ In response to further SACSEA prevarication, Comyns Carr appealed to superiors. “In response to urgent requests for surrender of ITAGAKI unanimously agreed here as major war criminal [SACSEA] declines to send him until September,” the prosecutor complained to London on 26 March 1946. “We now have direct evidence against ITAGAKI as [a] protagonist in arranging the original Mukden incident of 1931, which started the whole history . . . [the] Trial without him would lose much significance.” Delay was unacceptable, especially since “SACSEA also demands six weeks delay in surrendering Lt. Gen. KIMURA, Heitaro, Vice Minister of War under TOJO, and directly responsible for Prisoner of War maladministration.” Comyns Carr urged, “Take this question to higher level for decision.”²⁶

SACSEA agreed to release Itagaki and Kimura just weeks before the IMTFE’s start. Mountbatten’s impenitent message to Britain’s Secretary of State explained the delayed turnover.

ITAGAKI has . . . been a key man in [the] execution of SACSEA’s commitments as regards prisoners of war. In addition, both he and Kimura (principal Japanese commander in Burma) were required for interrogation purpose . . . Despite the risks involved (and it must be emphasised that our forces are thin on the ground over all this vast area, that Indian units are being withdrawn at India’s wish, that operations continue in Java, that thousands of internees remain to be rescued in Java and that breakdown in discipline of Japanese prisoners would give rise to grave military food shipping and other economic problems) – despite these risks ITAGAKI and KIMURA are being handed over . . . I feel however that it is only fair to SEAC [South East Asia Command] that their difficulties should be realized.²⁷

SACSEA’s parting shot reveals the messy and often unsatisfying logistics of transitional justice. Even securing defendants from allies became a contested process. The feeling and reality that IMTFE personnel had to struggle for every increment of progress frustrated internal and external

²⁵ A. S. Comyns Carr via United Kingdom Liaison Mission (UKLIM), Tokyo to Supreme Commander of Southeast Asia Command (SACSEA) (20 March 1946), IWM Papers, FO 648, Box 152, Folder 3.

²⁶ A. S. Comyns Carr to Foreign Office (FO) and SACSEA (26 March 1946), IWM Papers, FO 648, Box 152, Folder 3.

²⁷ SACSEA to Secretary of State, London (12 April 1946), IWM Papers, FO 648, Box 152, Folder 3.

observers. Accepting the IMTFE's place in broader postwar maelstrom of competing priorities, difficult transnational logistics, and negotiated justice became a hurdle for participants convinced that the court represented a new age of internationalism.²⁸

SACSEA became reluctant to participate fully with the IMTFE project because of the associated logistical burden and because it had its own plans for accountability.²⁹ The tribunal met similar resistance in other jurisdictions. As a result, prosecution, defence, and administrative teams in Tokyo devised alternative strategies to gather evidence; operations which did not add to the already heavy burden of SACSEA and other authorities. If evidence would not or could not come to Tokyo, then Tokyo went to the evidence. IMTFE divisions sent individuals or personnel teams to sites abroad as temporary fact-finding missions or longer regional liaison postings. The resulting travel time, personal commitment, and financial costs added to the logistical difficulty of IMTFE administration. A snapshot of IPS and IDS missions – prosecutor Daniel Nelson Sutton to China, prosecutor U. E. Maung to Burma, defence attorney Alfred Brooks to Washington, and defence attorney George Furness to London – demonstrates the geographical range and variety of tasks carried out by IMTFE personnel. As part of a much larger, more complex, administrative experience, their work illustrates the dramatic logistical complications associated with carrying out international justice.

²⁸ The British prosecutor could not afford to rest on the laurels of this diplomatic victory. "It would be of great assistance if such parts of the interrogation of these two men with [a] certificate or affidavit of correctness by shorthand writ and interpreter or best proof available and other evidence in affidavit form which relate to their responsibility for treatment of Prisoners of War and civilian population could be sent here with escort returning with them or by fastest means possible." Relentless, Comyns Carr pushed every advantage he could to circumvent the difficult logistics of international justice. UKLIM to FO and British War Crimes Executive (JBJB), London (17 April 1946), IWM Papers, FO 648, Box, 152, Folder 3.

²⁹ SACSEA proved more willing to commit to war crimes operations on their own terms. For example, in January 1946, it announced being "very much in favour" of sending a 3 [or] 4 man attachment to US war crimes investigations by CINC AFPAC ADV [Commander in Chief, Allied Forces, Pacific, Advocate]. SACSEA to BRITAS, Tokyo (20 January 1946), IWM Papers, FO 648, Box 152, Folder 3. UKLIM in Japan responded that Chief Prosecutor Keenan and British Prosecutor Comyns Carr would "welcome assistance of proposed legal section," asking in particular for at least one officer with "good knowledge" of Singapore. UKLIM to SACSEA (5 February 1946), IWM Papers, FO 648, Box 152, Folder 3.

The prosecution scrambled to gather evidence leading up to court's first day. In April 1946, an IPS team left Tokyo to investigate Japan's crimes in China. Given the extent and brutality of atrocities in the arena, the team of Daniel Nelson Sutton, John J. Crowley, and Thomas H. Morrow expected a relatively straightforward job gathering evidence, deposing witnesses, and recording hands-on the devastation wrought by Japan's armies. Instead, the group met an array of challenges typical of many modern international courts. First, Sutton and his colleagues found it difficult to secure firsthand accounts, especially from ethnic Chinese witnesses. A *New York Times* article noted the group's "slow and complicated task," including the challenge of finding "suitable" eyewitnesses. "There are millions of Chinese who know of Japanese brutalities and oppression as victims or witnesses but they are hard to find among those persons who are considered educated enough to give court testimony," explained the paper. "Individuals sufficiently educated or sophisticated enough to know what the war crimes trials are all about often don't want to testify."³⁰ The Sutton group's problems demonstrate the inherent difficulty of integrating cold legal protocols with raw post-conflict emotions. In order to recount experiences, survivors of mass trauma often first need to build trust in their audience and in their interlocutors, and investigators must create a comfortable space for sharing tales of horror. Sutton and his associates failed in this regard partly because the era's legal culture had a limited appreciation or awareness of victims' rights. The heavy weight of the time's social prejudices regarding "suitability" and "sophistication" also obfuscated their efforts. The search for witnesses by Sutton and his colleagues did not come up short because of an actual paucity of survivors. They subconsciously limited their search based on racial and legal assumptions about what constituted "useful" testimony in a presumed to be "rational" and fixed court of law.

³⁰"War Crimes Case Delayed in China: Finding Suitable Witnesses to Go to Tokyo Proves Slow and Complicated Task," *New York Times*, 1 April 1946, 9.

Chinese victims deserved sympathy, but to the prosecution team, Western eyewitnesses carried presumptive probative authority. Moreover, time and administrative constraints made a difficult task closer to impossible. The haste felt by participants and the resulting sloppiness and administrative shortcuts helped create the overall appearance of a rushed and vengeful trial moving indifferently towards a foregone conclusion. Though hard to dismiss, the IMTFE's shortcomings need also to be contextualised. In part, at least, its faults and the ensuing critiques grew out of the trial's novelty and the global lack of experience with such international tribunals.

Sutton's experiences also highlight the difficulty of extricating sources from government bureaucracies, even ones willing to help. No one force explains these difficulties. In some jurisdictions, domestic political considerations outweighed international commitments. In others, ground-level exigencies and competing institutional priorities obstructed IMTFE work. Above all, the tribunal's improvised structures meant a lack of established procedures for participating individuals and constituencies. As a result, IMTFE investigators faced problems around the globe. After meeting with Morrow and Sutton, for instance, an Australian diplomat in Chongqing observed, "They did not even have anything concerning the atrocities associated with the massacre of Nanking. They had been in Peking and Nanking, but to the present, they had not obtained from the Chinese authorities one affidavit." Lack of evidence did not come from lack of effort. "Col. Morrow and Mr. Sutton were sent from one place to another in Chungking, and eventually arrived back at their starting point without obtaining any information at all."³¹ Sutton's attempts to secure sources from the US embassy in Nanjing demonstrate the IMTFE's transnational goose chase. Due to difficulties tracing evidence, Sutton's group moved on to Washington to secure access to Nanjing embassy documents denied while they were in China.

³¹ Australian Representative, Chungking RE: Chinese Apathy Regarding War Crimes (21 March 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

Arthur R. Rengwalt, Chief of the US State Department's Far Eastern Division assured the group that George Acheson, then a Political Advisor for SCAP, could secure the document release. Once in Washington, however, Sutton maddeningly found that Acheson did not have authorisation. "I talked to Mr. Acheson yesterday and he stated that the State Department obviously misunderstood the request which we made of it. He has no authority to authorize [the] Embassy at Nanking to furnish copies of the desired reports and material in the files there." More frustrating still, "Mr. Acheson further stated that had he been in Nanking at the time we were there he would have furnished copies of the data in the file."³² The cumulative impact of such administrative issues reduced the overall quality of prosecution and defence evidence, helped delay the proceedings, and bolstered the appearance of rushed, cursory, and preordained justice.

The investigatory excursions of Burmese prosecutor U. E. Maung illustrate a similar range of administrative and logistical difficulties. Maung's time in Tokyo was brief. Although the Secretary of State for Burma confirmed his appointment as early as 20 February 1946,³³ Maung did not arrive in Tokyo until June 2.³⁴ Finding that "materials relating to Burma were very scanty," Maung left less than two weeks later (15 June) to bolster the IPS' Burmese

³² Daniel N. Sutton to Carlisle Higgins RE: Request For Authority to Secure Copies of Records from Embassy in Nanking (8 May 1946), Lowe Papers, Box 2, Item 4.

³³ Secretary of State, Burma to Governor of Burma (20 February 1946), London, UK: Indian Office Records, British Library, Asia, Pacific and Africa Collections (Previously Oriental and India Office Library). IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. Hereafter "British Library."

³⁴ Maung's journey embodied the epic logistics of international justice. "I left Rangoon by air in the forenoon of 14th May and arrived at Singapore in the afternoon of 15th May. No air passage to Hongkong was available till 20th May and I took advantage of the enforced stay at Singapore to study legislative and judicial problems arising out of the War. I attended also at the headquarters of the War Crimes Section and obtained certain materials for Tokyo. Arriving at Hongkong in the afternoon of 22nd May, weather conditions in the China Sea delayed my departure till 31st May. Getting in contact with the Attorney General of Hongkong, the Hon'ble G. E. Strickland, I was enabled to study legislative and judicial problems of Hongkong. The acting Chief Justice of the Supreme Court, the Hon'ble Mr. Justice E. H. Williams, and the Attorney General very kindly afforded me facilities for the study. I had the honour of an interview with His Excellency the Governor of Hongkong. Leaving Hongkong on 31st May, I arrived at Tokyo late in the afternoon of 2nd June." U. E. Maung to UKLIM, "Progress Report from 14th May to 31st July 1946" (31 July 1946), British Library, IOR/ M/4/3049 Telegrams, Burma Office, Japanese War Criminals – Reports on Progress of the Tokyo Trials.

evidence. He arrived back in Rangoon on 23 June to collect material on the building of a “Burma-Siam Railway,” the inner-workings of the “Burma Puppet Administration,” the forced “concubinage of two Englishwomen,” the beheading of Allied airmen, and countless other killings of local Burmese. Like Sutton and others, Maung discovered the logistical nightmare of gathering convincing and suitable courtroom evidence in a recovering war-torn land, even in one’s own country. Local climactic conditions and geographical obstacles further delayed the Burmese prosecutor’s progress. “Collection of materials was not as easy as was anticipated,” Maung admitted in a progress report. “Heavy monsoon rains reacting on bad roads in post-war Burma affected travelling very adversely; and evidence from different parts of Burma could not arrive at Rangoon as quickly as could be wished. Records of the puppet administration had either disappeared or been dispersed and had to be collected with some difficulty.”³⁵ Maung toiled for months sending batches of evidence to Tokyo, and did not prepare for return to the IMTFE until the end of September 1946. When logistical difficulties and the tragic air disaster death of British prosecutor Rex Davies aborted Maung’s trip back to Japan, authorities ultimately decided that the Burmese prosecutor had sufficiently fulfilled his duties to make returning to Tokyo no longer “justified.”³⁶ Unanticipated administrative delay precipitated Maung’s withdrawal of Maung. An overlooked example of the IMTFE’s internationality as a transnational and multicultural endeavour, Maung’s premature recusal may explain the Burmese prosecutor’s almost entirely

³⁵ Ibid.

³⁶ An internal memorandum explained. “Maung left Rangoon by air on 26th to meet Mr. Davies or UK Division at Singapore for discussions but owing [to] engine trouble [the] journey [was] broken at Bangkok. Davies involved in air crash at Hongkong and died. E. Maung therefore did not proceed [to] Singapore. As he could not expect [to] get air passage to Tokyo for some days he returned. It is proposed therefore that E. Maung should not return to Tokyo but resume his duties here as Advocate General.” Governor of Burma and Secretary State to Burma Office, London and Prosecution Team, Tokyo (14 October 1946), IWM Papers, FO 648, Box 152, Folder 4.

forgotten place in the historiography. Indeed, the lack, or perceived lack, of Asian representation at the IMTFE remains a key factor in several influential critiques of the court.³⁷

The defence in Tokyo had readier access to Japanese sources and witnesses. However, because of the international charges mounted against their clients, attorneys also embarked on transnational evidence gathering. The work completed by defence lawyers abroad reflected their commitment to individual clients at all cost, as well as the inventive no holds barred approach many took in crafting cases. George Furness' trip to Washington and London in January 1947 illustrates this potent mix of determination, creativity, and gumption. Furness' client, Shigemitsu Mamoru, served as Japan's ambassador to Britain during the early part of World War II. Despite Japan's allegiance with Germany, Shigemitsu made several close and powerful friends inside the British establishment. Knowing this, Furness sought out the most influential possible character witnesses for his client, showing little compunction for diplomacy or decorum. His visit to London drew concerned attention from both Furness' IPS opponents and the British government. On 11 January 1947, the Foreign Office sent a worried memorandum to representatives in Tokyo. "FURNESS, Counsellor for SHIGEMITSU at TOKYO trial, has been visiting UK with the object of obtaining statements on behalf of his client from British statesmen and officials," the note began. "He saw Sir G. SANSOM in WASHINGTON and has seen Sir R. CRAIGIE, Lord HANKEY, and Mr. R. A. BUTLER NORMAN [sic. Probably R. A. B. Butler]. He has also been in touch with Lord HALIFAX and may approach Mr. EDEN who is not in this country at present." The Foreign Office became so concerned about potentially embarrassing counter narratives to the heroic British war image and policies that they pushed Furness "not to put in

³⁷ Bix, *Hirohito*, Dower, *Embracing Defeat*, Harries and Harries, *Sheathing the Sword*.

statements but instead to submit interrogatories which would have to be approved by Tribunal.”³⁸ When he got wind of these developments, British prosecutor Comyns Carr shared the Foreign Office’s sense of foreboding. In January 1947, Comyns Carr wrote to Britain’s political representative in Japan, Alvary Gascoigne, “Concerning the activities of FURNESS,” saying, “[I] trust that those he may interview will avoid expressing opinions and confine themselves to statements of fact.”³⁹ The British prosecutor also grew concerned that “facts” from these testimonies would undermine an IPS case dependant on Allied righteousness to underscore Japan’s malevolence. Furness’ gambit ultimately paid dividends. Shigemitsu’s sentence was the lightest (7 years in jail). Moreover, Lord Hankey, one of the men Furness interviewed maintained contact with the attorney throughout the trial. Later, Hankey galvanised parole efforts to free Shigemitsu through the damning *Politics, Trials, and Errors* (1950).⁴⁰ Furness, therefore, constructed an effective case in the face of logistical challenges. To accomplish these results, however, Furness had to absent himself from responsibilities in Tokyo. The constant in and out of defence staff affected overall IDS cohesion, which remained tenuous at best. Furness’ singular focus on Shigemitsu also highlights the individualist approach typical of the IDS, a tactic which

³⁸ In exchange, the Foreign Office agreed to send advanced copies of the interrogatories through diplomatic channels to ensure prompt delivery of the affidavits to Tokyo. FO, London to UKLIM, Tokyo (11 January 1947), IWM Papers, FO 648, Box 152, Folder 4.

The list of public officials basically forms a collection of individuals the defence believed would be willing to criticise British wartime policies and/or the IMTFE itself. George Sansom was British representative to the FEC with doubts about the SCAP’s over-ambitious agenda. As British ambassador to Japan from 1937 to 1941, Robert Craigie had been instrumental in agreeing not to oppose Japan’s incursion into China. He believed conciliation with Japan would have prevented total war in the Pacific. Lord Hankey was one of the most influential British civil servants of the first half of the twentieth century – as, *inter alia*, creator and secretary of the Imperial Defence Committee, the War Cabinet, the Imperial War Cabinet, the British Empire Delegation to the Paris Peace Conference, and the modern Cabinet Office through the inter-war period. From the defence perspective, Hankey was a member of Chamberlain’s War Ministry discarded by Churchill. R. A. B. Butler was, among many other positions, Under-Secretary of State for Foreign Affairs in Chamberlain’s cabinet, and known to have disliked Churchill. As Chamberlain’s Foreign Secretary and a chief architect of appeasement, the IDS hoped that Lord Halifax would down play Japanese aggression in the pre-war era. Eden – later Prime Minister – was a prominent politician under Chamberlain and Churchill known for anti-war sentiments, already pursuing diplomatic action to release convicted German war criminals at the time of Furness’ visit.

³⁹ A. S. Comyns Carr to Alvary Gascoigne (20 January 1947), IWM Papers, FO 648, Box 152, Folder 4.

⁴⁰ Lord Hankey, *Politics, Trials, and Errors* (Oxford: Pen-In-Hand Publishing Company, Ltd., 1950).

both delayed the trial and added to the defence's logistical challenge. On the other hand, because of efforts like Furness', the IDS managed to develop an enduring and relatively compelling counter narrative in Tokyo which fed into external critiques of the court. Moreover, the tribunal's categorical findings in the face of 'reasonable doubt' played into its image of one-handed justice.

To cut back on rising trip expenses the defence negotiated with the US War Department in early 1947 to devise the optimal system for accessing material abroad. Defence attorney Owen Cunningham put together a proposal which suggested, "One counsel be stationed in Washington at all times and that one member of the staff here be detailed to go to Washington, with a new member following [a] rotation plan." Sixteen attorneys announced willingness to follow the rotation roster.⁴¹ The War Department's initial response was tepid. "We concur in one defense man permanently assigned. [But] Rotation will incur unnecessary expense, and will necessitate each man briefing and orienting his successor. This is an overlapping of effort. There is one man and [a secretary] already assigned handling defense materials."⁴² Eventually the sides came together and agreed to a rotation plan, but without a permanent Washington liaison.

It was a simple idea that led to complicated responsibilities. Attorneys were stationed in Washington approximately one month at a time. During their stay, defence liaison tasks ranged from negotiating War Department document releases, cutting red tape to access confidential OSS and CIA files, and shipping law books back to Tokyo, to collating and sourcing newspaper articles, interviewing members of congress, and traveling throughout the US deposing returned service members and experts. Attorney Alfred Brooks' rotation in Washington in May and June

⁴¹ Owen Cunningham, "Report on Assignment of Member of Defense Staff as Liaison to be Stationed in Washington DC War Crimes Branch," Cunningham Papers, Box 3, ID 34 – IDS Telecom Conferences. The sixteen attorneys included Alfred Brooks, Joseph C. Howard, E. Richard Harris, Roger Cole, James N. Freeman, David F. Smith, Carrington Williams, Edward P. McDermott, George Yamaoka, Charles Caudle, Samuel A. Roberts, George Furness, and Roger S. Rutchick with Owen Cunningham, Michael Levin, and Franklin E. Warren as "alternates."

⁴² Undated cable, Cunningham Papers, Box 3, ID 34 – IDS Telecom Conferences.

1947 illustrates the hectic pace.⁴³ In one typical teleconference between Brooks (in Washington) and IDS members (in Tokyo) on 5 June 1947, colleagues asked Brooks to complete a veritable mishmash of tasks in his final week stateside. Among other things, Lawrence J. McManus asked Brooks to get a West Point curriculum of study and send multiple volumes of the Pearl Harbor congressional reports, George Blewett told him to trace and procure the original sources of a *Life* magazine article, and Roger Cole requested a list of official duties and responsibilities of the US Army Chief of Staff. Attorney Samuel A. Roberts directed Brooks to contact and interview an array of characters including Owen Lattimore (an Asian specialist who had been a US advisor to Chiang Kai-shek during the war), General John A. Magruder (head of the American Military Mission to China in 1941, later Deputy Director of the OSS), Dr. E. Stanley Jones (An American theologian known to have been, among other things, a close confidant of FDR, friend to Gandhi, and prominent Methodist missionary in India), and Brigadier General Claire Lee Chennault (Commander of the US “Flying Tigers” covert aviators in China). Often requests had needle-in-haystack probability. Lawrence McManus, for example, told Brooks to “locate Frazier Hunt – believe[d] [to be] with [a] Broadcasting Station in N.Y.” McManus added with a little more helpfulness: “Hunt was with INS in Japan in 1932.”⁴⁴ Impressively, Brooks managed to find and interview Hunt. However, many other such missions came up short, and balancing the multitude of responsibilities proved both personally and administratively taxing.⁴⁵

Once in Tokyo, the mass of researched documents posed an entire new set of administrative and logistical difficulties. Trial administrators faced a task of historic proportions;

⁴³ According to Tokyo-Washington teleconference records, Brooks left Japan in the first week of May. Teleconference (2 May 1947), Cunningham Papers, Box 3, ID 34 – IDS Telecom Conferences. He returned to Tokyo on 10 June 1947. Teleconference (12 June 1947), Cunningham Papers, Box 3, ID 34 – Telecom Conferences.

⁴⁴ Teleconference (5 June 1947), Cunningham Papers, Box 3, ID 34 – Telecom Conferences.

⁴⁵ Although confident in his assistant in Tokyo, Brooks could not help but anxiously double check with IDS members in Tokyo. “Notify Harris that Miss Kay has full instructions on handling affairs of my office during my absence,” he re-confirmed, “and that I request no change be made in my absence.” Teleconference (2 May 1947), Cunningham Papers, Box 3, ID 34 – Telecom Conferences.

literally and symbolically. Processing, reproducing, translating, storing, and distributing the evidence became a time consuming and complicated process. “The mechanical difficulties . . . in connection with translation and reproduction of documents are tremendous,” attested New Zealand prosecutor Quilliam. These difficulties “cause delays from time to time.”⁴⁶ Moreover, judicial and strategic decisions frequently wasted the enormous time and effort put into processing certain documents. Harold Evans described the meandering path documents took from collection, through collation, to court, when Wellington asked him to ensure that testimonies from liberated New Zealand POWs saw light during the proceedings. “The routine I have adopted in dealing with these statements is as follows,” wrote Evans as he detailed the necessarily cumbersome administrative protocols to his government. “The original is handed to the particular attorney in the International Prosecution Section responsible for covering Prisoner of War offences in the area to which the statement relates. There are some half a dozen attorneys engaged on this work.” Then more qualitative assessment began. “After the statement has been examined by the attorney, if it is decided that it shall be used in the case, it is translated and passed to the Documents Section for copying and ‘processing.’” Although New Zealand submitted compelling evidence, it was impossible “to know for certain how much of what you have supplied us with will in fact be used,” until nearer the particular phases presentation. “Evidence is coming in all the time and the volume of it is immense, as some of the typists well know.”⁴⁷ The IMTFE’s colossal organisational scope limited its evidentiary completeness. Time pressures and strategic expediency rendered countless investigative hours wasted on material that never saw court. Delay of all kinds frustrated participants and observers, hurt the trial’s reputation, and helped create a lasting thread of dissonance.

⁴⁶ R. H. Quilliam to A. D. McIntosh (17 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁴⁷ Harold Evans to A. D. McIntosh (30 June 1946), NZ Archives EA 2 1945-15B 106-3-5 Part 3.

Poor decisions and personal miscues exaggerated existing logistical difficulties. Ever a critic of the IPS leadership, prosecutor Quilliam lamented organisational priorities regarding evidence-gathering. “Months of work were devoted to interrogation which it now transpires can be used hardly at all,” he wrote. “On the other hand the failure to carry out at the very beginning the obvious task of investigating Japanese documents has caused many troubles . . . it is apparent that the most valuable evidence in the case is contained in these documents.” Worse still, Japanese sources came with inherent linguistic and administrative challenges which now had to be sorted under mounting time pressure. “The delay in examining and translating them has caused a great deal of confusion and difficulty,” vexed Quilliam.⁴⁸ An organisation of the IMTFE’s size requires well-conceived administrative procedures. In a complex and largely *ad hoc* international court, protocols must leave room for flexibility while maintaining comprehensiveness. Simple bureaucratic missteps resulted in lost time, wasted effort, elevated costs, and a weakened public image. In April 1947, for example, Theodore Goulsby (executive officer and head of the IMTFE administration, secretarial pool, mailroom, and document processing) wrote to Walter McKenzie about a lost document. “An exhaustive search has failed to locate . . . IPS Document 1641.” Having re-consulted records, Goulsby discovered that McKenzie was the last to use the material. The IPS only had one copy of the item in question – “a report on the Manchurian incident regarding the dispatch and withdrawal of Army and Navy” – Goulsby told McKenzie. The document’s “charge-out slip [is] signed by you.”⁴⁹ In response, McKenzie bristled, “I didn’t bring any documents with me. I reviewed my files and it appears that I had delivered this document to the Processing Section for re-translation and processing just

⁴⁸ R. H. Quilliam to A. D. McIntosh (17 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁴⁹ Theodore Goulsby to Walter McKenzie (1 April 1947), McKenzie Papers, Box 1, Folder – Correspondence – April 1947.

shortly before I left.”⁵⁰ The source of this confusion remains unclear. Structural screw-ups in Tokyo grew out of a mixture of bad procedures, poor leadership,⁵¹ and disorganisation, but also the inherent difficulty of running such a complex enterprise. This multi-week delay over a single document, no matter how important, formed an unfortunately common occurrence. Multiplied by the thousands of sources, the difficult IMTFE logistic picture became daunting. Personal incompetence magnified logistical complications and *vice versa*. The combined appearance and actuality of ineptitude slowed court proceedings but expedited its fall from grace.

Unsurprisingly, processing delays caused considerable anxiety within trial divisions. Though understandable, British prosecutor Comyns Carr stressed over the inevitable delays caused by prosecutor Maung’s difficulties in Burma. “[The] Prisoner of war phase [is] now expected to begin in mid-October. It is desirable that you return with balance of evidence by [the] end [of] September, in order to have documents processed in time,” Comyns Carr urged Maung on 4 September 1946. “Please cable immediately your ETD and ETA.”⁵² Aware that the evidentiary labyrinth did not end with the arrival of Maung and his evidence back in Tokyo, Comyns Carr became more insistent after another three week delay. “[It is] most important [that there is] no further postponement of your return to Tokyo,” he pressed the Burmese prosecutor on 20 September. “Processing of documents will take considerable time and it is essential that we discuss Burmese document before processing can start. [It is] Urgent that you return to Tokyo

⁵⁰ Walter McKenzie to Theodore Goulsby (17 April 1947), McKenzie Papers, Box 1, Folder – Correspondence – April 1947.

⁵¹ Goulsby developed a reputation for pedantry. Morris Gamble and Robert Crozier both worked directly under Goulsby and neither remembers the colonel with fondness. Crozier Interview and Gamble Interview. Justice Northcroft shared their low opinion of the administrator. The IMTFE’s complexity necessitated a competent and exceptional administrator, he explained. “Instead, [the IPS] got a Colonel whose unit has dissolved around him and who, I am bound to say, does not appear to be a very effective person anyhow, and instead of sending him back to America where he would probably have been demobilised, he was appointed Secretary General. He surrounded himself with an executive, an adjutant, and horde of people, so that there is a chain of people to whom he can ‘pass the buck,’ and even if any of these people knew what they had to do, nobody quite knows whose business it is to do it.” E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives EA2 1946-30B 106-3-22 Part 3.

⁵² A. S. Comyns Carr to U. E. Maung (4 September 1946), IWM Papers, FO 648, Box 152, Folder 4.

immediately rather than remain in Burma to collect further evidence.”⁵³ Conflicting postwar pressures in Japan worked against IMTFE case building, causing further participant angst. Occupation priorities and post-conflict reconstruction agendas often pulled evidence away from tribunal objectives and needs. In this environment, communication breakdowns within tribunal divisions could be costly. “I have found that valuable evidence has been allowed to be sent back to the States and that essential witnesses have been demobilised and sent home,” complained Quilliam. “I have had extraordinary difficulty in arranging for these witnesses and for evidence to be brought back here.”⁵⁴ Part of a much larger administrative nexus, the IMTFE organisation struggled to navigate a sea of logistical challenges and priorities. This set of challenges formed both an inevitable component of pursuing international justice and a product of the specific local circumstances in postwar Japan. Regardless of origin, the IMTFE brand suffered with every resulting delay. By trial’s end, the court’s reputation for ineptitude and injustice had become cemented, a fact largely responsible for continuing criticism of its performance and legitimacy.

The *longue durée*: Logistics and Delay in Tokyo

Other chapters reveal that delay in Tokyo came in many forms and from multiple sources. Like many international bodies, personality clashes, inter- and inner- group dissonance, technical squabbling, and political posturing slowed the IMTFE behind the scenes and in court. The prolonging of proceedings became one of the most distorting logistical outcomes in Tokyo, as the trial took longer than anyone expected it would. Worse still, most participants predicted and hoped for efficacious justice, so when the on-the-ground realities of international justice made this outcome impossible, the delay hurt all aspects of the IMTFE experience. The emotional wellbeing of participants disintegrated, resignations depleted staff ranks, the public lost interest over time, the press began to ridicule delays, commitment to thorough justice waned, and the

⁵³ A. S. Comyns Carr to U. E. Maung (20 September 1946), IWM Papers, FO 648, Box 152, Folder 4.

⁵⁴ R. H. Quilliam to A. D. McIntosh (17 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

global political climate transformed dramatically, even the health of the accused faltered. Time became the bane of IMTFE existence. “I think [it is] obvious that the undue length of the proceedings is threatening to destroy the whole purpose and value of the trials,” noted R. H. Quilliam in June 1947.⁵⁵ Most delays stemmed from organisational difficulties. Better management might have mitigated such issues, but given the IMTFE’s place and time, its logistical and administrative challenges proved largely unavoidable. International justice represents a colossal endeavour that taxes human and material resources. In a perfect situation, the cost becomes astronomical.⁵⁶ Because of its novel character and the surrounding devastation of postwar Japan, the IMTFE operated in a far from “perfect situation.” The resulting logistical difficulties invariably slowed the tribunal, and helped initiate a long history of condemnation.

A series of early administrative nightmares set the tone for IMTFE protraction and the prevailing negativity engendered by delay. From day one, translation difficulties hamstrung the court. “A very funny thing happened . . . on the opening of the trial,” recalled Harold Evans. “With all the judges present and with all the spectators in the gallery and that sort of thing, it was realised that a great deal would depend on the way in which the questions were translated into Japanese. So the opening day was really a test of the competency of the translators who were sitting in a special box in one part of the courtroom.” The Potsdam Declaration which promised, “Stern justice shall be meted out to all war criminals,” became the centre of confusion. Without Potsdam, there would be no IMTFE, so, as Evans remembered, “it was very important that the words that were quoted by the Japanese interpreters were a true indication into Japanese of what

⁵⁵ R. H. Quilliam to Foss Shanahan (3 June 1947), NZ Archives EA2 1947-26C 106-3-22 Part 5.

⁵⁶ The International Criminal Court (ICC) exemplifies the cost of global justice. It spent over \$1 billion – and a decade – before securing a first conviction in March 2012 (of Thomas Lubanga Dyilo for war crimes relating to child soldiers in the Democratic Republic of Congo). See: Court Reports and Statements, ICC <http://www.icc-cpi.int/Menus/ICC/Reports+on+activities/Court+Reports+and+Statements/Court+Reports+and+Statements.htm> (Accessed 5 December 2011).

was said when the trial was first begun. So they wanted to get this right.” When the words “stern justice” were read in court, Evans remembered, they were followed by “a big long silence.” President Webb, already sensitive to time issues, noticed a commotion in the translators’ box and demanded an explanation. According to Evans’ recollection the chief translator responded, ““The Japanese are having some difficulty about stern justice . . . they don’t understand how justice can be stern justice, because justice is justice not stern justice.”” With its deep philosophical implications, the question, “how could there be stern justice? Justice is justice,” left an indelible mark on Harold Evans’ IMTFE experience. It planted the first seeds of doubt in his mind about the project’s legitimacy. “[One] question by the President. ‘Are you having some difficulty with this Mr. Translator?’” recalled Evans. “I thought that was marvellous. It really tipped off the whole thing.” The delay over translating such a relatively straightforward but unquestionably crucial phrase also illustrates the complex linguistic task faced in Tokyo.⁵⁷

Translation became synonymous with delay and an inescapable reality of ground-level justice at the IMTFE. Though it slowed proceedings in Tokyo, simultaneous multi-lingual translation also represented one of the court’s most impressive accomplishments. As prosecutor James Robinson attested, “Delays in the court proceedings due to difficulties of different language are considerable, but the three-channel IBM ear-phones usually give the listener the opportunity to hear the proceedings concurrently in English and Japanese and sometimes Russian, or Chinese or Dutch or other language.”⁵⁸ A microcosm of the court itself, the IMTFE’s technologies of translation proved both impressive in their innovation and a nuisance in their application and functionality. Walter McKenzie complained of difficulties with the headphones.

⁵⁷ Evans Interview.

⁵⁸ James Robinson to Walter McKenzie (10 April 1947), McKenzie Papers, Box 1, Folder – Correspondence – April 1947. Takeda, “Interpreting at the Tokyo War Crimes Tribunal,” 65-83, Kayoko Takeda, *Interpreting the Tokyo War Crimes Trial: A Sociopolitical Analysis* (Ottawa: University of Ottawa Press, 2010).

In August 1946, he wrote, “[Webb] frequently speaks so low that you cannot hear him unless you have your headphones on, and you can’t wear them conveniently when you are examining a witness and watching the witness instead of the Court.”⁵⁹ Chief Prosecutor Keenan resisted using the bulky headphones in court for their dramaturgical interference. Keenan’s peccadillo and related translation issues, provide an example of how even the most mundane details carried dangerous weight in the magnified conditions of international justice. For instance, President Webb rebuked Keenan when the chief prosecutor’s verbosity outpaced the simultaneous translation of Pu-Yi’s testimony and when his unwillingness to follow technical protocols hindered proceedings. “Please observe the red light like everybody else,” Webb chided. Not wearing earphones, Keenan missed parts of Pu-Yi’s answers and some of the related courtroom interactions. Nevertheless, he forcefully and unwisely challenged Webb’s impugnation of Pu Yi’s reliability. “I hadn’t been aware that anyone was being tried for any offense other than the prisoners, Japanese nationals, in the dock,” Keenan protested. Already irked by the chief prosecutor’s cavalier attitude towards the technology, Webb replied tersely. “Obviously, without your earphones you do not hear all that is said.” The next day, Webb blamed Keenan’s inattentiveness for misrepresenting Pu-Yi’s words. “Unless you wear those headphones you will miss a lot of what the witness says,” Webb instructed. “I listened to all he said and he didn’t say half the things you suggested he said,” Webb concluded.⁶⁰ Technology and translation became integral to international justice in Tokyo, but related issues, even ostensibly trivial ones reflected in personality clashes, complicated both trial processes and the wider IMTFE experience.

⁵⁹ Walter McKenzie to Bland Pugh (6 August 1946), McKenzie Papers, Box I, Folder: Correspondence – August 1946.

⁶⁰ *Transcripts*, 3985-3986 and 4034-4035.

Illustration 7: The IPS Language Division



IPS Language Division at work. ©Morris Gamble, by permission.

Illustration 8: The IPS File Room



Two administrators among growing piles of IPS Files. ©Morris Gamble, by permission.

Illustration 9: The IPS Mimeograph Section Sub-Unit



Technology proved central to the IMTFE. Here members of the IPS Mimeograph Section Sub-Unit catalogue and copy trial material. ©Morris Gamble, by permission.

It became clear from the start that administering an international court in supply-poor and damaged Tokyo would also significantly prolong proceedings. Seemingly mundane details routinely threw off tribunal progress. Inability to manage Tokyo's summer heat, for example, cost the trial weeks of work. In July 1946, Walter McKenzie described, "I was on the floor presenting evidence yesterday when Justice Webb of Australia, President of the Tribunal, advised us (although he directed his remarks to me) that they planned to adjourn until the air conditioning unit for the courtroom was installed and working."⁶¹ The abruptness of Webb's adjournment of court on 10 July 1946 because of faulty air-conditioning suggests an impetuous decision, a sudden culmination of discomfort. However, administrators anticipated the heat and

⁶¹ Walter McKenzie to Ernest O'Brien (11 July 1946), McKenzie Papers, Box 1, Folder – Correspondence – July 1946.

predicted the courtroom's unpreparedness for the physical demands of summer well in advance. In March 1946, R. H. Quilliam reported "some concern" to the New Zealand government about the "trying climatic conditions which we may expect to experience for about two months [sic] during June, July, and August. According to several Europeans who know the conditions well, it will be found intolerable for the Court to sit." Prosecution members considered making "representations" to court authorities "either to move the whole court into some healthier place, or to have a long vacation." The IPS leadership overrode the suggestion, Quilliam recounted, because "The rest of us consider that it is inexpedient for us, who have been pressing so persistently for expedition, to do anything that might result in further delay."⁶² Unsurprised by the heat, this physical challenge nevertheless resulted in the "delay" Quilliam and others so adamantly resisted – and resented.⁶³

Improper cooling may seem a superficial complaint in the grand scheme of history. But in resource-poor post-conflict locales and under the magnified pressure of internationalism in action, such mundane considerations play real and consequential roles in determining outcomes and experiences. Discomfort with Tokyo's heat and humidity, not to mention the resulting frustration with the delay to equip the courtroom with proper air-conditioning, affected in court appearances. Oppressive summer heat became more than a logistical nightmare; it became a personal bane. In July 1946, McKenzie revealed that the "extremely hot" weather made his office "very uncomfortable" and the packed courtroom "very hot and stuffy." "When I was before the Court the last time," he continued, "the perspiration was running down my chest and

⁶² R. H. Quilliam to Foss Shanahan (26 March 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

⁶³ Frank Costigliola has also noted the importance of seemingly tedious logistical issues to international history. He convincingly argues, for example, that poor heating in Spaso House – the "huge, drafty American embassy" in Moscow – helped define early Cold War policy. Diplomats and officials, including George F. Kennan, US Ambassador W. Averell Harriman, and British Ambassador Archibald Clark Kerr, tended to gather in Spaso House's few properly heated rooms. These rooms became sites of emotive, divisive discourse about the Soviet Union and its intentions. Costigliola, "After Roosevelt's Death," 1.

back while I was presenting evidence.”⁶⁴ “The difficulty is that we have to dress up and come down every morning prepared to go to Court, and not know until the last minute whether we are going to work or not,” Walter McKenzie confessed to a friend. “It has been rather disconcerting because we have to remain under pressure all the time.”⁶⁵ Because the flustered lawyer visible in the IMTFE’s initial phases is out of character with the McKenzie apparent in other professional dealings, it is fair to say that the conditions got the better of the prosecutor. Defence attorney Norris Allen also found the courtroom unbearable. On 3 June 1946, he noted how “The Klieg lights gave me a terrible headache in one morning session.”⁶⁶ The next day, his frustration with the lighting reached a climax. After several hours under the figurative and literal bright lights in the court, Allen reached his limit. “I got so damn mad, if I’d have had a Beebe gun, I’d have shot them all out. How, in God’s name, any moron could expect a person to sit in that I’ll never know.”⁶⁷ In August 1947, Quilliam reported that the week was “Very hot all through.” Even though vacationing in Chuzenji, he and his wife both felt “badly affected by the extreme heat.”⁶⁸ Justice Röling’s response to the heat captures the frustrated, alienated, and often Orientalist lens through which many participants processed the experience of being international in Tokyo. “Life is difficult in this heat. You lose the energy for the more difficult things and you are falling down, as a child to some sort of slang, to the easiest way of doing,” Röling wrote to a friend. “This bloody country lulls you in a dreamless sleep in which an egg is an egg and an apple an apple;

⁶⁴ Walter McKenzie to Clayton D. Lincoln (18 July 1946), McKenzie Papers, Box I, Folder: Correspondence – July 1946.

⁶⁵ Ibid.

⁶⁶ Entry: 3 June 1946, Allen Diary.

⁶⁷ Entry: 4 June 1946, Allen Diary.

⁶⁸ Entry: 10 August 1947, Quilliam Diary. It became customary for IMTFE personnel to escape Tokyo whenever possible in the summer. “On holiday!” Harold Evans rejoiced in August 1948, “It is beautiful, quiet, and peaceful, and cool, just the place in which to spend a holiday away from that dreadful Marunouchi Hotel in hot oppressive Tokyo.” Harold Evans to Parents (1 August 1948), Evans Papers, Box 16, Item 2.

and you don't see any longer the wonders of it and accept it as just an apple and just an egg.”⁶⁹ To say the least, this reverie represented an interesting and frank admission of attention deficit from a judge responsible for weighing evidence and meting out justice at a historic trial.

Problems with air conditioning extended beyond a simple lack of will on the part of occupation authorities, or disorganisation by tribunal administrators, or personal over-reactions by tribunal personnel. Postwar Tokyo's manifold logistical hurdles made it truly difficult to create a comfortable courtroom environment. Priorities lay elsewhere, and despite determined work to remedy the issue, supply shortages undercut support staff efforts. Court reconvened only four days into the initial delay. “Some sort of a ventilation system has been installed,” wrote McKenzie, “which made the courtroom quite comfortable for the first half hour.” Unfortunately, comfort proved short lived. “The Court announced that inasmuch as the water supply had failed and the cooling system wouldn't work any longer and the temperature was rising, they would adjourn to an unspecified future date when the air conditioning would be functioning.”⁷⁰ The court adjourned for a week to fix matters. A week's delay may not seem significant in a trial that took over two years to complete, but this type of delay – and there were many – had real, immediate impacts on the tribunal's proceedings. For example, the postponement disrupted the flow of an already disordered prosecution case. “It was extremely unfortunate because we had arranged to let Colonel Morrow of Cincinnati, Ohio, put on three witnesses from China out of order, as they had to return to their official duties,” complained McKenzie. “Two of them were Americans and important UNRRA [UN Relief and Rehabilitation Administration] officials. The

⁶⁹ B. V. A. Röling to Donald Nisbet (22 June 1946), Röling Papers, Box 27 [underlining in original].

⁷⁰ McKenzie also suggested racist reasons to adjourn court. “Heretofore we have thought the Court's objections to the conditions in the courtroom were based [only] on the heat,” the prosecutor told a friend. “But President Webb added a new element this morning in that the ventilation was poor, and he considered it dangerous to health, evidently due to the large number of Japanese Nationals in the courtroom.” Walter McKenzie to Herman Schmier (15 July 1946), McKenzie Papers, Box 1, Folder – Correspondence – July 1946. For a similar equation of Asian bodies with filth or disease, see: Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco's Chinatown*, American Crossroads Series (Berkeley, CA: University of California Press, 2001).

third one was a Chinese General. . . . They are going to leave for China anyway whether their evidence is given or not.”⁷¹ McKenzie’s grievance represented a common problem. The cumulative burden of logistical setbacks prolonged the tribunal, and the drawn-out trial became an increasingly difficult venture to defend and admire in public and private.

Personnel and training presented another logistical challenge. As both a pioneering multilateral institution and international court, many participants arrived unprepared and untrained for the logistics and intricacies of the IMTFE experience. Although many participants had legal experience, few felt conversant in the philosophy or practise of international jurisprudence.⁷² Being “international” meant assertively and competently indicting, defending, or passing judgment on a set of historical events about which most knew very little. The unfamiliar nature of assignments exacerbated other personal and professional difficulties. Although McKenzie admitted that he found the work “interesting,” especially the opportunity to “learn a lot about Japanese and Chinese history,” it also lay entirely outside his expertise as a referee in

⁷¹ Walter McKenzie to Herman Schmier (15 July 1946), McKenzie Papers, Box 1, Folder – Correspondence – July 1946.

⁷² This may seem like an administrative oversight, but running a pioneering institution at war’s end made finding individuals with immediately relevant training difficult. At best, organisers sought transferable skills rather than specific expertise. Modern international organisations are more professionalised, but they still rely largely on voluntary personnel for field missions. Experts that are perfectly willing to participate in international forums in New York or The Hague are frequently less enthusiastic about working in less secure settings. Thus, the individuals prepared to work abroad or in difficult situations, are rarely the best trained. The on-the-ground resource limitations and chronically understaffed world of modern global governance dictate that institutions often take the best of who is available, opting to train *in situ*. For a poignant and highly personalised view of personnel difficulties and the gap between field participants in international organisation and bureaucratic bodies, see Samantha Power’s recent work on the international life and tragic death of Sergio Vieira de Mello. Samantha Power, *Chasing the Flame: Sergio Vieira De Mello and the Fight to Save the World* (New York: Penguin Press, 2008).

bankruptcy.⁷³ On top of problems gathering evidence in “the enemy’s country,” McKenzie and his staff had to contend with “the added difficulties of a strange language and oriental psychology, [it] has not been an easy task.”⁷⁴ Real and imagined problems caused by unfamiliar environments and assignments challenged employees and the Tokyo administration. “I am meeting with difficulties in my work,” Quilliam wrote in April 1946. “I have [not] been able to obtain so far the expert assistance necessary for the subject I am responsible for.”⁷⁵ Although the IDS, IPS, and the Bench in Tokyo had both official and unofficial legal and historical ‘advisors’ available to them,⁷⁶ there was never enough knowledge and expertise to go around. Upon his return to New Zealand, Quilliam admitted to an associate that he found the unusual work environment and responsibilities in Tokyo off-putting and that he was “thoroughly enjoying doing normal work and meeting and working with normal people.”⁷⁷

The strain of long hours in an unaccustomed climate surfeit with logistical challenges affected IMTFE participants physically. Many individuals, especially older workers, experienced health troubles, which hurt job performance both in and out of court. “There is an element which may over-ride present decisions on this difficult problem – health,” Northcroft reported. “We are

⁷³ Walter McKenzie to George Read (5 June 1946), McKenzie Papers, Box I, Folder: Correspondence – May-June 1946. It is not clear how exactly McKenzie ended up recruited for assignment in Tokyo, nor why he volunteered to go for that matter. He was extremely well connected with the Democrat establishment and a close friend of Victor Swearingen, Chief of the Eastern Section of the War Department’s War Crimes Branch during the IMTFE’s establishment. A sense of duty may also have drawn McKenzie. He served with acclaim during the Siberian Expedition of World War I but was too old to contribute to the World War II effort. He may well have been attracted to the adventure or publicity. More likely, authorities brought McKenzie in because his expertise in financial and accounting law theoretically fit well with prosecution charges of conspiracy, common plan, and economic aggression. In practise, however, McKenzie’s pre-existing skill-set remained underused in Tokyo.

⁷⁴ Walter McKenzie to Richard Hedke (24 July 1946), McKenzie Papers, Box I, Folder: Correspondence – July 1946.

⁷⁵ Entry: 29 April 1946, Quilliam Diary.

⁷⁶ Official legal and historical advisers included Basil Buchko and Richard De Martino. Unofficially, the court also benefitted from the expertise of individuals such as E. H. Norman, head of the Canadian Legation in Tokyo and noted historian of Japan, as well as John Gadsby a lawyer attached to the British Consulate in Shanghai. British prosecutor Comyns Carr wanted Gadsby in an official “advisory capacity” for his expertise in “Japanese law and international law.” Although Gadsby did not end up going to Tokyo, he proved “most helpful” during IPS visits to China. A. S. Comyns Carr to JBJB (undated, c. April 1946), IWM Papers, FO 648, Box 152, Folder 3.

⁷⁷ R. H. Quilliam to Herbert Evans (30 January 1948), Evans Papers, Box 16, Item 2.

in for another summer without the break to the hills.” Although the New Zealander felt “strong and healthy,” he worried about other “better and more useful Judges” who showed signs of strain. “One is, or was, a bad T.B. case and the other’s trouble is heart. Withdrawal on the score of health may become inevitable.”⁷⁸ Defence lawyers became especially anxious about how judge “withdrawals” would affect their case. “It has been learned unofficially that Mr. Justice McDougall, on orders from his doctor, principally for reasons of health, intends to leave Tokyo for the months of July and August,” wrote acting chief of the defence George Yamaoka in April 1947. “We understand that he suffered heart attacks last summer and there is a possibility of recurrence during the warm weather here in Tokyo . . . we understand that he will probably leave about June 15, irrespective of whether the Court will take a recess or not.” Yamaoka’s response had two purposes. First, he urged co-counsel not to object to McDougall’s plans. “We understand that if there is a single objection from defense counsel he will not return,” explained Yamaoka. Second, McDougall’s impending departure forced the acting defence chief to reorder defence arguments. He pushed colleagues to accelerate their pace lest McDougall’s health fully stymied the court.⁷⁹ Thus, the logistical shortcomings of the previous summer caused serious health concerns and forced a change in defence tactics. Both outcomes added to delays in IMTFE justice and exaggerated the court’s bumbling reputation.

Acute and chronic health issues likewise complicated IMTFE logistics and hence processes. Walter McKenzie’s experiences highlight the physical toll of supply shortages. The prosecutor depended on medical supplies and nutritional supplements unavailable in Japan to cope with the pressure of international work, and his stocks dwindled fast. “I’ll be out of

⁷⁸ E. H. Northcroft to Sir Michael Myers (18 May 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5. The “T.B. case” was likely Lord Patrick and the judge with “heart” issues was Justice McDougall.

⁷⁹ George Yamaoka to All Defence Counsel (30 April 1947), Williams Papers, Box I, Folder 1: Defence Counsel Memoranda, Letters.

everything but serutan this week and I need them to help pull me thro[ugh] this strain,” he wrote home during a busy phase. “I can’t understand how I am doing it, except that the Lord must be helping me a lot.”⁸⁰ Osmond Hyde explained how food poisoning – an inevitable issue in a recovering war-torn country and unfamiliar microbial environment – cost precious work-hours in one February 1946 incident. “Last night when I returned to my hotel I was sick. I had severe pains in my stomach. This morning I was very shaky. I could not eat much at breakfast. I saw [Carlisle] Higgins at breakfast and he was sick too,” wrote Hyde. “It seems we got something bad in our food as I understand over 100 here in this hotel were afflicted in the same manner I was. It was a miserable feeling whatever it was – it hit several at the office and knocked us off our feet for about two days each. I know that I do not want to repeat the experience.”⁸¹ Hyde cancelled all scheduled interrogations during his convalescence. The recurrence of similar illnesses proved a common and unavoidable obstacle for trial administrators. Any issue which undermined professional effectiveness hurt the court’s already shaky repute.

Contagion magnified the impact of health problems. In October 1947, Harold Evans told his mother, “I am suffering from the cold that is about at present. The transition from really hot summer to cool autumn is fairly quick and is apt to catch you.”⁸² Experiencing similar difficulty in November 1947, Associate Prosecutor for the Philippines Pedro Lopez apologised to the court for the “confused and disordered state of my cross-examination and my inability to ask this witness about questions based on the documents which I feel are important in enforcing the case of the prosecution.”⁸³ He further explained, “I have not been feeling very well . . . my head has

⁸⁰ Walter McKenzie to Connie McKenzie (2 June 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family – May-June 1946.

⁸¹ Entry: 8 February 1946, Hyde Diary.

⁸² Harold Evans to Parents (19 October 1947), Evans Papers, Box 16, Item 2.

⁸³ *Transcripts*, 33231.

been dizzy and I can't catch what you are saying to me.”⁸⁴ Living and working in close proximity meant illnesses rarely affected just one person. In March 1948, for instance, Evans informed his parents that Justice Northcroft had “been in bed with a cold the last few days.”⁸⁵ In the same letter, Evans admitted to also feeling under the weather with a “bout of headaches” that made him “especially tired in the evening and fuzzy in the morning.”⁸⁶ The IMTFE transcripts do not always record the reasons that judges missed portions of the proceedings. We know from Evans’ letters, however, that Northcroft missed five court days between March 22 and March 26, 1948. The fact that every other judge except for Jaranilla, Patrick, and Webb missed at least one court day that week gives strong indication that something was indeed going around.⁸⁷

Even something as routine as vaccinations, a requisite for foreign employment, affected the health and performance of IMTFE employees. In February 1947, for example, Quilliam confided in his diary that although he had a “fairly busy morning,” his main concern became feeling “the effects of my vaccination and/or typhus inoculation much more than usual. My arm is still very sore and I have a feeling of malaise which is most unpleasant.”⁸⁸ Likewise, McKenzie told his wife, “On Thursday afternoon I got my 3rd typhoid shot, and it hit me pretty hard. I didn’t feel very good . . . I worked – or tried to – all day Friday, but I didn’t feel at all good and was burning a temperature so I came home a little early and went to bed at 5:45pm without eating any dinner.”⁸⁹ Younger, fitter, IMTFE participants also suffered the ill effects of vaccination shots. On 15 June 1946, Fischel wrote to her mother, “This encephalitis was really

⁸⁴ Ibid.

⁸⁵ Harold Evans to Parents (16 March 1948), Evans Papers, Box 16, Item 2.

⁸⁶ Ibid.

⁸⁷ Justices Bernard, Cramer, McDougall, Mei, Northcroft, Pal, Röling, and Zaryanov all missed court during the week of March 22-26, 1948.

⁸⁸ Entry: 20 February 1947, Quilliam Diary [emphasis in original].

⁸⁹ Walter McKenzie to Connie McKenzie (31 March 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family – March 1946.

the shot to end all shots and is the only one that ever made me sit down.”⁹⁰ Even basic medical requirements complicated work conditions and the personnel experience in Tokyo.

No matter how unavoidable, every delay weighed heavily on tribunal participants who constantly cogitated on when the trial would end. Yet, no one could accurately predict the tribunal’s eventual length, an uncertainty which only heightened frustration. During the air-conditioning postponement, McKenzie admitted, “It is difficult to form any definite estimate yet as to the length of the trial.” He guessed (incorrectly), “If there are no more adjournments, the prosecution will complete its case in August 1947. I hope that will mean that the trials can be completed in September, and that I can return in September, or October at the latest.”⁹¹ However, the pragmatics of justice eliminated the chance of having “no more adjournments.” As Justice Northcroft described the uncertainty, “After all the U.S.A., which organised and staffed the Court, predicted 6 months, it is now 1 1/2 years and will be 2, and perhaps 2 1/2 years.”⁹² Logistical difficulties compounded one another. During the summer of 1946, air conditioning woes, translation issues, and other challenges worked off each other to delay the tribunal and frustrate participants. “Work has been extremely strenuous over here, as we have to labor under a number of serious handicaps,” wrote McKenzie. “Eighty per cent of Tokyo was destroyed by bombs, and that means that there are many resulting inconveniences. The language problem is [also] extremely difficult.”⁹³ In a later letter, McKenzie expanded on the language problems. “The interruption is proving more lengthy than they anticipated,” he detailed, “because in most instances the translation of the witnesses’ testimony has to be from Chinese to English and

⁹⁰ Elaine Fischel to Mother (15 June 1946), Fischel Papers.

⁹¹ Walter McKenzie to Ernest O’Brien (11 July 1946), McKenzie Papers, Box 1, Folder – Correspondence – July 1946.

⁹² E. H. Northcroft to Sir Michael Myers (18 May 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

⁹³ Walter McKenzie to Herman Schmier (15 July 1946), McKenzie Papers, Box 1, Folder – Correspondence – July 1946.

Chinese to Japanese, or from English to both Chinese and Japanese.” Hopeful that the prosecution’s Manchurian phase would wrap up soon, McKenzie nevertheless conceded, “more unexpected delays can occur in a trial like this than can usually be foreseen in one at home.”⁹⁴

War-ravaged Tokyo presented a unique array of logistical challenges that participants were simply unprepared for. The first few months of the tribunal demonstrated that administering justice in Tokyo would prove a larger, more difficult task than imagining and planning the tribunal. By November 1946 – two years before trial’s end – the British Foreign Office declared itself “disturbed” by the tribunal’s duration. In March 1947, Northcroft became more hyperbolic. “One thing is certain,” Northcroft vented, “the end is not in sight yet and unless there is a repetition of the 1923 earthquake which will swallow Sugamo Prison, the trial will drag on for many months. So much for the time element.”⁹⁵ Neither Northcroft, McKenzie, Quilliam, British Foreign Officials nor anyone else could avoid the IMTFE’s administrative challenges. Slowly, governments and participants began to appreciate and denounce the inevitable setbacks to international justice in Tokyo. As delays tainted the court’s image, internal frustration and disgruntlement set the tone for open condemnation in memory, law, and history.

Sight and Seeing: Administration, Optics, and the Perception of Victors’ Justice

The enduring spectre of victors’ justice which continues to haunt IMTFE reflects the importance of seemingly mundane matters to the outcomes and images of internationalist endeavours. Indeed, some of the most obvious examples of IMTFE inequity grew out of the myriad logistical difficulties faced in Tokyo. Aside from conceptual slippage within the very notion of judicial objectivity, the priorities of postwar recovery stacked the cards against maintaining the appearance or practise of neutrality, an aspiration further complicated by deep-

⁹⁴ Walter McKenzie to Ernest O’Brien (26 July 1946), McKenzie Papers, Box 1, Folder – Correspondence – July 1946.

⁹⁵ E. H. Northcroft to Humphrey O’Leary (21 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

seated wartime prejudices. With no established international alternative, “victor” countries took the lead in war crimes operations. Trial organisers never seriously considered establishing a neutral-power run court, which became an ultimately implausible idea. Calls for retribution invariably coloured Allied responses and the tribunal’s organising powers faced considerable domestic and international public pressure to hold Japan’s leadership accountable. Perhaps naturally, investigating and prosecuting war criminals became a more extensive endeavour than defending them. The heavy financial and organisational burden shouldered by the US in running the IMTFE only sharpened the resulting perception and reality of bias. To many, the tribunal appeared to be not only a victors’ trial, but also an American court. Coupled with predominant but mistaken views of the war as a mainly US-Japanese conflict, assumptions about the IMTFE as ‘American’ justice fed into its perceived and actual reputation for political vengeance.⁹⁶

Despite the appearance of and real manifestation of bias, after choosing the IMTFE path, Allied “victors” pursued the trial with a genuine commitment to running as fair a trial as possible. Unfortunately, even without enduring wartime prejudices, various problems – logistics foremost among them – rendered fairness difficult. As this section demonstrates, unavoidable structural and administrative issues created fertile conditions to both promote the exercise of prejudice and

⁹⁶ This misconception endures, particularly in North American scholarship of the Pacific War. Countries other than the US, especially China, contributed to and suffered enormously for eventual Allied victory over Japan. As discussed later, US administrative dominance in Tokyo evolved as much by default as by intentional unilateralism. Although tribunal participants personally resented American prevalence, the other Allied governments proved largely willing to let the US carry the weight. Correspondence between two leading British legal experts (and prominent government figures) made British intentions clear, “[We] prefer not to commit ourselves too far administratively. We feel that we should restrict ourselves to the appointment of a British assistant prosecutor with such few subordinate British staff as he thinks necessary, to the staff of the United States prosecutor, to function, at any rate in the first instance, only at those trials where a real British interest is involved or of real major Japanese war criminals” Patrick H. Dean, FO to Sir Hartley Shawcross, Attorney General (14 December 1945), British Library, IOR/ L/PS/12 458, Telegrams, India Foreign Office, Japanese War Criminals - Major War Crimes – October 1945 - December 1947. Shawcross and Dean were both intricately involved in post World War II war crimes operations. Shawcross served as Britain’s Chief Prosecutor at the Nuremberg IMT. Dean was Assistant Under-Secretary of State and Legal Adviser at the Foreign Office at the time, and “the Foreign Office’s most senior expert on war crimes.” John Carey, William V. Dunlap, and R. John Pritchard, ed., *International Humanitarian Law: Prospects* (Ardsley, NY: Transnational Publishers, Inc., 2005), 324.

foster a palpable air of injustice. Individuals in Tokyo and contemporary global observers saw only acts of bias, not the complex roots of imbalance. In doing so, they also created many of the presumptions that continue to shape IMTFE historiography. Scholars still use administrative inequity to prove deliberate prejudice in Tokyo.⁹⁷ Like many reductive notions, the vengeance critique has developed such rhetorical force that disputing it suggests a certain level of analytical naiveté, despite calls to move “beyond” victors’ justice in the literature.⁹⁸ The fundamental problem with the victors’ justice remains not the allegation itself – which often reflects actual even systemic biases – but rather its reductive universalising authority. In the victors’ justice rubric, examples of bias become incontestable proof of overarching cynicism in Tokyo. The first mistake in this line of argument is assuming that a messy, contested institution like the IMTFE can be reduced to a singular narrative of vengeance. There was no unifying, unitary IMTFE experience, vengeful or otherwise. The second fault lies in equating imbalanced *practise* to prejudicial *intent*. The following section demonstrates that a combination of administrative choices and inescapable logistical difficulties caused both actual and, more damningly, *apparent* judicial inequality. Real bias existed, but it emerged from – not directed – the IMTFE experience.

Evidence for and against the ‘Rape of Nanking’ provides an instructive example of how logistical imbalances contributed to the impression and fact of judicial bias. Section IV, Article 13 of the IMTFE Charter stated, “The Tribunal shall not be bound by technical rules of evidence” and authorised the court to “admit any evidence which it deem[ed] to have probative value.”⁹⁹ In practice, this article inadvertently benefited the prosecution. It typically proved more

⁹⁷ Minear, *Victors' Justice*.

⁹⁸ Onuma, “Beyond Victors’ Justice,” 63-72, Toshiyuki Tanaka, Timothy L. H. McCormack, and Gerry J. Simpson, *Beyond Victor's Justice?: The Tokyo War Crimes Trial Revisited* (Leiden: Martinus Nijhoff Publishers, 2011).

⁹⁹ USDS and Joseph B. Keenan, *Trial of Japanese War Criminals: Documents: 1. Opening Statement by Joseph B. Keenan, Chief of Counsel, 2. Charter of the International Military Tribunal for the Far East, 3. Indictment* (Washington: U.S. Government Printing Office, 1946), 42.

difficult for prosecution witnesses to attend court than it was for defence ones. The victims of Japanese crimes had to travel long distances and make personal and economic sacrifices to get to Tokyo. The perpetrators, on the other hand, were readily accessible because they were either nearby or in custody for other war crimes. The bulk of the prosecution's evidence concerning Nanjing (20 of 30 witnesses) consisted of written affidavits by absentee witnesses, impervious to cross-examination. Conversely, the vast majority of defence witnesses regarding the massacre (24 of 27) appeared in court, where they encountered vigorous cross-examination by the prosecution. As a result, whereas the court usually admitted prosecution documents almost without question, it contested defence evidence from the start.

Explicit inequality in the application of evidentiary rules exacerbated the incidental prejudice against the defence caused by practical, logistical, and procedural concerns. Though not innately prejudiced, the inbuilt flexibility of evidence protocols played into existing biases.¹⁰⁰ Again, the prosecutorial favouritism apparent in the IMTFE's handling of the Nanjing massacre is particularly telling. The defence repeatedly objected to the preponderance of written instead of verbal evidence in the prosecution's case. The bench almost uniformly rejected such objections. In August 1946, American defence counsel William Logan voiced frustration with these setbacks. "The accused in a criminal case is entitled to be confronted by the witnesses, to see them, hear

¹⁰⁰ During a conference on expediting the proceedings, Webb blamed the court's constitution and charter for the appearance of unfair evidence protocols without acknowledging his own role in judicial bias. "I am not here to offer any apology on behalf of the Tribunal, but as you know the Charter says we are not bound by any technical rules of evidence. That not merely prevents us from following our own technical rule – we could hardly do that because there are eleven nations represented and in some particulars they all differ in these technical rules – but it has the effect of preventing us from substituting any other body of technical rules of our own. All we can do on each piece of evidence as it is presented is to say whether or not it has probative value, and the decision on that question may depend on the constitution of the Court. Sometime we have eleven Members; sometimes we have had as low as seven. And you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you always get the same decision from seven judges as you would get from eleven. . . . I would be deceiving you if I said decision did not turn on how the Court was constituted from time to time. They do. Only the other day in court on an important point I know the decision would have been different if a Judge who was not here was present. How are we going to overcome that? We cannot lay down technical rules." Record of Conference on Matters in Relation to the Expedition of the Trial (24 June 1947), IWM Papers, FO 648, Box 153, Folder 5.

their testimony, and have the opportunity of cross-examination,” Logan argued. “[Without this] to our mind the trial would result in anything but a fair trial because it would result in a battle of affidavits.”¹⁰¹ Although President Webb acknowledged Logan’s “very important point,” he firmly concluded, “affidavits must be used to a larger extent here if this trial is not going to be prolonged for very many years.”¹⁰² The dismissal of defence objections does not necessarily prove a bias, but the consistency with which the tribunal *upheld* similar objections by the prosecution proved more damning. In fact, during the defence stage of the trial, President Webb used expediency not as an excuse to allow documentary evidence, but rather as a reason to *disallow* it. “Documents of this kind are being repeatedly rejected,” Webb chastised the defence. “Time is wasted. I suggest you list them all, tender them in a bunch, have them objected to and rejected.”¹⁰³ Webb’s terseness and his decision to reject unilaterally “bunches” of defence evidence reveal a clear predisposition towards the prosecution at Tokyo or at least against the Japanese accused. This prejudice played a significant role in determining the ‘official’ IMTFE narrative of the Nanjing massacre.¹⁰⁴ The apparent and actual inequity, in turn, helped construct a lasting victors’ justice trope in IMTFE literature.

The personal and administrative bias of relying on documentary evidence seeped into the Judgment. The resulting findings reinforced a growing public perception of inequality. Although actual bias underscored public criticisms of the tribunal, the *perception* of injustice damaged memory and historiography of the court more than real prejudices. Writing the IMTFE judgment represented a massive undertaking. Judges sought to establish a detailed and intractable account

¹⁰¹ *Transcripts*, 4452.

¹⁰² *Transcripts*, 4452-3.

¹⁰³ *Transcripts*, 21434.

¹⁰⁴ Defence criticism of the IMTFE’s prosecutorial-bias outlasted proceedings. Attorney George F. Blewett, for example, later wrote, “To a student or practitioner of international law, the Tokyo war crimes trial can only be a source of disquiet and uneasiness. Not only were basic departures from long-accepted Western legal traditions tolerated, but a patently double standard was applied to the leaders of the victorious and defeated nations.” George F. Blewett, “Victor’s Injustice: The Tokyo War Crimes Trial,” *American Perspective* (Summer 1950): 291.

of what happened in Nanjing and of other Japanese crimes. “It was soon apparent that there would be very considerable delay” in writing a judgment, noted an Australian observer, because of the “enormous volume of evidence” and “large number of counts and the composition of the tribunal with its eleven judges drawn from different countries.”¹⁰⁵ Under personal and political pressure to finish, sifting through masses of documentary evidence and producing a completely original account of Japanese transgressions forced the Bench to cut corners. Willingness to cut corners, particularly in a certain direction, revealed individual biases, but logistical conditions made the tribunal and its judges more vulnerable to both deliberate and unconscious prejudice. Without structural exigencies, judges may have felt less pressure to produce fast judgments, and more freedom to abrogate personal biases. The logistics at hand necessitated staffing reinforcements. Justice Northcroft, for one, asked that an additional clerk be sent from New Zealand. Northcroft’s current judicial assistant Harold Evans agreed. “He needs more help than I am able to provide,” noted Evans, “in the colossal job of getting order out of the chaos of evidence, documentary [and] otherwise, that has been slung at the Court.”¹⁰⁶ Given the conditions, the judicial decision to rely on staff to sort material for the judgment seemed a reasonable one. Yet it was also a choice that affected the judgment’s quality and thus its image.

Debates over finer legal points and general ideas about guilt or innocence occupied the judges, but pragmatism dictated that much of the judgment’s writing fell to judicial assistants. Indeed, the widow of one of Justice Northcroft’s clerks, Quentin Quentin-Baxter, contends that her husband wrote significant portions of the final judgment.¹⁰⁷ Correspondence from Alison Quentin-Baxter’s private collection supports this claim. On 27 September 1948, Justice Northcroft wrote an effusive letter to Quentin-Baxter’s father. “[Quentin’s] work is important

¹⁰⁵ Australian Head of Mission, Japan (24 July 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

¹⁰⁶ Harold Evans to Parents (30 March 1947), Evans Papers, Box 16, Item 2.

¹⁰⁷ Alison Quentin-Baxter, Correspondence with Author (16 January 2007).

and of a very high order. He is producing material for use by a few of us who are the drafting committee for the judges in the production of the judgment,” lauded the New Zealand judge. “His work is so good that, unlike the contributions of others similarly employed, we are able to adopt his treatises on difficult and important aspects of Far Eastern historical developments in large measure with only slight alteration either in substance or expression.”¹⁰⁸ Likewise, much of the judgment borrowed heavily from a two-volume “Study on Prosecution’s Phases on Japan’s ‘Aggressive’ War” completed by Frances C. Morris [from the Office of President Webb] and James Yang [Assistant to Chinese Justice Mei Ju-Ao].¹⁰⁹ Convinced of both the broad strokes and particularities of the prosecution’s arguments, the majority judges and their assistants parroted the IPS narrative of events. The documentary nature of much of the evidence made it easy to paraphrase, and this ill-advised, though expedient, approach contributed to the impression of preordained judgment in Tokyo. The IMTFE’s status as a symbol of international justice only elevated the socio-political ramifications of its judicial choices.

The treatment of the “Rape of Nanking” reflects a wider judicial phenomenon. The ‘official’ narrative of events read in court in November 1948 established the following:

Soldiers swarmed over the city and committed various atrocities . . . let loose like a barbarian horde to desecrate the city. . . Individual soldiers and small groups of two or three roamed over the city murdering, raping, looting and burning. There was no discipline . . . Organized and wholesale murder of male civilians was conducted with the apparent sanction of the commanders on the pretense that Chinese soldiers had removed their uniforms and were mingling with the population. Groups of Chinese civilians were formed, bound with their hands behind their backs, and marched outside the walls of the city where they were killed in groups by machine gun fire and with bayonets.¹¹⁰

¹⁰⁸ Indeed, Northcroft concluded, “One of our number, and the best brain among us and a really distinguished Judge [author: most likely Justice Patrick] has remarked at times that he would have been happy to have produced it himself. High praise and well deserved!” E. H. Northcroft to Dr. Baxter (27 September 1948), Private Collection of Alison Quentin-Baxter. Hereafter “Quentin-Baxter Papers.”

¹⁰⁹ “Study on Prosecution’s Phases on Japan’s ‘Aggressive’ War,” Northcroft Papers, Box 327 (Volume I) and Box 328 (Volume II).

¹¹⁰ IMTFE, *Judgment*, Chapter VIII, Northcroft Papers, Box 20, 1011-13.

The picture it painted offered a strange blend of organised aggression and frenzied carnage: violence that was both systematic and systemic. The judgment also concluded that roughly 100,000 to 200,000 people died and approximately 20,000 women were raped in an “orgy of crime [that] started with the capture of the City on 13 December 1937 and did not cease until early in February 1938.”¹¹¹ The narrative presented by the IMTFE judgment borrowed much, including language, from the prosecution case. Indeed, during the draft phases of judgment writing, Justice Henri Bernard from France chided fellow judges, “one could almost say that we will only review the prosecution argument.”¹¹² Although findings on Nanjing generally conformed to facts on the ground, such slavish parroting of prosecution arguments fed and embellished the perception of victors’ justice in Tokyo.

The final IPS summation stated, “Soldiers were *let loose like a barbarian horde to desecrate the city . . . small bands of two or three or more Japanese soldiers roamed at will . . .* [I]t was the *killing, raping and looting* of these soldiers that perpetrated the worst of the terrors on the city.”¹¹³ The IPS summation also stated that once the Japanese were in control of the city, “*an orgy of violence and crime* by the soldiers began and continued for more than six weeks.”¹¹⁴ The emphases added to the above quotations reveal how the judgment followed the prosecution narrative almost *verbatim* both because the majority agreed with IPS argument and because copying saved time and effort. The prosecution also played a determining role in establishing the chronology – “December 13, 1937 to February 6, 1938”¹¹⁵ – and scale – “not less than twenty thousand cases of rape”¹¹⁶ and “approximately 260,000 the number killed”¹¹⁷ – of atrocities. The

¹¹¹ IMTFE, *Judgment*, Chapter X: Verdicts, Northcroft Papers, Box 321, 1180.

¹¹² Henri Bernard, “Memorandum: Deliberations” (28 April 1948), in Henri Bernard and B. V. A. Röling, *Bernard and Röling on Judgment*, Northcroft Papers, Box 330.

¹¹³ *Transcripts*, 41229-41231.

¹¹⁴ *Transcripts*, 40116.

¹¹⁵ *Transcripts*, 40132.

¹¹⁶ *Transcripts*, 40134.

IMTFE judgment therefore legitimised temporal and statistical estimates made by the prosecution which have since become entrenched as the ‘facts’ about what happened in Nanjing. Although the historical record generally corroborates both prosecution arguments and the judgment, the overt parallels between prosecution arguments and the Tribunal’s findings opened the IMTFE to obvious accusations of one-sided victors’ justice. Deniers of the Nanjing massacre exploit this weakness to cast wider doubts about Japanese war crimes and atrocities. Although the IMTFE initiated this controversy unwittingly, its judgment presents a telling example of how pragmatics can circumvent ideals in international justice.

In spite of judicial and administrative challenges, the defence at Tokyo managed to develop an enduring counter-narrative of events in Nanjing. Though not convincing from a historical or historiographical sense, the defence story of Nanjing further illustrates how the prosecution’s freedom to use documentary evidence handicapped its defence opponents and the tribunal’s reputation. The most lasting defence counter-narratives of Nanjing came from one-on-one interaction with witnesses in court, not from documentary evidence. The defence proved relatively successful at poking holes in the accounts of prosecution witnesses during rare opportunities to cross-examine. Like later Nanjing deniers, the defence did not really attempt to produce a competing history of the atrocity. Instead, they sought to expose minute discrepancies in individual testimonies to imply broader inaccuracies, and ultimately suggest that tales of mass atrocities represented gross exaggerations of naturally occurring wartime violence. An exchange between defence counsel Ito Kiyoshi, prosecution witness Zhen Fubao (Chen Fupao), and President Webb in July 1946 is characteristic of the confusion caused by this strategy.

Ito: You have stated first that thirty-nine people were taken from the refugee area and that they were all civilians and then you say that most of them were civilians and then you say that some of them were civilians and

¹¹⁷ *Transcripts*, 40148.

then you say one you know in particular was a policeman. But which of these statements is true?

Zhen: They were all civilians in the refugees, all of these people. They were all civilians.

Ito: I cannot understand your answer. Did you get my question?

Webb: The answer is plain. He said they were all civilians. You must accept it.

Ito: Then when you say 'most of them,' or when you say 'a number of them,' are these phrases incorrect?

Zhen: Shall I repeat the story from the beginning?¹¹⁸

From a legal perspective, these strategies proved unsuccessful: the tribunal eventually found the accused guilty. Defence tactics also failed to produce a convincing body of facts. Their specious arguments and conjectural evidence paled in comparison to insurmountable truths established by prosecution material. The existence of such exchanges in the IMTFE record, however, helped obfuscate the narrative under construction at the trial.

Indian Justice Pal's voluminous dissenting judgment further legitimated defence challenges to the master narrative. Pal became revered by Japan's right-wing apologist community. These so-called 'revisionists' have championed Pal's dissent since its first translation into Japanese in 1952.¹¹⁹ Influenced by defence cross-examination techniques, for example, Pal criticised the testimonies of Reverend John Magee and Dr. Xu Chuanying (Hsu Chuan-Ying). "Both these witnesses have given us horrible accounts of the atrocities committed at Nanking. It is, however, difficult to read this evidence without feeling that there has been distortions and exaggerations."¹²⁰ The final defence summation, especially its challenge of burial records, also became influential in establishing a counter-narrative of the Nanjing massacre. As Yamamoto Masahiro explains, "Scholars who deny the fact or discount the extent of the Rape of

¹¹⁸ *Transcripts*, 2612-13.

¹¹⁹ Brook, "The Tokyo Judgment and the Rape of Nanking," 677.

¹²⁰ Radhabinod Pal, "Dissenting Judgment" (30 July 1948), Northcroft Papers, Box: 332a-c. Hereafter "Pal Dissent," 607.

Nanking today still employ the same analysis the defense made at this occasion.”¹²¹ With greater access to prosecution witnesses, the defence may well have mounted a more effective and convincing defence of Japan’s actions in Nanjing. While a historically and morally unseemly prospect, such a defence could have improved the perception of judicial fairness in Tokyo. Logistics did not make it impossible to be fair in Tokyo, but administrative issues made it harder.

Perception can be a two-way street with bias is in the eye of the beholder. In the final historical ledger, the IMTFE unquestionably became skewed administratively and procedurally against the defence. At the time and on the ground in Tokyo, however, both sides tended to feel slighted. Prosecutors frequently complained of administrative failings hindering their effectiveness. “We finished presenting our phase of the case to the International Military Tribunal on Tuesday of this week,” wrote Walter McKenzie. “[But] there may be other things to do, because they are cutting down our staff very extensively.”¹²² Likewise, British prosecutor Comyns Carr repeatedly asked his government for more translators in the trial’s early months. “We need more,” he pleaded. “The best we have are Japanese prisoners of war.”¹²³ The prosecution also begrudged certain home-field advantages the defence had in defending local clients. “We have had to work under a great many handicaps,” remarked McKenzie in July 1946. “We are in the enemy’s country, and they were in possession of nine-tenths of the evidence that had to be obtained to present against the accused.” They experienced difficulty “Trying to obtain this evidence from friends of the accused and out of departments of which they were formerly the chiefs.”¹²⁴ Similarly, British prosecutors observed, “Significantly less incriminating material

¹²¹ Masahiro Yamamoto, *Nanking: Anatomy of an Atrocity* (Westport, CT: Praeger, 2000), 209. The defence reasoned that the number of victims buried per day reported by burial ‘parties’ were physically impossible.

¹²² Walter McKenzie to J. W. Loveday (9 August 1946), McKenzie Papers, Box 1, Folder – Correspondence - August 1946.

¹²³ Maurice Reed to London (undated, c. March 1946), IWM Papers, FO 648, Box 152, Folder 3.

¹²⁴ Walter McKenzie to Richard Hedke (24 July 1946), McKenzie Papers, Box 1, Folder – Correspondence – July 1946.

has . . . been captured here than in Germany.” Without a comparable wealth of documents, “at the forthcoming trial we shall probably have to rely more on oral evidence and affidavits than has been the case at Nuremberg.” Astutely, the report noted, “it is likely to prove more difficult to win definite responsibility on the accused in the Tokyo trials” – at least truly persuasive “responsibility.”¹²⁵ The resulting probative weakness hurt the credibility of the master narrative of Japanese culpability built by the IPS and accepted by the Bench in Tokyo.

During a special conference between IMTFE judges, defence attorneys, and prosecutors on how to expedite the proceedings, Chief Prosecutor Keenan made a passionate, if somewhat exaggerated, lament of the logistical cards stacked against the prosecution. “I don’t want to plead the burden on the prosecution, but it has been a tremendous one,” explained the chief prosecutor. “We have a very small staff, as you know, at this time, and it is all centered on a few individuals to do a job.” More incredibly, Keenan professed envy of defence resources. “That isn’t at all the situation with the accused. While we have now alone to state the general propositions and charges and establish the charge of crime against individuals and conspiracy, we have to do it, a few men against twenty-five. That burden is divided among you people. You have no such burden as we have.” Keenan then explained the difficulties faced by the IPS in gathering evidence for its huge caseload and, he suggested, that such problems did not hamper the IDS. “We have got to cover the whole field, and we have got to have it processed and all that work done,” the Chief Prosecutor expanded. “We don’t believe that there is any real need whatsoever for the accused, in order to fully perform their duties, to do anything more than examine the Indictment.” Defence stalwart Ben Bruce Blakeney’s sardonic rejoinder told another tale:

It was, of course, our friends of the prosecution, not we, who drew this Indictment, fifty-five Counts, covering seventeen years of time and half a world of space. It was they who put in evidence running the gamut from the celebration

¹²⁵ UKLIM to FO (14 February 1946), IWM Papers, FO 648, Box 152, Folder 3.

and portentous firecracker incident at home to the theft of Mrs. Wang's pig in far China. In our Judgment, many of those things had no part in the case.

The defence, not the prosecution, had the burden. Blakeney assured the court that the IDS had made "discriminating effort to weed out those parts of the issues in this monstrous indictment which has not been sustained against individuals or, in some cases, against anyone."¹²⁶ Historians and contemporaries debate the IMTFE's fairness. Proponents and opponents of victors' justice alike overlook the role of logistics in shaping the IMTFE and its reputation. The organisational dimensions of international justice made victors' justice allegations and perceptions both more damning and damaging to the trial's image. The point here is not to dispute undeniable prejudice, but rather to complicate reductive and ahistorical assumptions of victors' justice in Tokyo. Too often, scholars use examples of IMTFE bias to dismiss the entire endeavour. They presume that removing objectivity brings down the entire IMTFE house of cards. This oversimplified construct misses the nuances behind the court's prejudice and the unavoidable, often mundane, structural matters that helped embellish and even cause both the image and reality of judicial unfairness in Tokyo.

Conclusion

The cumulative structural and logistical difficulties greatly disrupted and prolonged the IMTFE. The specialised demand for personnel (trained legal clerks, competent translators, experienced court reporters, etc.) and the volume of equipment and material needed to run the IMTFE would have presented supply challenges even in the best circumstances. Operating in postwar Japan made administering justice even harder. No matter how historically significant, the IMTFE formed only part of a much larger Occupation project. Meeting the institutional demands of the tribunal, therefore, emerged as an ongoing and negotiated process. Despite

¹²⁶ Record of Conference on Matters in Relation to the Expedition of the Trial (24 June 1947), IWM Papers, FO 648, Box 153, Folder 5.

concerted efforts, the IMTFE never had optimal staffing or resources. The result became an inconsistent and often unequal sharing of personnel resources between the prosecution, defence, and the general administration. Technical difficulties – e.g. with translation machinery and air conditioning – also delayed and obstructed the tribunal. These ostensibly ‘mundane’ aspects of running an IMT in war-ravaged Japan left indelible marks on the application of justice in Tokyo, both in court and out. This chapter proves how administrative challenges shaped the IMTFE’s effectiveness and image, and suggests that the organisational experience in Tokyo reveals fundamental truths about the structural essence of global governance in action. At first blush and upon cursory historical analysis, the IMTFE exhibited many signs of administering victors’ justice. No matter how imperfect, however, the tribunal signaled a profound shift in how the international community confronts major crimes and crises. In constitution, administration, logistics, and other areas the IMTFE presaged a modern, messy internationalism typical of the second half of the twentieth century. Like with many other similar international bodies, the complex ground level and structural issues in Tokyo combined to prevent IMTFE processes from living up to its expansive principles and promises.

CHAPTER 3: Inventing International Justice: Law and Order as Sensibilities in Tokyo

In July 1946, New Zealand's representative in Washington, Sir Carl Berendsen, met with UK and US authorities to discuss the controversial replacement of American IMTFE Justice John P. Higgins. Berendsen reported the "gist" of the meeting was to decide that filling the vacancy proved "a matter of practice and not of inflexible rule." Despite technical legal doubts, all agreed, "In this particular case the political circumstances alone would seem to warrant the appointment of a United States representative."¹ Though legally suspect, it became impractical and politically untenable *not* to replace the judge. This principle-practice fulcrum came to define IMTFE jurisprudence. Breaking legal ground emerged as an involute business riddled with built-in contradictions and controversies. IMTFE administrators and judges applied principles from common, civil, military, and other judicial traditions to suit the court's aims. Even if arguably necessary to complete and run the tribunal, the resulting *ad hoc*, at times arbitrary, process dissatisfied observers of all stripes ranging from strict continental jurists to eclectic common law trained participants, and shades in between. Yet, expediency forced the hands of tribunal actors making compromise unavoidable: "inflexible rule" became impractical and largely incompatible with trial aims. Moreover, upgrading international infrastructures meant that in most cases the existing law provided just enough uncertain to permit, even necessitate, flexible interpretation and implementation. In other words, the apparent inconsistencies derided by critics stemmed not simply from politics or victors' justice. They developed as inherent by-products of building a trial and inventing international justice from competing legal systems and nascent norms.

The historiography to date concentrates predominantly on in-court, hence public, legal controversies. This chapter focuses instead on differing legal approaches behind the scenes. In

¹ Sir Carl Berendsen, New Zealand Minister, Washington to Minister of External Affairs, Wellington (16 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

particular, it explores how the ‘trial within’ shaped the formulation and consideration of the court’s conspiracy charge and internal perspectives on tribunal jurisdiction and legitimacy. Day to day proceedings became cumbersome, even halting. Translation difficulties particularly hampered expansive debate about legal matters. As a result, the most detailed and significant legal discussions took place *in camera*, and differing legal perspectives on key IMTFE issues proved more evident in chambers than in court. The private arena therefore provides an illuminating forum for understanding the negotiation of IMTFE justice. As with other parts of this dissertation, this chapter focuses on intimate, experiential details in Tokyo to draw broader conclusions about internationalism and justice. Uncritically, this approach generates a false impression of triviality within the court’s core interactions. Ostensibly marginal spats among judges, may distract from the serious legal issues under review. However, interpersonal rivalry usually reflected more complex internal problems. Lashing out at rivals, opponents, colleagues, and subordinates, for instance, became an easy outlet for deeper frustrations and stress. Big questions of morality, law, justice, and ideology periodically manifested as seemingly petty venting, cheek, acrimony, and complaint. In Tokyo, the most apparently blatant examples of victors’ justice or pettiness often represented something much more complicated.

Like other components of the complicated encounter and malleable processes which characterised the international space formed in Tokyo, the IMTFE’s legal world formed a negotiated, contested, and improvised experience that defies easy, reductive categorisation. Nevertheless, several patterns developed within the volatile, uncertain melange of legal ideologies, philosophies of law, personal backgrounds, and national jurisprudential traditions. Emotions and experiences came to define legal difference in Tokyo as much as fixed notions of jurisprudence and procedure. Inside the raised stakes environment of international justice, jurists interpreted the law and legal matters using spirit as well as training, feeling bound with reason.

This blend of personal judgment and juridical cognition in Tokyo confounds the notion of objective and sterile legal processes. It also presents an analytical challenge for understanding the invention of international law at the IMTFE and related institutions. The idea of “sensibilities” provides a useful conceptual tool for understanding such complex and contested judicial experiences. “By bringing together the elements of sense perception, cognition, emotion, aesthetic form, moral judgment, and cultural differences,” explains cultural and intellectual historian Daniel Wickberg, sensibilities “let us dig beneath social actions and apparent content.”² International law and legal practise in Tokyo filtered through a mix of sensibilities rooted in interpersonal relations, social dynamics, political pressures, competing ideologies, emotional experiences, and moral judgments.

Using internal bench, prosecution, and defence files, this chapter reveals that a loose polarity enrooted between formalist and pragmatist perspectives in Tokyo.³ These groupings arose not as prescribed or strict doctrines, but rather as legal *sensibilities* of choice, personal inclination, and intellectual acrobatics all predicated on the intricate, *ad hoc*, invented law and practise constructed in Tokyo. Individual legal responses varied considerably, but the project at hand forced certain broad delineations. Intellectual openness, the willingness to “create” law, conviction in the IMTFE project, and preconceived views of Japanese guilt drove the production of normative Tokyo law. Meanwhile, dissentient sensibilities created a competing legal

² Wickberg, “What Is the History of Sensibilities?,” 669.

³ Jessica Wang describes a similar pragmatist-formalist typology in US legal and intellectual currents of the 1920s and 1930s. Wang defines “Legal pragmatism” as a composite of two intellectual traditions “legal realism” and “sociological jurisprudence” both of which reject “textbook models of legal practice.” Instead, legal pragmatists view law “as a dynamic process rather than a static set of rules . . . a process and ongoing experiment.” Formalists, on the other hand, adhere narrowly to strict legal orthodoxies seeing “the law” as a monolithic body of principles and rules operating above and beyond social conditions. “Legal pragmatism emerged from [a] rolling cauldron of economic upheaval, class conflict, and reform politics as a means of adapting law to realities of industrial society,” concludes Wang. It became “both a rationale and living reality in the conduct of public affairs” during the New Deal era of “dynamic and flexible experimentation in using governmental power to meet human needs.” In Tokyo, international legal pragmatism (and formalism) emerged more as sensibilities than doctrinaire schools. Jessica Wang, “Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism,” *Journal of Policy History* 17, no. 3 (2005): 257-93.

experience, not to mention a destructive narrative of dysfunction. The exaggerated promise, principles, and pragmatics of international justice created an impossible situation for jurists expected, and expecting, to produce a conclusive judgment on Japan's crimes and to provide an exemplar for future courts. The resulting personal and legal contradictions helped establish the IMTFE's reputation for cynical victors' justice, an epithet which continues to undermine the tribunal's place in history, law, and memory.

Ex officio, ad hoc, ex post facto, or sui generis? The IMTFE's Place in Legal History (and Latin)

Participant receptivity to the IMTFE depended largely on preformed visions of the tribunal's role in world affairs and Tokyo's place alongside Nuremberg in the course of international criminal jurisprudence. Did occupational authority and unconditional surrender make both courts legitimate *ex officio* manifestations of global communal accountability? Or were Tokyo and Nuremberg strictly *ad hoc*, improvised proceedings sanctioned by international accord to render justice by whatever available means for a particularised problem in a difficult transitional era? Were the IMTs illegal, *ex post facto* examples of retroactive judgment without precedent in international law? Further still, is it more accurate to assess Tokyo and Nuremberg as classes alone, pioneering *sui generis* outgrowths of a peculiar postwar movement? How participants answered these questions in Tokyo and Nuremberg depended on personal sensibilities rooted in preconceived ideals, individual values, emotional reasoning, intellectual flexibility, and legal backgrounds. The IMTFE mediated between two broad outlooks: expansive legal pragmatism and restrictive orthodox formalism; "practice" and "inflexible rule."

Historian Elizabeth Borgwardt captures the complex interaction between principles and practice in Nuremberg and Tokyo. The IMTs represented institutional innovations, couched in legal nomenclature and justified by the war. As the first IMT, Nuremberg occupied the "anomalous position as an event on the cusp of the transition from war to peace . . . striving to

lay the juridical groundwork for a future peace.”⁴ Both tribunals contributed to “a broad historical trend affirming the universal value of international moral and legal sanctions,” Borgwardt continues. In so doing, Nuremberg and Tokyo provided “A means of lifting international justice to a new and higher level.”⁵ Nuremberg specifically, “embodied the first institutionalized, multilateral attempt to use the ideals of the rule of law to give voice to this moral intuition . . . the Nuremberg Charter was instrumental in crystallizing a pre-existing concept in a new way, for which a modern vocabulary rapidly developed.”⁶ IMT participants became builders not borrowers. Borgwardt employs a “New Deal” motif to explain how court organisers reconciled restrictive precedent-driven legal doctrine with expansive promises of postwar accountability embedded in the “post-surrender exigencies of total war.”⁷ In her view, Nuremberg and subsequently Tokyo projected “a peculiarly American, New Deal-style approach onto the international stage,” she explains: “A Rooseveltian synthesis of the legalistic and moralistic idioms of American multilateralism.”⁸ Borgwardt overstates US dominance, but her New Deal metaphor holds value. Whether rooted in the US experience or reflective of global development in the 1930s and 1940s, the blend of idealism and pragmatism that typified New Deal endeavours suited the postwar years. World War II hardened both ideals and pragmatics, including what Jessica Wang labels a steadfast New Deal belief “that modernity required novel forms of statecraft.”⁹ New Dealers in Nuremberg and Tokyo, together with contemporaries from similar movements in other Allied countries, developed a legal pragmatist sensibility which they unleashed on an international stage, unafraid to challenge doctrine and create law to meet social

⁴ Borgwardt, *A New Deal for the World*, 203.

⁵ Ibid., 236.

⁶ Ibid., 241.

⁷ Ibid., 207.

⁸ Ibid., 205 and 38. The Nuremberg Charter and by extension the Tokyo Charter represented “concrete” examples of “how the interaction among politics, ideas, and institutions pushed American diplomacy toward multilateral solutions as World War II drew to a close.” Borgwardt, *A New Deal for the World*, 197.

⁹ Wang, “Imagining the Administrative State,” 272.

needs. Borgwardt and Wang present compelling arguments about US developments, but the IMTs, especially in Tokyo, represented international and not exclusively American bodies. In Tokyo, the international community developed novel forms of global justice and governance to adjust to a new postwar modernity. The *zeitgeist* set the stage for an *international*, not American, movement to create and operate new governance systems which blended principles and practise.

Legal philosophies emerged as both strategic tools and deeply held belief systems in Tokyo. Participants used whatever legal construct best suited their incoming, existing stance regarding the tribunal's authority and Japanese guilt. Behind the scenes at the IMTFE, jurists of both legal pragmatist and orthodox formalist sensibility used two main legal philosophies to support their arguments. Natural law or naturalism posits that all law derives from inherent universal principles, values, and rights that are recognisable in human nature and discernible by reason. On the other end of the spectrum, positivism rejects any judicial process not grounded in explicit and pre-existing obligations and codified law.¹⁰ The state of international law at the time of the IMTFE aligned participants to certain philosophical outlooks in Tokyo based on whether they embodied pragmatist sensibilities or formalist inclination. From a legal pragmatist perspective, postwar exigencies provided more than sufficient conditions to underpin path-breaking international justice. To convince others, however, Tokyo judges inclined to pragmatism typically drew on natural law theories because the blending of law and morality proved convenient and compelling in the pervading "never again" mindset which followed the war. The inherent inclusiveness of natural law provided a powerful rationale for the sweeping

¹⁰ General understanding of "natural law" and "positivism" from Frederick F. Schauer and Walter Sinnott-Armstrong, *The Philosophy of Law: Classic and Contemporary Readings with Commentary* (Fort Worth, TX: Harcourt Brace College Publishers, 1996).

ambitions of postwar justice.¹¹ Since those inclined to formalism demonstrated a less expansive understanding of the IMTFE's place in jurisprudence and history, they tended toward positivism's more regimented outlook on law. Because of the limited case law precedent for operative international justice, most jurists with formalist sensibilities doubted the IMTFE's legitimacy on some level. Polarisation among participants led to and contributed to a divisive reputation for the IMTFE in Tokyo and beyond.

Justice in Tokyo also refracted through a prism of national legal cultures. Personnel of pragmatist or formalist inclination constructed arguments, prepared cases, heard evidence, and understood the tribunal's very premise through personal legal-cultural lenses. The gap between Common law (Australia, Britain, Canada, India, New Zealand, and the US) and Civil or Continental law (France and the Netherlands) formed the most elemental division of legal traditions.¹² In addition to the Civil-Common law divide, four other judicial systems existed in Tokyo. Filipino representatives came from a unique hybrid legal background that mixed American-influenced common law, Spanish introduced civil tenets, and indigenous customary practices. The Russian contingent also followed a separate body of law. Instead of protecting individuals from the state, Soviet or Socialist Law used courts as political agencies to guard the state from individuals.¹³ Chinese law at the time was idiosyncratic. The Nationalist regime integrated a western-style civil law system, but actual penetration of the law beyond civil society and central geographies remained limited. Traditional Chinese practices retained influence.

¹¹ Chief Prosecutor Keenan and IPS theorist Brendan F. Brown were among the most vocal natural law exponents and legal pragmatists in Tokyo. Keenan took a no-nonsense moralistic interpretation of law. The universalising characteristic of natural law theories helped him bring together varied nationalities and legal systems by suggesting common ideals of a "Society of Nations." Keenan and Brown, *Crimes against International Law*.

¹² Scotland and Quebec operate under bi-juridical systems combining aspects of common and civil law.

¹³ The most infamous examples of the Soviet system included Stalin's "Show Trials" of the 1930s. The conflation of politics and justice in a public setting gave Socialist Law an interesting place in Tokyo. Soviet justice actually blended quite well with a political and symbolic court like the IMTFE. However, the Soviet government's more interventionist understanding about judicial investigation caused issues during the Tokyo proceedings.

Finally, Japanese legal culture had a role in the IMTFE. Representing a judicial system based largely on French and German continental law, Japanese attorneys struggled with the IMTFE's adversarial Anglo-American approach. Although no other system really challenged Anglo-American predominance, participants from other cultures processed the IMTFE experience through distinctive legal gazes. Accommodating and suiting such a range of traditions and tenets became impossible at the IMTFE. At least on some level, the law and procedures invented in Tokyo invariably conflicted with every legal system represented in court. As a result, broader sensibilities based on personal inclination, values, emotions, and principles rather than political considerations or legal abstractions underscored the IMTFE's juridical experience.

Justice in court and behind the scenes in Tokyo filtered through a multifaceted legal kaleidoscope. Internationalism forced interaction between philosophies and cultures of law which rarely co-exist, let alone combine and work together. Thus, the defining characteristic of IMTFE jurisprudence became how readily individuals and their personal, cultural, and legal practices adapted to and accepted the on-the-ground realities of international justice. The tribunal became a contest between participants who, by inclination or precept, assumed their role as inventors of law (legal pragmatists) and those who felt unwilling or unable to compromise legal values in the name of international justice (orthodox formalists). Typically, deliberate or intuitive pragmatists arrived in Tokyo committed to IMTFE ideals and convinced of Japan's guilt. Those inclined to formalist sensibilities could not or would not bend legal principles to mete out postwar justice in Japan. This competing set of sensibilities led to a fractured legal tale and legacy in Tokyo. Because support for the tribunal seemed so obvious and necessary to pragmatists, their justification often appeared cursory or rang hollow. On the other hand, generally, vocal formalist dissent encouraged criticism of the court's injustice.

Leadership / Convenience / Law / Compromise

“Although we often speak of them in omnibus terms,” Boister and Cryer argue, international courts “are complex entities with various different organs, participants, agendas, and philosophies.”¹⁴ The interplay of legal ideals, cultures, and practices caused disunity within the defence, prosecution, and bench. However, law in Tokyo also developed into a negotiated process of collaboration and concession. In this fractious environment, personal leadership skills, willingness to compromise, and the ability to bridge social and legal divides became paramount. Probative, technical, and conceptual convenience shaped divisional approaches and appropriated personal philosophies. Because legal pragmatism best supported IPS aims and arguments, prosecutors adopted a pragmatist sensibility, sometimes only ostensibly. To counteract prosecution strategies, therefore, the defence became necessarily, self-consciously, and logically formalist in practise and principle. On the Bench, where differences of legal cultures and ideologies also caused rifts, the formalist-pragmatist axis became a defining characteristic of dissent and assent.¹⁵ Although these sensibilities did not manifest as fixed categories, they help explain the IMTFE’s complex legal experience and disputed, dysfunctional image.

Because the two postwar IMTs shared analogous origins, parallel objectives, and joint legal tenets, competing formalist-pragmatist sensibilities determined internal views of both the Nuremberg and Tokyo Charters.¹⁶ The foundations of the two tribunals developed during the war. As knowledge of Axis abuses spread, the Allies issued several international decrivals of the violations. The Inter-Allied Joint Declaration on the Punishment for War Crimes (13 January 1942) became the first public condemnation of Axis misdeeds. Signed by 19 countries, the Inter-

¹⁴ Boister and Cryer, *The Tokyo IMT*, 221.

¹⁵ For an excellent discussion of legal philosophies in Tokyo see: Ibid., 221-300.

¹⁶ M. E. Bathurst, "The United Nations War Crimes Commission," *The American Journal of International Affairs* 39 (1945): 565-70, Egon Schwelb, "The United Nations War Crimes Commission," *The British Yearbook of International Law* 23 (1946): 363-76, Egon Schwelb, "Crimes against Humanity," *The British Yearbook of International Law* 23 (1946): 178-226.

Allied Joint Declaration condemned the waging of inhumane war and promised accountability for war criminals after the war. On 7 October 1942, a corollary Anglo-American Agreement promised extensive war crimes investigation, leading to the establishment of the United Nations War Crimes Commission (UNWCC) a year later. On 17 December 1942, London, Moscow, and Washington simultaneously issued a further warning that war criminals would not escape justice. Similarly, the Moscow Declaration of November 1943 labelled war crimes justice an official Allied war aim. The formal postwar international tribunal structure emerged with the formulation of the Nuremberg Charter at the London Conference among representatives from France, Great Britain, the US, and the USSR in August 1945. Issued five months later, the Tokyo Charter technically followed the Potsdam Declaration of 26 July 1945 and not the Nuremberg Charter,¹⁷ but despite this distinction, the charters used virtually identical language and law.¹⁸ Thus, like Nuremberg, the Tokyo Charter represented “a new combination of older

¹⁷ The Potsdam Declaration promised to uphold the terms of the Cairo Conference (1 December 1943) where Britain, China, and the US declared they were fighting a war to “restrain and *punish* [emphasis added] the aggression of Japan.” Potsdam promised, “stern justice shall be meted out to all war criminals.” IMTFE, “The Cairo Conference,” *Exhibits* Volume 1, Exhibit No. 1, Northcroft Papers, Box 221; and IMTFE, “The Potsdam Declaration,” *Annexes to Judgment* Volume I, Annex No. A-1, Northcroft Papers, Box 321.

¹⁸ The language between Nuremberg and Tokyo Charters is noticeably similar. Compare Section II, Article 5 of the Tokyo Charter outlined in “Appendix I: Charter of the International Military Tribunal for the Far East” to Section II, Article 6 of the Nuremberg Charter which granted power to bring persons to justice who “whether as individuals or as members of organizations” committed any of: 1) Crimes against Peace: “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”; 2) War Crimes: “Namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”; and 3) Crimes against Humanity: “Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.” Section II, Article 8 stipulated that “superior orders” could not be accepted as a defence: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.” Charter of the International Military Tribunal [Nuremberg] (8 August 1945), Jaranilla Papers, Box 44, Folder 3.

conceptions regarding just and unjust wars, mixed with positivist ideas from previous treaties about traditional crimes of war . . . [and] innovative arguments about the scope of a ‘living’ customary law.” The originators of the both Charters “saw themselves as harnessing the pre-existing legitimacy of persuasive legal precedents in order to create something new.”¹⁹ In other words, the Tokyo Charter dovetailed with legal pragmatist sensibilities. The document formed a creative, expansive amalgam of law designed to correct sociological deviation by whatever means necessary to suit the exigencies of the day. As the basis for IMTFE law, the Tokyo Charter set the tone for “practice” *versus* “inflexible rule” polarity.

Taking the Charter’s lead, the IPS took on a legal pragmatist quality which sublimated national, cultural, and philosophical divides. In Nuremberg “crimes against peace,” “conspiracy,” “crimes against humanity,” and conventional war crimes appeared as four individual counts. The Tokyo indictment grouped these four allegations together in three general charges,²⁰ subdivided into 55 specific counts.²¹ Convinced of Nuremberg’s legitimacy, the Tokyo prosecution never seriously considered designing a radically different legal framing to suit Japanese crimes. Indeed, Tokyo prosecutors believed they had a responsibility to reinforce the new laws created in Nuremberg. No matter how well intentioned, however, the effort to fit Tokyo into Nuremberg parameters proved disastrous. “Conspiracy,” “common plan,” and “aggression” charges which were tailor-made for the German context did not suit Japan’s milieu

¹⁹ Borgwardt, *A New Deal for the World*, 212-13. “The Nuremberg approach was an innovation in the world of legal ideas, but the trial’s design was also an attempt to learn from the historic failure of World War I-era approaches,” expands Borgwardt. “The Nuremberg Charter was a search for a pragmatic, New Deal-style middle way that could support a conception of the progressive development of international law, while avoiding the pitfalls of the past.” Borgwardt, *A New Deal for the World*, 217.

²⁰ The Tokyo Indictment’s third general charge linked “Crimes against humanity” and war crimes.

²¹ IMTFE, “Indictment,” *Annexes to Judgment* Volume I, Annex No. A-6, Northcroft Papers, Box 322. Borgwardt describes the similar process of transposing Charter to Indictment in Nuremberg. “Prosecutors drafted a rambling sixty-seven page indictment to apply the charter’s principles in a specific way to each individual defendant,” explains Borgwardt. “This indictment was diplomatically described by one of its authors as ‘a polygenetic document.’” Borgwardt, *A New Deal for the World*, 198.

or history. Germany had a clear group – the Nazis – with a clear leader – Hitler – that had taken clearly aggressive steps to initiate and precipitate war. In Japan, the situation was far more complex, for example, the empire had 17 Cabinets and 16 Prime Ministers in the period investigated by the IMTFE (1927-1945).²² Yet, in spite of inherent probative and legal challenges, the IPS persisted in mirroring Nuremberg charges in order to create a cohesive body of law for future institutions. Individual prosecutors therefore had to accept and develop a piecemeal, imperfect, case and body of law in Tokyo. Legal pragmatism became a powerful adhesive within the IPS. Whatever their personal legal inclinations, prosecutors united behind a pragmatic commitment to both the indictment they crafted and to the IMTFE Charter. By signing on and accepting the tribunal’s legitimacy, Japan’s guilt, and the IMTFE’s grander purposes, IPS members agreed to create new law in Tokyo. The force of history and justice facilitated personal compromises of conscience and philosophy for greater objectives.

The issue of “conspiracy” best illustrates the importance of compromise to the experience and essence of international justice in action. Conspiracy or “common plan” was a strictly Anglo-American doctrine imbedded in the IMTFE Charter’s crimes against peace and crimes against humanity charges, and enshrined in the first and several subsequent counts of the IPS Indictment.²³ Borgwardt explains conspiracy’s probative expedience. “Once a tribunal has declared a group criminal, it would merely be a matter of showing whether any given individual

²² Prince Konoe Fumimaro served as Prime Minister for two non-consecutive terms. He committed suicide after the war and was therefore never brought to trial. Japan’s one continuous “leader,” of course, was Emperor Hirohito. Debate continues, however, over the extent to which the Emperor operated as a mere figurehead or played an active role in Japan’s “aggression.” Regardless, he was certainly no Hitler. Furthermore, the already varying number of governments was almost infinitesimally segmented by internal schisms, secret societies, and interest groups. Prosecutors in Tokyo therefore had difficulty sustaining the argument that pre-war Japan’s movement towards war grew out of a clear conspiracy and common plan.

²³ Count 1 read, “All the Defendants together with divers other persons . . . participated as leaders, organisers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy, and are responsible for all acts performed by themselves or by any person in execution of such plan.” The word “Conspiracy” also figured in nine of the indictment’s 55 counts (specifically: Counts 1, 2, 3, 4, 5, 37, 38, 44, and 53). For more information, refer to Appendix II: IMTFE Summary of the Indictment.

was a member of that group.”²⁴ This guilt by association factor proved essential to the Japanese context since, as legal scholar and political theorist Judith Shklar notes, “The war in the East was one that could not be easily discussed in terms of proximate causality.”²⁵ Conspiracy provided a neat tool to condemn the accused. “The efficacy of the doctrine of conspiracy as a technical device for the prevention and suppression of potential crime stems largely from its elasticity,” Tokyo prosecutor Brendan F. Brown wrote.²⁶ Indeed, prosecutor Solis Horwitz admitted that the IPS’s first phase on conspiracy to commit aggressive war “was not designed to establish individual guilt but the guilt of the various parts of government. The individuals on the docket who held these positions would therefore be guilty implicitly.”²⁷ Committed to advancing internationalism and uncritically convinced of Japanese guilt, IMTFE jurists applied conspiracy even more forcefully than their Nuremberg counterparts did.²⁸

Conspiracy appealed to the IPS because it spoke to both the ideals and pragmatics of justice in Tokyo. The IMTFE “will help to finally establish certain definite principles of International criminal law that will aid in preserving the future peace of the world,” Walter

²⁴ Borgwardt, *A New Deal for the World*, 221.

²⁵ Judith N. Shklar, *Legalism* (Cambridge, MA: Harvard University Press, 1964), 179. Shklar also points out the cultural disjuncture between the prosecution’s case and Japanese history and society. “What on earth could the Christian-Judaic ethic mean to the Japanese?” she asks. “To them such a law of nature could, at best, be an alien moral tradition – at worst, the nationalistic ideology of the victors.” Shklar, *Legalism*, 183. The enduring “judgment on civilisation” trope in Japan’s public memory of the IMTFE supports Shklar’s contention. Kei Ushimura, *Beyond the 'Judgment of Civilization': The Intellectual Legacy of the Japanese War Crimes Trials, 1946-1949*, trans. Steven J. Ericson (Tokyo: International House of Japan, 2003).

²⁶ Brendan F. Brown, “The Crime of Conspiracy” (15 May 1946), Lowe Papers, Box 2, Item 2.

²⁷ Solis Horwitz, “The Tokyo Trial,” *International Conciliation* 465 (November 1950): 505.

²⁸ Borgwardt argues that the Nuremberg Bench “expressed its continuing discomfort with the concept by making sure that no defendant was convicted for the crime of conspiracy alone.” Borgwardt, *A New Deal for the World*, 224. In contrast, the IMTFE sentenced Ōshima Hiroshi to life solely for guilt in the Count 1 conspiracy charge. It likewise found fifteen others – Araki, Hashimoto, Hiranuma, Hoshino, Kaya, Kido, Minami, Oka, Ōshima, Sato, Shimada, Shiratori, Suzuki, Togo, and Umezū – guilty of only conspiracy-laced counts within the crimes against peace and crimes against humanity charges (i.e. without being convicted of counts 54 and 55 on conventional war crimes). IMTFE, Judgment, Chapter X: Verdicts, Northcroft Papers, Box 321. Whereas Nuremberg judges tended to narrow their charter’s scope, Tokyo jurists – out of probative necessity, cultural presumption, and to build up the Nuremberg edifice – often widened the IMTFE Charter. For example, Tokyo judges did not follow Nuremberg’s “tight nexus between crimes against humanity and the aggressive war charge.” Borgwardt, *A New Deal for the World*, 229.

McKenzie declared as he explained the IPS' "new order" objectives to the editor of the Red Cross' *Home Service Digest*. "This is a matter in which all the civilized people of the world are immensely interested at this time. Some definite provision must be made to peaceably settle future international disputes if civilization itself is to survive."²⁹ Conspiracy fit these ideals, but set up a tricky balance between prosecutorial and moral necessity. As a sensibility and strategy, legal pragmatism proved effective in smoothing contradictions and defects among IPS personnel and within arguments. Prosecutor Otto Lowe admitted, for instance, "the Kellogg-Briand Pact, Potsdam Declaration and Acceptance of Surrender Terms" formed the "nearest approach" to legal backing in the IPS case, but "there was no international legislature to enact and codify laws against [such] crimes." All the same, the ends justified the means. "For the first time heads of states are personally and criminally responsible for conspiring to and waging an aggressive war in violation of treaties, and that the persons in control of government are a personal and corporate entity."³⁰ In the conspiracy charge, the IPS married a very pragmatic approach to prosecuting Japan's leadership with steadfast commitment to continuing Nuremberg principles and an expansive conception of postwar legalism.

Under Chief Prosecutor Keenan's leadership, two strains of US jurisprudence – sociological justice and legal realism – figured prominently in the prosecution case. A fixture in FDR's Washington, Keenan personified New Deal faith in administrative flexibility, expert knowledge, and socio-legal governance. This outlook aligned with the creation ethos of IMTFE law, and manifested as legal pragmatism in its rawest form. Keenan had an extensive background in sociological jurisprudence. He graduated from Harvard Law School in 1913, where he studied under the field's pioneer, Roscoe Pound. As a Special Assistant to the Attorney

²⁹ Walter McKenzie to Agnes McGraw (9 April 1947), McKenzie Papers, Box 1, Folder – Correspondence – April 1947. Conspiracy figured prominently in McKenzie's articles and beliefs about IMTFE importance.

³⁰ Otto Lowe to Brendan F. Brown (15 May 1946), Lowe Papers, Box 2, Item 2.

General in FDR's administration, Keenan conducted a national sociological survey of the "conditions" behind rising crime rates. Keenan's Special Assistantship also exposed the prosecutor to legal realism, especially during a national roundup of "kidnappers and racketeers" between 1933 and 1935. His colleagues in those years included a number of young realists, one of whom (John Brabner-Smith) Keenan brought to Tokyo to help refine early IPS theories. Although inexperienced, Brabner-Smith figured prominently in Keenan's IMTFE inner-circle. In early 1946, for example, Keenan included Brabner-Smith in the small group installed at the Fuji View Hotel to work on the prosecution's Opening statement. Brabner-Smith and other realists provided the "get-it-done" initiative behind IPS legal pragmatism.³¹

³¹ Brabner Smith graduated from Yale, the "reigning center of legal realism." Wang, "Imagining the Administrative State," 262. His published and private writings reflect a realist outlook. Other Yale disciples included Frederick Mignone and Chinese Associate Prosecutor Hsiang Che-Chun. IPS Biographical No. 1, David W. Conde Fonds, Rare Books and Special Collections, University of British Columbia, Vancouver, British Columbia, Box 19, Folder 4. Hereafter "Conde Papers." For more on Brabner-Smith's background see John Brabner Smith Personal Papers, Regent University Law Library, Virginia Beach, VA. Hereafter "Brabner-Smith Papers."

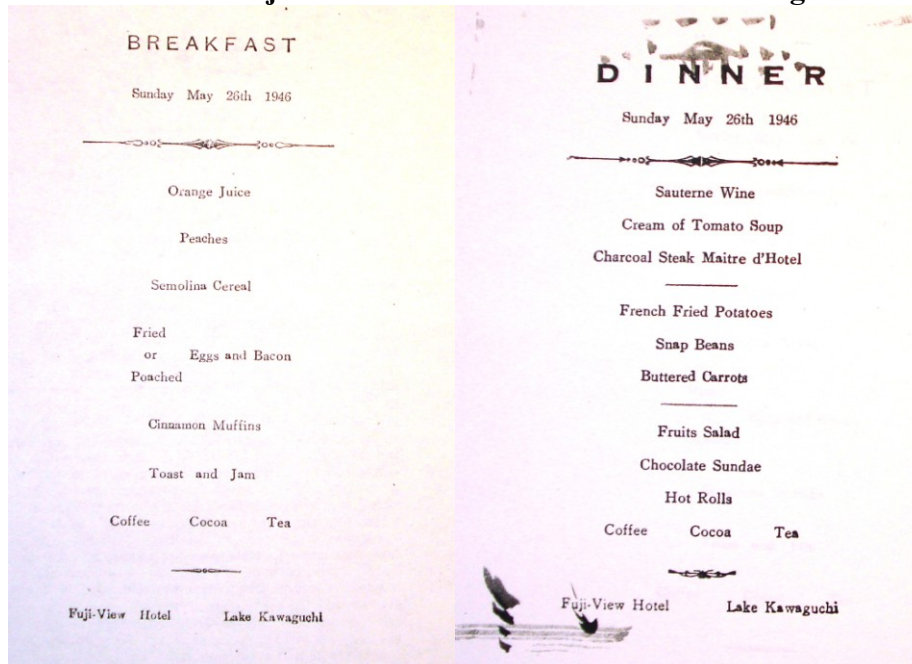
"On Thursday, May 23rd I went to Fuji View Hotel with Lt. Col. Brabner-Smith to help Mr. Keenan with his opening statement to the Tribunal," Walter McKenzie described. "The boys told him it was essential I stay here until our trial brief was finished. We finished it after 9:00 pm Wed[nesday] eve[ning] and I left Thurs[day] pm." Walter McKenzie to Connie McKenzie (2 June 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family – May-June 1946. Brabner-Smith's scrapbook includes several photographs of the hotel and environs as well as the light-hearted comment, "Mr. Keenan 'ordered' Judge McKenzie, Capt. Robinson and myself to Fujiview May 20, to work on his opening statement." He also kept souvenir menus from the retreat. John Brabner-Smith, Scrapbook, Private Collection. In February 1947, James Robinson reminisced fondly to McKenzie, "I recall frequently our work with Mr. Keenan at Fuji View last summer." James Robinson to Walter McKenzie (27 February 1947), McKenzie Papers, Box I, Folder: Correspondence – January-February 1947.

Illustration 10: The Drafting Committee of the IPS Opening Statement



Back (l-r): Walter McKenzie, unknown, unknown, John Brabner-Smith, Lloyd Lambert (Court Reporter). **Front** (l-r): Virginia Bowman, Joseph Keenan, Evelyn Alexander (Keenan's Secretary), James Robinson. ©Regents of the University of Michigan. Access courtesy of McKenzie Papers, Box 3, Folder: Photographs – Far East War Crimes Trial 1946-1947.

Illustration 11: Fuji View Hotel Menus from IPS Drafting Retreat



Menus from the Fuji View Hotel during writing of the IPS Opening Statement in May 1946. ©Daniela Brabner-Smith, by permission.

Keenan also brought over Brendan F. Brown, an academic and lawyer who personified the prosecution's legal pragmatism. An IPS maven, Brown arrived somewhat belatedly to shore up the intellectual foundations of the prosecution's legal case and ideological backing. His appointment served two purposes. First, the IPS commissioned Brown to reinforce the conspiracy charge's place in legal history by buttressing its case-law scaffolding in order to appeal to more formalist-inclined judges and observers.³² Second, having studied under two pioneers of sociological jurisprudence (Roscoe Pound and Felix Frankfurter), Brown deepened the socio-legal components of the IPS' pragmatism.³³ "International law includes the whole regime of *international social control*," Brown wrote in an internal IPS memorandum. "This regime embraces *not only a body of precepts*, which exist in the form of treaties, agreements and the like, *but also a judico-moral order* from which positive international law derives its validity [emphases added]." He continued, "International law has not yet attained a sufficient development for legislative or statutory law," but the "social control" roots of internationalism provided a legal foundation for IMTFE arguments. Brown's emphases reveal a distinctly pragmatist sensibility. "There is no reason *in justice or in utility* to choose as its major premise the view point of the analytical school of juris-prudence concerning the nature and scope of international law; or that of the realists who reject the validity of universal legal principles [emphasis added]," Brown pre-empted critics. Not running a tribunal, "would be to *lose an*

³² Amassing as much hard and fast conspiracy law as he could became one of Brown's assignments. Fruits of this labour include a compilation of US federal laws relating to conspiracy and an anthology of conspiracy precedents in every American state; proof positivist for the 'never again' determination to hold Japan accountable. Brendan F. Brown, "A Compilation of State Criminal Conspiracy Statutes," Lowe Papers, Box 2, Item 2; and Brendan F. Brown to Otto Lowe on "Criminal Conspiracy Law (Federal)" (7 May 1946), Lowe Papers, Box 2, Item 2. Although Brown functioned as the primary investigator for these studies, he had help from a number of Attorney General Office staffers. In June 1946, Otto Lowe thanked James P. McGranery, Assistant to the Attorney General, specifically naming Benjamin Pollack, Nora C. Taranto, Robert R. Requs, Albert Dudley, Elizabeth Rusen, as well as Brendan F. Brown for their work in conspiracy research. Otto Lowe to James P. McGranery, Assistant to the Attorney General (4 June 1946), Lowe Papers, Box 2, Item 4.

³³ Biography of Dr. Brown (April 1946), Lowe Papers, Box 2, Item 2. For Pound and Frankfurter's masterful socio-legal study see: Roscoe Pound et al., *Criminal Justice in Cleveland* (Cleveland, OH: The Cleveland Foundation, 1922).

historic opportunity to begin the formulation of a highly desirable legalistic institution [emphases added].” Breaking legal ground had simply never been so important. “The potential destructive power of atomic warfare may preclude a second opportunity, if needed legalistic institutions of peace do not take root now.”³⁴ Tokyo *felt* like the right time to invent new laws and establish strong bodies of global governance, regardless of legal technicalities. This sense of destiny inspired expansive legalism, while postwar righteousness encouraged pragmatism. Unprecedented violence demanded unprecedented action.

Beyond moralism and realism, the conspiracy charge reflected a different kind of cultural response to the war rooted in how participants thought about Japan and personal conviction of Japanese guilt. The US contingent of the prosecution in particular arrived on the IMTFE scene viewing the Japanese leadership as a “gang” of miscreants. From an Anglo-American legal perspective, the logical response to Japanese thuggery became the use of conspiracy laws designed to prosecute “gangs,” and to bring in legal specialists experienced in prosecuting organised crimes. G. Osmond Hyde embodied the twin prosecution pillars of experience “putting away” criminal groups and an uncritical belief in the criminality of Japan’s conspiratorial regime.³⁵ During interrogations of the former Japanese ambassador to Germany, Hyde described Ōshima as the “arch-conspirator” in a “Japanese-German conspiracy to wage aggressive war.”³⁶ Two days later, he continued his assessment: “Firmly imbedded within the heart of this soldier-diplomat Oshima was almost fanatical in his zeal – in his desire to accomplish the clasping of

³⁴ Brendan F. Brown, “The Crime of Breach of Treaty under International Law,” (9 April 1946), Lowe Papers, Box 2, Item 2.

³⁵ Hyde’s first experience as a lawyer came while working for the Alien Property Custodian’s Office established by President Woodrow Wilson to seek out and seize World War I ‘enemy’ property and assets – usually well hidden behind legal and banking structures.

³⁶ Entry: 16 February 1946, Hyde Diary.

hands by Japan and Germany in their ill-fated march towards world domination.”³⁷ The thug image of Japan led prosecutors toward a formulaic understanding of Japanese leadership.

Ironically, for a trial intent on breaking legal firmament by holding individuals accountable for acts of war, the Tokyo prosecution cared relatively little about specific individuals. Putting together a comprehensive and *representative* list of conspirators emerged as a primary aim. En route to Tokyo in March 1946, prosecutor Walter McKenzie met with Telford Taylor (then a returned Nuremberg prosecutor) in Washington to discuss selection protocol for the IMTFE accused. After the meeting, McKenzie recounted what he learned to Chief Prosecutor Keenan. “[Nuremberg] had tried to select one man from each group or war organization [but] not enough care had been taken in considering the age or health of some of the men indicted. The result was that some important groups were not represented,” wrote McKenzie. Taylor recommended that “at least two from each group should be included so that we would not be handicapped in our proof of conspiracy if one of the defendants should die or become incapacitated.” That way, “we could properly prove our case and obtain a judgment if we include certain war mongering societies, membership in which was to be deemed a crime.”³⁸ Prosecutors could plug virtually anyone into the “at least two from each group” formula as long as they established convincing structure of “conspiracy.”³⁹ This type of categorical thinking added to the impression of preordination in Tokyo. Such actual and apparent pigeonholing of

³⁷ Entry: 20 February 1946, Hyde Diary. As Meirion and Susie Harries argue, Keenan’s inclination toward conspiracies also suited Allied aims and preconceptions. “His gang-busting persona fitted the hoodlum image of the Japanese militarists projected by Allied propagandists. But in all other respects – professionally, physically, intellectually – he was unsuited to head an international prosecution, particularly in a remote Asian country.” Harries and Harries, *Sheathing the Sword*, 105.

³⁸ Walter McKenzie to Joseph B. Keenan (26 March 1946), McKenzie Papers, Box I, Folder: Correspondence – January - April 1946.

³⁹ IPS fixation on conspiracy is apparent in Joseph F. English’s 400-page index of Japanese conferences leading up to war. “Decisions of Imperial Conferences, Liaison Conferences, Privy Council Meetings, Cabinet Meetings, Four Ministers’ Conferences, Five Ministers’ Conferences, Senior Statesmen’s Meetings, Supreme War Plans Council, Joint and Miscellaneous Conferences - As Found in the Prosecution Evidence,” Records of the International Military Tribunal for the Far East, Australian War Memorial Archives, Canberra, Australia – AWM 83, Box 245 - IPS Index of Japanese Conferences, Councils, Meetings, etc. Hereafter “AWM 83.”

Japan and its leaders convinced later scholars the court lacked serious intent or fairness, but deeply rooted cultural assumptions – not intent – made any alternative unlikely and improbable.

Although conspiracy was a singularly Common Law, and particularly American, notion, US prosecutors sought determinedly to sell it as something more. They tried to establish a sufficient appearance of case-law weight to allay the consciences of detractors, especially those outside the Anglo-American majority. As prosecutor Otto Lowe explained, “Simply stated, criminal conspiracy means that if two or more persons conspire to do an unlawful act (or a lawful act in an unlawful manner) they have already committed a crime even if no overt act follows.” The concept, Lowe and others argued, was universal: “nearly every country in the world had enacted a law against criminal conspiracy.”⁴⁰ Many other prosecutors echoed this “nearly every country” refrain. For example, though Brendan F. Brown conceded that the conspiracy doctrine “arose, and was fully developed only in the Anglo-American legal system,”⁴¹ he also claimed “analogous institutions” existed in French, German, and Russian law dating back as far as the thirteenth century.⁴² Brown’s later work with Chief Prosecutor Keenan used similar language to construct a universal image of the conspiracy doctrine. “The Prosecution proposed a generic concept of conspiracy which is suitable and just according to international law,” argued Keenan and Brown, “because it embraces juridical materials and essences which are *common to the great legal systems of the world* [emphasis added].”⁴³ Specifically, Keenan and Brown traced conspiracy in some form or another to French, German, Russian, Chinese, and Japanese law.⁴⁴ In another publication, prosecutor Daniel Nelson Sutton similarly argued that “all the great legal systems of the world” recognised conspiracy. Since

⁴⁰ Otto Lowe to Dr. David Y. Paschall, President, College of William and Mary (5 June 1946), Lowe Papers, Box 1, Item 1.

⁴¹ Brendan F. Brown, “The Crime of Conspiracy,” Lowe Papers, Box 2, Item 2.

⁴² Ibid.

⁴³ Keenan and Brown, *Crimes against International Law*, 89.

⁴⁴ Ibid., 92.

most of the other alleged crimes stemmed from the conspiracy, the concept had a rightful place at the heart of the IPS case.⁴⁵ Such attempts to force universalist scaffolding on an Anglo-American tenement often felt hollow. Unsurprisingly, US prosecutors emerged as the loudest champions of conspiracy's universality. Nevertheless, as the next sections shows, many non-American participants came to accept the charge. Such widespread acquiescence illustrates the curious blend of compromise, wilful blindness, legal pragmatism, and commitment to building international justice that typified legal discourse and interaction in Tokyo.

American prosecutors rarely doubted the conspiracy charge's legal legitimacy or factual grounding, and non-American members arrived in Tokyo too late to radically alter the approach. Bound to the Nuremberg precedent and early US planning in Tokyo, the non-American prosecution had to deal with the conspiracy charge as formulated. Even if they disagreed with its specific framing, prosecutors from Common law backgrounds generally accepted the conspiracy charge as legitimate. Going along with conspiracy required a greater leap of faith from non-Anglo-American prosecutors. Yet, they kept any personal misgivings private.⁴⁶ Publically, especially in court, prosecutors bought into the conspiracy charge and presented a united front. Personal leadership helped forge internal IPS unanimity on legal matters regarding the overall direction of the prosecution case. British prosecutor Comyns Carr, for example, emerged as a

⁴⁵ David N. Sutton, "The Trial of Tojo: The Most Important Trial in All History?," *American Bar Association Journal* 36 (February 1950): 96.

⁴⁶ Some prosecutors never came around to the conspiracy charge. Denzel Carr thought the IPS should have concentrated on conventional war crimes. "I wouldn't have had the [conspiracy charge] at all," Carr later commented, "Because that was not in international law. It was not recognized international law." Carr Interview. Similarly, Christmas Humphreys lamented the fact that "it was necessary, in order to prove the complicity of the various Defendants in the overall conspiracy, to sink to a standard of proof regrettably low But there it was, and as these were the rules of the game we played them." Humphreys, *Via Tokyo*, 84. R. H. Quilliam grieved about the limited international precedent for conspiracy. Controversy could have been avoided, he argued, if the IMTFE's founding documents had more accurately reflected agreed conventions. It is "strongly advisable," averred Quilliam, that the charters of future courts "expressly declare that a conspiracy to commit war crimes of crimes against humanity is in itself a crime." Quilliam, Report on Proceedings. To conduct their work, doubters like Denzel Carr, Humphreys, and Quilliam had to swallow personal convictions, especially once the conspiracy charge was given supreme placement in the IPS case.

connective force behind the scenes. His work in drafting the IPS Indictment, and securing general support for it, reflects a natural ability to bridge entrenched personnel divides. The fact that prosecutors came around to conspiracy also reveals how personal conviction of Japanese guilt and willingness to compromise shaped the tribunal's inner-workings and public face. Cultural presumptions, wartime resentment, and factual conviction against Japan smoothed over jurisprudential divergence. Chinese, Dutch, French, Philippines, and Russian prosecutors overlooked national legal traditions because the notion of conspiracy fit preconceptions of the Japanese. Borgwardt suggests that Nuremberg prosecutors considered Nazi leaders "singularly psychotic exemplars of a deeply disturbed dystopia, and discussion of their crimes was replete with imagery of disease and dementia."⁴⁷ Presumptions of Japanese psychosis likewise informed the sensibilities of Tokyo prosecutors. Unlike their Nuremberg counterparts, however, the IPS avoided terms which imply altered normality such as "disease" or "disturbed" actions words. In their view, Japan was not itself "normal." Its transgressions, therefore, represented anticipated behaviour rather than aberrations. Thus, while the IMTFE became a tool for change, it focused less on *explaining* Japanese actions than on identifying and prosecuting expected criminality. The court pursued education, *not* re-education. Japan's guilt became so assumed that IPS arguments took on *fait accompli* hues, a fact that reinforced the image of predetermined justice.

The entire IPS case thus rested on "proving" a conspiracy that most prosecutors saw as self-evident. Writing on his role in the Manchurian aggression phase of the prosecution, Walter McKenzie reinforced the centrality of the conspiracy charge to prosecution success. "The establishment of the conspiracy was an important feature, because the relevancy of much of the subsequent testimony depended upon its firm establishment," he told a friend in July 1946. "I

⁴⁷ Borgwardt, *A New Deal for the World*, 202.

believe we have done that, and things are moving along very nicely now.”⁴⁸ Elsewhere he explained, “It was up to us to lay a firm foundation for the establishment of the conspiracy in order that much subsequent proof would be admissible.” McKenzie felt confident. “I think we have done that fairly well by using certain Japanese witnesses and documents obtained from the War Ministry, Foreign Office, Cabinet Decisions and Privy Council Meetings.”⁴⁹ Prosecutor Otto Lowe defended the choice to construct the prosecution case around a conspiracy lodestone. “As is the case in all historic events, there was considerable difference of opinion even among members of the Bars of all countries,” Lowe wrote. “We, in Tokyo, had no intention of falling into that error as *the basis of our trials was the Law of Criminal Conspiracy* [emphasis added].” Prosecutors undertook the conspiracy crusade in a conscious, but it must be noted, unsuccessful, attempt to avoid the “ex post facto” charges levelled on Nuremberg.⁵⁰

Those committed to the conspiracy charge and its veracity became unshakable. It was historically and legally unquestioned. Even when doubting prosecutorial performance, conspiracy proponents rarely doubted the charge’s factual or legal legitimacy. For example, John Goette, a prominent witness closely associated with IPS members, wrote to Walter McKenzie, “There seems to be pessimism in the IPS over failure to tie the defendants into conspiracy. I really think many of them will get off lightly on that ground.”⁵¹ Even though displeased and pessimistic about IPS work, Goette did not stop to consider that “failure to tie the defendants

⁴⁸ Walter McKenzie to Ben O. Shepherd (18 July 1946), McKenzie Papers, Box 1, Folder: Correspondence - July 1946.

⁴⁹ Walter McKenzie to John A. Hamilton (6 August 1946), McKenzie Papers, Box 1, Folder – Correspondence – August 1946. McKenzie convinced his Michigan friends of the importance of the conspiracy charge. His office manager in Detroit admitted, “Your reference to the Manchurian Problem did not register with me until I noticed an item in the paper in the last day or so referring to it. I then realized that in a sense the whole case of the prosecution has its inception in this problem, and that what followed were mere incidents of the master plan. I am beginning to appreciate the importance of your work.” Walter McKenzie to Archie Katcher (18 June 1946), McKenzie Papers, Box 1, Folder: Correspondence – May - June 1946.

⁵⁰ Otto Lowe to Dr. David Y. Paschall (5 June 1946), Lowe Papers, Box 1, Item 1.

⁵¹ John Goette to Walter McKenzie (5 March 1947), McKenzie Papers, Box 1, Folder: Correspondence – May - June 1947.

into conspiracy” could indicate that no true conspiracy existed. Given preconceptions of Japanese behavioural traits, imagining an evil “conspiracy” bent on world domination became easy. Although admitting that proving the “general charge of conspiracy around which we are attempting to build our case,” would “not [be] an easy task,” Osmond Hyde saw the challenge as evidentiary, not legal, or factual. “We should become experts on Japanese history – and intrigue. They are good in this latter field,” he confided to his diary, demonstrating a typically stunted view of Japanese cultural dispositions.⁵² Opinions about who guided the conspiracy varied. “I personally think it began with Araki [Sadao],” argued prosecutor Robert Donihi. From the 1920s on, “The affairs of Japan vis à vis the rest of the world seemed to congeal into a pattern.”⁵³ Chief Prosecutor Keenan felt convinced that Marquis Kido was the “real culprit” the “leader of this group . . . the history of this case will show him as the arch criminal.” “It is now apparent that [the Japanese people] were cruelly misled by this *crowd of intriguers and half-mad men* who are now in the prisoners dock [emphasis added],” wrote Keenan. “We were very fortunate in selecting as defendant the real offices of this war making business over here.”⁵⁴ Disagreements on law, ideology, even substance and history mattered little. Therein lay the conspiracy charge’s beauty. Almost anyone in Japan’s complex and shifting political environment could be tied to a common plan of aggression. The conspiracy charge felt politically, legally, and even culturally irresistible, but the forced feeling of the charge spoiled the court’s credibility then, and now.

Compromise and leadership ability became even more important – and difficult – for the defence section in Tokyo, which weathered deep legal and cultural divides. Incompatibility between Japanese and US members was apparent to contemporary observers and is well

⁵² Entry: 3 January 1946, Hyde Diary.

⁵³ Donihi Interview, Part I.

⁵⁴ Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe - Krould. Sequence 746-755).

documented in the historiography.⁵⁵ Prosecutor Walter McKenzie among others noted, “There has been a good deal of friction among the Defense lawyers, and it has been impossible to make an agreement with any of them that was binding.”⁵⁶ Likewise, R. H. Quilliam remarked, “Language difficulty causes a great deal of trouble, and of course difficulties also arise from the different standards of Anglo-Saxon and Japanese lawyers.”⁵⁷ To a degree, McKenzie and Quilliam’s *schadenfreude* proved perceptive, especially regarding legal disagreements. The inexperience and unfamiliarity of Japanese attorneys with common law style adversarial cross-examination caused particular issues. “The Japanese were not good at cross-examination,” remembered Carrington Williams. They “would go on and on and on until they were literally blown out of the water by some of the witnesses from whom they were trying to elicit helpful responses . . . the American defense lawyers would frequently sit there and groan with horror at some of the things that were being done to our clients by well-meaning Japanese defense lawyers.”⁵⁸ Internal IDS memoranda reflect shades of legal-culture incongruence. In March 1947, for example, William Logan addressed “all” attorneys, but meant especially for Japanese lawyers. “Neither attorney nor witness should waste time asking the Tribunal’s permission to ask or answer questions. The attorney should ask the question directly and the witness should answer directly,” Logan explained. Witnesses “should not evade questions asked on cross examination,” and instructed “not to make a speech.” Above all, Logan urged witnesses and attorneys to avoid

⁵⁵ See: Brackman, *The Other Nuremberg*, 72-83 and 283-312, Boister and Cryer, *The Tokyo IMT*, 78-80 and 275-77, Totani, *The Tokyo War Crimes Trial*, 122-29 and 82-83.

⁵⁶ Walter McKenzie to Victor Swearingen (5 August 1946), McKenzie Papers, Box 1, Folder: Correspondence – August 1946.

⁵⁷ R. H. Quilliam to A. D. McIntosh (date unknown), NZ Archives EA2 1946-31B 106-3-22 Part 1.

⁵⁸ Williams Interview.

arguing with the bench, and limit statements to facts “not opinions, impressions or conclusions.” The memorandum concluded: “tell the truth at all times.”⁵⁹

A collective defence would have been the most effective IDS response to the prosecution’s guilt by association conspiracy charge. However, disagreement over whether or not to mount a joint defensive caused tension among IDS attorneys rooted in divergent legal cultures and ideologies. Pursuant to the adversarial common law tradition and steeped in a culture of individualism, American lawyers expected to fight ardently for the individual innocence of their clients, regardless of collective good. Erasing the individual agency of clients by grouping accused together felt anathema to US attorneys. Those who could not rig principles to fit pragmatism hurt cohesion. The resulting instances of disunity upset Carrington Williams. “The defense group organized or you might say disorganized and operated very loosely in the beginning,” he recalled. This issue became “a source of great concern to me because many of them seemed to think that they could all go off in different directions.”⁶⁰ Attorney George Furness explained his commitment to an individual defence, “There were conflicting interests. The interests of all the defense were not common, which we objected to, and we felt that we should defend them individually.”⁶¹ Trained in a legal system with few provisions for the rights of offenders and raised in a culture that emphasised communal responsibility, Japanese lawyers preferred a common defence. This cultural disconnect caused internal problems, especially when both sides of the defence divide adhered too narrowly to national sensibilities. On 27 June 1947, for example, all accused and counsel met, presided over by Japanese attorney Dr. Uzawa Somei, to decide how best to present evidence. After telling off US attorney Samuel A. Roberts “rather

⁵⁹ William Logan to All American and Japanese RE: Attorneys and Witnesses (12 March 1947), Williams Papers, Box I, Folder 1: Defense Counsel Memos, Letters.

⁶⁰ Williams Interview.

⁶¹ Furness Interview.

definitely,” Uzawa explained that it was “useless to take each bill and show purpose.” Instead, Uzawa stressed that the IDS “must take bills as a whole and show non-aggressive purpose [emphasis in original].”⁶² This emphasis on unified rather than individualised arguments posed a different set of issues, since many Japanese counsel believed that Japan had done no wrong. Indeed, some Japanese personnel had positions within the political system they defended. “Each man chose a Japanese lawyer or Japanese diplomat to represent them,” Furness remembered, adding “a great many of them were diplomats.”⁶³ For these attorneys, “collective” defence also meant justifying Japan’s policies *inter alia* rather than exculpating individual clients. With such natural divides, IDS cohesion rested upon compromise and willingness to work together in the face of conflicting approaches and backgrounds. The defence struggled to navigate braided channels of legal, cultural, and political discontinuity in Tokyo. Those with a flexible pragmatist outlook managed to cooperate. Those who could not sacrificed overall IDS effectiveness.

Rationalising Japan’s crimes did not sit well with US counsel, especially former members of the US armed forces. American attorneys who could not accept justifying Japanese actions grew dissatisfied and their isolation caused internal division. Similarly, when Japanese lawyers fixed too inflexibly on Japan’s innocence, they risked alienating colleagues. However, attorneys from both nationalities prospered when willing to employ whatever means of defence *together*. Carrington Williams, an Air Force Judge Advocate General lawyer during the war, explained to his Japanese co-counsel, “being an American, it would be awkward for me to attempt a defense of Japan’s course during World War II.”⁶⁴ Even several decades later, Williams remained offended by the approach of certain obdurate Japanese IDS. “The arguments

⁶² Carrington Williams, handwritten meeting notes (27 June 1947), Frank S. Tavenner Papers, Special Collections, Arthur J. Morris Law Library, University of Virginia, Charlottesville, Virginia. MSS 70-3 Box 25, Folder 9: Hoshino – Defense Materials. Hereafter “Tavenner Papers.”

⁶³ Furness Interview.

⁶⁴ Carrington Williams to Fujii Goichirō and Migita Masao (12 February 1947), Williams Papers, Box I, Folder 1.

that [some] Japanese lawyers put forward were pretty thin,” he recalled. “Their approach was frequently ideological.”⁶⁵ An internal defence memorandum from March 1947 reveals frustration with the legal philosophy and ideology of Japanese members. “As a further suggestion to Japanese attorneys,” the chair of the meeting, William Logan, asserted, “In the preparation of affidavits be extremely careful to state facts – not opinions or conclusion. Affidavits containing conclusions and opinions are disregarded by the Court and are absolutely worthless.”⁶⁶ The personal backgrounds of certain Japanese attorneys exacerbated such tensions, particularly since many had served in the Japanese regime. For example, the career of Shiobara Tokisaburō, counsel for Kimura, included serving in the colonial administrations of Manchukuo and Korea, as well as work for the Ministry of Welfare during the war. Miyata Mitsuo, who represented Umezu, was President of the Corporate Judicial Person Manchuria Central Association [sic]. Nishi Haruhiko, who represented Tōgō, was a career diplomat who had served variously as Counsel-General in Qingdao, Councillor of the Soviet Embassy, President of the Europe and Asia Bureau, Envoy Extraordinary and Minister Plenipotentiary to the USSR, and Vice-Minister of the Japanese Foreign Office. Shigemitsu’s lawyer, Yanai Hisao, once served as Envoy Extraordinary and Minister Plenipotentiary to Ecuador and Columbia, and President of the Treaty Bureau.⁶⁷ Japanese and American attorneys had to work hard to overcome such differences which could, and sometimes did, derail defence efforts. Pragmatic sensibilities helped a core of the most effective IDS members find common ground amidst differing cultural and professional backgrounds, conflicting views of the war, the dogmatic underpinnings of some Japanese IDS arguments, American hyper-individualism, the oft-alien approach of Japanese

⁶⁵ Williams Interview.

⁶⁶ William Logan to All American and Japanese RE: Attorneys and Witnesses (12 March 1947), Carrington Williams Papers, Box I, Folder 1.

⁶⁷ Biographical information from Conde Papers, Box 19, Folder 4. Accused diplomats such as Tōgō and Shigemitsu secured peers rather than professional lawyers for legal representatives. This somewhat strange decision may reflect the assumption by accused that the IMTFE represented a political rather than legal exercise.

personnel to the Anglo-American law, and the general unfamiliarity of US lawyers with Japanese contexts and contingencies. When it did manage to form a cohesive unit, the IDS helped construct both a resilient trial counter-narrative and critical view of the tribunal itself.

Despite these potential and actual issues, the defence put together a relatively effective case built on collaboration behind the scenes. Good leadership, pragmatism, and intellectual openness helped overcome the linguistic-legal-cultural void between Japanese and US defence members. Though language proved difficult, trouble communicating did not necessarily lead to animosity, just frustration.⁶⁸ Although most Japanese defence attorneys did not speak English, several key members did. George Furness later recalled, “Usually the Japanese defense counsel were people who could speak English and could work with an opposite member.”⁶⁹ A handful of Japanese advocates even had training in US and British law. Hozumi Shigetaka (Counsel for Kido Koichi) studied at Middle Temple, London and at Harvard Law School. He was also professor of English and American Law at Chūō University. Okamoto Toshio (counsel for Minami Jirō) had experience as a barrister of the Inner Temple in London. Takayanagi Kenzō (counsel for Shigemitsu Mamoru and Suzuki Teiichi) had been Chair of English and American Law at Tokyo Imperial University, and he had spent two years in Europe and the US on a procurement mission for his university’s law library. Takayanagi especially impressed George Furness and others. “He was a great lawyer, an expert,” Furness later recalled.⁷⁰ Likewise, Usami Rokurō (counsel for Hiranuma Kiichirō), whom Carrington Williams remembered as an “unusually delightful Japanese” who “understood the British-American legal system much more than the other Japanese lawyers did,” had been admitted as a barrister of London’s Inner

⁶⁸ Elaine Fischel spoke to her mother about language differences. “Yesterday one of the Japanese lawyers gave me a presento – a beautiful silk handkerchief – they drive you crazy as they don’t speak English and me no Japaneseo so we have a gay time but at least I’m pleasant and keep them out of the Captain’s [Beverly Coleman] hair.” Elaine Fischel to Mother (9 May 1946), Fischel Papers.

⁶⁹ Furness Interview.

⁷⁰ Furness Interview.

Temple.⁷¹ Since the court default became common law (albeit with exaggerated judicial powers and expanded evidentiary protocols), and since American colleagues could be unbending in national practices, common law experience among Japanese attorneys became an important bonding agent. Pragmatically inclined attorneys who felt willing to understand and appreciate US law and “think American” became the most effective IDS collaborators.

American personnel, such as George Yamaoka, Benjamin Bruce Blakeney, and Richard Harris, helped bring the defence together with language skills and pragmatist sensibilities. All three spoke Japanese.⁷² Their crucial leadership generated internal defence cohesion. Elaine Fischel confided to her mother that Harris was “very fine and cultured and speaks Japanese fluently.”⁷³ In her memoirs, Fischel recalled, “The Japanese attorneys loved him. He was always in a huddle with them, always trying to help them.”⁷⁴ Yamaoka proved especially valuable and appreciated for his ability to serve as conduit between Japanese and American counsel. An “extremely educated and cultured” *Nisei* from New York City, colleagues selected Yamaoka as head of the defence section after Beverly Coleman’s withdrawal.⁷⁵ As Furness explained later, “he was the best person to work between the two because most of us, including me, couldn’t speak any Japanese.”⁷⁶ Carrington Williams felt even more effusive: “A delightful, intelligent gentleman,” he recalled, “[and] a superb diplomat. He could get along with the Americans; he

⁷¹ Williams Interview. Prosecutors also noted high calibre in some opponents. “It will be an interesting fight,” wrote prosecutor Walter McKenzie, “because among the defense counsel are many able and experienced Japanese and American lawyers, including a professor of constitutional law at the University of Tokyo.” Walter McKenzie to Archie Katcher (11 May 1946), McKenzie Papers, Box I, Folder: Correspondence – May-June 1946. Similarly, Robert Donihi named Kiyose, “Perhaps the smartest of the defense lawyers, certainly. Certainly smarter than most of us on the prosecution. . . . Marvellous lawyer, marvellous gentleman.” Donihi Interview, Part I

⁷² Although only with the IDS briefly, Valentine Deale was also fluent in Japanese, having completed language training at the Navy Oriental Language School at the University of Colorado. He became the first American to engage in defense activities. See: Conde Papers, Box 19, Folder 4, and Biographical Index of Defendants and their Counsel, Northcroft Papers, Box 326.

⁷³ Elaine Fischel to Mother (10 April 1946), Fischel Papers.

⁷⁴ Fischel, *Death among the Cherry Blossoms*, 49.

⁷⁵ Elaine Fischel to Mother (26 April 1946), Fischel Papers.

⁷⁶ Furness Interview. In the intensified cross-cultural IMTFE environment, Yamaoka served as both a visual representation and linguistic mediator of the bi-racial IDS.

could get along with the Japanese, and could get along with the court.”⁷⁷ The esteem Yamaoka maintained with ‘lower’ levels of the IDS organisation reflected his gifts as a communicator and administrator. Unquestionably impressed by the array of talent around her, Fischel nevertheless called Yamaoka her “favorite attorney.” Whereas some counsel treated her as a mere secretary, Yamaoka always acted “so very charming and brilliant and very nice to me.”⁷⁸ On a smaller scale, Carrington Williams’ generally open demeanour and genial disposition fostered a good working relationship with his Japanese colleagues. Williams envisioned himself as an advisor rather than an advocate. “The responsibility for conducting Mr. Hoshino’s defense and making decisions relative thereto rests with the Japanese counsel and I hope never to give the appearance, nor is it my desire, to usurp that responsibility in any way,” Williams assured Japanese counterparts. “My principal duty is to advise on matters of law and procedure, since this is a predominantly Western and Anglo-American Tribunal.”⁷⁹ The willingness to trust, personal leadership, and collaborative spirit helped overcome internal defence divides. Yamaoka, Takayanagi, Blakeney, and Usami and other connectors, as well as a group of “splendid interpreters,” helped bridge the gap and allowed the IDS to construct an enduring defence.⁸⁰

Personal diplomacy, pragmatist sensibilities, and collaboration are crucial to global governance and international justice, because legal aptitude rarely proves conducive to personnel management. The combative trial environment and high-pressure cauldron of international justice brings leadership skills to the fore or, more typically, exposes personal deficiencies. With the exception of Comyns Carr and Frank Tavenner, the highest order of prosecution leadership

⁷⁷ Williams Interview.

⁷⁸ Elaine Fischel to Mother (1 May 1946), Fischel Papers.

⁷⁹ Carrington Williams to Fujii Goichirō and Migita Masao (12 February 1947), Williams Papers, Box I, Folder 1: Defense Counsel Memos, Letters.

⁸⁰ Furness Interview.

in Tokyo proved disastrous.⁸¹ However, shared ideological commitment to the IMTFE project, and conviction of Japanese guilt helped the IPS stitch together a cohesive public face and legal case. Given the IMTFE's novelty, prosecutors adopted a naturally pragmatist outlook: this sensibility offered the only way to fully endorse IMTFE precedent and principle. Some IPS members struggled to find peace with these aspirations, but by either inclination or intent came to accept IMTFE law. Defence law and internal legal discussions highlight the difficulty of using pat analytical categorisations to explore the complex and messy processes of international justice. The IDS reflected both formalist and pragmatist sentiments. Legally, defence arguments became largely reactive. In court, they logically fell back on overtly formalist arguments which stressed the IMTFE's lack of case-law precedent in order to counteract the prosecution's expansive view of law. Socially and internally, however, the IDS depended on pragmatist sensibilities to foster collaboration among Japanese and American attorneys. Profound cultural, linguistic, and tactical differences threatened defence unity and hence its effectiveness as a legal team. Within the IDS, therefore, willingness to cooperate, personal flexibility, and individual managerial skill became the best answer to the deep incompatibility gap between Japanese and American defence personnel. Pragmatist sensibilities serve as the most effective guarantee of cooperation, acceptance, and efficacy in the turbulent social, legal, and international space created by *ad hoc* institutions of global justice and governance. By allowing both the prosecution and defence to build competing and compelling arguments, pragmatist sensibilities and adjustments helped create the IMTFE's divisive and disputed finding and legacy.

⁸¹ Internal mismanagement and leadership failures are explored in greater detail in other chapters, especially regarding political, cultural, and personal levels.

Precedent at Creation: Divisive Law, Divided Bench

In November 1946, President Webb circulated a draft ‘judgment’ on the defence’s challenge to the IMTFE’s “jurisdiction, powers, and authorities.”⁸² Following a flurry of criticism, Webb urged colleagues, “I seek helpful criticism . . . Each of us should make his choice of the views open to him and give his reasons for that choice.” Providing “reasons” for ingrained legal philosophies and ideological assumptions felt “more difficult than mere criticism,” acknowledged Webb, but he expected openness and compromise.⁸³ Unfortunately, many IMTFE judges, including Webb, proved chronically unwilling to accept opposing viewpoints and quick to perceive slights from colleagues. Throughout the trial, the Bench struggled to reach a level of discourse beyond “mere criticism,” in how individuals communicated legal opinions, how they received critique, and how the court managed perspectives and approaches to the law. Judicial discord hinged on intellectual openness, not national or philosophical conventions, and a split between “practice” and “inflexible rule,” pragmatism and formalism defined judicial interaction. The “practice” school, which emerged as the tribunal majority, set aside strict legal beliefs to suit the unique challenges of operational international justice. Pragmatists of choice and tendency adjusted personal, national, and ideological “practice” to suit circumstances. Those of a formalist bent favoured narrow interpretations of the law and “inflexible rule” in almost all cases. This doctrinaire spirit birthed a community of dissent in Tokyo. If contrasting sensibilities within and between defence and prosecution teams in Tokyo indirectly influenced the court’s contested history, divergence among pragmatist and formalist judges exerted a much more direct and consequential power in shaping the IMTFE’s outcomes, reputation, and future.

⁸² For a copy of Webb’s preliminary draft regarding jurisdiction see: W. F. Webb to Henri Bernard, “The Jurisdiction, Powers and Authorities of the International Military Tribunal for the Far East” (29 November 1946), Bernard Papers, F Δ rès 874-10-1-48.

⁸³ W. F. Webb to All Members of the Tribunal (11 December 1946), Bernard Papers, F Δ rès 874-10-1-48.

With certain exceptions, the tribunal followed common law protocols, a fact that exposed fissures between formalist and pragmatist judges and sensibilities. Anglo-American numerical, political, and legal dominance forced judicial hands. Collaboration and conciliation with tribunal facts and framings proved relatively easy for the Anglo-American majority. Adopting the pragmatist outlook necessary to accept the court's foundations came easier for judges immersed in generally familiar jurisprudence and procedures. They had to bend less principle and practise to fit the IMTFE mould. The common law bloc which stuck closely together consisted of Justices Cramer (US), Jaranilla (Philippines), McDougall (Canada), Northcroft (New Zealand), and Patrick (Britain).⁸⁴ Legal and cultural differences existed within this group. For example, representatives from Canada and Great Britain had training beyond straightforward Anglo-American common law tradition, since both Scotland and Quebec operate a bi-juridical system blending components of common and civil law. Canadian Justice McDougall practised law and became a judge in Quebec, while British Justice Lord Patrick sat in Scotland. All the same, both judges came soundly from the English establishments in their territories and generally acted in accordance and cooperation with Anglo-American common law brethren on the Tokyo Bench. Although not typically viewed as an active contributor to the IMTFE judicial cocktail, Filipino Justice Jaranilla added both nuance and ardour. He demonstrated clear kinship to US causes and for bringing stern justice to the Japanese. However, Jaranilla hardly became a passive partner. Indeed, he emerged as an autonomous, often pugnacious, voice regarding many court decisions. Some of Jaranilla's independence may be rooted in his distinct hybrid Philippines legal background. Judges inclined to pragmatism who came from other systems had to work harder to

⁸⁴ Even when it worked in their favour, the Anglo-American dominance frustrated personnel. Keenan and others grew frustrated with the Anglo-American bloc. "It is simply impossible to get the idea out of their minds that this is not a British trial to be held according to British rules and practices," griped the Chief Prosecutor. "They apply the British rules wherever possible." Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe – Krould, Sequence 746-755).

join the majority. Justices Mei (China) and Zaryanov (USSR) actively reformed personal and national legal precepts into the international cast. Firm commitment to the IMTFE mission and unquestioned presumption of Japanese guilt eased the transition to conformity.

Whether common law or other, judges disposed to formalism – by values or conscious choice – refused to accommodate. Legal obduracy had several roots. Personal stubbornness, for instance, fed President Webb’s formalist sensibilities. Once it became clear that other judges would not affirm his presidential prerogative, the Australian willfully distanced himself from others, especially his common law brethren.⁸⁵ Indian Justice Pal’s dissent proved more political. Formalism became a legal tool as well as an emotional, ideological, and moral sentiment in Pal’s polymorphic attack on the tribunal. He employed whatever law and philosophy helped his cause.⁸⁶ Dutch Judge Röling held purely legal objections. One of the most active judges with formalist sensibilities in Tokyo, Röling ultimately could not overlook differences between IMTFE law and practices and his own continental experience. Röling’s formalist inclination reinforced a positivist commitment to law based on conventions and other signed charters. Rules should be made with no inherent or necessary connection between validity of law and ethics or morality. The Dutch judge particularly objected to needlessly blanket charges steeped in moral justifications. Röling believed that existing customs of war provided ample law to hold Japan’s

⁸⁵ Strictly speaking, Webb did not a “dissent.” Nevertheless, he cannot be considered a majority member having published both a “separate opinion” and an unpublished three-volume over 600-page alternate “judgment.” See: W. F. Webb, “Separate Opinion of the President” (1 November 1948), Northcroft Papers, Box: 334 – (Hereafter “Webb Opinion”); and W. F. Webb, Judgment (17 September 1948), Volume I-III, Webb Papers, AWM 92 – Series 2, Wallet 1-3.

⁸⁶ Boiled down, Pal proved willing to adopt and adjust whatever approach justified his steadfast disagreement with all things IMTFE. Schooled in common law principles, Pal sat determinedly outside this Anglo-American core of judges in practise. His overt formalism therefore had very flexible pragmatist roots. For more on Pal’s mutable legal ideology see: Boister and Cryer, *The Tokyo IMT*, 285-91, Brook, “The Tokyo Judgment and the Rape of Nanking,” 673-700, Kopelman (Borgwardt), “Ideology and International Law,” 373-444, Nandy, “The Other Within,” 45-67, T. S Rama Rao, “The Dissenting Judgment of Mr Justice Pal at the Tokyo Trial,” *The Indian Yearbook of International Affairs* 2 (1953): 277.

leaders accountable without needing to resort to new laws.⁸⁷ Similarly rooted in a formalist sensibility, French judge Bernard consistently tried to bring the court around to a more civil law mindset. When these attempts failed, Bernard eventually committed to dissent.⁸⁸ Except for Webb, all legal objectors in Tokyo also held serious substantive misgivings about Japanese guilt.

Internal Bench reactions to Webb's early "judgment" and the subsequent jurisdiction debate underscores how gaps between legal pragmatism and formalism, intellectual openness and inflexibility, and acceptance or derision of the IMTFE project rent the Bench apart from within. Judicial discord in Tokyo also shows the failure of Webb's leadership in an international setting that required tact and subtlety, not toxic autocracy. Webb's managerial ineptitude cemented personal, legal, political, and substantive divisions.⁸⁹ Justice Northcroft described Webb's "peremptory and ungracious treatment" of colleagues. "He leaves everyone in Court with the impression that his rulings are dictated by petulance or impatience . . . an impression which may easily develop in the future of prejudice."⁹⁰ Northcroft further derided "the President's methods" which consisted of "ignoring of his colleagues." In the New Zealander's opinion, Webb's "determination to be the author of a monumental judgement," caused avoidable

⁸⁷ See B. V. A. Röling, "On Conventional War Crimes," Northcroft Papers, Box 331. See also: B. V. A. Röling, "The Tokyo Trial and the Development of International Law," *Indian Law Review* 7, no. 1 (1953): 4-14, B. V. A. Röling, "The Tokyo Trial in Retrospect," in *Buddhism and Culture: Dedicated to Daisetz Teitaro Suzuki in Commemoration of His Ninetieth Birthday*, ed. Susumu Yamaguchi (Kyoto: Nakano Press, 1960), 247-66, Röling and Cassese, *The Tokyo Trial and Beyond*, B. V. A. Röling and C. F. Rüter, *The Tokyo Judgment: The International Military Tribunal for the Far East*, APA-University Press Amsterdam (1977).

⁸⁸ French Justice Henri Bernard proved a rare breed: a formalist naturalist. He ascribed to natural law tenets that more commonly justified pragmatist outlooks on the IMTFE project. However, Bernard's narrow-mindedness about other legal cultures, not to mention his stubborn disparagement of the trial itself, embodied the doctrinaire spirit of IMTFE formalism. Henri Bernard, "Dissenting Judgment of the Member from France of the International Military Tribunal for the Far East" (12 November 1948), Northcroft Papers, 334. Hereafter "Bernard Dissent."

⁸⁹ Webb's leadership failings reveal another axiom about international justice. The characteristics required to be an esteemed jurists often do not translate well to personnel management. Chief Prosecutor Keenan's inexpert handling of the IPS provides an obvious parallel. Similarly, Borgwardt and Telford Taylor note that Chief Prosecutor Robert Jackson's "bombastic style and inability to manage a team made . . . controversies even more contentious" in Nuremberg. Borgwardt, *A New Deal for the World*, 224, Telford Taylor, *Nuremberg and Vietnam: An American Tragedy* (Chicago: Quadrangle Books; distributed by Random House, 1970).

⁹⁰ E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

“chaos.”⁹¹ Convinced that it was a presidential duty to write the IMTFE Judgment, Webb became piqued very early on when other judges did not conform to this expectation. For example, when Canadian Justice McDougall suggested that a true joint majority judgment rather than a unilateral tract would better reflect the spectrum of judicial opinion in Tokyo, Webb misread McDougall’s suggestion as a power play instead of a sensible consideration. “As you have decided on a competing draft, which you say you are anxious to avoid, I have decided to let you proceed,” Webb vented. “I shall now follow the usual practice of writing my own judgment and distributing it for acceptance or rejection.” He added peevishly, “I return the copy of your reasons for judgment which I have not perused.”⁹² Webb’s heavy-handed and curious assumption of a presidential prerogative to write the sole IMTFE judgment speaks to a larger lack of executive ability and unsuitability for international work.⁹³ It also reflects his formalist spirit, a sensibility which proved disruptive in court and behind the scenes.

All IMTFE judges arrived in Tokyo conscious of the tribunal’s jurisprudential significance but with entrenched personal opinions on exactly how and why it was important. Unifying such a legally, politically, socially, and culturally diverse bench would have required supreme patience and managerial aptitude. President Webb possessed neither. Especially sensitive to challenges to presidential authority, criticism of his November 1946 jurisdiction draft incensed the president. His response to Chinese Justice Mei’s critique countermanded the President’s own plea to elevate the level of discourse in chambers. Ironically, Mei’s suggestions

⁹¹ E. H. Northcroft to Humphrey O’Leary (18 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

⁹² W. F. Webb to E. S. McDougall RE: The Judgment (26 December 1946), Webb Papers, AWM 92 - Series 1, Wallet 9. Webb’s understanding of presidential prerogative was hardly “usual.”

⁹³ Predictably, Webb despised the obduracy of others. “I understood that the committee was appointed to draft a statement of the law which would be likely to prove acceptable to all nine members,” Webb complained after McDougall proved unable in Webb’s view to reconcile judicial differences while drafting the judgment. “Some, in fact, thinking the Charter is an expression of International Law, do not agree that the Supreme Commander could create crimes *ex post facto*. I think any further meeting of the committee would be futile [emphasis in original].” W. F. Webb to E. S. McDougall (19 February 1948), Webb Papers, AWM 92 - Series 1, Wallet 9.

were consciously respectful and reasoned. “I am trying to be outspoken and express my idea as frankly as possible. For, I firmly believe, it is only through absolute frankness and exhaustiveness in discussion among the members that the result of the Tribunal can be best achieved,” explained Mei.⁹⁴ Natural compromisers like Mei struggled to defuse judicial conflict, especially under Webb’s divisive leadership. American Justice Cramer also tried to mediate the growing tension to no avail. “It would be most unfortunate if this difference of opinion should become public now, not only here in the trial of the case but also for the world public,” Cramer reminded colleagues. “If it once becomes public that our Court is so divided, these various comments will become more numerous. . . . I am strongly of the view that no opinion should be delivered in open court until the end of the trial.”⁹⁵ Cramer’s cool and compromising presence came to the fore as head of the drafting committee which successfully brought together Canadian, Chinese, British, New Zealand, Philippines, and Russian judges in support of the majority judgment. Webb’s pique reflected the inverse. Under the President’s direction, discussion of the tribunal’s legal foundations turned venomous, decision-making on the issue stalled, and internal dissent cohered.⁹⁶ But it is Webb, not Cramer, who is remembered, retold, and reviled.

Close-mindedness poisoned judicial interaction in Tokyo. Internal Bench memoranda seemed superficially polite, even collaborative. Yet the thin veil of formal professional decorum masked deeper legal and personal acrimony. The stakes in Tokyo felt incredibly high. Judges

⁹⁴ “I wish to make it perfectly clear that I am not criticising the Draft as a piece of academic research,” assured Mei. “I am doing it only because it is to be taken as the Draft of the formal Judgment . . . In my humble opinion, it needs perhaps a thorough revision and abridgement, if not complete re-writing, before it can be used as a source decision to be announced to the world.” Mei Ju-Ao to W. F. Webb (8 December 1946), Bernard Papers, F Δ rès 874-10-1-48.

⁹⁵ Myron C. Cramer to W. F. Webb (29 January 1947), Webb Papers, AWM 92 - Series 1, Wallet 9.

⁹⁶ Justice McDougall explained the communication breakdown. “Finally, last January when it was seen that we could not get more than three to agree on any one solution, it was decided to defer the evil day and state our ‘Reasons’ in the final judgment. With that result in connection with a question which to some of us is clear, it is impossible to hope that the final judgment with an indictment of fifty-five counts and twenty-six accused can be anything but a complete failure even from a political point of view.” E. S. McDougall to Louis St. Laurent, Secretary of State for External Affairs, Canada (19 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

invested deeply in the experience and every point of divergence became a fiercely contested issue. Ultimately, debate came down to whether a judge thought the IMTFE “right” or “wrong,” considered creating law “good” or “bad,” and believed Japan “guilty” or “not guilty.” The judicial majority in Tokyo generally proved the most open-minded regarding what legal boundaries the tribunal could transcend and the most collaborative as a group. Incongruously, however, they also tended to be the most narrow-minded regarding challenges to the IMTFE project. Assurances of civility aside, judges who believed in the IMTFE’s legal, ethical, and factual validity tended to denigrate deviation from that norm. Though judicious, British Justice Lord Patrick did not brook dissent on questions of trial legitimacy.⁹⁷ In the jurisdiction debate, the British judge responded severely to even the suggestion by certain colleagues that they had the right to dissent. “If any Judge could not subscribe to the plain declaration in the Charter under which he was asked to act,” Patrick wrote, “He should not have accepted an appointment under the Charter.” If unwilling to follow the charter “at any time,” the judge in question “should tender his resignation to the Allied Powers.” Continuing to act in truancy amounted to “a ‘fraud’ upon the Charter and upon the Allied Powers.”⁹⁸ E. S. McDougall, a Canadian judge with a similarly pragmatist sensibility, echoed Patrick’s sentiments. “The Charter is the expression of International Law,” the Canadian opined. “The Tribunal is bound by the Charter under which it has power to try the offence of waging aggressive war and the other crimes therein set forth.” McDougall explicitly condemned the formalism of “Two of the members” who took “the

⁹⁷ The Anglo-American foundations of IMTFE law made it easier for Patrick to be accommodating. He was able to be active and willing to share legal views because ultimately they fit into a common-law rubric. Aligning with the majority took a greater effort from non-Anglo-American judges like Jaranilla, Mei, and Zaryanov. These judges had to suspend training wilfully and repress personal legal preferences to support the IMTFE cause. Justice Pal’s determination to dissent in spite of Anglo-American training may have struck Patrick as legal betrayal. Perceived slight, therefore, may explain the British judge’s particular frustration with his Indian colleague.

⁹⁸ Lord Patrick to W. F. Webb (11 October 1946), Bernard Papers, F Δ rès 874-10-1-48.

extraordinary view that notwithstanding their appointment, they are entitled to hold that aggressive war is not a crime and in their opinion it is not a crime.”⁹⁹

Unsurprisingly, Patrick and McDougall’s interpretation of judicial responsibility irked more activist confreres. “I must confess I do not agree with him in his views either of the meaning of the Charter or of the Judge’s duty,” responded Indian Justice Pal in a rare memorandum.¹⁰⁰ “None of us can claim infallibility for his own view and unless we are absolutely sure of the correctness of a particular view we should not be intolerant of other possible views.” More pointedly, Pal also protested Patrick’s suggestion of judicial disqualification. “I do not know if it is my learned brother’s view that it is also for the Tribunal to decide whether or not a Judge should tender his resignation and when should he do that. If not, his remarks in this respect would, I believe, be somewhat misplaced in a note for the tribunal.”¹⁰¹ Open dissent troubled pragmatically-minded jurists more concerned with expedient, unified accountability. McDougall complained to Ottawa, “The other members of the Tribunal have not expressed their views except with destructible criticism of the work of others.”¹⁰² “Everybody is working independently,” complained New Zealand Justice Northcroft. “I hate to think of the futility of persuading them to shed their pet theories and conclusions.” From Northcroft’s perspective, unanimity formed the only way to establish worthwhile postwar justice. “If [the Tribunal] is to make a useful contribution to international law,” he averred, the Bench “must be

⁹⁹ E. S. McDougall to Louis St. Laurent (19 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

¹⁰⁰ Despite his omnipresence in post-trial discourse, Pal was not a particularly active internal commentator in Tokyo. He distanced himself early from majority opinion content to work on his lengthy dissent without trying to bring other colleagues around to his view. Other dissenters, specifically Bernard, Röling, and Webb, frequently engaged opposing judges in judicial debates. Because of their eventual dissent – rooted in inability to shed formalist interpretation of law – the historiography tends to make the teleological assumption that Bernard, Röling, and Webb lived lives apart for the entire proceedings. A similar trend misinterprets the lack of available sources for “silent” majority members – Jaranilla, Mei, and Zaryanov – as passive acquiescence to majority arguments. Rare material from the Bernard fonds, Webb papers, and Röling collection proves these misconceptions patently untrue.

¹⁰¹ Radhabinod Pal to W. F. Webb (17 October 1946), Bernard Papers, F Δ rè 874-10-1-48.

¹⁰² E. S. McDougall to Louis St. Laurent (19 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

entirely or substantially of one mind. The chance to secure that, I fear, has gone.”¹⁰³ Achieving “unanimity” proved difficult in Tokyo for a group of judges divided by contrasting sensibilities.

The jurisdiction debate exposed real and imagined differences of law. Committed pragmatists shaped legal cultures to IMTFE realities; those drawn to formalism proved unwilling or unable to bend orthodoxies. As deeply held, value-laden, and often intuitive responses to the IMTFE experience, these sensibilities often played out in very personal conflict over legal principles and practices. Formalism contains an inherent irony. Though it defined laws according to prescribed sets of principles, personal orthodoxies proved mutable and self-ascribed. As an international court, IMTFE formalism manifested as restrictive spirit rather than a consistent legal benchmark or doctrine. For example, President Webb’s peculiar interpretation of tribunal presidency developed from an idiosyncratic understanding of common law. “Personally, it will suit me to write my own judgement,” Webb explained. “In the Australian courts, and, I believe, in all British courts,” the Chief Justice “covers all the law and the facts, leaving other judges to agree with him or to write their own judgement.”¹⁰⁴ More pragmatically inclined common law judges rubbished Webb’s claims, especially when they began threatening IMTFE legacies. Justice Northcroft complained, “The President, from the start, has preferred to ‘walk alone.’” Looking forward rather than to the past, Northcroft worried about setting a cohesive example for *future* trials. “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,” the New Zealander worried.¹⁰⁵ In an analogous complaint, Justice McDougall confided, “We have now reached the point where it is obvious that not only is the trial futile but that the final

¹⁰³ E. H. Northcroft to Humphrey O’Leary (18 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

¹⁰⁴ W. F. Webb to All Members of the Tribunal (11 December 1946), Bernard Papers, F Δ rès 874-10-1-48.

¹⁰⁵ Northcroft argued, Nuremberg “seems to be generally approved and considered a valuable contribution to international law. Varying opinions from this Court including sharp dissent from Nuremberg must be disastrous.” E. H. Northcroft to Humphrey O’Leary (18 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

judgment will have the effect of detracting from rather than adding to useful jurisprudence in International Law.” McDougall began to visualise the IMTFE’s danger as a poor precedent-generator under Webb’s leadership. “The fear, if not the conviction, which some of us have is that the final judgment will consist of a number of separate judgments or opinions,” reported McDougall. “Whatever contribution that Tribunal has made to International Law will be so open to argument and discussion that in the event of any other international tribunals being constituted, the law will be more in doubt than ever.”¹⁰⁶ Webb’s inability to compromise personally or legally led to a fractured judiciary, a result feared and resented by more collaborative colleagues.

Illustration 12: Justice I. M. Zaryanov



“A Pleasant Fellow”: Soviet Judge I. M. Zaryanov. Although his appointment was publicly criticised, Zaryanov became a popular figure and engaged jurist behind the scenes. ©US Army Signal Corps. Access courtesy of Nationaal Archief, Den Haag, Röling Papers – 2.21.273, Box 1.

Observers during the tribunal and scholars ever since paint Russian Justice Zaryanov as a silent partner in the tribunal’s public spectacle. Brackman’s description of “a jovial man, as big and burly – and as dangerous – as a Kodiak bear” is characteristic – and caricatural.¹⁰⁷ Skewed

¹⁰⁶ E. S. McDougall to Louis St. Laurent (19 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

¹⁰⁷ Brackman, *The Other Nuremberg*, 65.

by Cold War assumptions, accounts portray the Soviet judge's participation as a peculiar combination of playfulness, detachment, and menace. IMTFE scholars assume that Zaryanov had little impact on the tribunal's judicial landscape particularly because the judge had no working knowledge of English or Japanese. In the words of Zhang Wanhong, "It is hard to imagine how he conducted his work."¹⁰⁸ But this prevailing misconception of Zaryanov may simply be a lack of imagination and research. A deposit of Bench memoranda uncovered in the fonds of French Justice Bernard reveals that Zaryanov actually became deeply involved and active in judicial debates. Moreover, he proved instrumental in cementing the majority in Tokyo. Zaryanov emerged as a jurist of unrecognised subtlety inclined to pragmatism and staunchly committed to tribunal aims and ideals and willing to accept, and work to intermix, whatever legal ideas buttressed the IMTFE project. Zaryanov believed in the moral roots and social necessity of Tokyo justice. "It is hardly possible to speak of any mitigating circumstances at the trial where the perpetrators of crimes are those who ruled the state and for a number of years decided the destiny of nations," argued Zaryanov.¹⁰⁹ The "basic idea" of punishing acts "so monstrously criminal that they are at variance with all basic natural and moral traits inherent to humanity throughout its history" felt justified. "Historically changing social relations" created the right conditions for moving international justice forward.

Despite deciding to accept the validity of Tokyo justice, Zaryanov expressed some concern about the court's supranational implications. "The modern international community is a community of sovereign states . . . independently shaping their domestic policy, in particularly their system of domestic law," argued Zaryanov. Jurists had to remain mindful of this fact when "establishing an international system of law." Nevertheless, Zaryanov worked constructively to

¹⁰⁸ Zhang, "From Nuremberg to Tokyo," 1680.

¹⁰⁹ I. M. Zaryanov to W. F. Webb (4 February 1948), Webb Papers, AWM 92 - Series 1, Wallet 11.

strengthen the internationality, and thus the global legitimacy, of IMTFE law. The Russian judge worried that dependence on Anglo-American tenets undercut the tribunal's role as the legal expression of international outrage. He actively sought legal backing from outside US and British jurisprudence for "Aggression," "bandit systems of warfare" (conspiracy), and "crimes against humanity." Condemning these acts formed "an obligatory legal element of various national systems of law," not just common law traditions. "It is quite obvious," wrote Zaryanov, "that the Non-acceptance by any state of these legal principles in its domestic law would have implied that that was a system of lawlessness a threat to the independence and existence of other nations."¹¹⁰ Friend and colleague Justice Northcroft described the Russian judge as "a vigorous-minded person."¹¹¹ Zaryanov's unflappable commitment to the IMTFE proved both emotional and reasoned. The Charter, argued Zaryanov, "is the expression of the right of the victorious nations acknowledged by all the civilized peoples to create judicial institutions on the occupied territory to try war criminals and to establish rules of law that are indispensable for the administration of justice." It represents "the only source of judicial authority of the members of the Tribunal" and "binding upon each of the judges to the same extent to which the codes of substantive law and procedure in a national court are binding upon them." Zaryanov felt legally and factually convinced of Japan's conspiracy and would not tolerate questioning of it.¹¹² The combination of erudition and doggedness added spark to the legal tinderbox in Tokyo, especially on a judiciary forced to negotiate complex legal issues in close quarters on the world stage.

Zaryanov found an unlikely comrade in justice and sensibility in his Nationalist Chinese colleague. Both tried to find the happy median between judicial extremes. The Chinese judge became a determined adherent to the IMTFE project. Justice Mei's commitment to Tokyo's, and

¹¹⁰ I. M. Zaryanov to W. F. Webb (3 January 1947), Bernard Papers, F Δ rès 874-10-1-48.

¹¹¹ E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

¹¹² I. M. Zaryanov to W. F. Webb (31 August 1948), Bernard Papers, F Δ rès 874-10-49-88.

by extension Nuremberg's, founding documents and ideals proved unshakable. "Let me repeat my long-cherished stand," Mei avowed. "We are bound by the provisions of our Charter," even when faced with doubts. "The Charter in defining our jurisdiction is but an expression of international law, not a violation of [it]."¹¹³ Elsewhere, Mei expanded his views. "I am firmly convinced that the Charter is intrinsically sound and its provisions in regard to war-crimes are simply declaratory of principles of law already in existence, instead of creating any new ones," argued Mei. "I have never been able to agree with the opposite view. Furthermore I believe that this Tribunal, being created by the Charter, is bound to observe the Charter in toto, i.e. every article of it." At the same time, however, Mei appreciated the tribunal's moral underpinnings and understood the symbolic importance of international justice. Like Zaryanov, Mei gently tried to reduce the appearance of Anglo-American justice in Tokyo. "Protracted citations from well-known decisions of American and British Courts should, in my opinion, be avoided as much as possible, lest it would mar the international character of the Tribunal," Mei told President Webb. "Non-English-speaking readers . . . might tend to be prejudiced and thereby get a totally wrong impression."¹¹⁴ The importance placed by the Anglo-American majority members on the "naked conspiracy" charge troubled Mei. To reconcile personal misgivings with judicial collaboration, Mei looked first for similar precedent in China's case law. "In the Chinese Criminal Code," Mei admitted, he could only find "some 14 provisions by which the mere planning, conspiring or preparation for the commission of a crime is punishable." To square the circle, Mei became intellectually flexible enough to emphasise moral rather than legal backing for the naked conspiracy charge. "It is my firm conviction that aggressive war is a crime of the most heinous kind," Mei explained, in direct opposition to his personal technical legal understanding. "It is

¹¹³ Mei Ju-Ao to W. F. Webb "On Draft Judgment No. 4" (11 March 1948), Webb Papers, AWM 92 - Series 4, Wallet 4.

¹¹⁴ Mei Ju-Ao to W. F. Webb (8 December 1946), Bernard Papers, F Δ rès 874-10-1-48.

many times more heinous than murder or robbery, treason or revolt.” If conspiracy could be employed to hold individuals accountable for this “heinous” act, then so be it.¹¹⁵ Out of necessity, Mei and Zaryanov proved most flexible regarding national and ideological positions. Their unrecognised work behind the scenes as judicial connectors helped build a majority in Tokyo.

Imbued with a pragmatist sensibility, Philippines judge Delfin Jaranilla became another unsung judicial binder in Tokyo. Jaranilla demonstrated an absolute commitment to strict accountability. Before decrying IMTFE sentences as “too lenient, not exemplary and deterrent, and not commensurate with the gravity of the offense or offenses committed,” the Philippines judge tailored personal legal philosophies to best defend majority findings. Jaranilla’s thoughts regarding dissenter Justice Pal illustrate his somewhat mercenary approach to legal ideology. Jaranilla argued that by accepting appointment as an IMTFE judge, Pal had “unconditionally accepted not only the validity of the Charter and of all its provisions,” but also had implicitly agreed to Potsdam conventions ““for the just and prompt trial and punishment of the major war criminals in the Far East.””¹¹⁶ Dissent was not an option. Circumstances could not allow it. The Philippines judge embodied both the idealism and social justice roots of legal pragmatism. For example, he found solace in the IMTFE’s founding documents not only as legal tender but also as a symbolic advance: “[The Charter] has assured the application of democratic practices and guarantees as enjoyed by the foremost nations of the world [emphasis in original].” In Jaranilla’s mind, special circumstances called for exceptional measures. “This war is the most hideous, hateful and destructive wherein such untold atrocities have been perpetrated and committed. Shall we overlook and let calmly the international criminal acts go unnoticed and unpunished?”

¹¹⁵ Mei Ju-Ao to W. F. Webb “On Draft Judgment No. 4” (11 March 1948), Webb Papers, AWM 92 - Series 4, Wallet 4.

¹¹⁶ Delfin Jaranilla, “Concurring Opinion of the Member from the Philippines” (1 November 1948), Northcroft Papers, Box 324. Hereafter “Jaranilla Opinion.”

he asked. “Justice is the fundamental aim of the courts; in the absence of statutory inhibition, [jurists] may take [extraordinary] steps [emphasis in original].”¹¹⁷ Jaranilla proved legally supple in order to maintain rigid commitment to the IMTFE project.

Judicial debate regarding the prosecution’s conspiracy charge offers an invaluable gauge of pragmatist-formalist sentiments on the Tokyo Bench. Common law imbalance at the tribunal led to Anglo-American myopia which frustrated other judges, especially when British or American tenets were presumed “universal,” “usual,” or “normal.” For example, Lord Patrick explained the notions of “naked conspiracy” (a common plan where conspirators are criminal whether the planned crime is committed or not) and “executed conspiracy” (a common plan that carries out a crime). Courts generally held “executed” conspirators guilty not of conspiracy but of whatever crimes was committed (e.g., murder, larceny, etc.). “It would appear to be a matter of public policy how far a ‘naked’ conspiracy to commit a crime is to be held in different countries to be a substantive crime,” he concluded.¹¹⁸ Patrick presented the distinction believing that it would help non-common law judges understand, and therefore accept, the charge. A further memorandum highlighted Patrick’s pragmatic desire to create at least the semblance of international, not common, law. Although drawing on the “roots” of “English Common Law,” Patrick maintained that conspiracy was not a singularly British or American idea. In fact, he suggested it fell “In accordance with principles of jurisprudence familiar to all of us.”¹¹⁹ Patrick’s memorandum was not particularly inflammatory or narrow, but formalist sensibilities – an unwillingness to adjust to the legal reality of common law dominance in Tokyo – meant that dissenters reacted strongly. “Lord Patrick does not advocate but merely quotes the British law,”

¹¹⁷ Jaranilla Opinion.

¹¹⁸ Lord Patrick, “On Conspiracy and Planning of Aggressive War,” Webb Papers, AWM 92 - Series 1, Wallet 14.

¹¹⁹ Lord Patrick, “On ‘Planning’ and ‘Conspiracy’ in Relation to Criminal Trials and Specially in Relation to This Trial,” Webb Papers, AWM 92 - Series 1, Wallet 14.

responded French Justice Bernard. “When invoking their national legislation,” Bernard asked judges, “[please] do so not in the name of its nationality but with the assistance of the reasons which have caused its adoption.” Conspiracy without substance seemed “particularly regrettable” because “we are then apparently invited to compare the alleged facts with the definition of the conspiracy which is presented to us as similar in every country, when on the contrary, it is totally different in many of them.”¹²⁰ Although pragmatism helped bind majority judges, its universalising nature drove formalist dissenters farther away.

Chinese Justice Mei shared Bernard’s concerns about “peculiarities of the Anglo-American doctrine of conspiracy,” specifically “how in certain cases, an act to be committed may be itself legitimate, but conspiring to commit it may be deemed criminal. Such is never the case under the Chinese system or any ‘continental’ system that I know of.” Mei continued, “Conspiracy is much wider in scope and application under the Anglo-American law than under other legal systems. Under the Chinese system, mere conspiring, planning or preparing (without act of attempting) to commit ordinary crimes is not punishable.” But, with a pragmatic sensibility typical of all majority members but lacking in dissenters, Mei suggested a compromise. “I am wondering whether it is necessary or feasible . . . to evoke the technical Anglo-American doctrine in regard to ‘naked conspiracy,’” asked the Chinese judge. “As a practical matter, none of the accused is charged solely with ‘naked conspiracy.’”¹²¹ International justice requires buy-in from all parties. Non-common law judges willing to compromise legal

¹²⁰ Henri Bernard to W. F. Webb, “Remarks Relative to the Naked Conspiracy” (13 October 1948), Webb Papers, AWM 92 - Series 4, Wallet 4. Patrick’s conclusion further rankled Bernard. “So far, therefore, as this indictment is concerned all of the Judges in dealing with executed conspiracies will be applying rules of responsibility *common to all their legal systems* [emphasis added].” Lord Patrick, “On Conspiracy and Planning of Aggressive War,” Webb Papers, AWM 92 - Series 1, Wallet 14.

¹²¹ Mei Ju-Ao to W. F. Webb “On Draft Judgment No. 4” (11 March 1948), Webb Papers, AWM 92 - Series 4, Wallet 4.

practices for judicial concord, like Mei, managed to balance principle for the sake of practicality in Tokyo. Judges like Bernard did not, and their inability to adjust split the Bench.

Conflict between President Webb and Russian judge Zaryanov reflected the stark contrast between pragmatist and formalist sensibilities in Tokyo. Zaryanov became particularly adamant about the conspiracy charge, which he viewed as “one of the pivotal issues of the trial and [of] particular great importance for deciding correctly the question of guilt of individual defendant.”¹²² In August 1948, Webb asked if the Charter “[made] conspiracy to wage aggressive war not followed by a war a justiciable offence.”¹²³ Webb’s rather innocuous question riled Zaryanov. With the trial’s end in sight, the Russian judge evidently felt fed up with the President’s intransigence, especially on points that could undermine the case against Japan’s aggression against the USSR (which notably was “not followed by a war”). “Our learned President,” Zaryanov began, “is fundamentally erroneous” on a point “that is so indisputable and clear that after more than two years of the trial it does not require any special explanation.”

Embracing the charge’s breadth and probative openness, Zaryanov explained:

[Conspiracy] implies a whole system of far-reaching measures deeply involving all the aspects of the country’s life. In Japan, owing to a special part played by the military in the country’s public activities the aggressive schemes of the conspirators found a definite expression in national policy ever since the conspiracy was formed. . . . It is necessary to emphasize definitely that in this case the execution of the conspiracy went on ever since it was formed and that it progressed continuously in various forms . . . Throughout the historical period under the Tribunal’s consideration [emphasis in original].¹²⁴

Webb’s response showed the acrimony engendered by judicial intolerance in Tokyo, especially when two stubborn jurists collided. The encounter resulted in a role-reversal typical of the topsy-turvy milieu of an international court. Webb, himself regularly accused of imperiousness, admonished Zaryanov. “To import the English concept of conspiracy or to make a new crime out

¹²² I. M. Zaryanov to W. F. Webb (31 August 1948), Bernard Papers, F Δ rès 874-10-49-88.

¹²³ W. F. Webb to All Members of the Tribunal (19 August 1948), Bernard Papers, F Δ rès 874-10-49-88.

¹²⁴ I. M. Zaryanov to W. F. Webb (31 August 1948), Bernard Papers, F Δ rès 874-10-49-88.

of common elements of conspiracy as recognized in many countries,” he argued “would be to legislate judicially.”¹²⁵ From Webb’s formalist perspective, Zaryanov’s arguments simply did not hold water with a Charter “limited to wars terminated by the Instrument of Surrender,” and “not intend[ed] to include naked conspiracy against any country at any time,” not to mention the fact that “International Law has no crime of naked conspiracy.” The heated exchange offers further proof of Webb’s inept handling of judicial debate behind closed doors.

Based on preconceptions about Japanese guilt, determination to break legal ground, sincere commitment to justice, or some combination of these and other sentiments, Tokyo judges inclined to pragmatism prioritised accountability above all else. Those drawn to formalism, on the other hand, refused to sacrifice legal principle for international or postwar exigency. Justice Cramer’s commitment to seeing retributive justice done at the gallows took on pragmatist sentiments. The normally mild-mannered American forcefully dismissed a suggestion that hanging the accused could be perceived as “vindictive.” “It is a strange view to me that sentencing a criminal to death, in accordance with the law for the crimes he has committed could be termed ‘vindictive,’” lashed Cramer. “It is a matter of justice, plain and simple [emphases in original].” “If carrying out the law is vindictive, why have laws?” asked the American. “You invite criminals to run amuck [sic], killing, torturing, bayoneting and beheading whomever they choose but you do not punish them according to the law clearly applicable to such acts.” Cramer could not fathom or accept Webb’s attitude.

Do you mean to say, if any of these defendants who are found guilty of the crimes with which they are charged, that they should not be executed when the result of their acts has been not only murder but many thousands of murders? . . . The only just and safe thing to do, is to sentence such criminals to death in punishment for the crimes that they have committed and thus make sure that they will never again be a menace to humanity and to the laws of God, and that their just punishment may deter others from perpetrating similar crimes. To my

¹²⁵ W. F. Webb to I. M. Zaryanov (6 September 1948), Bernard Papers, F delta rès 874-10-49-88.

mind if we find certain of these defendants guilty as charged it would be a travesty on justice if we did not give them the death penalty.¹²⁶

Cramer's objections reflected attitudes of the era, the grand vision of justice in Tokyo, and – from his perspective – a pragmatic outlook on settling the war's score. Justice Pal occupied the other end of the spectrum. Pal used a distinctly formalist argument to justify acquitting all the accused. His values, background, and reaction to the IMTFE experience allowed no other legal response. "It is perhaps right that we should feel a certain satisfaction and recognize a certain fitness in the suffering of one who has done an international wrong. It may even be morally obligatory upon us to feel indignant at a wrong done." However, "it would be going too far to say that a demand for the gratification of this feeling of revenge alone would justify criminal law."¹²⁷ Cramer saw the just realities of war. Pal saw rash vengeance.

Legal ideologies and cultures became mutable doctrines for jurists inclined to pragmatism in Tokyo. This malleability and fluidity explains the lasting irony that the naturalist-guided prosecution case, became generally accepted, even mimicked, by a judicial majority peopled largely by judges inclined to positivism. The three most active judgment drafters, Justices Cramer, Northcroft, and Patrick felt unmistakably positivist. "Silent" majority judges – Zaryanov, Mei, and Jaranilla became more obviously polymaths.¹²⁸ Out of practicality, this triumvirate adopted a tempered approach in order to reconcile conflicting cultures of law with the ideological commitment to "justice" they shared with Anglo-American co-majority members. As such, the Russian, Chinese, and Filipino judge embodied the pragmatic sensibility so crucial to reconciling principle to practise in the improvised arena of internationalism in Tokyo and

¹²⁶ Myron C. Cramer to W. F. Webb RE: Errata Sheet of Draft of Judgment by the President (15 June 1948), Webb Papers, AWM 92 - Series 1, Wallet 9.

¹²⁷ Pal Dissent.

¹²⁸ "Silent" here refers to being largely ignored and dismissed by the historiography. Generally, less is known about the internal judicial opinions of this threesome. However, as I explain in this and other chapters, Jaranilla, Mei, and Zaryanov became active and engaged contributors in chambers.

elsewhere. “Japan has no right whatsoever to repudiate what she had solemnly entered into and undertaken by means of such an important and historic instrument,” argued Jaranilla.¹²⁹ Whenever Mei found it difficult to overcome discontinuity between his legal culture and the dominant common-law group, the Chinese judge found alternative justifications. For example, unable to find sufficient compatibility between the Chinese Criminal Code and the “naked conspiracy” charge, Mei turned to moralism. War was terrible. It must be regulated. Besides, “[Conspiracy to commit aggression] is, as the Nurenberg Judgment calls it, a ‘super-crime.’ As such, not only should its commission be punishable, but also the planning, conspiring or preparing for its commission?”¹³⁰ Mei’s fellow judicial binder, Zaryanov, also overlooked “the law of procedure in my country” to punish war criminals, even when faced with forced universalist arguments.¹³¹ “It was convincingly shown in the systematic summary of criminal laws, pertaining to this issue, of a number of nations, given in the Prosecution Summation (The Summation read by Mr. Comyns Carr, T. 39037-39048),” the Russian judge argued in August 1948. “Principles common for all legal systems are a source of the existing international law.”¹³²

Majority judges compromised and collaborated. Dissenters would not. Willingness to dissent and unwillingness to bend legal, personal, or ideological views of the IMTFE and Japan provided a main line of continuity among the disparate group of objectors in Tokyo. Dutch judge Röling developed a particularly strident formalist sensibility. His case also reveals, however, the unfixed nature of legal sensibilities in Tokyo. In fact, Röling experienced several changes of outlook in Tokyo. For example, when writing to a friend in July 1948, Röling flirted with the idea of bending training to fit practise. “Back then [at the beginning of the IMTFE] I was of the

¹²⁹ Jaranilla Opinion.

¹³⁰ Mei Ju-Ao to W. F. Webb, “On Draft Judgment No. 4” (11 March 1948), Webb Papers, AWM 92 - Series 4, Wallet 4.

¹³¹ I. M. Zaryanov to W. F. Webb (4 February 1948), Webb Papers, AWM 92 - Series 1, Wallet 11.

¹³² I. M. Zaryanov to W. F. Webb (31 August 1948), Bernard Papers, F Δ rès 874-10-49-88.

opinion that there is no possibility to unite the content of the charter with existing international law,” he wrote. “Regarding this point, I have adjusted my opinion and have accepted the charter and its key points are an extension of International Law and have accepted crimes against peace as an idea.” This was not an easy intellectual exercise but Röling explained his reasoning. “I have accepted it in my own special interpretation which separates this crime as a ‘political crime’ distinct from ‘conventional war crimes.’”¹³³ In the end, however, Röling proved unwilling or unable to step wholly into the majority. The Dutch judge did not oppose the idea of international justice. The tribunal’s great postwar responsibility “can hardly be over-emphasized,” Röling wrote in his dissent. “The dreadfulness of World War II,” he concluded, “made us realize the necessity of preventing wars in the future . . . These horrors of World War II may compel the nations to take the legal steps to achieve the maintenance of peace.”¹³⁴ In the end, however, the Dutch judge believed that jurisprudence should develop at measured rate based on appropriate and reasoned foundations and progressively codified precedents. His formalist sensibility could not accept the IMTFE’s shaky legal tenement.

Röling believed that sitting as a Tokyo judge “does not, and cannot, imply that the Tribunal would be bound to follow the Charter in case it should contain provisions in violation of international law.” The Charter could not break the Dutch judge’s commitment to international law or case law. Commenting on an early draft of the Majority Judgment, Röling wrote, “The point is that, according to existing international law, the peace treaty prevents prosecution of war crimes unless the treaty provides especially for it [emphasis in original].” Following existing bodies of law and customs in Tokyo was paramount. “It is especially important that this Tribunal show respect for existing international law, if only to disprove the

¹³³ B. V. A. Röling to Dr. H. N. Boon, Chief of Diplomatic Affairs Division, Ministry of Foreign Affairs (6 July 1948), Röling Papers, Box 27. I am indebted to Frederik Vermote for help translating.

¹³⁴ Röling Dissent.

wide-spread opinion that a victors' tribunal will always disregard international law and will but decide arbitrarily.”¹³⁵ In other writings, Röling proved especially bullish in relation to conventional laws of war. In the Dutch judge's view, creating new laws to cover violations already criminalised in existing jurisprudence made no sense. “It ought to be stated authoritatively and clearly by this Tribunal that the argument of the Prosecution is not correct,” Röling wrote regarding Chief Prosecutor Keenan's pet theory about interweaving “murder” as an actualisable offence in warfare. “Murder in the national law of peace is intentional and illegal killing,” Röling concluded. “To assume that every intentional killing in an illegal war, committed with the knowledge of the illegality of that war, is murder would be a negation of the recognition of war in international relations. It would constitute a change in international law which this Tribunal does not have the authority to bring about.”¹³⁶ Röling's dissent asserts, “Neither the lofty phrases used in resolutions, nor the ambiguous Pact of Paris outlawed war in the sense that waging an illegal war did become criminal in the ordinary sense.”¹³⁷ Other dissenters like Bernard and Pal held less orthodox views on technical legal matters. Bernard's formalism became most obvious on probative and procedural issues. He struggled to accept unfamiliar common law evidentiary protocols and objected to the majority's overreliance on prosecution arguments.¹³⁸ Pal proved capable of swinging from legal and ideological pole to pole in a single passage. His formalism grew out of deeper cynicism in the court's apparent double standards, especially its colonial hypocrisies. In spite of divergent approaches and backgrounds, all three major objectors to the IMTFE shared a narrow sense of the tribunal's objectives and efforts. They processed the tribunal from a formalist sensibility and refused to

¹³⁵ B. V. A. Röling, “Judgment Part B, Chapter III: ‘Japanese Aggression against the USSR’” (28 July 1948) in *Bernard and Röling on Judgment*, Northcroft Papers, Box 330.

¹³⁶ Röling “Some Points of Law,” in *Bernard and Röling on Judgment*, Northcroft Papers, Box 330.

¹³⁷ Röling Dissent.

¹³⁸ Bernard Dissent.

agree with the IMTFE project. Their formalist dissent and its competing pragmatist majority judgment established a shaky and conflicting judicial and historical firmament in Tokyo.

Principles and Practice: Negotiating International Law at the IMTFE

Most, if not all, legal traditions represented at the IMTFE operated under a few core assumptions: courts are independent bodies; defendants are presumed innocent until proven guilty¹³⁹; trial proceedings are as long and thorough as needed to see justice done. What, then, happens if these tenets do not exist? What if such universal principles of jurisprudence are impossible to uphold, or at least are close to unattainable? This puzzle confronted jurists in Tokyo and continues to plague most international courts which remain inherently improvised and malleable processes. Inevitably, ideals give way to compromise; “inflexible rule” is subducted beneath the mass of “practice” and pragmatics. On paper and in conception, the IMTFE represented a new form of international justice. On the ground, lofty legal objectives proved hard to reach. Given the era and issues, true independence felt unachievable. Lawyers and jurists either accepted the IMTFE or not, and dismissing charges against the accused proved politically impossible. The scars of war remained too deep for anyone – save Justice Pal – to genuinely absolve Japan or its leaders of responsibility. The whole purpose of the trial became to mete “justice” for the wrongs committed by those on the docket. Despite these unavoidable problems of exigency, emotion, politics, and principle, international courts by nature and determination frame their efforts in fixed notions of morality, objectivity, facts, and law. The in-built contradictions lead invariably to internal disillusionment, doubt, and dissent, and in the Tokyo case, an enduring sense of injustice and reputation for victors’ justice.

¹³⁹ Article 11 of the Universal Declaration of Human Rights (1948) embedded the presumption of innocence in the global rights fabric.

The IMTFE's central legal problem became that everyone agreed justice must be done, but few could agree about how exactly to accomplish "justice" or even what it should look like. As a result, Tokyo developed a pliable judicial structure, in practise and conception. The IMTFE's judicial experience formed a fluid amalgam of often-conflicting legal cultures and ideologies framed by and interpreted through two foundational legal sensibilities: pragmatism and formalism. Though hardly monolithic, these schools of inclination, values, and cognition shaped feelings and findings. Supporting the tribunal made people fit personalised legal thoughts to the broader forces of new international law being built. Majority judges, for example, had to find ways to match their training and predispositions to the often-contradictory circumstances and law presented by the prosecution case. Judges who may have been formalist by inclination in any other setting made undeniably pragmatist decisions that included inventing and accepting false positivist framings for a largely unprecedented Charter. For example, majority members like Northcroft, McDougall, and Patrick followed positivist interpretation which usually fit more comfortably within a formalist framings. As either subconscious or deliberate legal pragmatists, these judges felt so convinced of Japan's guilt and of IMTFE righteousness that they managed to see and accept precedents which could only generously be termed indefinite. Their experiences illustrate the malleability of legal tenets in fractured postwar milieus.

Entrenched cultures of thought and practise strongly influenced how individuals in Tokyo dealt with the most pressing legal concepts at the IMTFE. Those most convinced of Japan's guilt, of the importance of the tribunal's aims, and the exigencies of the postwar world, proved able to accept and adjust to the creation of new law in Tokyo. Others felt unable to break the shackles of personal and legal doctrine and accept the IMTFE's legal miasma. These objectors produced a dark taint of dissension and division in international justice and history. The IMTFE in operation lived and died on judicial compromise, but the inevitable concessions

have poisoned the tribunal's judicial and historical afterlife. The legal solutions reached in Tokyo were certainly imperfect, but no matter how objectionable, the court's failings emerged from process not policy. The IMTFE's complex web of laws and legal practise became a fundamental and inescapable component of the tribunal as an international body with a life and experience of its own. Although subject to unique local contingencies, the spirit of dissonance in Tokyo – pragmatism v. formalism, “practice” v. “inflexible rule,” order v. justice, peace v. stability, etc. – represented a common facet of all forms of internationalism which by essence coalesce personal, legal, ideological, and political strains.

As a result, like other institutes of global governance, a profound ambiguity underscored the IMTFE's legal experience. Participants felt keenly aware that apart from Nuremberg, justice like Tokyo had never been done before. Rightly or not, they were *inventing* law. This fact tested the personal inclinations, legal training, and ideological principles of participants. Anxiety over creating new international law aggravated existing divides (within divisions and within selves) between formalist and pragmatist legal sensibilities. Pushed to the brink, judges and jurists fell back on instinct and values as much as pure technicalities. The Tokyo experience thus exposed an intrinsic contradiction in the purported inviolability of all legal concepts. Hegemonic notions of “the law” as an unbending, rational, and objective authority collapsed in the face of international justice in operation. As noted above, observing the IMTFE experience beggars the very notion of reductive binaries such as rational-emotional cognition or fair-unfair justice. Like many international organisations and other similarly idealistic endeavours, the tribunal promised too much and delivered too little. Far from cynical or avoidable, however, Tokyo's shortcomings proved to a degree inevitable. New laws begot new problems, novel practices caused novel difficulties, overextended ideals created false counter-‘realities.’ This conflicted core of the IMTFE represents the typically messy essence of being international, in law and history.

CHAPTER 4: Idealism, the Cold War, Colonial Questions, and Global Justice

Previous chapters describe how the IMTFE's multinational structure and internal dynamics made it a pioneer of both international organisation and justice. As such, the IMTFE confronted a unique set of temporal, geographical, and global contexts. It represented "a huge international morality play that reflected new truths about life in the Post War."¹ The IMTFE operated in a transitional era of rare proportions. Participants navigated multiple and often-conflicting sea changes: ambitious postwar idealism, stark Cold War *realpolitik*, and disordering decolonisation. At its birth, the tribunal grew out of epochal 'never again' inspired idealism, but by trial's end, the IMTFE functioned in a markedly more constricted Cold War period. The war also set off the first major wave of decolonisation, especially in Asia, and with both colonised and colonisers (past and present) in the same institution, the IMTFE met novel pressures of a decolonising world. Elsewhere I examine *who* worked in Tokyo, *what* the tribunal became, *where* it ran, and *how* it functioned. To fully understand the IMTFE historically, one must also appreciate *why* the trial happened and explore the broad implications of *when* it ran.

Although the IMTFE operated in a particular milieu and convened to address a specific set of crimes, its experiential lessons reveal broader truths about the messy and contested nature of internationalist principles and practises more generally. Participants lived, negotiated, and transcended three transformative global movements: postwar idealism, the Cold War, and decolonisation. These movements and others provided a heady context for the tribunal, and related ideals and ideologies gave purpose to the IMTFE's formation and function. By navigating the competing and converging streams of a complex international moment, Tokyo participants shared and shaped an intrinsic element of global governance in operation. Multilateral institutions and international courts often carry out their work in times of crisis and change, and Tokyo proved no different. Critics tend to assume that the court slavishly followed

¹ Johnson, "Defending the Japanese Warlords", 211.

grand political influences. Viewed through a reductive victors' justice lens, the IMTFE's judicial inequalities outweighed its genuine if over-ambitious idealism; the tribunal's colonial double standards reflected a conscious colonial and racial bias; and its Cold War compromises embodied pure, cynical machinations. Truth resides in all these suppositions, and the IMTFE witnessed its share of both deliberate and unintentional vice, racism, vengeance, and hypocrisy. Yet, like the rest of this dissertation, this chapter reveals that the IMTFE's intricate ground-level experiences confound oversimplified notions of vengeance and politicking. World events shape all international bodies and their participants. However, this chapter argues that localised conditions ultimately determined institutional outcomes and experiences in Tokyo.

Ideals in Practise: The IMTFE and the "Future of World Society"

Scholars and practitioners often reduce the ideological debate around global governance to opposing poles. The thinking behind international courts, for example, is oversimplified to two camps. Strategic realists push for fast, even summary, justice. Idealistic legalists advocate for extensive, public, and symbolic accountability. Distilling the debate to this degree, however, misses the range of variance behind such courts, not to mention the profound complexity of internationalism itself. This chapter shows that in operational multilateral institutions, ideals complement as much as contradict so-called "real" considerations like power and politics. Using "idealism" in a very literal sense – realisable hope for an improved way of being; commitment to a better future – this chapter demonstrates that rather than an unfettered, impractical aspiration, postwar idealism became a great unifier of principles, preconceptions, and processes. The Tokyo and Nuremberg IMTs represented the culmination of a very complicated and mutable intellectual and ideological heritage tied together by shared participation in a global movement to re-envision and remodel world affairs. Personal idealisms carried ideological underpinnings: moralistic, socialist, nationalist, imperialist, anti-colonial, religious, legal, liberal, conservative, vengeful, geopolitical, racial, and other. But determination to change future outcomes and

redress past wrongs emerged as an almost universal guiding principle in Tokyo; itself an outgrowth of a wider postwar *weltanschauung* rooted in the expectation of massive changes to instruments of global and human security. Although at times cynical and calculated, IMTFE idealism more often reflected a genuine commitment to creating new and different international and legal systems. Indeed, idealism became an integral part of what made the IMTFE so international and so multifaceted without ultimately imploding, stalling, or breaking down. Without postwar idealism, the tribunal would not have existed and would not have functioned.

Although participants arrived with vastly divergent aims and preconceptions, a shared understanding that the tribunal would shape the future as much as rectify the past unified nearly all IMTFE personnel. “In a sense with all the pressing problems which occupy us the trials [Nuremberg and Tokyo] may seem somewhat unnecessary, something which relates to the past,” Lord Robert Alderson Wright (Chairman of the United Nations War Crimes Commission) told a special meeting of the FEC in June 1946. “But they are really related to the future . . . These trials, no matter how imperfect they are, should be supported and justified. Really it is the future we are thinking about, not the past, for the past is beyond reparation. The only thing is not to let it happen again.”² Prosecutor Walter McKenzie typified the grandiose vision in Tokyo. “This is a matter in which all the civilized people of the world are immensely interested at this time,” McKenzie wrote. “Some definite provision must be made to peaceably settle future international disputes if civilization itself is to survive.”³ Though multifaceted, postwar idealism became the personal and ideological glue behind the scenes in Tokyo. When heady promises met frustrating processes, the court’s reputation and legacy faltered.

The epochal “never again” mentality placed the IMTFE and its participants alongside other related institutions in a formative international moment, and within a longer genealogy of

² Extract from H. M. G. Document, Minutes of Special Meeting of FEC (16 June 1946), in NZ Archives, EA2 1946-31B 106-3-22 Part 1.

³ Walter McKenzie to Agnes M. McGraw (9 April 1947), McKenzie Papers, Box 1, Folder – Correspondence – April 1947.

internationalism. The tribunal overlapped *inter alia*, the Nuremberg IMT (October 1945–November 1946), the establishment of UNESCO (November 1945), the formal organisation of the International Monetary Fund (December 1945), the first session of the UN General Assembly (January 1946), the initial hearings of the International Court of Justice (April 1946), the formation of a World Health Organisation (April 1948), the adoption of a Genocide Convention (December 1948), and the signing of the Universal Declaration of Human Rights (December 1948). It is tempting to treat the era retrospectively as a hiccup rather than a revolution in international relations,⁴ an argument sustained by the Cold War’s swift hijacking of still nascent bodies of world community. Long-term limitations, however, cannot erase the idealism and internationalism theorised, implemented, and *felt* during the period. For many individual contributors to the movement, in Tokyo and elsewhere, the postwar era represented a time of change and optimism. Developments in Nuremberg, Tokyo, and elsewhere looked like signal achievements to people rooted in decades-old internationalist discourse. Specific ideological preferences varied, but most participants remained keenly aware of their place in a transformative international movement. This awareness informed and underlay all that they did.

Individual commitment to the IMTFE’s broader ideals rested on a range of personal ideologies and global intellectual currents. Many participants grounded their dedication to Tokyo ideals in a strict legalist interpretation of world politics. Japan violated institutionalised moral and legal norms of international relations and warfare. Accordingly, the Allied powers must hold Japanese leaders legally accountable for their transgressions. A number of British and American personnel in particular envisioned Nuremberg and Tokyo as concrete tokens of the determination

⁴ Mark Mazower and others question both the effectiveness and novelty of the era’s international institutionalisation. Mazower, *No Enchanted Palace*.

of ‘civilised’ peoples to back legal authority in global affairs.⁵ Faith and religious movements also underscored personal idealism in Tokyo. With some exceptions,⁶ Christian doctrine became the most preeminent religious influence on IMTFE contributors, especially through close linkages between religion and natural law jurisprudence. President Webb, for instance, went so far as to argue, “International Law is essentially a product of Christian Civilization and began gradually to grow from the second half of the Middle Ages.” The IMTFE Charter “does not violate International Law or the Natural Law, but gives effect to it,” the president concluded.⁷ Father Peter J. Herzog, a professor and priest at Sofia University in Tokyo, profoundly influenced Webb’s thinking, along with the president’s personal background in Catholicism.⁸ Christian moralism also shaped prosecution arguments and IPS personnel themselves. John Brabner Smith, a young lawyer who helped prepare Keenan’s opening statement, was deeply religious. His personal papers at Regent University reveal a lifelong commitment to unifying Christian ideals and natural law. Another prominent prosecutor, Brendan F. Brown,

⁵ John Hagan examines US legalism in both IMTs. John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago: University of Chicago Press, 2003). Gary Bass argues that the “sting” of the post-World War I “fiasco” in Leipzig moderated British legalism, but contends, “Nuremberg remains legalism’s greatest moment of glory.” Bass, *Stay the Hand of Vengeance*, G. J. Bass, “War Crimes and the Limits of Legalism,” *Michigan Law Review* 97, no. 6 (1999): 2103-16. See also Shklar, *Legalism*.

⁶ Prosecutor Christmas Humphreys and analyst Richard De Martino brought Buddhist sensibilities. Richard De Martino, “The Zen Understanding of Man” (PhD, Temple University, 1969), Richard De Martino, “The Zen Understanding of the Initial Nature of Man,” in *Buddhist and Western Philosophy*, ed. N. Katz (Atlantic Highlands, NJ: Humanities Press, 1981), 8-120, Richard De Martino, “Karen Horney, Daisetz T. Suzuki, and Zen Buddhism,” *American Journal of Psychoanalysis* 51 (1991): 267-83, Christmas Humphreys, *Karma and Rebirth*, Wisdom of the East Series (London: John Murray, 1943), Christmas Humphreys, *Buddhism*, Pelican Book (Harmondsworth, Middlesex: Penguin, 1951), Christmas Humphreys, *Zen Buddhism* (New York: Macmillan, 1967), Christmas Humphreys, *Both Sides of the Circle: The Autobiography of Christmas Humphreys* (London: G. Allen & Unwin, 1978). Indian Justice Pal had a Hindu background. Radhabinod Pal, *The History of Hindu Law in the Vedic Age and in Post-Vedic Times Down to the Institutes of Manu* (Calcutta: University of Calcutta, 1958).

⁷ Webb Opinion.

⁸ See for example: “The Punishment of War Crimes and the Law of Nature: A Study of the Scholastic Doctrine of the 16th and 17th Centuries,” a 215 page treatise by Herzog in the Webb Papers, AWM 92 - Series 1, Wallet 13; and W. F. Webb to Father Peter J. Herzog (20 October 1947), Webb Papers, AWM 92 - Series 1, Wallet 13. New Zealand Justice Northcroft disapproved of Herzog’s influence and ideas. The New Zealander called Webb’s expanded early draft judgment “an impossible document” which was “Compiled by a couple of young people (a young Australian man and an American girl) on his staff, assisted as he told us by a Professor (German, I think) of some University in Tokyo.” E. H. Northcroft to Humphrey O’Leary (18 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

demonstrated a similar personal and professional devotion to religious natural law.⁹ Beyond Tokyo, religion became an important ideological underpinning of postwar global governance and international relations, and several global movements coupled faith and internationalist fervour in the era.¹⁰ Religion bound many personnel to IMTFE ideals, but this kind of faith-based commitment also gave the court a messianic flavour and fervour that proved unattainable.

Religiously rooted or not, most IMTFE participants believed in the ‘importance’ and idealism of their task. Several personnel published books and articles about the trial’s purpose and place in history. Prosecutors became the most effusive public champions of the IMTFE. Joseph Keenan and Brendan Brown, for example, described Tokyo and Nuremberg as “manifestations of an intellectual and moral revolution which will have a profound and far reaching influence upon the future of world society.”¹¹ Using scientist metaphors for law and society, Keenan and Brown argued that the IMTs generated “the original cells from which a fully developed specimen of international criminal law will evolve.”¹² The “painstaking” efforts of tribunal employees produced a “superb judicial mechanism.” These “champions of the world

⁹ Brown served as Acting Dean (1942-1946) and Dean (1949-1954) of the Catholic University of America. See: Brabner Smith Papers and Brendan F. Brown, *The Canonical Juristic Personality with Special Reference to Its Status in the United States of America* (Washington, DC: The Catholic University of America, 1927), Brendan F. Brown, *The Natural Law Reader* (New York: Oceana Publications, 1960).

¹⁰ Samuel Moyn describes the emergence of a peculiar blend of religious utopianism and ecumenicalism which posited a profound connection between global Christianity, human rights, and justice. Samuel Moyn, "The First Historian of Human Rights," *The American Historical Review* 116, no. 1 (2011): 58-79, Moyn, *The Last Utopia*. See also: Otto Frederick Nolde and Charles Habib Malik, *Free and Equal: Human Rights in Ecumenical Perspective, with Reflections on the Origin of the Universal Declaration of Human Rights by Charles Habib Malik* (Geneva: World Council of Churches, 1968), John Nurser, *For All Peoples and All Nations: The Ecumenical Church and Human Rights*, Advancing Human Rights Series (Washington, DC: Georgetown University Press, 2005), Ruth Rouse and Stephen Neill, *A History of the Ecumenical Movement 1517-1948* (London: Published on behalf of the Ecumenical Institute by S.P.C.K., 1954), Glendon, *A World Made New*, Jacques Maritain, *Human Rights Comments and Interpretations: A Symposium* ([S.l.]: Allan Wingate, 1949), Jacques Maritain, *Les Droits De L'homme et La Loi Naturelle* (New York, NY: Éditions de la Maison française inc., 1942), Cardinal G. K. A. Bell, *Christianity and World Order* (Middlesex: Penguin Books, 1940), Andrew Rule Osborn, *Christianity in Peril. The New World Order and the Churches* (London: Oxford University Press, 1942), World Council of Churches, *The Church and the International Disorder: An Ecumenical Study* ([S.l.]: S.C.M. Press, 1948), George W. Egerton, "Entering the Age of Human Rights: Religion, Politics, and Canadian Liberalism, 1945-50," *The Canadian Historical Review* 85, no. 3 (September 2004): 451-79, Nathaniel Berman, "'The Sacred Conspiracy': Religion, Nationalism, and the Crisis of Internationalism," *Leiden Journal of International Law* FirstView (2012): 1-46. Christian Realism also came to prominence in the period. See: Heather A. Warren, *Theologians of a New World Order: Reinhold Niebuhr and the Christian Realists, 1920-1948* (New York, NY: Oxford University Press, 1997).

¹¹ Keenan and Brown, *Crimes against International Law*, v-vi.

¹² *Ibid.*, 160.

community” and global justice “merit the commendation of all living men, and deserve the encomiums of generations unborn.”¹³ Keenan and Brown’s IPS associate Daniel Sutton appreciated Nuremberg and Tokyo through a more prosaic lens: “[They] were courts – not blank walls and firing squads,”¹⁴ part of “the building of a system of international law and order.”¹⁵ The IMTFE represented “one of the first steps,” concluded Sutton, “but a long and upward step, taken to replace a system of force with a system of law and order.”¹⁶ Likewise, fellow prosecutor Frederick Mignone believed that “the trials represent tangible examples of the law’s progress in attempting to meet the needs of society – the society of nations.”¹⁷ Solis Horwitz called the tribunal an “act of faith,” the “real significance” of which became the “conviction that war was not a necessary concomitant of international life and that acknowledged principles of law and justice were fully applicable to nations and their leaders.”¹⁸ Although less vocal, representatives from other divisions also extolled the IMTFE’s virtues in print. Quentin Quentin-Baxter, one of New Zealand Justice Northcroft’s assistants, opined that the Nuremberg and Tokyo IMTs “have for the first time asserted the right of nations to bring to justice individuals responsible for violating the peace of the international community.”¹⁹ Even critic of the court, defence attorney Ben Bruce Blakeney, publicly recognised the “tremendous” and “awe-inspiring” responsibility of those involved. For Blakeney, the ideals themselves formed the *raison d’être* for his outspoken criticisms. “If from this trial the better world which we all hope for, the more perfect system of law, are to emerge, the proceedings must be able to say that justice has been outraged.”²⁰ Idealism provided the background for public defenders and detractors alike. As part

¹³ Ibid., 42. Keenan and Brown proved unabashedly self-congratulatory in their assessment of the IMTFE.

¹⁴ Sutton, “The Trial of Tojo,” 165.

¹⁵ Ibid.: 94.

¹⁶ Ibid.: 165.

¹⁷ A. Frederick Mignone, “After Nuremberg, Tokyo,” *Texas Law Review* 25 (1947): 476.

¹⁸ Horwitz, “The Tokyo Trial,” 575.

¹⁹ R. Quentin Quentin-Baxter, “The Task of the International Military Tribunal at Tokyo,” *New Zealand Law Journal* XXV (7 June 1949): 137.

²⁰ Benjamin Bruce Blakeney, “International Military Tribunal: Argument for Motions to Dismiss,” *The American Bar Association Journal* 32 (1946): 523.

of a wider effort to build structural safeguards for future peace and global governance, postwar idealism embedded the IMTFE and its participants within a powerful international moment. Sadly, it proved a moment destined to fail in living up to its aspirations.

Idealism dominated the IMTFE's private domain since principle motivated many participants to work for the tribunal. Interrogator Osmond Hyde felt compelled to contribute to a historic event. His diary reveals a self-reflexive idealist. The tribunal represented "an opportunity that comes – not in a life time but once in history," reflected Hyde.²¹ "With the eyes of the entire world upon us and an almost universal cry for the punishment of those responsible for the war ringing in our ears we daily pursue our work in an honest effort to discharge credibly this heavy responsibility. It is, indeed, a mighty task."²² Hyde felt responsible to both future generations and to generations lost: "We are conscious of those who seemingly cry from their graves for justice to be done." By remaining steadfast in this "tremendous undertaking," Hyde and his colleagues would "bring credit to our country" and provide a "lasting monument" to a better world.²³ Even as they grew frustrated with the operational challenges of international justice, prosecution members remained convinced of the IMTFE's higher ideals. In April 1947, James J. Robinson explained to fellow prosecutor Walter McKenzie that despite its faults, he still believed the trial would help "prevent all the preliminary and incidental lawlessness by which international gangsters and reckless political and military leaders, by lies, by terror, and by disregard of official responsibility, lead whole peoples toward total wars."²⁴ Although disenchanted by the process of international justice, New Zealand Prosecutor Quilliam refused to question the court's ideals or import. "I do not want you to think that I consider the Trials will be a failure," Quilliam averred. "I am confident that despite all the difficulties, we can make out a

²¹ Entry: 16 February 1946, Hyde Diary.

²² Entry: 20 February 1946, Hyde Diary.

²³ Entry: 21 February 1946, Hyde Diary.

²⁴ James Robinson to Walter McKenzie (10 April 1947), McKenzie Papers, Box I, Folder: Correspondence - April 1947.

strong case which after a fair and proper Trial will result in the conviction of most, if not all, of the Defendants, and will have permanently beneficial results in International Affairs.”²⁵ But in truth, process could not match promise. The inherent difficulties of translating international justice ideals into practice help explain the high attrition rates among IMTFE personnel. Many participants grew disenchanted, home sick, and even cynical, as lofty expectations for a quick, historic trial became realised in gritty, cumbersome, operational justice. Hyde and Quilliam’s emotional dislocation, for instance, and their subsequent departures from Tokyo became emblematic of the cynicism which pervades memory and historiography of the court.

Postwar idealism informed views within the high-level judicial, political, and military establishment in Tokyo. “These trials are in a sense the moral climax of the war,” a British Foreign Office telegram announced.²⁶ General MacArthur saw the IMTFE as part of broader, almost messianic, occupation objectives which he outlined to Chief Prosecutor Keenan. “He smiled somewhat winsomely and said that although both himself and his father before him had spent their lives as professional soldiers, he realized the futility of human beings resorting to or employing the art of killing one another,” Keenan recounted after a December 1947 meeting with the Supreme Commander. The horrors of total war stemmed from “a failure of the human race to move forward on a straight line,” MacArthur told Keenan. “We have retrogressed instead of advancing in matters of the spirit and soul.” The Chief Prosecutor left the meeting assured that the General supported the IMTFE “more than ever,” because it “serv[ed] an educational purpose and an exemplary one in deterring or perhaps preventing military aggression in future years. He said it was well worth anyone’s effort.”²⁷

²⁵ R. H. Quilliam to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

²⁶ UKLIM, Tokyo to FO, London (7 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

²⁷ Joseph Keenan to Charlotte Keenan (16 December 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe - Krould. Sequence 756-759).

Tokyo judges also had expansive views of the tribunal's importance. The usually staid Northcroft exalted that "for the first time" Tokyo and Nuremberg "asserted the right of nations to bring to justice individuals responsible for violating the peace of the international community. In this way a warning has been given to national leaders who contemplate aggression."²⁸ Justice Jaranilla believed that the tribunal's findings "will not only affect vitally the liability of the defendants at bar, but also will potently influence future international relations and the course of world history."²⁹ Even dissenting judges idealised IMTFE potential. Reflecting the era's broader faith in multilateral solutions to global issues, Dutch Justice Röling agreed that international society had to do *something* in the face of total war. In a later interview, Röling reflected, "I am still convinced that the Trial was a kind of milestone in legal development."³⁰ Japan's actions "could not be passed over in silence. Those leaders had discarded values cherished by the world; they had violated basic rules of human behaviour."³¹ Indeed, some of the most idealistic language in Tokyo came from the tribunal's staunchest critic: Indian Justice Radhabinod Pal. "In an age of growing international conscience people should know where and how the law stands," Pal explained, "so that they may clearly see what is to be done in order that the developed moral conscience of the world may really assert the moral dignity of the human race."³² Pal accepted the notions of international justice and global community, but doubted that the world was ready, and questioned the IMTFE's success in furthering the ideal. Later critics appropriated the spirit and substance of this and other Pal critiques.

²⁸ E. H. Northcroft, "Memorandum for the Right Honourable the Prime Minister Upon the Tokyo Trials 1946-1948 (17 March 1949), Northcroft Papers, Box 335. Hereafter "Northcroft, Memo to PM."

²⁹ Jaranilla Opinion.

³⁰ Röling and Cassese, *The Tokyo Trial and Beyond*, 86.

³¹ *Ibid.*, 88.

³² Radhabinod Pal, "Dissentient Judgment of Mr. Justice R. B. Pal on the Preliminary Objections to the Trial Taken by the Accused," (date unclear), AWM 83, Box 239, 161. Hereafter "Pal, Preliminary Objections." Bo Jacobs speaks eloquently of how awareness of mutually assured atomic destruction contributed to global consciousness and community in this era. Robert Jacobs, "Target Earth: The Origins of the Image of the Whole Earth in the Ashes of Hiroshima and Nagasaki," in *Filling the Hole in the Nuclear Future: Art and Popular Culture Respond to the Bomb*, ed. Robert Jacobs (Lanham, MD: Lexington Books, 2010), 187-205.

Judicial debate about IMTFE jurisdiction showed the range of idealism in Tokyo. Chinese Justice Mei understood both the grand vision and technical practicality of building a “double foundation” of internationalism in Nuremberg and Tokyo. “In my opinion, the Tokyo Trial, like the Nuremberg Trial, should also be considered as ‘the greatest thing that comes out from this World War,’ to borrow a phrase of President Truman,” he wrote to Webb in December 1946. “We must not slavishly follow Nuremberg,” he averred, but together, the courts could change history. “Being separately and independently upheld by both of the two greatest military tribunals the world has ever set up” would create a lasting legal and international legacy.³³

Soviet Justice Zaryanov looked beyond Nuremberg and Tokyo by tracing the tribunal’s jurisdiction and purpose to “certain deep changes in the minds of the peoples,” beginning with World War I. A second total war, only decades later, cemented the shift in the global firmament.³⁴ Zaryanov’s unique socialist perspective welcomed allegations of victors’ justice. In fact, the Russian judge believed victory itself demanded and justified justice. “The Tribunal should consolidate this victory of democracy in the war as well as stimulate the further strengthening and development of democracy,” he wrote to President Webb. “It would be strange if a historic victory of world importance of democratic states over fascist aggressors in World War II introduced no changes in the existing International Law.” The IMTFE had both legal and moral obligations. Its findings must “correctly portray the profound historic justice of the victory of democratic states in World War II and be commensurate with the dictates of the public conscience of nations all over the world.”³⁵ Zaryanov’s justifications illustrate the multitude of idealisms at work in Tokyo. Too often scholars present postwar developments as imposed Western, predominantly American, liberal values, and they overlook the individual

³³ Mei Ju-Ao to W. F. Webb (8 December 1946), Bernard Papers, F° Δ rés 874-10-1-48.

³⁴ I. M. Zaryanov to W. F. Webb (August 1946), Bernard Papers, F° Δ rés 874-10-1-48.

³⁵ I. M. Zaryanov to W. F. Webb (3 January 1947), Bernard Papers, F° Δ rés 874-10-1-48.

contributions and ideological perspectives from other traditions.³⁶ As Stalin's representative, Zaryanov's assertions certainly deserve some healthy scrutiny. However, the Soviet judge's preference to work behind the scenes rather than use the tribunal's public arena to spout party lines suggests a true commitment to international justice rooted in genuine idealism. Zaryanov's willingness to go on the record regarding the IMTFE also suggests that, at least theoretically, Soviet ideology proved flexible enough to accommodate internationalist and judicial ideals.

When donating IMTFE files to the College of William and Mary, Otto Lowe, special assistant to Chief Prosecutor Keenan explained, "As is the case with all historic events, there was considerable difference of opinion."³⁷ Idealism reigned in Tokyo but not as a universal force among participants. Some personnel saw the tribunal as merely another professional assignment, an unavoidable final chapter in wartime service or a sinecure to avoid less appealing or more dangerous postings elsewhere. Many others lost faith in Tokyo ideals when faced with its failings and frustrations. Indeed, by trial's end, cynicism may have been as common as idealism. Yet it is difficult to find IMTFE personnel who did not at some point, in some way, believe that they were participating in a *cause célèbre*. Like most aspirational principles, IMTFE idealism had exaggerated overtones, but ideals in Tokyo also reflected a profound sea change in global conscience following the war. The tribunal contributed to a transformative movement. Postwar idealism became a unifying force in Tokyo and within other constitutive institutions of global governance in the era, fusing individuals' ideologies, and providing a powerful international –

³⁶ Human rights historiography exemplifies the neglect of non-Western ideals and participation in postwar internationalism. Borgwardt, *A New Deal for the World*, John M. Headley, *The Europeanization of the World: On the Origins of Human Rights and Democracy* (Princeton: Princeton University Press, 2008), Moyn, *The Last Utopia*, Moyn, "The First Historian of Human Rights," 58-79. Akira Iriye, Mary Ann Glendon, and Paul Gordon Lauren, among others, have begun to acknowledge the global influences on human rights norms and regimes. Manu Bhagavan, "A New Hope: India, the United Nations and the Making of the Universal Declaration of Human Rights," *Modern Asian Studies* 44, no. 2 (2010): 311-47, Akira Iriye, Petra Goedde, and William I. Hitchcock, *The Human Rights Revolution: An International History* (New York: Oxford University Press, 2011), Lauren, *The Evolution of International Human Rights: Visions Seen*, Mary Ann Glendon, "The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea," *Harvard Human Rights Journal* 16 (2003): 27-39.

³⁷ Lowe Papers, Box 1, Item 1.

and internationalist – identity. Unfortunately for the trial and its legacy, the IMTFE’s grand ideals proved impossibly, infuriatingly, hard to reach.

“I Don’t Like the Russians but I Never Met a Russian I Didn’t Like”: The Cold War IMTFE

Like its Nuremberg counterpart and related postwar institutions, the IMTFE formed part of an extraordinary era of multilateralism. More than Nuremberg, however, Tokyo became both an outgrowth of global idealism and a product of the early Cold War.³⁸ The shifting international climate influenced the tribunal in and out of court. Whereas postwar idealism provided a foundational tenement for the IMTFE, Cold War conditions developed over time. Kennan’s Long Telegram, Churchill’s Iron Curtain Speech, the Truman Doctrine, the Marshall and Molotov Plans, crises in the Dardanelles, Iran, Palestine, and Czechoslovakia, and the beginning of the Berlin Blockade gradually transformed the global landscape. This section suggests two perspectives to understand the Cold War in Tokyo. On the surface, the tribunal appeared a Cold War product, particularly as a space to air factional grievances in the courtroom, through media outlets, and other public avenues. Despite outward signs of the global conflagration, however, this section proves that the court ultimately transcended the Cold War on the ground and behind the scenes. Close social and professional interaction brought supposed political rivals together, especially on the prosecution and bench where cooperation became most critical. In addition, the need to present a united, ‘objective’ front impelled judges and prosecutors to work consciously to keep Cold War politics out of the courtroom as much as possible. As a functioning international organisation, the IMTFE experience reveals nuanced truths about the complex and contested inner-workings of global governance institutions normally presented as either sterile bodies of principle or sites of unmitigated geopolitics. Tokyo demonstrates how international

³⁸ Cold War tensions affected Nuremberg as well. However, the primary international tribunal in Nuremberg wrapped up by October 1946 – before the most overt early Cold War events. For more see: Francine Hirsch, "The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order," *American Historical Review* 113, no. 3 (June 2008): 701-30.

bodies take on and create internal dynamics which overcome – or at least configure – political power relations, no matter how pressing the external forces.

Cold War tensions did impact the IMTFE's exterior persona. Much like its approach to other international organisations in the era, the Soviet Union publicly positioned itself apart from the mainstream IMTFE: close enough to leverage concessions, but sufficiently removed to claim higher ground. On a governmental level, the USSR criticised the direction of justice in Tokyo (when convenient) without fully abdicating control to its Western counterparts. This pseudo-outsider position became at once encouraged and resented by the West. Both camps used press coverage as a forum to criticise the opposing faction without sacrificing the structural commitment to international justice. Public SCAP comments regarding the tribunal often met with corresponding Soviet denunciations. The day SCAP published the IMTFE charter in January 1946, for example, *New York Times* headlines also announced Soviet intentions not to participate.³⁹ A month later, the *Times of India* offset the official appointment of IMTFE judges with a story regarding Soviet calls for the inclusion of Emperor Hirohito on the docket.⁴⁰ After the IMTFE judgment in November 1948, the Soviet newspaper *Izvestia* protested the “unjustifiably lenient” sentences.⁴¹ The media also formed an arena for Western critique of

³⁹ “Plans Completed for Trial of Tojo: Soviet Will Apparently Not Be Represented on Court in Tokyo Next Month,” *New York Times*, 18 January 1946, 18.

⁴⁰ “Soviet to Demand Hirohito's Head: General Macarthur's Bitter Opposition: Tribunal to Try Major Jap Criminals Formed,” *Times of India*, 19 February 1946, 1. Hirohito's immunity became a controversial issue among Western powers as well. Convinced that Hirohito escaped justice, President Webb's separate opinion argued “The authority of the Emperor was proved beyond question when he ended the war. . . . This immunity of the Emperor, as contrasted with the part he played in launching the war in the Pacific, is I think a matter which this Tribunal should take into consideration in imposing sentences.” Webb, Separate Opinion. Chief Prosecutor Keenan backed the decision not to try Hirohito. In November 1947, he assured his wife, “I have seen enough of this picture to know the real situation about the Emperor and it is all rather pathetic. He was no fool and knew much of what was going on about him, but the circumstances under which he lived and the inhibitions built up by even short-lived tradition together with a small group of scheming scoundrels used him completely as a tool.” Indeed, Keenan believed his views on Hirohito were the root of acrimony between himself and Webb. “You may remember that this was my judgment when I came home the first time in June of 1946. It was not the view of many members of this court, and they resented my statement. Now in this trial the truth of this conjecture or observation is coming out day by day. The head of the court has attempted to prevent its emergence, but it is so true and the facts so clearly convincing that this evidence is received with petty resentment.” Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6, Letters from Joseph B. Keenan, (Igoe - Krould. Seq. 746-755).

⁴¹ “Tokyo Verdict Praised: But Russian Press Says Some Sentences Were Too Light,” *New York Times*, 29 November 1948, 17.

Soviet policies and actions. In April 1946, for instance, Chief Prosecutor Keenan complained to the press that the late arrival of Soviet Prosecutor Golunsky had delayed completion of the IPS Indictment and that Golunsky further slowed progress by objecting to the document's "legalistic style" and demanding that its language be popularised and made more accessible to the masses.⁴² *New York Times* coverage of the IMTFE judgment echoed defence arguments by questioning certain "anomalies" which would affect the "moral impact" of the tribunal, specifically "the fact that a Russian sits on the judge's bench as the representative of a Power which, with little disguise, is pursuing the same policies the court has condemned."⁴³ The image of a political Cold War court gained a level of public currency at the time and since incommensurate to the actual impact of the Cold War on IMTFE processes and outcomes.

Cold War tensions infiltrated proceedings only when copacetic to internal trial objectives and dynamics. The American defence counsel attempted to sow internal prosecution and judicial discord and justify Japanese actions by instigating Cold War controversy. Indeed, Galen Johnson's study of the American IDS describes his subjects as vanguards of anti-communism and the IMTFE itself as "a seeding ground for the new Cold War."⁴⁴ Owen Cunningham, as always, emerged as a key provocateur. In June 1947, Cunningham used Churchill's "Iron Curtain" speech to paint Japan's incursion into Northeast Asia as a legitimate response to the threat of world communism. The Soviet Union pursued a "two-faced policy" during the war, argued Cunningham, designed to instigate communist revolution and cause "upheaval" in the region. "Asia then, and Asia today," he declared, "suffered and is suffering from Russian

⁴² "Indictment of Tojo Ready by Wednesday," *New York Times*, 22 April 1946, 6.

⁴³ "Japan Guilty," 24.

⁴⁴ Although Johnson overestimates Cold War hostility in Tokyo, the defence counsel did become the most active Cold War conduits at the IMTFE. Johnson, "Defending the Japanese Warlords", 200.

interference or communistic interference with the establishment and maintenance of peace.”⁴⁵

Fellow defence counsel Aristides Lazarus took a similar tack. The March 1947 Truman Doctrine, “has said exactly what these people [the accused] have been saying all along,” averred Lazarus. Anti-Soviet fears in the late 1940s validated the Japanese leadership’s alarm in the 1930s: “[A] reasonable fear and proper fear, of the spread of world communism.”⁴⁶ Visions of a new Cold War enemy helped American IDS members deliver strained rationales for the transgressions of their former Japanese nemeses.⁴⁷ For Japanese counsel, worsening Cold War tensions provided a handy and self-serving justification for Japan’s war actions. “Japan never entertained the slightest intention of attacking the Soviet Union,” argued Chief of Defence Counsel Uzawa Somei. Indeed, in hindsight, “Japan for many years had been genuinely disturbed by Soviet aggressiveness, large preparations for war and desire to fasten its communistic philosophy upon Japan and China as well as other nations throughout the world.”⁴⁸

The Defence played off developing Cold War tensions to challenge Soviet evidence, especially the written affidavits of Russian-held witnesses. “Before proceeding to detail our evidence,” Lazarus announced to the court in May 1947, “we must point out the singularly

⁴⁵ *Transcripts*, 23778. Cunningham’s anti-communism deepened as the Cold War worsened. “The very existence on the court of a Russian Judge and the presence of a Russian prosecutor reduce the proceedings to a paradox,” Cunningham asserted in a vitriolic speech to the American Bar Association in September 1948. Owen Cunningham, “The Major Evils of the Tokyo Trials,” (7 September 1948), Cunningham Papers. Box 4, Folder 42. Hereafter “Cunningham, Major Evils.”

⁴⁶ *Transcripts*, 20478-20479.

⁴⁷ Defence attorney Blakeney criticised this issue in depth. Noting Soviet ‘aggression’ against Finland and the Baltic States, Blakeney argued, “We feel it is going to look verily [sic] like a double-standard if the Tribunal finds these defendants guilty and finds other great nations to have been innocent in doing the same acts.” *Transcripts*, 17613. Later, Blakeney averred, “It must be apparent that the offer by the U.S.S.R. to charge and condemn Japan for an action which, as the evidence tendered and to follow will show, was precisely the course of conduct of the U.S.S.R., itself in analogous circumstances, but at another time, that this offer is abhorrent to every principle of equity or justice.” *Transcripts*, 23572. Aristide Lazarus (IDS) asserted, “We intend to show . . . That Japan never aggressed against Russia. On the contrary, it was always the other way around.” *Transcripts*, 17421. Early diplomatic exchanges reveal that the USSR felt aware of the perceived double standard. In January 1946, for example, an internal memorandum from the British Foreign Office to British prosecutors explained, “United States Charge d’Affaires tells me that PCFA [People’s Commissariat of Foreign Affairs, USSR] before appointing their representatives showed considerable anxiety about the terms of the indictment. They may well have feared this might reveal awkward facts concerning Soviet-Japanese relations before the Soviet entry into the Far Eastern War.” FO to British Division, IPS (31 January 1946), IWM Papers, FO 648, Box 152, Folder 3.

⁴⁸ Uzawa Somei, “General Motion to Dismiss the Indictment on Behalf of All Defendants,” Conde Papers, Box 30, Folder 12.

unsatisfactory and, so to say, intangible character of the case which we are called upon to meet.” The prosecution team, he alleged, used written testimony from Soviet-held witnesses who were “dead,” “under charge or investigation for ‘crimes,’” or “ordinary prisoners of war” who had still not been repatriated some twenty-one months after war’s end.⁴⁹ In June 1947, Lazarus’ defence colleague Ben Blakeney protested the ongoing imprisonment of former Japanese soldiers with “no apparent reason . . . unless it be to prevent them from becoming available for cross examination.”⁵⁰ Blakeney also questioned the “character” of Soviet affidavits. “‘Unsatisfactory’ is, in truth, a gross understatement,” he asserted. The testimonies formed “a hodge-podge of opinion, conclusion, affirmative answers to flagrantly leading questions, hearsay compounded upon hearsay, self-contradictions . . . It must be read to be believed.”⁵¹ Travelling to interview witnesses “Behind the Iron Curtain” in the Soviet Union would solve nothing. “It is a vain hope and a futile endeavor,” Blakeney challenged, “to attempt the eliciting of favorable testimony, adverse to his captors, from a man with a gun in his back.”⁵² Blakeney’s Japanese co-counsel, Miyata Mitsuo, issued a similar challenge. “The evidence is a mass of affidavits of absent witnesses, some of them dead by their own hands or by the firing squad,” Miyata began. “Only two [witnesses] were produced (with devastating results) for cross-examination.” The entire prosecution phase on Russia relied on “conclusions, rumor, hints, and hearsay . . . tendencious studies by Red Army General Staff deputy chiefs of department, prepared for use in this trial; and of charges of aggression leading up to a war in which Japan was attacked.”⁵³ For Japanese and American IDS members alike, Cold War fears formed a deepening political reality, as well as an increasingly potent legal tool which helped them build a compelling and enduring narrative of political justice in Tokyo.

⁴⁹ *Transcripts*, 22402.

⁵⁰ *Transcripts*, 23788-23789.

⁵¹ *Transcripts*, 23789-23790.

⁵² *Transcripts*, 23791.

⁵³ Miyata Mitsuo and Ben Bruce Blakeney, “Motion to Dismiss of Umezu Yoshijirō” (20 January 1947), Conde Papers, Box 30, Folder 12.

Prosecution and judicial responses to the Defence's Cold War-influenced arguments illustrate the transcendent nature of international work. In court and behind the scenes, acceptance of the IMTFE project forced participants into somewhat artificial Cold War camps. Legal necessity gave defence attorneys free license to embrace, even exaggerate, personal allegiances in the developing conflict. Internal pressures and trial expediency forced prosecutors and judges into more complex and compromised Cold War postures. At least ostensibly, their internationalist mission overtook expected political considerations and personal convictions. Predictably, Soviet prosecutors took hard lines against defence attacks which tied legal objections to culturally embedded questions of honour. Major-General A. N. Vasiliev, for instance, responded forcefully to Blakeney and Miyata's forays. "I categorically protest against such insolent attacks on the Soviet Union," the Russian began. "It is not the first time that the defence insulted the country that I have the honor to represent here . . . [but] this is carrying things too far." Vasiliev continued, "If Mr. Blakeney wants to win spurs on the Anti-Soviet arena, that is his personal matter, but our country has deserved the right not to be insulted in this Tribunal."⁵⁴ IMTFE loyalties induced non-Soviet members to take politically unexpected stands. British prosecutor Arthur Comyns Carr found himself in the unlikely position of Soviet defender, quick to pre-empt any attempt to infiltrate the proceedings with Cold War issues. "I really must protest against this kind of harangue," the British Prosecutor responded to Owen Cunningham's

⁵⁴ The bench agreed with Vasiliev, prompting a tepid apology from Blakeney, "If the facts are unpalatable to counsel, I am sorry, but I am trying to state them as objectively as possible." *Transcripts*, 23791-23793. The non-repatriation of Soviet-held Japanese POWs remained a touchy issue in the Occupation. In 1949, US, British, and Australian governments voiced concerns about the safety of Japanese prisoners in Russian hands, and the newly formed UN General Assembly demanded a private Red Cross investigation. These Cold War-tainted controversies caused a flurry of media activity that lasted into the beginning of 1950. "Assembly Committee Discusses Russian POWs, Red Cross Inquiry Recommended," *The Times*, 13 December 1950, 5, "Japanese Held by Soviet: Russians Refuse to Discuss Issue: American Inquiries Resented," *The Press*, 5 January 1950, 5, "Japanese War Prisoners: Demonstration in Tokyo: Delegation to Soviet Embassy," *The Press*, 24 December 1949, 7, "Anti-Soviet Demonstration in Tokyo: Concern About Fate of Jap War Prisoners," *Times of India*, 30 June 1949, 1, "10,000 Japanese Accused by Soviet," *New York Times*, 4 December 1949, 3, "Tokyo War Chiefs Reported in Russia: Kwantung Army General Staff Said to Be Held in Siberia, Along with Puppet Heads," *New York Times*, 24 November 1949, 19. See also: Sedgwick, "Apathetic and Insignificant?"

June 1947 sorties.⁵⁵ Comyns Carr objected strongly to Cunningham's "repeated attempt to introduce present-day political controversies into this discussion."⁵⁶ The benefit of hindsight allowed future scholars to paint such unexpected Cold War interactions as disingenuous political choices emblematic of the court's clumsy and blatant victors' justice, rather than genuine attempts to build and maintain consensus behind the scenes and protect the IMTFE's mission.

"Present day political controversies" created a confusing backdrop for prosecutors. Under the defence's anti-communist assault, the dominant prosecution narrative in Tokyo became both a tale of Japanese aggression and a tacit defence of Soviet expansion, which posed an increasingly troubling piece of legal theatrics for Western participants with mounting concerns about "losing" China, Korean, and Eastern Europe. Publically steadfast, IPS members maintained private doubts.⁵⁷ In October 1946, Walter McKenzie expressed concerns about the Cold War ramifications of potential military cutbacks in the US. "The proposed reductions can easily cost the United States and the world all the benefits of our recent history," he wrote. "Close enough contacts" with Russians in Tokyo convinced McKenzie "that unless the United States can present to the world at large a picture of an adequate, well organized fighting machine,

⁵⁵ *Transcripts*, 23759-23760.

⁵⁶ *Transcripts*, 23779.

⁵⁷ Defending Soviets upset R. H. Quilliam for political and probative reasons. "The Russians at the time undertook to prove these counts [on Japan's aggression against the USSR] but when it came to the point their proof was not, according to our ideas, altogether convincing. The Defense has seized on this part of the case as something which may enable them to divert attention from more important matters. After all the Russians are somewhat vulnerable when they charge other nations with waging aggressive war. The memory of Poland, Finland, and other Baltic states is still too fresh," the New Zealander wrote. "Furthermore, the Defense have been able to get hold of various resolution adopted at Communist conventions in Moscow, and other material, in which the Communist idea of forcing Communism on other countries is demonstrated and the methods to be employed to bring this about are not dissimilar to the tactics employed by the Axis countries. . . . I suppose there is not much doubt but that Japan was the real offender in the Mongolia border incidents, but that has not been shown as clearly in this case as one would wish." R. H. Quilliam to A. D. McIntosh (3 June 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

we are likely to have serious trouble.”⁵⁸ In other letters, McKenzie railed against organised labour in the US “destroying the American way of life” and wondered if union strikes were “part of a master scheme engineered by the communists.”⁵⁹ Even Denzel Carr, a master linguist, fluent in Russian, and of a distinctly cosmopolitan outlook, projected Cold War antipathy onto Justice Zaryanov. “The Russian judge, who was sitting there, was anything but fair in his outlook on life,” Carr recalled. “Everything was tainted and especially it was almost to snicker at when he talked about the aggression in one place or another. . . . We didn’t think much of him.”⁶⁰ As this dissertation proves elsewhere, Carr may have been unfair in his assessment of Zaryanov’s personal commitment to IMTFE ideals and processes. Carr’s frustration with what the Soviet judge *represented*, however, is harder to argue.⁶¹ Apologising for, or at least turning a blind eye to, Soviet transgressions hurt, but at least for some participants, the stakes of justice made sacrificing personal opinions worth it. Personal idealism forced realist compromises.

⁵⁸ Walter McKenzie to Frank A. Picard (28 October 1946), McKenzie Papers, Box I, Folder: Correspondence – September-October 1946. McKenzie’s fear of the USSR superseded his animosity toward Japan and Japanese crimes. Like others involved in the Occupation, McKenzie came to see Japan as a necessary future ally. “I cannot help but feel that in view of our present unsettled and disturbing relations with Russia that America must build up as friendly a relationship as possible with Japan and the Japanese people,” he wrote in early 1948. “The things that you good people over there are doing will be a bigger factor in developing this feeling than anything the diplomatic corps can do.” Walter McKenzie to Eleanor Barc (10 February 1948), McKenzie Papers, Box I, Folder: Correspondence – 1948. Similarly, in January 1951, McKenzie wrote to Japanese friends, “I have wondered and worried a good deal about Japan and the situation there caused by the trouble in Korea. I am afraid we are going to have serious trouble with Russia, and I know that will mean that Japan will have to get back into a war, but I hope this time it will be as an ally of the United States instead of an enemy.” Walter McKenzie to Mary and Mrs. Matsuzawa (11 January 1951), McKenzie Papers, Box I, Folder: Correspondence - 1949-1958.

⁵⁹ Walter McKenzie to Willis Mahoney (16 June 1947), McKenzie Papers, Box I, Folder: Correspondence - May-June 1947. McKenzie’s anti-communism predated Tokyo. At the end of World War I, McKenzie served in the so-called “Polar Bear Expedition,” a US intervention into Northern Russia which began ostensibly to open an Eastern Front against Germany, but ended up seeing action against Bolshevik revolutionaries. These experiences gave the Michigan prosecutor a deep-seated suspicion of international communism; specifically the Soviet Union.

⁶⁰ Carr Interview. Other IMTFE participants shared McKenzie, Carr, and Quilliam’s distrust of Russians. Senior prosecutor Frank Tavenner’s personal feelings about Soviet participation at the trial are hard to determine. However, his later position as the Chief Counsel for the US House Committee on Un-American Activities (HUAC), which persecuted alleged US ‘communists’ in the 1950s, suggests anti-communist leaning which he had to consciously limit and restrain for the sake of IMTFE and IPS cohesion.

⁶¹ Although more collaborative than expected, Zaryanov was hardly immune from national political biases. “It was convincingly demonstrated by Associate Prosecutor for the U.S.S.R. Minister Golunsky who compared the position of the Soviet people who were held in suspense throughout all this period of time in expectation of a Japanese attack with that of a person held by a gangster at the point of a gun and expecting any moment, day and night, that this gun will fire,” Zaryanov extolled. “The Soviet people were denied the opportunity of safely devoting themselves to peaceful work and had to be prepared, at all times, to put aside the plough and the hammer in order to take up a rifle.” I. M. Zaryanov to W. F. Webb (31 August 1948), Bernard Papers, F° Δ rés 874-10-49-88.

The Bench followed the Cold War patterns set by defence and prosecution teams. Apart from President Webb, the community of dissent generally shared defence criticism of Soviet involvement. On the other hand, majority judges unequivocally endorsed the prosecution's treatment of Cold War issues. Given the overwhelming Anglo-American preponderance among the judges, the majority proved remarkably forgiving of Soviet policies. "Do not take advantage of the great tolerance displayed by this Allied Court to indulge in what might be termed enemy propaganda," President Webb warned Aristides Lazarus.⁶² "You appear to take a sheer delight in insulting Allied countries . . . I will not stand for gratuitous insults to my country or any other country represented in this Court."⁶³ Webb's response reflects the subconscious personal and nationalist concerns that permeated the IMTFE's international space; yet, his interjection also illustrates the court's sensitivity to any deliberate contamination of the Ichigaya courtroom by external political forces. While personnel could not mitigate all outside influences, most considered the appearance of overt political justice anathematic. To those committed to the project's broader internationalism, IMTFE ideals and practices seemed sacrosanct, immune from internal critique, and immured from outside considerations.

At first, the Cold War in Tokyo extended beyond the merely performative and caused serious political problems. As mentioned, in order to gain diplomatic advantage and score political points, Russian representatives arrived late in Tokyo. The British Foreign Office learned of the Soviet appointment of Justice Zaryanov and prosecutor Golunsky as early as the end of January 1946,⁶⁴ but the Russian contingent did not arrive in Tokyo until April 1946.⁶⁵ Soviet stalling irked the other countries involved, but *not* having a Soviet contingent did not

⁶² *Transcripts*, 20480.

⁶³ *Transcripts*, 20481-20482.

⁶⁴ FO to British Division, IPS (31 January 1946), IWM Papers, FO 648, Box 152, Folder 3.

⁶⁵ British Division, IPS to JBJB, London (20 April 1946), IWM Papers, FO 648, Box 152, Folder 3.

seem a credible or realistic option.⁶⁶ In mid March, Associate Counsel met to discuss the “continued absence” of the USSR. The team felt at a loss. According to British Prosecutor Comyns Carr, internal opinion remained divided. On the one hand, Soviet involvement could “help dispel the growing world atmosphere of friction.” On the other hand, the IPS could not ignore this growing tension, and prosecutors already in Tokyo had limited patience for the continual appeasement of Soviet officials. To entice Soviet cooperation, Keenan announced that he had agreed to the Russian demand that each prosecutor could interrogate “any person, whether Defendant, suspect or witness.” Notably, this concession included the possible Soviet questioning of Japanese Emperor Hirohito. However, the meeting also resulted in a firm ultimatum to the USSR asserting that the other nations would “proceed in their absence” if the Russian contingent did not officially announce its intentions by March 19 and arrive in a “reasonable time” after that.⁶⁷

The Soviet group agreed to participate, but once in Tokyo, they continued to use disruptive tactics to achieve political objectives. Only days after the Russians arrived, Comyns Carr wrote to the British War Crimes Executive in London, “History repeats itself in that presentation of Indictment delayed due to its necessary examination by Russians who arrived night of 13th April.”⁶⁸ Comyns Carr also reported that two Japanese, Shigemitsu Mamoru and Umezu Yoshijirō, had been added as defendants at the “request” of Soviet representatives. A conciliatory man, Comyns Carr found the Russians “most cooperative” and appreciated that they

⁶⁶ Desired or not, Soviet participation at the IMTFE became a geopolitical necessity. As Robert Donihi later explained, “Keenan was really very much against inviting the Soviet Union. There was no way of avoiding it. They, after all, were one of the Allies.” Donihi Interview, Part I.

⁶⁷ A. S. Comyns Carr to FO, Washington (15 March 1946), IWM Papers, FO 648, Box 152, Folder 3. According to R. H. Quilliam, Keenan told the Soviets, “unless some definite information as to the date of the Prosecutor’s arrival is received within a few days, say by the 18th instance, Russia would be notified that if their representative does not come within a fixed time the Prosecutors who are here would proceed without him, that is, settle the list of accused and of the indictment (sic) and, if necessary, commence the trial.” R. H. Quilliam to Foss Shanahan (18 March 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

⁶⁸ British Division, IPS to JBJB, London (20 April 1946), IWM Papers, FO 648, Box 152, Folder 3.

had “not raised any objection in principle.”⁶⁹ Others felt less appreciative of Soviet “cooperativeness,” but as one objector noted, “the majority thought it advisable to make this concession to the Russian.”⁷⁰ Though a necessarily and unavoidable part of international justice and organisation in action, such compromises caused internal frustration. Russian intransigence infuriated R. H. Quilliam, especially the inclusion of new defendants and alterations to the Indictment. Where others saw compromise, Quilliam saw submission. “[Golunsky’s] attitude over this matter . . . was that it was necessary in an International proceeding for the representatives ‘to compromise,’” complained Quilliam. “We found, however, that his idea of compromising was that persons opposed to his view should abandon their opinions.”⁷¹ Quilliam admitted privately, “It was difficult to be patient in face of unreasonableness of late arrivals in not accepting what has been done.”⁷² One to hold a grudge, Quilliam later lamented the impact Soviet obstinacy had on the prosecution argument. “They claim to be the only true democrats and the only peace loving people,” he told a colleague in Wellington in June 1947. “They therefore strongly resent any suggestion which appears, however remotely, to reflect on their conduct as peace-loving democrats.”⁷³ Quilliam’s remarks reflect an astute grasp of the world outside the IMTFE bubble. Ironically, however, such sensitivity to external forces proved more bane than boon in Tokyo. Quilliam’s Cold War says much about the contradictory experience and essence of international justice. Both sides of the emerging conflict ultimately had to decide to share in the IMTFE, or not. This choice helped make the court run but, in so doing, hurt its reputation among contemporary observers and later scholars.

⁶⁹ A. S. Comyns Carr to FO, Washington (15 March 1946), IWM Papers, FO 648, Box 152, Folder 3.

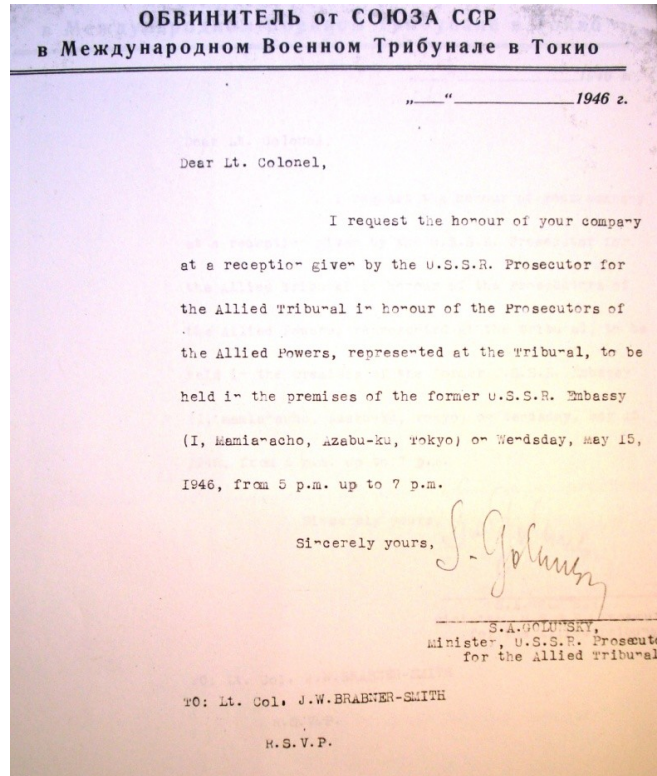
⁷⁰ R. H. Quilliam resented Soviet tactics but eventually had to accept their presence for the good of the IPS case. “Colonel-General Golunsky, with a staff of approximately forty, reached Tokyo,” Quilliam reported. “When shown our list he had no objection to make to any person included in it, but said that he wished to add four or five persons . . . eventually by a majority vote, the names of Shigemitsu (Mamoru), and Umezū (Yoshijirō) were added to the list. . . . I think that every extra defendant will make the Trials more unwieldy and will add to the length.” R. H. Quilliam to A. D. McIntosh (24 April 1946), NZ Archives, EA2 1946-31B 106-3-22 Part 1.

⁷¹ Ibid.

⁷² Entry: 18 April 1946, Quilliam Diary.

⁷³ R. H. Quilliam to A. D. McIntosh (3 June 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

Illustration 13: Invitation to John Brabner-Smith from the Soviet Embassy



A personal invitation from Russian Prosecutor S. Golunsky to prosecutor John Brabner-Smith for a reception at the Soviet Embassy. © Daniela Brabner-Smith, by permission.

After the initial feeling out process and posturing, Cold War rivals settled into collaborative work. Once committed to a joint project, internal dynamics took over. As the world outside became increasingly tense and cynical, the world inside the IMTFE followed its own path. This cooperation among adversaries kept the court functioning, but also made it appear ever more cynical and out of touch with a ‘reality’ and justice to external observers. The significance of the exchanges discussed above lies not in the obvious initial tension between Soviet and non-Soviet personnel, especially between defence attorneys and Russian prosecutors, but rather the way that the “Allied” bench steadfastly resisted public displays of division along Cold War lines or otherwise. In the face of external political threats, the majority remained publicly, even stubbornly, unified in its international endeavour. The IMTFE became vulnerable to international disagreements, and could not operate outside world politics. However, at its core, the tribunal formed a collective experience shaped by on-the-ground internal dynamics as much as by grander external forces. As the ensuing paragraphs illustrate, behind the scenes the IMTFE

became as much the antipode of the Cold War as its product. As an international court and multilateral institution, the IMTFE ‘within’ developed into a deeply social and personal encounter. In an interview with defence counsel, Shigemitsu Mamoru, the former Japanese ambassador to the USSR, declared, “I don’t like the Russians but I never met a Russian I didn’t like.”⁷⁴ This attitude captures an important dimension of the Cold War in Tokyo and the very essence of being international. Although external influences appeared in public circles, a less clearly delineated line between Cold War friends and foes emerged behind the scenes. Though necessary to make such institutions work, the unavoidable internal political and global compromises irreparably damage credibility and reputation.

The IMTFE participant experience unfolded as an ex-pat lifestyle typified by leisure and play as well as work. Typical of all international institutional and social spaces, overlapping circles in Tokyo led to personal amity and deep friendships among participants.⁷⁵ Private affinity between supposed adversaries helped the IMTFE transcend the Cold War. As Shigemitsu suggested, it became hard *not* to like Soviet personalities. They generally proved to be popular social figures from the highest-ranking judges and prosecutors down to administrators and interpreters. As a judge’s associate, New Zealander Harold Evans had access to different levels of the social hierarchy. He enjoyed the company of Russians of all stripes. He described Justice Zaryanov’s translator as “a most charming v[ery] accomplished woman,” who “accompanies the Judge on social occasions,”⁷⁶ and at least once enjoyed evening with compatriot Quentin Quentin-Baxter and two “very pleasant and agreeable fellows” from the Soviet group. “These

⁷⁴ Furness Interview.

⁷⁵ Several scholars note the growth of social communities through international scientific and cultural exchange programs. Most argue that social interaction among such communities engendered warm feelings and positive political outcomes. See, for instance, Iriye, *Cultural Internationalism and World Order*, Manzione, “‘Amusing and Amazing and Practical and Military’: The Legacy of Scientific Internationalism in American Foreign Policy, 1945-1963,” 21-56, Selcer, “The View from Everywhere: Disciplining Diversity in Post-World War II International Social Science,” 309-29. However, Frank Costigliola’s recent work reveals a darker, disruptive side to international exchange by tracing poisonous Cold War idioms to the experiences of British POWs behind Soviet lines during World War II. Costigliola, “‘Like Animals or Worse,’” 749-80.

⁷⁶ Harold Evans to Parents (24 September 1946), Evans Papers, Box 16, Folder I.

two seemed in every way like ourselves.” Indeed, “I would say we are temperamentally more akin to such Russians than to most Americans I’ve met.”⁷⁷ Evans’ boss, Justice Northcroft, shared a similar closeness with his Soviet counterpart. In January 1947, for example, one of the New Zealand administrators, Margaret Anderson, married an Australian diplomat named John Forsyth. The small, intimate reception held by Northcroft at the Imperial Hotel to celebrate the nuptials had a guest list of only eleven “close friends.” Northcroft included Justice Zaryanov and his interpreter in this select group.⁷⁸ After the tribunal, Northcroft told his prime minister, “General Zaryanov was one of the majority of seven. Furthermore, I personally found him to be a most reasonable and co-operative colleague.”⁷⁹

Personal affinity bridged national and divisional gaps. Chief Prosecutor Keenan warmed to several Soviet authorities. “I see quite a bit of the Russians,” he wrote. In particular, Keenan felt “very fond of the Russian judge.”⁸⁰ Elaine Fischel did not have much opportunity to engage with Soviet counterparts and for her they remained largely an exciting, unthreatening enigma. “One of the Russians smiled at me in the dining room,” she reported excitedly to her mother in April 1946. “I’d sure like to meet up with some Russians . . . they’re all over the place now.”⁸¹ Fischel felt especially keen to socialise with the Soviets. After befriending Captain Richard Harris, the IDS Administration Supervisor, Fischel gushed, “I’d love to go to some Russian

⁷⁷ Harold Evans to Parents (14 February 1948), Evans Papers, Box 16, Folder 2.

⁷⁸ Harold Evans to Parents (5 January 1947), Evans Papers, Box 16, Folder 1.

⁷⁹ E. H. Northcroft, “Letter to the Right Honourable the Prime Minister RE the Tokyo Trials 1946-1948,” Northcroft Papers, Box 335. Hereafter “Northcroft, Letter to PM.” Northcroft found Zaryanov a “vigorous-minded person,” “pleasant fellow,” and “attractive colleague,” but found needing an interpreter to converse “difficult and especially complicated at judicial conferences.” E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁸⁰ Joseph Keenan to Charlotte Keenan, (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe - Krould. Sequence 746-755). Keenan’s favourite Russian – his “old friend” – General Kuzma Derevyanko – Soviet representative on the FEC – was recalled to Moscow. Northcroft also knew Derevyanko “quite well. He lived at the Imperial Hotel until recently, and since he had moved I have dined with him at the house he had established.” Although the General could be “narrow and dogmatic in his views,” Northcroft noted “he is very easy to get on with and very pleasant socially.” E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁸¹ Elaine Fischel to Mother (26 April 1946), Fischel Papers.

parties and he thinks that can be arranged.”⁸² As in other sites of Cold War interaction, Soviet parties became legendary.⁸³ Socialising, particularly drinking together, eroded Cold War animosity. “They were, all of them, just roaring drunk,” IMTFE administrator Morris Gamble remembered of a particularly epic farewell party with Soviet counterparts. “Just kids, they were all kids. They couldn’t speak English anyhow, and they were officers, they weren’t any older than I was.”⁸⁴ Alcohol smoothed internal trial divisions. “The judges used to give a dinner sometimes,” defence attorney George Furness later recalled. “The Russian general [‘a very pleasant fellow’] used to take a small glass of vodka and give me a bigger glass of vodka and he said, ‘This is the way you drink vodka.’ And I had a very strong head then and I could keep up with him.”⁸⁵ Furness’ Soviet legal opponents also impressed him. In fact, Furness liked the Russian IPS “very much,” especially Associate Prosecutor Golunsky, whom he considered, “the best lawyer in the room,” and who used to give Furness drives to court.⁸⁶ Given prevailing global tensions, Americans in Tokyo could have felt only acrimony towards Soviet participants. Being international in Tokyo, however, made political rivalry both difficult and undesirable despite external forces or how associating together looked to outsiders.

Professional proximity also bred mutual admiration that helped transcend Cold War divisions. Representatives from the USSR and the West worked closely together within the prosecution and the bench. They shared the same tasks, felt the same pressures, and confronted the same obstacles. Although separated on the global scene by deep political and ideological

⁸² Elaine Fischel to Mother (10 April 1946), Fischel Papers.

⁸³ For colourful depictions of social life abroad during the Cold War see: Costigliola, “Unceasing Pressure for Penetration,” 1309-39, Daniel Yergin, *Shattered Peace: The Origins of the Cold War and the National Security State* (Boston: Houghton Mifflin, 1977).

⁸⁴ Gamble Interview.

⁸⁵ Furness Interview.

⁸⁶ Friendliness developed in spite of external pressures. Furness described the reaction of Soviet personnel when offered drives home. “They’d look around like this, up and down the hill, and then get in if they didn’t see anybody,” Furness recalled. “They were nice and then I’d get down near their billet about two blocks away and they’d say, ‘Captain Furness, would you mind leaving us here because you know how it is.’ They’d get out. They didn’t like to be seen.” Furness Interview. The Soviet culture of fear infiltrated but not governed the international IMTFE community. Denzel Carr once caught a Russian colleague “going around through the top drawer” of his desk. When the individual realised that he “was perhaps doing something he shouldn’t be doing,” Carr remembered, “he looked up sheepishly and said, ‘Well, you know, we sort of get used to this sort of thing.’” Carr Interview.

divisions, a common wartime and postwar international objective and experience bound IMTFE participants. They fought a vicious war together and, as allies still, they worked to build a better future, create new law, refine internationalism, and hold Japanese leaders publicly accountable for wartime transgressions. Defence attorneys felt bound to attack all prosecution arguments and for factual reasons, Soviet contentions tended to be among the most vulnerable prosecution positions. As a result, defence attorneys mercilessly challenged Russian charges. Though a logical defence strategy, certain IDS members regretted having to expose Soviet faults. Since many American attorneys had served during the war, some felt a lingering sense of joint enterprise with Soviet personnel. For example, Aristides Lazarus appeared virulently anti-communist in court, but away from Ichigaya enjoyed “most cordial relations,” with Russian members, especially A. N. Vasiliev. The Cold War only stretched so far. “I never forget that we fought on the same side and that it may be due to the fact that some Russian officers and soldiers fought as hard as they did that I, today, am alive to appear in this courtroom,” Lazarus averred. Judicial responsibility forced participant hands. “As attorneys appointed by the United States at the request of this Tribunal to help defend these people, we have a high duty,” Lazarus continued. “We must present all the evidence available,” and that included attacking Soviet legitimacy.⁸⁷ In projecting external influences onto IMTFE dealings, observers immersed in worsening global condition and scholars versed in monolithic Cold War history forgot the IMTFE’s prehistory in a broad-based *allied* war effort. The Cold War became a dominant political exigency, but in Tokyo it proved only one of many such influences all integrated and shaped by ground-level contingencies.

Common purpose helped the prosecution rise above developing Cold War frictions. Few questioned Soviet commitment to justice or its determination to win guilty verdicts against specific accused. On this level, the Soviet contingent applied itself with vigour, a fact that drew

⁸⁷ *Transcripts*, 20483.

admiration and acceptance from colleagues. Keenan, for one, wished that representatives from other countries possessed the same dedication. While complaining to his wife in November 1947 about the IPS' diminishing size, Keenan expressed appreciation for the continued strength of the Soviet contingent. Where others felt suspicious of the size of the Russian division, especially in retrospect,⁸⁸ Keenan felt grateful. "The Russians still keep a complete staff here in this work," he explained, "evidence [of] real interest."⁸⁹ Being international and sharing objectives forced unlikely collaborations. R. H. Quilliam, for instance, remained suspicious of Russian methods and motives, but accepted the inevitable compromises of international justice. In July 1946, Quilliam described an emerging controversy over Soviet-held defence witnesses to his government in Wellington. "This matter has interested us all very much," reported the New Zealander. "The Russian Prosecutor demanded that the Application [for bringing witnesses to court] should be strongly opposed but indicated at the same time that he thought it undesirable that he should take any part in the opposition," he continued. "The rest of us considered that it would be improper to oppose the Application," Quilliam noted. "If the Defence claimed that they required the witness, we thought that in the interests of a fair trial it is essential he should be produced." Despite personal misgivings, Quilliam accepted that at times working together in an international space required concession. "We are awaiting with much interest to see whether the Russians will produce [the witnesses]," he concluded.⁹⁰ For some, association with Soviet personnel came grudgingly, but the practise of internationalism on the ground facilitated functional, and often genuine, cooperation between Cold War camps in Tokyo.

⁸⁸ Prosecutor Robert Donihi remembered a "Heinz variety" of at least 57 Soviet IMTFE representatives. "They had more than all the rest of us put together." Donihi Interview Part I-II. In his unpublished manuscript "The Trial of Tojo," Owen Cunningham alleged the "excessive participation" by the USSR not only suggested illicit activities, it also undermined the trial's ideological consistency. The "bevy of Russian uniformed prosecutors created a paradox which confused the Japanese leaders on trial," Cunningham wrote. "They could not reconcile the democratic nations joined with the Soviet system." Cunningham, "The Trial of Tojo," Cunningham Papers, Box 4, Folder 45. Morris Gamble, an administrative officer, witnessed Soviet masses firsthand when delivering a file to their embassy. "I learned later that the Russians were authorised 100 people at their Embassy," Gamble explains, "They had 500 at that damn place . . . political operatives working with the Japanese unions." Gamble Interview.

⁸⁹ Joseph Keenan to Charlotte Keenan, (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe - Krould. Sequence 746-755).

⁹⁰ R. H. Quilliam to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

Professional interaction among judges also diminished Cold War tension. The previous chapter revealed that Soviet Justice Zaryanov became an integral and active part of the judicial majority in Tokyo. An obliging colleague with fellow majority members, he emerged as a staunch defender of the court's principles and practices when other judges wavered or dissented outright. His dealings with other judges exemplify a wider experience of unlikely and close collaboration among global rivals within unique international spaces. Whom Zaryanov clashed with speaks volumes about how international justice on the ground in Tokyo deviated from Cold War norms. Rivalry did not become a question of US judge *versus* Soviet judge, nor even between America's closest allies and Russia. The most fundamental divide emerged between a relatively united majority group of judges from Britain, Canada, China, New Zealand, the Philippines, the US, *and* the USSR, and a group of conscientious objectors from Australia, India, France, and the Netherlands. Internal discord on the IMTFE bench actually grew inversely to the global trend. As the tribunal wore on and the international climate grew more toxic, the need to cooperate in Tokyo in order to produce a unified final judgment became more pressing. Thus, the most obvious political rivals on the bench worked closer together behind the scenes as their countries grew further apart on the world stage. On the Bench, at least, Cold War issues played a secondary role to social dynamics and other drivers.

The greatest anti-Soviet voices on the bench came from France, India, and the Netherlands. Although the countries these judges represented had anti-communist subcultures of their own, Röling, Pal, and Bernard typically raised personal, legal, and interpretational objections rather than political ones. They objected because they were objectors. They protested Russian charges to score points as a community of dissent in Tokyo, not to send political messages to global anti-communism. Internal bench divisions in Tokyo stemmed mostly from opinions not politics.⁹¹ To bolster their dissents, for example, both Bernard and Pal presented

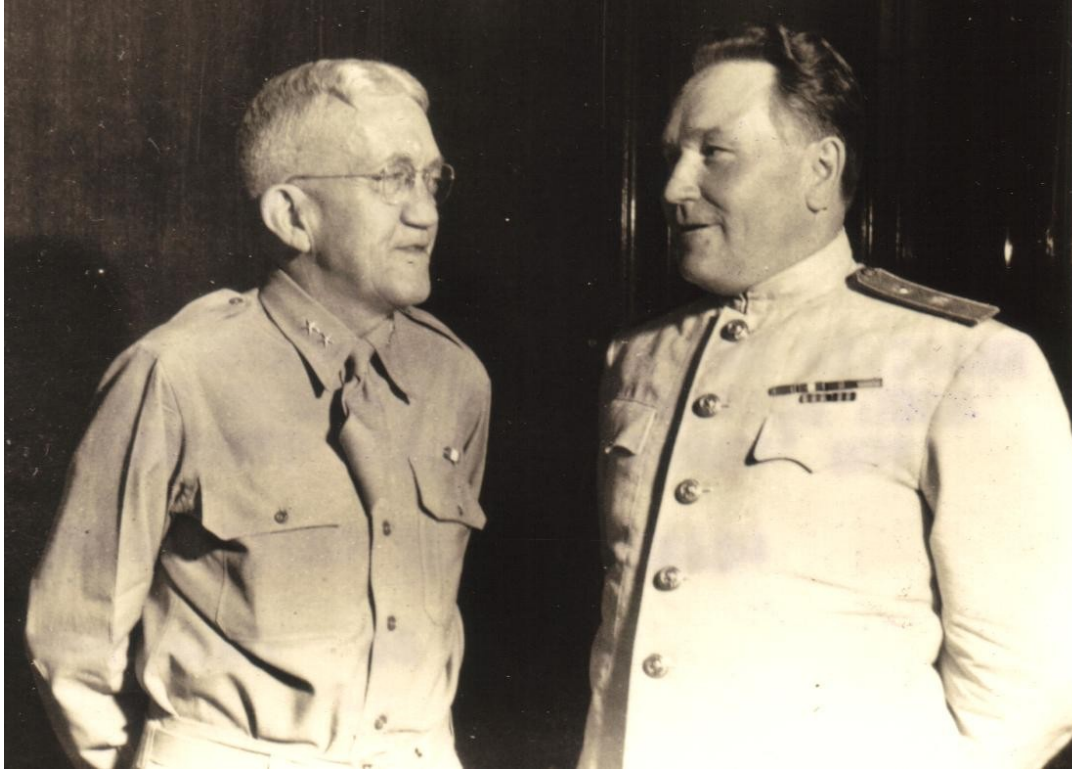
⁹¹ Bernard Dissent, 11, Pal Dissent, 241-46.

anti-communism as a legitimate excuse for Japanese imperialism in China, especially Northeast Asia. Röling emerged as a particularly ardent opponent of Soviet involvement and a target for Justice Zaryanov's policing of the IMTFE message and Soviet policies. For instance, Röling mocked the idea of Japanese 'aggression' on Soviet forces at Changkufeng Hill in Manchuria. "[Evidence] clearly shows that it was not Japan's intention to fight an aggressive war . . . Soviet troops made the first move. Japan asked withdrawal to the position previously held, in order to decide the issue afterwards, and only when this was refused did the fighting start."⁹² Typical of the IMTFE's intimate encounter, Zaryanov's response blended personal and political attack. "Justice Röling either did not bother to analyze (sic) the ample evidence pertaining to this issue or deliberately ignored it," Zaryanov responded. "At any rate Justice Röling reasons in such a way, as if there were no such evidence." Röling used specious reasoning to put forward an "absolutely arbitrary" and "vicious argument" that "grossly distorts the actual state of affairs" and "goes even further than the Defense." More damningly, Zaryanov alleged, "What Justice Röling proposes to regard as evidence as a matter of common knowledge is actually not evidence but wide-spread slanderous fascists propaganda the repetition of which at this time would be trite and cynical."⁹³ Confrontation between the Dutch and Russian judges carried the hallmarks of Cold War rivalry. When these politics did infiltrate Tokyo, however, it happened because playing off the emerging conflict supported internal tribunal objectives or existing interpersonal discord, not because of irrepressible external pressures. Röling and other objectors used Soviet involvement to reinforce broader critiques of trial legitimacy. Majority members adjusted or advanced personal and national politics to suit Tokyo memes.

⁹² B. V. A. Röling, "Judgment Part B, Chapter III: 'Japanese Aggression against the USSR'" (28 July 1948), in *Bernard and Röling on Judgment*, Northcroft Papers, Box 330, 49.

⁹³ I. M. Zaryanov to W. F. Webb (21 August 1948), Röling Papers, Box 23. At another time, Röling complained to President Webb about the fractious nature of colleagues. "One of the Members of the Tribunal [likely Zaryanov] wrote an answer to my memorandum which he destroyed without sending it because it was, as he told me, too rude." Röling continued, "He was so kind as to tell me one striking phrase – 'only a student who lost his head in a lot of books can come to this nonsense which, if accepted by the Tribunal, would make us the laughing stock of the world.'" B. V. A. Röling to W. F. Webb (20 March 1947), Röling Papers, Box 11.

Illustration 14: Justices Myron C. Cramer and I. M. Zaryanov



Unlikely associates. US judge Major General Cramer and Soviet judge General I. M. Zaryanov share a moment at the IMTFE. © US Army Signal Corps, WPA-46-67180. Access courtesy of private papers of Morris Gamble, by permission.

The formalised decorum enculturated by internationalism in action also undercut Cold War rivalry in Tokyo, especially when cordiality fostered genuine personal and professional admiration. A potentially superficial marker of amity, politeness can mask all kinds of acrimony, misdirection, and vice. However, when the superficial niceties of international and legal protocol lead to real results of unexpected accord, intentionality loses importance. Contrived cooperation represents cooperation all the same. In Tokyo, workplace association developed into something more substantial among participants living abroad, working in close proximity, and sharing social circles within an international space removed to a degree from outside influences. Take the politically volatile question of Soviet-held witnesses testifying in Tokyo. Allegations abounded about the unreliability of their testimony and the likelihood of Soviet brainwashing of the individuals in question. Occupation forces felt suspicious about allowing Soviet-influenced Japanese back into the country, but also hesitant to re-release such prisoners back to Russian

custody after testimony.⁹⁴ Behind the scenes, however, judicial professionalism curtailed the external political complications of prisoner transfer. In October 1947, President Webb received an application in chambers to have Soviet-held witness Rekuzo Takebe returned to Russia “at the earliest moment” after testifying. Respecting even-handed legal protocol, Webb agreed to this request and immediately issued the certificate, in spite of the potential public controversy. In so doing, Webb unwittingly countermanded SCAP policy. When informed of this misstep, Webb wrote MacArthur an uncharacteristically contrite *mea culpa*. “This afternoon I was told by the Executive Officer, Lt. Colonel Hanley, that the return of such Japanese prisoners of war to Russia is contrary to SCAP policy. I did not know.”⁹⁵ Although apologetic, Webb refused to renege his promise made as tribunal president, SCAP policy or not. MacArthur, not a man to give in lightly or a fan of the Soviet Union, nevertheless decided that he likewise could not challenge Webb’s promise. “With cordial regards,” MacArthur wrote Webb, “It is our intention to comply with this agreement.”⁹⁶ MacArthur’s concession serves as but one example of social and professional norms overriding broader Cold War tension and policy at the IMTFE. SCAP willingness to comply with IMTFE needs also reflects the court’s persistent political importance even in the face of competing global movements and other external forces.

⁹⁴ “Russian Attempts to ‘Communist’ Japan: Returning Prisoners of War Indoctrinated,” *Times of India*, 30 June 1949, 1. Pu Yi became the most controversial Soviet prisoner to attend the court. “Tokyo War Chiefs Reported in Russia,” 19, “Pu Yi Is ‘Missing; Wanted at Trial: Prosecutors Can’t Find Former ‘Emperor’ of Manchukuo, Captured by Russians,” *New York Times*, 29 July 1946, 25, “Soviet Allows Pu Yi to Testify in Tokyo,” *New York Times*, 7 August 1946, 1, “Henry Pu-Yi,” *Vancouver Sun*, 8 August 1946, 1.

⁹⁵ W. F. Webb to Douglas MacArthur (28 October 1947), Webb Papers, AWM 92 - Series 4, Wallet 3.

⁹⁶ Douglas MacArthur to W. F. Webb (31 October 1947), Webb Papers, AWM 92 - Series 4, Wallet 3.

Illustration 15: Emperor Henri Pu Yi in Soviet Custody



The testimony of former Manchurian emperor Henri Pu Yi became one of the most sensational Cold War moments in Tokyo. An escort of white-uniformed Soviet officers accompanied him everywhere. His minders included Major Yazev (top left), Comrade Permyakoff (2nd from left – interpreter), and Colonel Kudryavtsev (3rd from left). ©Elaine Fischel, by permission.

Cold War tension only penetrated the surface of international justice in Tokyo. Although a powerful global movement, it represented only one of many involute personal, logistical, cultural, legal, and political factors negotiated by IMTFE participants. This section challenges narrow assumptions about the influence of international friction on Cold War era multilateral institutions. With the IMTFE as a model for related institutions, my findings suggest ways that dynamics within *all* international organisations may have the potential to override *any* external political movement. In Tokyo, personal, legal, intellectual, cultural, and other considerations created an internal community which cut across expected Cold War lines by reconfiguring groups and alliances. By recognising the IMTFE and other international organisations in this way, this section posits a more textured understanding of the on-the-ground experience of the Cold War and other global movements, as well as reframes the very essence of internationalist enterprises more generally. This section demonstrates that once initiated, international bodies

take on lives of their own, not impervious to outside forces, but certainly immured from them. Tokyo-style tribunals and similarly complex multilateral institutions become inherently uncontrollable, fluid, and thus reasonably independent. Unquestionably political in origin and significance, the IMTFE in operation evolved not as an exclusively political institution but also a legal and international one. Susceptible to the influence of global movements like the Cold War, the IMTFE never became wholly subject to them. However reluctant, begrudging, even heated, the administration of international justice in Tokyo transcended the Cold War. Despite its independence, however, contemporary observers and later scholars saw only examples of Cold War dealings which contributed to the court's image as a stilted political victors' trial.

Anti-, De -, Neo - : The Colonial Prefix and Place of the IMTFE

Like the global Cold War, the IMTFE's colonial context affected the tribunal differently from within and without. Although not intended as a broad condemnation of imperialism *per se* the prosecution's indictment bound Japanese imperial expansion with a criminal 'conspiracy' of 'aggressive' policies. The IMTFE thus became a decidedly *anti*-colonial endeavour. Yet, in so doing, the court created a colonial hypocrisy which criminalised Japanese imperialism while ignoring analogous Allied activities.⁹⁷ Moreover, the IMTFE also contributed to a larger Occupation project to rebuild and fundamentally transform Japanese state and society. The son of an American colonial governor in the Philippines, General Douglas MacArthur unapologetically used SCAP authority to overhaul Japan's political, social, educational, cultural,

⁹⁷ Indeed, the indictment has been interpreted as an attack on Japan's very 'civilisation.' For arguments regarding the trial of Japan's 'modernity,' 'globalization,' or 'civilisation,' see: Moore, "The Trial of Japanese Modernization", Hirofumi Utsumi, "Globalization and Violence: A Case Study of the Tokyo Tribunal," in *Annual Meeting of the American Sociological Association* (San Francisco, CA: 14 August 2004), Minear, "In Defense of Radha Binod Pal," 263-71, Michio Takeyama, "Questions on the Tokyo Trial," *Japan Echo* XI (1984), Michio Takeyama and Richard H. Minear (trans.), "'The Trial of Mr. Hyde' and Victors' Justice," *Japan Focus* Online Article ID 2192 (2006), <http://www.japanfocus.org/-Richard-Minear/2192>, Boister and Cryer, *The Tokyo IMT*, 285-91, Ushimura, *Beyond the 'Judgment of Civilization'*. Unfortunately, in condemning Allied hypocrisy, these works tend to minimise the darker side of Japan's imperial expansion. For example, Takeyama Michio writes, "Japan was not unusual – on the contrary, it was just trying to be 'one of the boys.' . . . Japan had to concentrate its feeble strength in readiness for total war. . . . Japan, a late-developing nation, overextended itself: but if it had not, it would have had to subordinate itself to another country, as the other countries of Asia had done." Takeyama, "Questions on the Tokyo Trial," 57.

and economic systems, institutions, and even identity. Although well intentioned, Allied authorities in Japan exercised almost limitless power and influence on shaping Japan's future.⁹⁸ By contributing to this remodelling of Japan, the IMTFE buttressed a fundamentally *neo*-colonial construct.⁹⁹ At the same time, the tribunal served as an important litmus test for international organisation in a *de*-colonial age. By the end of 1948, independent states or semi-autonomous mandates had replaced former Japanese, British, and US regimes in Taiwan, Korea, India, Pakistan, Jordan, and the Philippines. Meanwhile, bloody liberation wars raged in Dutch and French possessions in Indonesia and Indochina. With Indian, Filipino, and Burmese representatives working alongside American, British, French, and Dutch colleagues, the IMTFE represented one of the first sites of multilateral engagement between colonised and colonisers.

The ensuing section explores how the *anti*, *neo* and *de* colonial contexts of the IMTFE played out both in public arenas and in behind the scenes encounters. Other scholars use the tribunal's colonial contexts to sustain broader and ultimately reductive attacks on the IMTFE's legitimacy. With good reason, the tribunal's undeniable imperial hypocrisies feed into assumptions of victors' justice in Tokyo.¹⁰⁰ Even trial proponents note its double standards

⁹⁸ Although SCAP had near limitless power in Japan, its remodelling efforts were not a unilateral encounter. Like more conventional examples of colonialism, the Occupation became a negotiated process, influenced, and affected by Japanese actors and agents as well as SCAP authorities. John Dower's seminal work *Embracing Defeat* and Herbert Bix's impressive *Hirohito and the Making of Modern Japan* are the best works on this perspective. Bix, *Hirohito*, Dower, *Embracing Defeat*.

⁹⁹ Borgwardt draws parallels between international justice and imperialism in Nuremberg and calls the IMT experience "ersatz-colonialism." Borgwardt, *A New Deal for the World*, 242. Contemporary observer Rebecca West excoriated the event, "People in Germany pretended they were people in the jungle who were pretending they were in England." – Quoted from Borgwardt, *A New Deal for the World*, 202. As I discuss in other chapters, in Japan the "jungle" felt much closer, more other, and more threatening.

¹⁰⁰ Allison Danner condemns the "discordant note" struck by having major colonial powers judge Japan's imperialism. Danner, "Beyond the Geneva Conventions," 4. Meirion and Susie Harries called the court, "the last bastion of colonialism." Harries and Harries, *Sheathing the Sword*, 108. More cynically, Ashis Nandy suggests that "unofficial reasons" for the tribunal included "the eagerness of some of the Western powers to protect the fruits of aggression that were being reaped in the colonies in the southern hemisphere." Nandy, "The Other Within," 50. Judith Shklar dismissed the charge of aggression in Tokyo as "nothing but an ideological defense of colonialism." Shklar, *Legalism*, 180. Onuma Yasuaki noted the "soiled hands" of IMTFE powers. Onuma, "Beyond Victors' Justice," 64. See also: Onuma, "Japanese War Guilt and Postwar Responsibilities of Japan," 616. John Dower remarks that the IMTFE solved the colonial double standard by "ignoring it." Dower, *Embracing Defeat*, 471.

regarding empire.¹⁰¹ Rather than simply itemising the court's most obvious and odious failings from hypercritical retrospection, this section distinguishes itself from others works by exploring the intimate and international ways that these colonial questions shaped IMTFE encounter and processes. Other scholars correctly identify examples of cynicism but they miss the nuance which underlay tribunal's colonial implications and imbrications. Instead, this section proves that the IMTFE embodied positive and negative dimensions of internationalism in the shifting postwar imperial contexts. It both represented a reassertion of empire and symbolised a new age of multilateral engagement among liberated colonies, imperial powers, and other states to address global issues. Above all, the IMTFE formed a localised experience unfolding within, but not subject to, a complicated set of global conditions. Like other international bodies, the court emerged as a messy and negotiated process, not a static arena for jaded power plays.

Given its time, place, and constitution, the IMTFE became a lively discursive forum for the global *anti*-imperial movement. Its apparent colonial double standard gave rise to a range of *anti*-imperial voices at the IMTFE. As a result, the transcripts produced an inconsistent historical narrative that reflects poorly – appropriately so – on the imperial practices of both the prosecuting nations and Japan. The prosecution believed that empire and aggression were indistinguishable in Japanese expansion. Japan's professed aim to establish a Greater East Asia

¹⁰¹ Brackman observed, "The Dutch and French accused Japan of invading and occupying the East Indies and Indochina, respectively, and of exploiting them economically – precisely what the Indonesians and Vietnamese accused their former colonial overlords of having done." Brackman, *The Other Nuremberg*, 213. Brackman's post-IMTFE career may explain this departure from his generally rosy view of the court. Brackman lived in Indonesia for several years as a special correspondent for the *Christian Science Monitor* reporting on anti-colonial fighting involving the Dutch in Indonesia and the French in Indochina during the 1950s. Indonesia appears to have held a special place in Brackman's heart. He published a number of books on the country. Indeed, his widow and daughter Agnes de Keijzer Brackman and Cathay Brackman have published a guide to Indonesian cooking. Although published posthumously in 1987 – Brackman died in 1983 – he likely wrote *The Other Nuremberg* after his time in Southeast Asia. Arnold C. Brackman, *Indonesian Communism, a History* (New York: Praeger, 1963), Arnold C. Brackman, *Southeast Asia's Second Front; the Power Struggle in the Malay Archipelago* (New York: Praeger, 1966), Arnold C. Brackman, *The Communist Collapse in Indonesia* (New York: Norton, 1969), Agnes and Cathay Brackman de Keijzer Brackman, *The Complete Indonesian Cookbook* (New York: Marshall Cavendish Corporation, 2009), Brackman, *The Other Nuremberg*. Biographical information about Brackman comes from the online guide to the Arnold Brackman Papers at the Howard Gotlieb Archival Research Center at Boston University. Web address: http://www.bu.edu/phpbin/archives-cc/app/details.php?id=7471&return=http://www.bu.edu/phpbin/archives-cc/app/search.php%3Fkeywords%3Dbrackman%26do_search%3DSearch (Accessed 16 November 2010).

Co-Prosperity Sphere (GEACPS) sustained the prosecution case. Dutch prosecutor A. T. Laverge outlined GEACPS objectives on 5 December 1946. Japan promised to create “an autonomous zone of peaceful living and common prosperity . . . including Japan, Manchuria, North China, [the] lower Yangtze River and the Russian Maritime Province,”¹⁰² in order to remove the West’s “dominant influence” and allow Asia to “enjoy its liberation from the shackles hitherto forced upon it.”¹⁰³ Under Japanese guidance, the newly “liberated” areas would “prepare for the great future fight between the white race and the colored races.”¹⁰⁴ Osmond Hyde described the first Assembly of the Greater East Asian Nations in November 1943 in Tokyo. Attended by nationalist – or depending on perspective, collaborationist – leaders such as Subhas Chandra Bose (India), Ba Maw (Burma), and Jose P. Laurel (Philippines), the assembly issued a Joint Declaration protesting the “insatiable aggression and exploitation” and “inordinate ambition” of Western powers in “enslaving” East Asia. The declaration also promised to liberate the region from the “yoke” of Western domination.¹⁰⁵ The IPS’ closing arguments portrayed Japan’s “co-prosperity” policy as thinly veiled imperialism. There is “little doubt,” it argued, “that the entire area of the Greater East Asia Sphere was to be treated as a colonial possession of Japan.”¹⁰⁶ The “deceit and fraud” of Japan’s liberationist ideology tried to “beguile the people of the occupied areas into believing that their nations were independent when they were in fact only colonies of Japan.”¹⁰⁷ Representatives at the GEACPS meetings were Japanese “puppets.”¹⁰⁸ A deep irony suffused IPS decrivals of Japan’s “predatory ambitions” and “fatuous talk about co-prosperity.” In a particularly blatant example, the IPS ridiculed Japan’s pledge to cede parts of Eastern Bengal to the newly minted “independent” Burma. “This would appear to be generous of Japan,” opined the prosecution, “were it not that she was passing over to Burma someone else’s

¹⁰² *Transcripts*, 12010.

¹⁰³ *Transcripts*, 12013-12014.

¹⁰⁴ *Transcripts*, 12024.

¹⁰⁵ *Transcripts*, 12098-12100.

¹⁰⁶ *Transcripts*, 39722.

¹⁰⁷ *Transcripts*, 39723.

¹⁰⁸ *Transcripts*, 39724.

property and not her own.”¹⁰⁹ In the prosecution’s eyes, the “someone else” the land belonged to was not, of course, the local Bengalese population. It was the British Empire.

Colonial powers tried gamely to limit the appearance of an imperial double-standard in Tokyo. For example, the potential in-court appearance of Ba Maw, the Japanese installed leader of ‘independent’ Burma, caused British anxiety. On 16 October 1945, L. B. Walsh Atkins of Britain’s Burma Office attended a meeting at the War Office in London to discuss preliminary US proposals for a trial of ‘major’ Japanese war criminals. Afterward, he wrote, “I had in mind that Ba Maw might conceivably be regarded as a ‘person holding a high political or civil position in one of the Japanese satellites’ and it seemed necessary to leave no doubt that he - or any other Burmese quisling – should be promptly handed over to us to be dealt with.”¹¹⁰ Unfortunately for Walsh Atkins, others at the IMTFE did not share British hopes to deal with Ba Maw ‘in house.’ Burmese prosecutor Maung explained that American and Philippines prosecutors wanted Ba Maw, who was in custody at Sugamo Prison, as a witness “to establish the ‘puppet’ nature of the Burmese Independent Government.”¹¹¹ Comyns Carr informed the Attorney General in London, “[I] [a]m opposing this on its merits but should like instructions as to whether I should also oppose it on political grounds.”¹¹² British authorities explored the legal “merits” of Ba Maw on the stand,¹¹³ but found the “political grounds” for *not* allowing the testimony more compelling. “Interested departments consider it most (repeat most) undesirable

¹⁰⁹ *Transcripts*, 42009.

¹¹⁰ Correspondence File, L. B. Walsh Atkins (16 October 1945), British Library, IOR/M/4/3042 Telegrams Burma Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-April 1947.

¹¹¹ U. E. Maung, “Progress Report from 14th May to 31st July 1946” (31 July 1946), British Library, IOR/M/4/3049 Telegrams Burma Office, Japanese War Criminals, Reports on Progress of the Tokyo Trials.

¹¹² A. S. Comyns Carr to Attorney General, London (11 June 1946), British Library, IOR/M/4/3047 Telegrams Burma Office, Japanese War Criminals, Proceedings of Tokyo Trials.

¹¹³ “Apart from the desirability to avoid tainted evidence – Dr. Ba Maw was from materials in our possession an active and willing collaborator to the end with the Japanese – it was felt that cross-examination by the defence would shatter his evidence,” wrote Maung. “From what we know of the happenings in Burma, we felt that much of his statements during interrogation, and which would form his examination in chief, would not bear the scrutiny of cross-examination. However, I pointed out that the true nature of the so called Independent Government of Burma could be established by other evidence.” U. E. Maung, “Progress Report from 14th May to 31st July 1946” (31 July 1946), British Library, IOR/M/4/3049 Telegrams Burma Office, Japanese War Criminals, Reports on Progress of the Tokyo Trials.

that Ba Maw should be called as a witness,” the Attorney General responded unequivocally. “It might prove embarrassing both to His Majesty’s Government and to the prosecution.” As if to reinforce the point subliminally, Walsh Atkins noted in the margins of his copy of the message, “This is not very happy.”¹¹⁴ In Rangoon, prosecutor Maung reported the governor of Burma’s definitive stand: “Governor does not approve of the proposal to examine Dr. Ba Maw as a prosecution witness.”¹¹⁵ British pressure kept Ba Maw off the stand. These kinds of concessions only served to highlight actual and apparent inconsistencies in the court’s facts and findings.

Anti-imperial discourse found a similarly self-serving place in defence arguments. The defence exploited every available probative weakness in the case against Japan’s empire. One tactic included framing Western imperialism as both a threat that impelled Japanese expansion and a *tu quoque* justification of their clients’ acts. This legal retort accused Allies of being and doing what they condemned in the actions of former adversaries. Japan’s work to establish a “new order” hardly represented a policy of “world conquest.” Rather it became “in essence strangely similar to the Good Neighbor Policy of the United States.”¹¹⁶ Attorney William Logan pointed out that historically many powers had encroached on Chinese territory. During the Boxer Rebellion (1900-1901), the Nanjing Incident (1927), and the Manzhouli Incident (1929), several foreign powers forcibly intervened in Chinese affairs. “These were incidents carried out by United States, Britain or the Soviet Union and they were not considered wars,” wrote Logan.¹¹⁷ Indeed, during the Boxer and Nanjing incidents, Western powers had intervened *alongside*

¹¹⁴ FO, London to UKLIM, Tokyo (14 June 1946), British Library, IOR/ M/4/3047 Telegrams Burma Office, Japanese War Criminals, Proceedings of Tokyo Trials.

¹¹⁵ U. E. Maung, “Progress Report from 14th May to 31st July 1946” (31 July 1946), British Library, IOR/ M/4/3049 Telegrams Burma Office, Japanese War Criminals, Reports on Progress of the Tokyo Trials.

¹¹⁶ Kiyose Ichiro, “Defense Opening Statement Part I,” Conde Papers, Box 30, Folder 14.

¹¹⁷ William Logan, “Personal View in Outlining the Opening Statement,” Conde Papers, Box 19, Folder 6.

Japanese forces and widely praised Japan for its contribution.¹¹⁸ The threat of Western imperialism forced Japan to pursue a “special mission” as the “stabilizing power” in Asia. “This is not a peculiar notion held only by the accused. . . This principle has been recognized by the great powers,” contended the IDS Opening Statement.¹¹⁹ “Most of the regions in the south had already come under the domination of several Occidental Powers.” Japan’s imperialism not only provided regional stability, it also embodied self-determination and sovereignty. “The sincere desire” of Japan’s leaders “was to elevate and enhance the standing of the nation to a position of perfect independence and sovereignty . . . a worthy [purpose], consistent with the principles advocated by President Wilson after World War I.”¹²⁰ Concurrently *pro* and *anti* imperial, the defence relied on a double irony. Their arguments formed as much a justification for imperial rule as they were a condemnation. Although rife with probative and factual weaknesses, defence sentiments and arguments continue to influence Japanese apologists and trial critics.

Exposing the willingness of Allied powers to whitewash Western imperialism became a favoured IDS tactic. In April 1948, George F. Blewett, attorney for Tōjō Hideki, defended Japan’s move into China in 1937 saying that it is “almost universal in world history” that powers with the upper hand during hostilities get territorial concessions. “In fact, during World War II the countries which felt confident of victory made, prior to the termination of the war, an arrangement to divide the enemy’s lands among themselves,” he added sardonically.¹²¹ Later, Blewett pointed out the “surprising similarity” between the joint declaration of the Greater East Asia Conference in 1943, and the ideals espoused by the Anglo-American Atlantic Charter of

¹¹⁸ The Boxer Rebellion was an anti-Western uprising in China, 1900-1901. An eight-nation foreign interventionary force including Japan, Russia, Britain, the US, Germany, Italy, and Austria-Hungary put down the rebellion. The 1927 Nanjing Incident – distinct from the 1937 massacre – occurred when Chinese Nationalist (Guomindang) forces entered Nanjing and began looting foreign properties. British, American, and Japanese ships intervened to stop the violence. The Manzhouli (or Manchouli) Incident was a Soviet intervention in 1929 to defend their ownership of the Chinese Eastern Railway (CER) from local warlords in North China.

¹¹⁹ Kiyose, “Defense Opening Statement Part I.”

¹²⁰ Ibid.

¹²¹ *Transcripts*, 47350.

1941.¹²² Blewett further noted that the only remarkable difference between the two pronouncements was that the Japanese statement decried racial discrimination whereas the Atlantic text conspicuously did not. “To condemn the Greater East Asia Declaration as criminal while justifying the Atlantic Charter as a sacred creed,” Blewett concluded, “is a very narrow and prejudiced way of thinking; an idea quite blind to the history and progress of mankind.”¹²³ Blewett expanded this argument to a broader defence of Japan’s policies elsewhere in Asia. “The fact that someone planned, in anticipation of victory, to reserve for Japan certain localities (such as Singapore) in East Asia for the protection of the co-prosperity sphere is in itself no proof [of aggression] . . . any more than that does the occupation of Okinawa by the Allied powers show that the Atlantic Charter was aggressive.”¹²⁴ Blewett argued that the West’s imperial practice and ideology differed little from Japan’s, historically, during the war, or in postwar neo-colonialism. The uncomfortable truth behind Blewett’s arguments drew the critical eyes of contemporary and future observers. Through a reductive lens, all tribunal hypocrisies proved that the court represented bald retribution and political justice.

The most sensational and self-serving defence of Japanese imperialism came in the affidavit of Blewett’s client. Tōjō’s affidavit and subsequent testimony in December 1947 caused a sensation. Lindesay Parrott of the *New York Times* described the scene: “a crowd filled usually empty seats in the chamber to hear what was regarded as the most dramatic testimony of the eighteen-month trial.”¹²⁵ The next day, Parrott expanded his account, “More than 500 would-be auditors were in line at the former War Ministry at 6:30 A.M. awaiting a chance at the 192 seats allotted to Japanese in the gallery. The same long line-up preceded the afternoon

¹²² *Transcripts*, 47357.

¹²³ *Transcripts*, 47359.

¹²⁴ *Transcripts*, 47483.

¹²⁵ Lindesay Parrott, “Tojo Makes Plea of ‘Self-Defense’: Japan’s Pearl Harbor Premier Insists in Trial U.S. And Britain Forced War on Him,” *New York Times*, 26 December 1947, 1.

session.”¹²⁶ From this platform, and to this audience, the former premier defended Japan’s actions. The “New Order” Japan sought to establish “was based on the foundations of mutual prosperity, independence, and the sovereignty of all nations concerned.”¹²⁷ Its “ultimate object” had been “to establish the stability of the Far East.”¹²⁸ To do so, Japan approached the situation as a “great family” of “mutual understanding” and “sincere cooperation”; a far cry, Tōjō insinuated, from “other nations which laid their basis of diplomatic activity on mere self interest.”¹²⁹ The greatest regional stability threat became the “intolerable position of colonies and semi-colonies under the control of the Powers.”¹³⁰ This “old order” of “suppression and discrimination,” Tōjō avowed, “would constitute an eternal root of evil and unrest in this part of the world.”¹³¹ “How these nations in East Asia ground under the oppression of western powers, and how eager they were for freedom,” lamented the man who helped subjugate most of Asia under Japanese occupation.¹³² Like his prosecutorial opponents, Tōjō remained either unaware or uncaring of rich imperial hypocrisy.

Bench views of the imperialism question reflected national histories and politics, but also showed the influence of personal inclinations. Indian Justice Pal emerged as the lone anti-imperial voice on a bench dominated by representatives of empire. “The foundation for Pal’s anti-imperialism is the very ideological posture that European colonialism itself generated, the polarity of East and West,” argues Tim Brook. “East-against-West provided Pal with a potent political fulcrum and gave his resistance to colonial and neocolonial domination ideological

¹²⁶ Lindesay Parrott, “Japanese Crowd to Hear Tojo at Trial: Newspapers Give Half Space to Testimony,” *New York Times*, 27 December 1947, 7. Interestingly, Parrott and George Blewett performed together in the Japanese chapter of the “Baker Street Irregulars” a Sherlock Holmes re-enactment group started in October 1947. His coverage of Blewett’s case may have been coloured by this relationship. Elsewhere, however, Parrott did not shy away from condemning the former Prime Minister. In the same article, for example, Parrott describe a piteous Tōjō, “unimpressive little man as he took the stand. In a faded greenish khaki uniform he walked tamely beside American military policemen.” Information on the “Baker Street Irregulars” is available at <http://www.batteredbox.com/PDFs/Sherlock%20Alive%20--%201948.pdf> (Accessed 31 January 2012).

¹²⁷ *Transcripts*, 36195.

¹²⁸ *Transcripts*, 36426.

¹²⁹ *Transcripts*, 36445-35446.

¹³⁰ *Transcripts*, 36430.

¹³¹ *Transcripts*, 36433 and 36439.

¹³² *Transcripts*, 36430.

coherence.”¹³³ Actually, given its tone regarding other issues, Pal’s official dissent contains surprisingly muted anti-imperialism. Although he did argue, “I would only like to observe once again that the so-called Western interests in the Eastern Hemisphere were mostly founded on the past success of these western people in ‘transmuting military violence into commercial profit,’” the dissent includes few other overt anti-imperial statements.¹³⁴ Nevertheless, the question of empire unquestionably shaped Pal’s understanding, and critique, of the IMTFE. In an unpublished early dissent draft uncovered in the Australian War Memorial Archives, for instance, Pal framed his broader challenge to IMTFE legitimacy in explicitly anti-imperial terms.¹³⁵ “The basis of international relations is still the competitive struggle of states,” he argued. “There are still dominated and enslaved nations, and there is no provision anywhere in the system for any peaceful readjustment without struggle.” Regrettably, Pal concluded, in the face of “old” imperialism and recent neo-colonial pursuits, “It is left to the nations themselves to see to the readjustment.”¹³⁶ Internationalism’s colonial double standard particularly irked the Indian judge. In Pal’s view, resistance by major Western imperial powers to the racial equality clause in the Covenant of the League of Nations exemplified deeper and wider hypocrisy. “Servitude of nations still prevailed unreveiled,” he wrote, despite the “widening sense of humanity” purportedly represented in the League and related movements. “Domination of one nation by another continued to be regarded by the so-called international community only as a domestic question for the master nation,” he concluded acidly. “I can not see how such a community can

¹³³ Brook, “The Tokyo Judgment and the Rape of Nanking,” 693-94.

¹³⁴ Pal Dissent, 279

¹³⁵ Pal, Preliminary Objections. The date of this two-volume 257 page early dissent by Pal is unclear. Its title and content suggests that it could have been written following the Defence’s first challenge to jurisdiction of the tribunal on 17 May 1946. Other files in Australian War Memorial Archives support this possibility. A series of IMTFE Bench files explored the tribunal’s jurisdiction in mid-1946. See for example: E. H. Northcroft, Lord Patrick, and E. S. McDougall, “IMTFE: Jurisdiction: Opinion of Members for The United Kingdom, Canada, and New Zealand” (May 1946), Webb Papers, AWM 92 - Series 1, Wallet 7; Lord Patrick, “Jurisdiction of the Tribunal, Memo to Sir William Webb from Lord Patrick” (1 July 1946), Webb Papers, AWM 92 - Series 1, Wallet 9. All indications point to Pal completing this initial dissent well before submitting his much larger opinion in late 1948.

¹³⁶ Pal, Preliminary Objections, 144-45.

even pretend that its basis is humanity.”¹³⁷ Though justified on many levels, the Indian judge’s colonial critiques remain problematic. In his rush to condemn Western actions, Pal had an unfortunate tendency to whitewash Japanese expansion. He too readily accepted Japanese avowals of “liberation” and “co-prosperity” as genuine and epochal.¹³⁸ Like later scholars in Japan and elsewhere, Pal missed crucial gradations in the IMTFE findings and experience in his rush to condemn victors’ justice in Tokyo. No matter how well documented, snap judgments of the tribunal by Pal and others forced the IMTFE into an artificially pat and wholly unenlightening analytical framing.

Anti-imperialism, at least anti-*Western* imperialism, became one area where Pal stood alone within the bench’s community of dissent. Justices Bernard and Röling shared Pal’s general criticism of the IMTFE, but they decidedly did not share his views on imperialism, especially concerning their own respective empires. Both France and the Netherlands brutally resisted colonial reordering, and their IMTFE representatives recognised the heightened political ramifications of imperial discourse in Tokyo.¹³⁹ Moreover, both Bernard and Röling accepted the assumptions of European superiority engendered by colonial rule. Bernard was a long-term colonial civil servant. His peripatetic career included posts in French colonies in Conakry (Guinea), Dakar (Senegal), and Bangui (Central African Republic). After Tokyo, Bernard returned to West Africa and became president of the Court of Appeal and Supreme Court of

¹³⁷ Pal, Preliminary Objections, 152.

¹³⁸ Pal’s defence of Japan’s anti-imperial agenda made him popular in certain Japanese circles. The controversial Yasukuni shrine in Tokyo erected a monument in his honour. The shrine’s museum includes a panel glorifying Japan’s importance in “Postwar Independence Movements.” “Not until Japan won a stunning victory in the early stages of the Greater East Asia War, did the idea of independence enter the realm of reality,” reads the panel. Beneath this inscription, the display shows photographs of important independence fighters ‘influenced’ by Japan, including Sudha Chandra Bose, Jose Laurel, Ba Maw, Sukarno, Ho Chi Minh, and Mahatma Gandhi.

¹³⁹ His government urged Röling to consider their “international position . . . in light of the current problems such as Indonesia,” which made dissent “very undesirable on political grounds.” Pim van Boetzelaer van Oosterhout, Minister of Foreign Affairs to B. V. A. Röling (28 October 1947), Röling Papers, Box 27.

Cameroon.¹⁴⁰ The idea that one country could possess another did not trouble Bernard. Indeed, in early judgment draft comments, he challenged the majority's stance regarding Japan's "aggression" in the Guandong Leasehold.¹⁴¹ Specifically, Bernard objected to the notion that securing concessions by force diminished and even criminalised Japan's claim to the region. "Such a statement is astonishing," he argued. "How is it possible to forget that these concessions were conceded by treaties?"¹⁴² Röling did not have Bernard's colonial background, but he reacted strongly to portrayals of Japan as an anti-imperial champion. "Defendants have claimed that Japan fought for the liberation of the peoples of Asia," argued Röling, seeking "the liquidation of Western imperialism, abolishment of the colonial system, and the building of a world in which all the people would find their proper places."¹⁴³ Yet Japan "attached her own interpretation to the concept of 'freedom' and 'independence.'" All evidence indicated that "The New Order, especially in its aspects of independence and of 'Asia for the Asiatics,' amounted to hardly more than Japan's method of internal aggression."¹⁴⁴ In other words, "The slogan 'Asia for the Asiatics,' in reality meant 'Asia for Japan.'"¹⁴⁵ Röling proved particularly sensitive to encroachment on Dutch territories. His chapter on "Japan and the Independence of the Asiatic Countries" focused only on Dutch territory in Indonesia, without discussing any other "Asiatic Countries." Elsewhere, Röling castigated Japan's attempt "to incorporate the Dutch East Indies area into Japanese territory [underscoring in original]."¹⁴⁶ Röling's attitude towards ex-pat life in

¹⁴⁰ Biographical information comes from the Bernard Papers' finding aid. See: <http://www.bdic.fr/pdf/tokyo.pdf> (Accessed 3 April 2012). Colonial controversies at the IMTFE became touchy subjects for the French contingent. Adding insult to injury, the defence claimed that Japan's advance into French possessions in Indochina was legal because Nazi-installed Vichy French authorities welcomed it.

¹⁴¹ Japan gained Manchuria's Liaodong peninsula after victory in the Russo-Japanese War 1904-1905.

¹⁴² Bernard "Remarks Concerning the Draft of Judgment of the Majority [Concerning Part B Chapter V, Volume I]" (2 July 1948), in *Bernard and Röling on Judgment*, Northcroft Papers, Box 330.

¹⁴³ Röling Dissent, 29.

¹⁴⁴ Ibid, 130.

¹⁴⁵ Ibid, 134.

¹⁴⁶ Ibid, 132.

Japan and towards non-Western peoples further suggests that when he arrived in Tokyo at least, Rölöing felt comfortable with the unequal trappings of European empire in Asia.¹⁴⁷

The IMTFE's colonial contradictions illustrate the complex interaction of international organisations and global movements, as well as the intricacies within the organisations and movements themselves. Critics see only hypocrisies which bolster broader critiques of the IMTFE and similar institutions. Yet the court's imperial identity and consequences extended beyond such reductive constructs. Although the IMTFE's neo-colonial trappings and anti/pro-imperial narratives undoubtedly reflected big power politics, the court's multipolar composition embodied a novel and difficult age of decolonisation. On the surface and in practise, the tribunal represented a profound shift in world affairs. It took on historical and symbolic valence as a groundbreaking postcolonial institution by including Indian, Burmese, and Filipino representatives before their respective countries achieved full independence from colonial rule. Two prosecutors, Govinda Menon and Krishna Menon, one judge, Radhabinod Pal, and one judicial assistant, Radha S. Sinha, represented India in Tokyo. Advocate General U. E. Maung represented Burma to the prosecution. Pedro Lopez and Justice Delfin Jaranilla signified the Philippines' new standing. Although subordinates within the tribunal administration, J. S. Sinninghe Damste and Coom Rustom Strooker helped bring Indonesian concerns to the table by

¹⁴⁷ Rölöing had a celebrated post-Tokyo legacy. He pioneered the field of Peace Studies, attended Pugwash Conferences, and developed an acclaimed reputation as an international jurist. Indeed, the *Journal of International Criminal Justice* recently published a special edition lionising Rölöing's career. Nico Schrijver, in particular, lauds Rölöing's "early plea to dismantle colonialism and to transform traditional international law from a European law of nations into a world law of nations." Nico Schrijver, "B.V.A. Rölöing: A Pioneer in the Pursuit of Justice and Peace in an Expanded World," *Journal of International Criminal Justice* 8, no. 4 (September 2010): 1071. See also: Antonio Cassese, "B.V.A. Rölöing: A Personal Recollection and Appraisal," *Journal of International Criminal Justice* 8, no. 4 (September 2010): 1141-52, Robert Cryer, "Rölöing in Tokyo," *Journal of International Criminal Justice* 8, no. 4 (September 2010): 1109-26, Constantijn Kelk, "Bert Rölöing as a Criminal Law Scholar," *Journal of International Criminal Justice* 8, no. 4 (September 2010): 1093-108, Harmen van der Wilt, "A Valiant Champion of Equity and Humaneness," *Journal of International Criminal Justice* 8, no. 4 (September 2010): 1127-40. Rölöing's commitment to global security, human rights, and international law after Tokyo proved genuine, but he was not as progressive going into the IMTFE. His early correspondence reveals a strong paternalistic, even racist view of the Japanese and Asian people he met (these are discussed in other chapters). His seeming support of European imperialism probably accurately reflects the Dutch judge's thinking at the time of the trial.

assisting IPS investigations. While these formed only small contingents, their existence gave rare and early recognition of postcolonial sovereignty on the international stage.

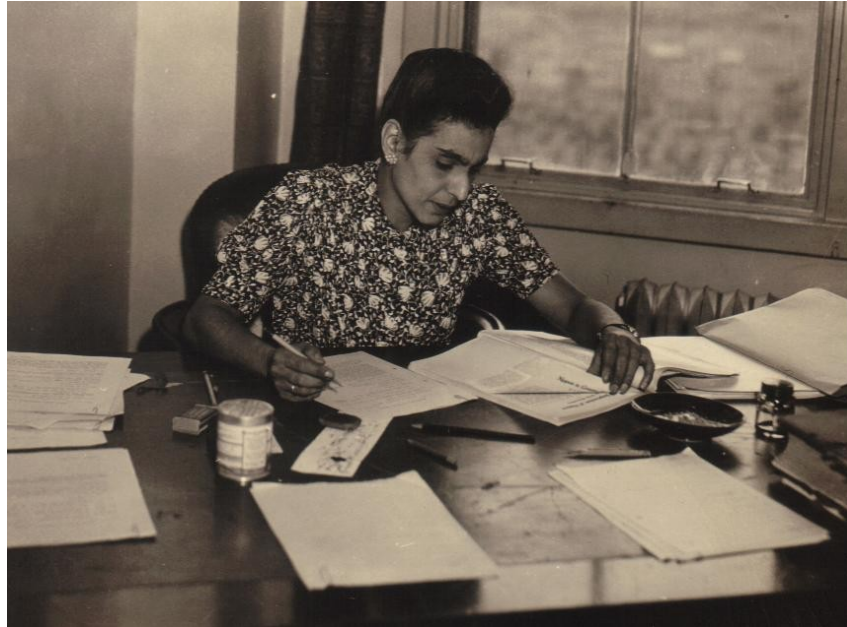
Given the era's prevailing attitudes and cultural assumptions, of course, the IMTFE became at best a partial step forward in multilateral relations. Massive structures of subordination underpinned internationalism in Tokyo and globally. Personnel from major powers often dominated decisions, while participants from newer or less puissant states frequently took on secondary roles. Despite these limitations, the international space created in Tokyo formed the beginnings of a more multipolar world order. Close social and professional engagement helped break down existing racial, cultural, and power division. For example, residing together at Hattori House, American prosecutor Walter McKenzie and Philippines prosecutor Pedro Lopez became fast friends. Lopez – “Pete” – thanked the American for the “kindness and patience” and “valuable suggestions” McKenzie had “in going over” Lopez’s opening remarks.¹⁴⁸ McKenzie returned the admiration. “I read your Opening Statement with a great deal of interest, and regret that I was unable to hear you deliver it in the very eloquent manner of which you are capable,” he wrote. “You are to be congratulated on the fact that your superb eloquence overawed the court and the defense counsel so that no objections were forthcoming.”¹⁴⁹ Indian and Burmese Prosecutors lived at the Canadian Legation along with other British Commonwealth personnel, and the sharing of personal circles fostered mutual respect and fondness. New Zealand prosecutor Quilliam’s diary records multiple parties with U. E. Maung, Krishna Menon, and Govinda Menon in attendance. Though Quilliam did not become close with his subcontinent colleagues, he did enjoy their company. British prosecutor Comyns

¹⁴⁸ The two also bonded over golf. “It may pain you to know that I am momentarily forsaking our goddess of ‘GOLF’ for something more thrilling and exciting and at the same time leg breaking,” Lopez wrote to McKenzie after attempting alpine skiing. Pedro Lopez to Walter McKenzie (23 December 1946), McKenzie Papers, Box I, Folder: Correspondence – November-December 1946.

¹⁴⁹ Walter McKenzie to Pedro Lopez (7 January 1947), McKenzie Papers, Box I, Folder: Correspondence – January-February 1947.

Carr considered Maung a “very reliable and capable” colleague.¹⁵⁰ Chief Prosecutor Keenan, who let many other prosecutors leave without protest, asked the Government of India to extend Govinda Menon’s posting. “He has been in an important relationship to this trial and I know you will be pleased to learn that his work has been very much to my satisfaction,” wrote Keenan. “His services would be of very great value to us when the defense comes on.”¹⁵¹

Illustration 16: Coom Rustom Strooker at Work



Coom Rustom Strooker, an Indonesian member of the Dutch contingent in Japan. ©Morris Gamble papers, with permission.

The Bench likewise gave measured assent to nascent de-colonial realities. Justice Pal’s political leanings and judicial interpretations set him apart, but he also drew admiration. Prosecutor Robert Donihi, remembered Pal fondly as a “very nice gentleman.”¹⁵² Similarly, a decade after the trial, prosecutor Frank Tavenner organised a party for the judge when Pal came to the US to address the UN General Assembly as a member of the International Law

¹⁵⁰ A. S. Comyns Carr to Attorney General (9 June 1946), IWM Papers, FO 648, Box 152, Folder 3. When rumours spread in October 1946 that the Menons would not return to Tokyo after gathering evidence in India, Comyns Carr expressed regret, saying that while able to “manage” without the Indian pair, he “would have been pleased to have them back.” A. S. Comyns Carr to JBJB, London (2 October 1946), IWM Papers, FO 648, Box 152, Folder 4. The Indian Defence Department informed the Secretary of State for India on 4 November 1946, “Indian Prosecutors, Govinda Menon and Krishna Menon not repeat not returning.” Government of India, Defence Department to Secretary of State for India (4 November 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

¹⁵¹ Joseph Keenan to Secretary of the Government of India, Imperial Secretariat, New Delhi (26 August 1946), Keenan Papers, Box 2, Folder 10: Letters from Joseph B. Keenan (Quilliam-Truman. Sequence 834-835).

¹⁵² Donihi Interview, Part I.

Commission. “He would very much like to ‘meet his friends’ while in the United States,” Tavenner told his former colleagues. “Several of us have thought it a good idea to have him as our guest at a cocktail party, followed by a dinner, at one of the clubs in Washington. . . . aside from the goodwill aspect of entertaining the Judge, it will do us all an immense amount of good to renew our acquaintanceship.”¹⁵³ As mentioned, Pal and Dutch justice Röling became very close. The Indian judge even received formal support from entrenched judicial rivals. In June 1946, for example, SCAP announced that Justice Webb, Patrick, McDougall, and Northcroft would remain in the Imperial Hotel until the end of the trial. The list omitted Pal, who also lived at the Imperial. SCAP’s omission incensed Pal’s brethren. “This discrimination must have occurred through mistake,” the justices protested to General MacArthur, “Mr. Justice Pal, who represents India on the Tribunal, and who is at present accommodated in the Imperial Hotel, must now find quarters elsewhere.”¹⁵⁴ MacArthur corrected the oversight.

Illustration 17: Pedro Lopez Tees Off



Pedro Lopez, Carlisle Higgins, and other prosecution members (along with female cadies) golfing. ©Daniela Brabner-Smith, by permission.

¹⁵³ Frank S. Tavenner to Walter McKenzie (22 Sep 1958), McKenzie Papers, Box I, Folder: Correspondence 1949-1958.

¹⁵⁴ W. F. Webb, M. D. Patrick, E. S. McDougall, and E. H. Northcroft to Douglas MacArthur (28 June 1946), MacArthur Memorial, RG 10, Box 11, Folder 65 – William F. Webb.

Illustration 18: The Commonwealth Contingent at the Canadian Legation



Commonwealth life at the Canadian Legation, Tokyo. Left to Right: A. S. Comyns Carr (Associate Prosecutor, Britain), Govinda Menon (Associate Prosecutor, India), Marjorie N. Culverwell (Administrative staff, British IPS), R. H. Quilliam (Associate Prosecutor, New Zealand), Miriam Prechner (Administrative staff, British IPS), Melville Laurence (Administrative staff, British IPS), Constance M. Rolfe (Administrative staff, British IPS), Miller (unknown position), Rex S. Davies (Assistant prosecutor, United Kingdom), and Betty Burrowes (Administrative staff, Australia). ©Jenny Quilliam, by permission.

While the tribunal contributed symbolically to a new era of more egalitarian international organisation, residue from colonialism carried on at the IMTFE.¹⁵⁵ It would be a mistake, for example, to equate British eagerness for Indian representation with benevolent acceptance of decolonising India. First, the “India” represented in Tokyo still operated within the British colonial administration and infrastructure. Thus, the voices heard within diplomatic and official

¹⁵⁵ India’s transitional status caused jurisdictional and administrative confusion. When working on the indictment, British prosecutor Comyns Carr asked the Foreign Office to clarify what to call British territories in the document. “Is it wished that a separate allegation be made in the indictment of making war against India and Burma or will it be sufficiently covered by an allegation of making war against the British Commonwealth of Nations?” Comyns Carr wrote in February 1946, “If separate allegation is desired, what would be the correct official description for purpose of inclusion in text of indictment of (a) India and Burma (b) Malaya, including Unfederated States, and Hong Kong[?]” A. S. Comyns Carr to War Crimes Section, FO (26 February 1946), IWM Papers, FO 648, Box 152, Folder 3. Administrative uncertainty also developed over who would pay Indian and Burmese personnel. The potential appointment of P. E. Gwynn as a member of the prosecution caused a flurry of exchanges between various agencies in India and Britain trying to work out who would support the posting. See for example: R. S. Brown, Military Department to C. Rolfe, India Office (2 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947; and War Department, India to Secretary of State for India (30 January 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

circles, and unfortunately in the records available for research, were largely British. Secondly, limits existed regarding just how ‘Indian’ governing insiders believed the Indian contingent in Tokyo should be. Indian Office records reveal that many initially hoped or assumed that India’s IMTFE representatives would be British not Indian.¹⁵⁶ Govinda Menon, for example, became at best a third-choice appointment. In January 1946, the Indian War Department first recommended the appointment of Lieutenant-Colonel P. E. Gwynn, a former intelligence officer who had lived in Japan for several years because “No civilian officer combining both legal qualifications and knowledge of Far East [was] available.”¹⁵⁷ In other words, rather than looking beyond the British establishment, the War Department nominated someone without legal training to represent “India” at an international court.¹⁵⁸ After Gwynn disqualified himself, the search broadened into civilian spheres, but still did not settle immediately on Govinda Menon. Less than a week after losing Gwynn, authorities decided on another, British, option. “We have asked Sir George

¹⁵⁶ Eventually, British administrators recognised the political value of appointing ethnically non-British representatives. On 13 February 1946, UKLIM in Tokyo explained, “It would be desirable that their judge should be an Indian so as to rule out any possible suggestion that we have in effect secured the nomination of a second British judge.” An Indian prosecutor would likewise be “more acceptable” than a British. UKLIM, Tokyo to FO, Washington (13 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. A series of telegrams in February 1946 between the Secretary of State for India, the British Ambassador to the US, and the Indian War Department, agreed with this assessment. On 19 February, the Ambassador announced, “U.K. advise that both prosecutor and judge if appointed should be Indians. This has always been my view.” UK Ambassador, Washington to War Department, India (19 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. On 20 February, the Secretary of State for India assured the War Department, “I have always assumed that you would appoint Indian judge.” Secretary of State for India to War Department, India (20 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

¹⁵⁷ War Department, India to Secretary of State for India (10 January 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

¹⁵⁸ After an initial background check, Gwynn interviewed for the position. “We have mention Gwyn’s [sic] name to the Foreign Office who considers that his knowledge of the Far East would render him an excellent choice.” S. P. Donaldson to D. I. R. Muir, Joint Secretary, War Department, India (22 January 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. On 6 February 1946, the Secretary of State for India agreed, “Gwyn [sic] seems suitable for inclusion in this team . . . we suggested that G of I [Government of India] should send him to Tokyo as soon as possible.” Secretary of State for India to War Department, India (6 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. During his interview, however, Gwynn declared himself unqualified for the job. By the end of February, the War Department announced that someone else would have to be found. “We have interviewed Gwynn and consider his suitability for proposed post has been exaggerated.” War Department, India to Secretary of State for India (26 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

Thomas, Indian Judge, retiring Chief Judge Lucknow, to accept post of prosecutor,” the department reported to India’s Agent-General in Washington.¹⁵⁹ It only announced the appointment of Govinda Menon in March 1946 after Justice Thomas “declined” the posting.¹⁶⁰ The selection of an Indian judge followed a similar pattern. In February 1946, the War Department suggested that Sir Patrick Sens, a British retiring Chief Justice of the Federal Court of India, “would be suitable either as a Judge or senior Counsel.”¹⁶¹ They did not offer Justice Pal the job until April 1946.¹⁶² Although most officials appreciated the symbolic value of representation for India, reservations remained about an *Indian* on the bench, especially Pal, a virtual unknown to the colonial establishment. “Could you tell us who Dr. R. B. Pal is?” read a trepid Indian Office correspondence file, “We are unable to trace him in either the I.O. lists or Bengal Records of Service.” The uncertain response clarified little. “Mr. Radha Binod Pal was never as far as I know, a permanent J[udge]. He acted on the Calcutta Bench from sometime around January 1941 more or less continuously up to the middle of ‘43 (I presume he was at the Bar but do not know).”¹⁶³ In some ways, the fears of individuals in the British colonial system became realised in Tokyo. As a judge, Pal emerged as a vocal anti-imperial critic and an embarrassment for the British, not a benign symbol of decolonisation.¹⁶⁴

¹⁵⁹ War Department, India to Indian Agent-General (4 March 1946), British Library, IOR/M/4/3045 Telegrams Burma Foreign Office, Japanese War Criminals – Participation of India in the Tokyo Trials.

¹⁶⁰ War Department, India to Secretary of State for India (22 March 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

¹⁶¹ War Department, India to Secretary of State for India (22 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

¹⁶² The British Ambassador in Washington first reported Pal’s appointment on 28 April 1946. Defence Department, India to UK Ambassador, Washington (28 April 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. Exactly how or why Pal came to be appointed remains somewhat of a mystery. Unfortunately, files regarding his appointment have gone missing from the British Library. The gap between the February 1946 suggestion of Justice Sens as an IMTFE judge candidate and the April 1946 appointment of Justice Pal also seems strange. Active pursuit of candidates may have stalled around this time, at least in the official telegraphic records, owing to ongoing debate over whether or not India would even be represented in Tokyo.

¹⁶³ Undated correspondence file (c. May 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

¹⁶⁴ Interestingly, Burma Office circles did not emphasise this racial distinction. All names put forward by colonial administrators in Burma for IMTFE appointments were ethnic Burmese. This could show either greater racial openness or simply a practical adaptation within a regime with limited resources.

Cynical politicking undermined the apparent benevolence of securing representation for emerging nations. Theoretically, getting former colonies to Tokyo stacked the IMTFE's political deck. Philippine and Indian judges, for example, made Anglo-American judiciary dominance insurmountable. The tribunal also presented a unique public relations opportunity in an unsettled postcolonial era. In Burma, British authorities worried about the afterlife of the Japanese-fostered 'independence' movement. Participating in war crimes operations could placate the local masses by asserting Burmese importance on the world stage. "There have been already some protests in the Burmese Press that Burma is not separately represented on the Far Eastern Commission," wrote a British-Burmese official in October 1945. "There will, no doubt, be a more substantial clamour for Burma's voice to be heard in the trial of Japanese War Criminals." He concluded that Britain could gain "considerable political advantage" by arranging for Burmese representation in the endeavour.¹⁶⁵ "We expect the appointment if approved to be very welcome in Burma, and hope therefore that it will be possible to reach an early decision and make an early announcement about it."¹⁶⁶ British authorities made a similarly calculated decision to push for Indian inclusion. An Indian judge and prosecution team would have an "emotional appeal to [the] Indian public," officials pointed out. "[We/Britain] Will have earned approval at least of Indian opinion by having used every means open to them to achieve their

¹⁶⁵ In November 1945, Walsh Atkins wrote to the head of the Foreign Office's War Crimes Section, "The Governor has replied strongly supporting the suggestion that a Burman judge should be selected for the purpose." Correspondence File, L. B. Walsh Atkins (16 October 1945). British Library, IOR/M/4/3042 Telegrams Burma Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-April 1947.

¹⁶⁶ L. B. Walsh Atkins, Burma Office to R. D. J. Scott-Fox, War Crimes Section, FO (29 November 1945), British Library, IOR/M/4/3042 Telegrams Burma Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-April 1947. Initially, Burma Office officials pushed for a judicial *and* prosecutorial presence. After initial feelers about appointing a judge, however, the Burma Office backed off. In January 1946, Walsh Atkins assured the FO in London, "we are anxious that if it is at all possible Burma should be associated in some way with the trials, she might possibly be represented in the prosecuting team if it were not possible to have a Burma judge on the bench." L. B. Walsh Atkins to R. A. Beaumont, FO (2 January 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

rightful objective.”¹⁶⁷ Prominent Indian leaders also advocated Tokyo inclusion. “The denial of a seat on the Tribunal to India will cause profound disappointment throughout that country. India’s nationals suffered the same brutal treatment at the hands of the Japanese as the nationals of the countries invited to nominate judges,” argued Indian Agent-General G. S. Bajpai, also India’s FEC representative. “It seems only equitable that India should participate in passing judgment on those responsible for these crimes. If contribution to Japan’s defeat is to determine the composition of the Tribunal, India’s claim to a seat is equally valid.”¹⁶⁸ Securing an Indian judicial appointment formed a conscious contribution to the IMTFE’s internationality, but doing so also, in Pal, introduced an unanticipated enemy within trial processes and legacies.

The IMTFE had multiple colonial contexts. As an important pillar of Allied occupation, the tribunal added to a neo-colonial mission to resuscitate and remould Japanese society. Its courtroom became a public venue for anti-imperial discourse, albeit for self-serving gains rather than genuine critique of the colonial edifice. In tracing Japanese ‘aggression,’ the prosecution pursued an essentially anti-colonial agenda while desperately avoiding or ignoring the imperial guilt of prosecuting nations. Defence attorneys and defendants, in turn, argued a different kind of anti-imperialism, painting Japan as liberators of Asia, heroes in a sincere and determined movement to save the region from Western oppression. In many ways an arbiter of the past, the

¹⁶⁷ External Affairs Department, India to Secretary of State for India (28 January 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. Indian representation formed more than a purely cynical political play. India had already achieved accelerated recognition within the postwar international landscape as a founding member of the United Nations and an active player on both the FEC and the UNWCC. Non-recognition at the IMTFE would have been a setback for Indian autonomy. “Our right to a Judge should be pressed in strongest possible terms,” asserted the Indian Department of External Affairs. “India has suffered as much as any nation at hands of Japanese war criminals, [our] Number of war prisoners, lost witnesses, certainly more than French or Dutch.” External Affairs Department, India to UK Ambassador, Washington (28 January 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. In March, the Foreign Office in London told its Washington liaison, “[The] Government of India attaches great importance to [the] inclusion of [an] Indian Judge and I feel we should not repeat not relax our efforts,” even if appointment this late in the game meant missed trial time. FO, London to FO, Washington (21 March 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. A week later, word circulated that SCAP had agreed to appoint an Indian Judge. Secretary of State to FO (26 March 1946), IWM Papers, FO 648, Box: 152, Folder: 3 – Telegrams February-June 1946.

¹⁶⁸ G. S. Bajpai, Indian Agent-General, Washington to Nelson T. Johnson, Secretary General, FEC (4 February 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

IMTFE also confronted its global present. The war under review at the tribunal ushered in the first surge of twentieth century decolonisation, and shifting imperial realities affected IMTFE nations and personnel. The Dutch and French savagely resisted the break-up of empire and their representatives processed the tribunal through a colonial gaze. American and British authorities opened the door to decolonisation, but fretted the results and felt uncertain around former ‘subjects.’ For India, the Philippines, and Burma, the IMTFE provided a platform to assert burgeoning sovereignty and to contribute to international community. Yet colonial administrators, not local national governments, selected and monitored representatives from these countries with calculated rather than altruistic aims. The IMTFE became one of the first multilateral bodies to explore and experience new colonial truths on the world stage. A pioneer in modern global governance, the tribunal’s colonial milieu presaged and embodied a difficult age of internationalism. As with its others dimensions, the IMTFE’s imperial contexts helped create both apparent and actual hypocrisies and judicial shortcomings which contemporary observers and scholars since have used to lambast the court and its legitimacy. In truth, however, the colonial imbrications in court and behind the scenes in Tokyo far exceeded the oversimplified narratives of victors’ justice or similarly limiting constructs. Subject to its own inner personal, social, cultural, as well as political dynamics, the IMTFE in action emerged as a generally autonomous institution and experience. Outside forces informed and at times even influenced IMTFE participants and processes but external pressures never directed nor dictated court actions, no matter how ‘obvious’ the hypocrisies of victors’ justice seemed to future critics.

Conclusions: Global Issues, Multilateral Justice

IMTFE countries “failed to show themselves free from the crimes charged against the Japanese,” claimed Owen Cunningham. “The participating prosecuting nations have not come into court free from blame themselves.”¹⁶⁹ *Every* country arrived in Tokyo with skeletons in

¹⁶⁹ Cunningham, *Major Evils*.

their closets. During the war, Canada and the US had interned thousands of citizens of Japanese heritage. Australia and New Zealand had long histories of racist anti-immigration politics targeting Japan. By dropping two atomic bombs and firebombing Japanese cities, especially Tokyo, the US arguably perpetrated the most deadly and horrific singular mass atrocities of the Pacific War. The US also sheltered Japan's bacteriological warfare specialists from prosecution. The Soviet Union entered the war with Japan late and with tenuous claims of Japanese 'aggression.' Throughout the trial, the USSR detained thousands of former Japanese soldiers in prison and labour camps in Northeast Asia. Decolonisation formed a precarious tightrope for British, Dutch, French, and US contingents. Although framed as aggression, many of the charges laid on Japan grew out of imperial expansion. In effect, the tribunal criminalised colonialism while deliberately ignoring, and hence tacitly absolving, ongoing colonial systems. This double standard added to the court's inconsistent legal and institutional legacy. Indian, Burmese, and Filipino representation in Tokyo partially mitigated British and American colonial guilt. However, the tribunal's double-standard proved more damning for Dutch and French members, whose governments stubbornly and violently held on to empire. Sufferers from both Japanese and Western expansion also had crosses to bear. The ignominy of wartime 'collaboration,' for example, remained an uncomfortable priority for Indian, Burmese, Philippine, and Chinese deputations. Likewise, the spectre of a brutal civil war hung over the Chinese delegation.

In short, the IMTFE carried out complex international justice in an unhinged and unsettled world, and can therefore only be understood within internal and global milieus. Renewed postwar idealism thrust the court to prominence in a brief but formative expansion of international architectures of peace and security. Meanwhile, the developing Cold War threatened the emerging world community before it got off the ground in Tokyo and elsewhere. The IMTFE played a polyergic role in a newly unbalanced colonial order. It formed a neo-colonial construct, which, incongruously put empire under a judicial microscope. In-court

proceedings provided a platform for competing anti-imperial arguments by both the defence and prosecution. Tokyo also became a sounding board for de-colonial discourse and an experimental Petri dish for postcolonial interaction on the world stage. International courts and other related organisations do not operate in vacuums and cannot avoid the forces that surround them. However, this chapter proves that the IMTFE translated external influence in more subtle ways than simple dichotomies of colonial vs. anti-colonial, villains vs. heroes, communist vs. other. International forums such as the IMTFE cannot be judged against some kind of Platonic ideal, but must be assessed in the context of the real and difficult conditions and lived experience of internationalism in operation. Despite its undeniable failings, the IMTFE cannot be reduced to a simple morality play. Commenting on how Roosevelt's death shaped the Cold War, Frank Costigliola argues that "at such turning points, the contingency of personalities, feelings, and cultural assumptions can propel massive events with dangerous (or positive) momentum."¹⁷⁰ In Tokyo, "turning points" in outside world politics formed part of the on-the-ground challenge of IMTFE justice. Social interaction, personal amity, professional engagement, and other inherent dynamics of internationalism shaped and ultimately transcended global issues in the public eye and behind the scenes. Global movements and other external forces only exert formative influence on international spaces when they suit and match the localised, internal condition of multilateral institutions. Thus, postwar idealism maintained nearly complete acceptance and continuous influence in Tokyo because of its centrality to the tribunal's internationalist principles and processes. Conversely, Cold War and colonial questions thickened only in certain circles, around particular issues, and at specific moments. While these internal processes controlled the court's functioning and findings, external forces – or at least assumptions about external forces – shaped how audiences perceived and remembered the IMTFE. Sadly, the court's intricate inner politics became seen as clumsy, cynical victors' justice.

¹⁷⁰ Costigliola, "After Roosevelt's Death," 23.

CHAPTER 5: Constructing Internationalism: Politics and Processes inside an International Court

Along with related contemporary institutions, the IMTFE initiated a new age of internationalism. It represented both the lofty promise and messy practise of global governance in action. “You have a Filipino judge on your right and an Indian on your left. In the center is an Australian, flanked by the American and Chinese judges. The remaining judges from left to right are the representatives of the Netherlands, Canada, Great Britain, Russia, France and New Zealand,” wrote prosecutor James Robinson as he described the heady experience of presenting international law to an international audience. “The eleven judges on the bench, representing the eleven nations whose flags are massed behind them, impress the observer with a feeling of competence and dignity and of international and inter-racial unity.”¹ Defence attorney Owen Cunningham saw the darker side of tribunal internationality, a space of competing agendas and “Political football” with “eleven nations outdoing each other to air their international grievances.”² In practise and politics, the IMTFE proved Robinson and Cunningham both right. Embodying the gild and grit of being international, the tribunal – like all international bodies – defied facile categorisation. First, politics became inseparable from the broader IMTFE experience, either as a distinct analytical framing or as a determinant of trial processes. Only a broad-based multi-dimensional study of personal, social, logistical, cultural, legal, global, *as well as* political considerations comes close to capturing the tribunal’s complexity. Secondly, the court’s very complexity defies, or should defy, oversimplified value judgments. Critics label the IMTFE a political trial or a manifestation of victors’ justice. Proponents describe a model of judicial rectitude and a bastion of international harmony. Ultimately, however, the internationalism constructed in Tokyo and the court itself emerged as an involute encounter, a negotiated process, and above all, a shifting and intimate lived experience.

¹James Robinson to Walter McKenzie (10 April 1947), McKenzie Papers, Box I, Folder: Correspondence - April 1947.

²Cunningham, Major Evils.

The IMTFE brought the world to Tokyo. A site of performative social interaction, Judges held “international parties,”³ embassies celebrated national cuisines and holidays,⁴ and participants lived a cosmopolitan experience.⁵ The IMTFE also developed into an intensely international political encounter. When the US Supreme Court considered its domestic authority to review IMTFE sentences, *Le Monde* spoke to the high stakes by decrying mere contemplation of the idea as typically impertinent American egoism, “*insolence internationale*.”⁶ Looking behind the scenes, this chapter exposes deeply political processes behind the selection of defendants, choice of arraigned crimes, framing of the indictment, and review of sentences at the IMTFE. In so doing, it questions reductive notions of internationalism as either an uncritical answer to global problems or an irrelevant, illusory, fool’s errand. Ultimately, I argue that, in Tokyo and elsewhere, constructing ‘the international’ unfolded as a complex, contested, process, not a staid, orderly, and sterile operation. In addition to the personal, social, structural, legal, global, and cultural dimensions explored in other parts of this dissertation, this chapter shows how individual and national politics interwove and interacted in Tokyo to form the very complicated essence of international organisation and justice. The resulting concessions and inevitable curtailing of judicial and international ideals created both the appearance and reality of political justice in Tokyo. Exaggerated perceptions of duplicity based on inflated notions of objectivity poisoned the IMTFE’s image in memory, law, and history.

³ Evans described an “international party” at the Imperial Hotel, “a nicely done affair” hosted by Röling attended by people from 20 countries: Harold Evans to Parents (23 March 1947), Evans Papers, Box 16, Item 1.

⁴ R. H. Quilliam attended several national themed events including two Russian Embassy feasts and a party held by Chinese IPS members. Quilliam Diary (respectively: 30 April 1946, 23 February 1946, and 10 October 1947). Harold Evans celebrated “China Day” at the Chinese Embassy on 10 October 1946. “All the big shots were there, from the Supreme Commander downward.” Harold Evans to Parents (11 October 1946), Evans Papers, Box 16, Item I. Evans also lauded every year’s British Empire Day celebrations. Harold Evans to Family and Friends (15 June 1946), Evans Papers, Box 16, Item I; Harold Evans to Parents (25 May 1947), Evans Papers, Box 16, Item I; and Harold Evans to Family and Friends (24 May 1948), Evans Papers, Box 16, Item 2. Chief Prosecutor Keenan enjoyed Soviet embassy celebrations of “their great army day.” Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe – Krould, Sequence: 746-755).

⁵ Shared housing broke down racial, cultural, and national boundaries. Life at Hattori House, the Canadian Legation, and the Imperial Hotel introduced participants to a multiculturalism few had experienced before.

⁶ “La Question Du Châtiment Des Criminels De Guerre Japonais Est En Pleine Confusion,” *Le Monde*, 9 December 1948, 3E. [The Question of Punishing Japanese War Criminals is Full of Confusion].

Situating Diplomacy: The National Politics of International Justice

Although the process of international justice ultimately trumped outside forces, participants did introduce national interests and domestic considerations to the court and its extra-judicial circles. The war irrevocably altered the domestic situations in the eleven IMTFE countries. Although conceived in wartime political climes and organised by wartime governments and leaders, the trial mostly operated under direction from authorities who had no part in its conception. Very few governments survived the war, as countries changed leaders and governing parties through death, democracy, and deposition. US President Franklin D. Roosevelt's death in April 1945 meant that President Truman, a man with virtually no foreign policy experience, oversaw most of the IMTFE-specific organisation, though the foundational and ideological tenets of postwar international justice had already been laid by Truman's predecessor.⁷ Similarly, in the UK, Clement Attlee's Labour party defeated Winston Churchill's Conservative government in July 1945, before the IMTFE began, but in the middle of the Potsdam Conference which supplied the tribunal's *raison d'être*. In Australia, three different Labour Prime Ministers – John Curtin, Frank Forde, and Ben Chifley – led the country between late October 1941 and the end of the tribunal in late 1948.

Other countries saw fundamental postwar changes not just in leaders but also in government structures, especially in defunct collaborationist, colonial, and military occupation regimes. In France, victory in the war meant ousting Vichy leadership. The IMTFE's timeline overlapped five different Provisional Government Chairmen – Charles de Gaulle, Félix Gouin, Georges Bidault, Vincent Auriol, and Léon Blum. After the establishment of the Fourth Republic in January 1947, the French political scene did not get any clearer. Between January 1947 and the IMTFE's close, the country had four Presidents from three different political parties.⁸ The Netherlands also experienced an unsettled postwar transition. Between liberation in

⁷ For Roosevelt's role in postwar international projects see: Borgwardt, *A New Deal for the World*.

⁸ Paul Ramadier, Robert Schuman, André Marie, and Henri Queuille.

June 1945 and the final days of the IMTFE, the Netherlands had three Prime Ministers under three separate parties⁹ and two monarchs – Queen Wilhelmina ceded the throne to her daughter Queen Juliana in May 1948 due to ill health. As discussed in the previous chapter, transition from colonies to independent states complicated the domestic political situations in India and the Philippines. In China, the tepid understanding between Communist and Nationalist forces dissolved with Japan's defeat. By the time representatives of the Nationalist Guomindang party arrived in Tokyo in early 1946, their country, already one of the most devastated from the war,¹⁰ stood on the verge of a full-scale civil conflict. All-out war broke out in July 1946, and the Chinese government represented in Tokyo fled to Taiwan less than a year after IMTFE personnel returned from Japan. In fact, the only countries with consistent governing parties and leadership during the transition from war to peace and singular leaders for the trial's duration were the Canadian government under MacKenzie King (1935-1948), Stalin's Soviet Union (1928-1953), and New Zealand Prime Minister Peter Fraser (1940-1949).

IMTFE countries also faced enormous domestic challenges throughout the tribunal's running. After the war, states like Australia, Britain, Canada, New Zealand, the Soviet Union, and the US confronted the monumental challenge of repatriating and demobilising returning service men and women from large forces stationed abroad. These countries also had to deal with the transition from wartime economies to more conventional markets and industries. The elevated status of women on the home front meant a historic reordering of family and gender roles. States with significant race problems experienced renewed, often violent renegotiation of racial boundaries and status. The most devastated countries, including Britain, China, France, the Netherlands, the Philippines, and the USSR, had to rebuild national psyches and infrastructure. Former occupied countries such as the Philippines, China, the Netherlands, and France faced not

⁹ Wim Schermerhorn, Louis Beel, and Willem Drees.

¹⁰ Diana Lary remains the most compassionate and compelling scholar of the human cost of warfare in China. Her recent study is characteristically excellent. See: Diana Lary, *The Chinese People at War: Human Suffering and Social Transformation, 1937-1945* (Cambridge: Cambridge University Press, 2010).

only these challenges, but also confronted the question of what to do with former collaboration regimes and collaborators.¹¹ Coming to grips with the war's profound legacy hardened the determination of leaders to prevent future wars, and when governments focused their attention on Tokyo, they did so with vigour. At the same time, however, domestic challenges and home front issues distracted governments from the Tokyo courtroom. Officially, the tribunal simply could not compete with more pressing priorities. Thus, in practise, the national interests in play at the tribunal emerged more from personal relationships, individual perspectives, and on-the-ground conditions in Tokyo rather than grand policy visions and high-level political machinations assumed by those who denounce the IMTFE's victors' justice.¹²

This chapter explores the complicated network of groupings – national, multi-national, and otherwise – which shaped the IMTFE's political experience. It reveals that most political interaction in Tokyo revolved around three rough divisions defined by professional collaboration and personal association, and only loosely by nationality or national policy. In other words, factions at the IMTFE reflected both what individuals and groups did, and how they saw themselves. Three basic political groupings formed behind the scenes: the US, the British Commonwealth or “Empire” Bloc, and “the Others.” Like the “non-aligned movement” which developed in the Cold War, the “Other” political group in Tokyo developed more as an alternative to American and British Commonwealth poles than from any conscious endeavour. This less formal association of individuals from nations and states outside the major diplomatic powerhouses nevertheless became a fixture behind the scenes. Competition and compromise within and among these political blocs produced the court's international experience. Tokyo

¹¹ See for example: Timothy Brook, *Collaboration: Japanese Agents and Local Elites in Wartime China* (Cambridge, MA: Harvard University Press, 2005).

¹² Although not specifically about “empire” or “hegemony,” this chapter builds on work by John Krige, Geir Lundestad, Charles Maier, and others on the mutually constitutive nature of global and local politics. John Krige, *American Hegemony and the Postwar Reconstruction of Science in Europe* (Cambridge, MA: MIT Press, 2006), Geir Lundestad, “Empire by Invitation? The United States and Western Europe, 1945-1952,” *Journal of Peace Research* 23, no. 3 (1986): 263-77, Charles S. Maier, *Among Empires: American Ascendancy and Its Predecessors* (Cambridge, MA: Harvard University Press, 2006).

represented a groundbreaking example of international cooperation and engagement not seen in Nuremberg or other courts until proceedings for the former Yugoslavia and Rwanda began in the 1990s.¹³ Although nominally and functionally “international,” the Nuremberg IMT reflected a certain kind of big-power diplomacy incongruent with the evolving ideals of global community (albeit suited to immediate postwar geopolitical realities). Four major powers ran Nuremberg, and while relations among these countries were not simple, diplomacy followed accepted, if increasingly dated, norms. While Nuremberg may prove a sound instructive example for future European tribunals, Tokyo represented the first true example of a *global* one. Unfortunately for the IMTFE’s operation, image, and legacy, the unavoidable compromise and in-built limitations embedded within its path-breaking internationality fed into contemporary and historical views of the tribunal as a vengeful, biased, and cynical show trial.

Illustration 19: An International Court



An International Court: Judges, assistants, and prosecutors from more than eleven countries meted justice in Tokyo. Attorneys like James Robinson faced a visually impressive international panel of jurists. ©Morris Gamble, by permission.

¹³ For more on the comparison of Nuremberg and Tokyo internationality see: James Burnham Sedgwick, "Brother, Black Sheep, or Bastard? Situating the Tokyo Trial in the Nuremberg Legacy, 1946-1948," in *The Nuremberg Trials and Their Policy Consequences Today*, ed. Beth Griech-Polelle (Baden-Baden, DE: Nomos Verlagsgesellschaft, 2009), 63-76.

American Trial? General Douglas MacArthur and the Internationality of the IMTFE

Most scholars consider the IMTFE a fundamentally “American trial.” Even works that challenge American preponderance only do so as a matter of degree.¹⁴ No one questions the US foundations of the trial. The fact that the Charter originated from General Douglas MacArthur, an American man in a largely American occupation, bolsters this argument. Based on MacArthur’s known megalomania and propensity to over-direct, scholars assume the trial’s American character emerged in practice as well as principle. This section suggests an alternate view of the trial and the Occupation itself. Numerical dominance and personal leadership by a national does not a unilateral action make. MacArthur felt unquestionably and un-apologetically American, but he became something else: the embodiment of international *Allied* cooperation.¹⁵ Because of the heated and violent nature of US-Japanese rivalry before and during the war, the prevailing misconception of an American trial in Tokyo feeds into criticism of imposed victors’ justice at the IMTFE. By recognising the court as a multilateral rather than unilateral endeavour, this section builds knowledge of both the international experience of Tokyo justice and the complexity of the court’s internationality which sustained its apparent and actual biases.

Debate about the Supreme Commander’s internationality began with the tribunal’s founding documents. SCAP promulgated the Tokyo Charter on 19 January 1946 under American authority. Yet, internationally inclined observers traced the Charter’s multilateral lineage back through inter-Allied statements such as the Cairo Declaration (1 December 1945),

¹⁴ Borgwardt notes but not questions the “continuing refrain,” of Tokyo as “even more of an ‘American show’ than Nuremberg . . . The prosecution was run by a single American chief prosecutor, and the structure of the overarching occupation was of course entirely run by MacArthur, with an Allied Far Eastern Commission in a toothless advisory role.” Borgwardt, “A New Deal for the Nuremberg Trial,” 700. Dower contends, “American control of prosecution policy and strategy bordered on the absolute.” Dower, *Embracing Defeat*, 458. Futamura dismisses the IMTFE’s internationalist trappings, “Unlike Nuremberg, the Tokyo Trial was more an ‘American’ than an international tribunal.” Madoka Futamura, “Individual and Collective Guilt: Post-War Japan and the Tokyo War Crimes Tribunal,” *European Review* 14, no. 4 (2006): 472. D. C. Watt argues that American predominance became an expected necessity. Donald Cameron Watt, “Historical Introduction,” in R. John Pritchard, Sonia Magbanua Zaide, and International Military Tribunal for the Far East, *The Tokyo War Crimes Trial: Index and Guide*, vol. 1-5 (New York: Garland, 1987), vii-xxiii. The other countries represented are not entirely ignored, but American-centric accounts point to the overwhelming numeric dominance of the tribunal finances, infrastructure, and staffing as simply too prevalent for anything other than a US inspired and directed outcome.

¹⁵ John Krige’s work on the “co-production” of the Marshall Plan speaks to similar processes at work in the European sphere. Krige, *American Hegemony*.

the Potsdam Declaration (26 July 1945), the Instrument of Surrender (2 September 1945), and the Moscow Declaration (26 December 1945). International partners of the IMTFE argued that even if initially accepted as a US court, an April 1946 policy directive on war crimes technically placed SCAP under international FEC authority.¹⁶ This issue lay at the crux of debate regarding whether or not the US Supreme Court had jurisdiction over the sentences imposed by the tribunal in November 1948.¹⁷ When the case first came before the Supreme Court, it split the bench. Justices Stanley Reed, Felix Frankfurter, and Harold Burton all declared a “want” of jurisdiction. The court deadlocked to such a degree that Justice Robert Jackson, who had initially intended to abstain from the vote because of his involvement as Chief Prosecutor in the related Nuremberg project, felt compelled to make a tie-breaking vote just to decide if the court would even consider the case, let alone overturn the IMTFE sentences. “Four members of this Court feel that the Japanese convicted of war crimes should have some form of relief, at least tentative, from this Court. The votes of these are not enough to grant it but, if I refrain from voting, they constitute one-half of the sitting Court,” Jackson explained. “On the other hand,” Jackson continued, “four other Justices are convinced, from their study of the question, that there is no constitutional jurisdiction whatever in this Court over the subject matter. To interfere and assume to review it would in that view constitute an unwarranted interference with delicate affairs that are in no way committed to the jurisdiction of this Court.” Jackson justified his decision to weigh in as follows: “Our allies are more likely to understand and to forgive any assertion of excess jurisdiction . . . than our enemies would be to understand or condone any excess of scruple about jurisdiction to grant them a hearing.”¹⁸ The Supreme Court’s eventual

¹⁶ For an apt discussion of this issue see Patrick Shaw, Head of Australian Mission, Tokyo, “Departmental Despatch No. 239/1948” (11 December 1948), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

¹⁷ For legal debate from the period see: William W. Bishop Jr., “Koki Hirota *et al.* v. Douglas MacArthur,” *American Journal of International Law* (1949): 170-72. The case remains controversial, especially in the context of the US Occupation of Iraq: Stephen I. Vladeck, “Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III,” *Georgetown Law Journal* 95, no. 5 (June 2007): 1497-554.

¹⁸ U.S. Supreme Court: *Koki Hirota v. General of the Army MacArthur* 335 U.S. 876 (1948). Cited online from <http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=335&invol=876> (Accessed 15 May 2011).

decision that it lacked the authority “to review, to affirm, set aside or annul” the IMTFE, and the deeply divided nature of this decision, speaks to the messy construction of internationalism in Tokyo and elsewhere. On one hand, Supreme Court review reflected continuing, even growing, US influence over global governance in the era. On the other hand, the decision also suggested a willingness to accede to an evolving internationalist framework.¹⁹

The US Supreme Court debate reveals the contested nature of internationalism in Tokyo and abroad. The issue concerned both appearance and power, especially for non-American IMTFE countries. It seemed “self-evident” to New Zealand’s head of mission in Washington, Sir Carl A. Berendsen, that the US court had “no power to review” since an “international instrument” defined SCAP’s actions. However, Berendsen appreciated the issue’s complexity and warned, “Four of the nine judges . . . [d]o not consider this by any means self-evident and a fifth thinks the question sufficiently obscure to be investigated.”²⁰ Berendsen advised his government to prepare diplomatic responses to the Supreme Court threat. Wellington’s reply made the stakes clear: “The issue of this appeal is of considerable concern not only to ourselves, but to all other Governments in the Far Eastern Commission.”²¹ Around the same time, the British Secretary of State for Commonwealth Relations circulated an anxious memorandum to the governments of Australia, Canada, India, and New Zealand. “The awkward point which may arise before the Supreme Court is that in setting up the Tribunal S.C.A.P was acting on a United States directive,” the cable read. “We think however that there is a good answer to this; namely, that the United States authorities in issuing the directive to MacArthur, were only enabling him to carry out the *Allied intentions* embodied in the Potsdam Declaration and the instrument of

¹⁹ U.S. Supreme Court: *Koki Hirota v. General of the Army MacArthur* 338 U.S. 197 (1948). Cited online from <http://supreme.justia.com/us/338/197/case.html> (Accessed 15 May 2011).

²⁰ Carl A. Berendsen to Acting Minister of External Affairs, Wellington (8 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

²¹ External Affairs, Wellington to TOTARA, Washington (18 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

surrender.”²² Similarly, when debating the conspiracy charge’s validity, Soviet Justice Zaryanov argued, “The Supreme Commander of the Allied Powers when promulgating the Charter, was implementing the will and the mission *entrusted to him by the Allied Powers* and consequently was acting quite lawfully.”²³ Constructing the meaning of internationalism in Tokyo emerged as a competitive process. Outside the US, MacArthur was not American; he was international.

In this thinking, the fact that SCAP received US directives became irrelevant. “The methods by which the directives are given to him [MacArthur] are purely incidental and do not affect the fact that he is acting on behalf of the Allied Powers concerned,” announced the British Secretary of State for Commonwealth Relations.²⁴ “We share your view that [the] only proper recipient of appeals against the sentence of Tribunal is SCAP,” the New Zealand External Affairs Department told counterparts in Canberra, New Delhi, Ottawa, and London. “The methods by which directive are given to SCAP do not affect [the] fact he is acting on behalf of Allied Powers.”²⁵ An internal British memorandum suggested that the Supreme Court review “caused great surprise in official circles at Tokyo from General MacArthur downwards.”²⁶ Other international representatives felt equally piqued. For example, on 15 December 1948, Nelson T. Johnson, the FEC Secretary General and an American, expressed his internationalist objections to Robert A. Lovett, the Acting US Secretary of State. He stated firmly, “The International Military Tribunal for the Far East is an international court, appointed and acting under international authority.”²⁷ Through its state publication, the Soviet Government “violently denounc[ed] General MacArthur for allowing the appeal to go forward” and blasted the Supreme

²² Secretary of State for Commonwealth Relations, London to Governments of Canada, Australia, New Zealand, India (13 December 1948), NZ Archives, EA2 1946-31A 106-3-22 Part 2. [Emphasis added].

²³ I. M. Zaryanov to W. F. Webb (31 August 1948), Bernard Papers, F° Δ rés 874-10-63. [Emphasis added]

²⁴ Secretary of State for Commonwealth Relations, London to Governments of Canada, Australia, New Zealand, India (13 December 1948), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

²⁵ Minister of External Affairs, Wellington to Commonwealth Secretary, London; External Affairs, Ottawa; External Affairs, Canberra; and Foreign Affairs, New Delhi (17 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

²⁶ Cecil Day, Cabinet Offices, London to Secretary of External Affairs, Wellington (9 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

²⁷ Nelson T. Johnson, Secretary General, FEC to Robert A. Lovett, Acting Secretary of State, US Department of State (15 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

Court's decision to review the sentences. "This action by the National Court of one member of the Tokyo tribunal is said to 'annul with a flourish of the pen all the work of the tribunal' and to violate all the international obligations assumed by the United States Government from Potsdam to the charter of the tribunal itself," noted the British Embassy in Moscow.²⁸ Reportedly, Dutch Justice Röling expressed "amazement" that the Supreme Court granted leave, while Chinese judge Mei issued a public statement suggesting that the reversal of the IMTFE Judgment by a US authority would create a "dangerous precedent" for international relations and exert a "deep effect" on "future cooperation and mutual trust among nations."²⁹ The Supreme Court served as an unwelcome reminder that the appearance of international, not unilateral, justice meant as much as the actual process of multilateralism. Tokyo participants and the governments involved struggled to control the meaning and message of international justice in action. By insisting on and reinforcing the IMTFE's international character, participating states and their representatives attempted both to contain undue threats to the court's autonomy and, somewhat conflictingly, to assert and maintain ownership over the process.

Administering justice in Tokyo brought into stark relief competing views on the court's internationalism and authority, and induced interaction among rival political visions. Long before the US Supreme Court review threatened IMTFE internationality, SCAP power over the tribunal formed a thorny diplomatic issue. Because of its centrality to the entire case, MacArthur's role in reviewing the sentences posed an early hurdle. British Commonwealth authorities in particular fretted over the potential overextension of US authority embodied in SCAP's review powers. On 25 November 1945, the Secretary of State for Dominion Affairs circulated a note to the external affairs ministries in Australia, Canada, New Zealand, and South Africa regarding a US war crimes policy paper from October. The message called the US

²⁸ Cecil Day, Cabinet Offices, London to Secretary of External Affairs, Wellington (9 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

²⁹ Ibid.

proposal “generally acceptable” but emphasised the “most desirable” need for an “international” court.³⁰ In response, Wellington suggested the FEC – i.e. *not* the US State Department or the MacArthur’s General Headquarters (GHQ) – as “the appropriate forum to settle questions of policy and any matters in doubt or dispute.”³¹ Canberra concurred. “We are in general agreement with your comments on United States proposals,” the Australian government told its New Zealand counterpart. “We think it essential that *responsibility of Supreme Commander* for all phases of trials of major war criminals as proposed by United States *should be subject to inter-governmental agreement on part of powers concerned.*” The FEC or some other “Allied Control Council” offered the “most convenient agency” for keeping US preponderance in check. The Australian government stressed that “Power to reduce or modify judgments of [the] court should be [a] matter for Governments which have formulated principles for trial . . . Or for a board of review set up by them rather than be left to sole discretion of Supreme Commander.”³² Happy to leave the heavy administrative and logistical burden of the tribunal in US and SCAP hands, British Commonwealth authorities worked to ensure that court-related policy and judicial decisions evolved multilaterally. In the end, the IMTFE’s organising powers settled on a SCAP review subject to “consultation” by the FEC.³³ Like the court itself, IMTFE sentence review represented a compromise: more American than some other countries hoped, but also more international than US authorities initially felt advisable, or than most scholars recognise.

³⁰ Secretary of State for Dominion Affairs, London to Minister of External Affairs, Wellington (24 November 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2. A copy of the US war crimes policy in question exists in: Secretariat, FEC, “Apprehension and Punishment of War Criminals in the Far East – Note by the Secretary” (24 October 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

³¹ Minister of External Affairs, Wellington to Secretary of State for Dominion Affairs, London (27 November 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2. The same day, a New Zealand representative in London cabled Wellington, “The United Kingdom authorities are taking issue with the suggestion of the United States Government that the arbiter on questions of dispute or doubt should be the Joint Chiefs of Staff and the State Department; their view is that the Far Eastern Commission should settle these matters and this is fully consistent with the opinions we have expressed to date.” Memorandum to Minister of External Affairs, Wellington (27 November 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2. [Emphasis added].

³² Minister of External Affairs, Canberra to Minister of External Affairs, Wellington (28 November 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

³³ Later sections of this chapter detail the SCAP review compromise.

MacArthur's impact on proceedings became a heated issue. Regardless of SCAP's internationality, some participants on the ground worried that the Supreme Commander's national loyalties introduced unwelcome American influence in Japan. The New Zealand contingent at the IMTFE, for instance, often conflated SCAP and US authority despite work by its government to configure SCAP as an international and not American body. Their comments reflect the personal responses and strategies developed by participants to deal with the appearance and reality of international justice when it did not match preconceived notions. In his later life Harold Evans explained, "a whole lot of the stuff came down to depending on what America thought. And what America thought in those days was partly what General MacArthur thought."³⁴ R. H. Quilliam likewise questioned the preponderance of SCAP and American power in Tokyo. Although generally "doing well," Quilliam found MacArthur's power alarming. "[There are] dangers in what is virtually a dictatorship," he wrote, "and in the domination by the United States over all Japan matters."³⁵ Justice Northcroft shared his compatriots' concerns. "Quite frankly I do not think it is a very 'good show,'" Northcroft reported.

You must visualise the atmosphere in Tokyo, where General MacArthur is the autocratic ruler of the country. Instead of having well-trained and competent administrative people about him capable of taking charge of various departments, he is surrounded by soldiers. These, no doubt, are good administrative people in military affairs, but they 'fall down' all over the place when they deal in their dogmatic way with things that they do not understand. . . . the final result is always the soldiers who implement decisions.³⁶

SCAP dominance of the Occupation in Northcroft's view bled into the IMTFE itself. Missing the trees for the forest, he considered the tribunal "completely American."³⁷

SCAP's Americanness or authority worried other insiders less. British Prosecutor Christmas Humphreys acknowledged MacArthur's autocracy, but took no issue with it; international or otherwise. Humphreys described MacArthur as a dictator, but a benevolent one

³⁴ Evans Interview.

³⁵ R. H. Quilliam to A. D. McIntosh (17 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

³⁶ E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

³⁷ Ibid.

perfectly suited for the job.³⁸ For others behind the scenes, SCAP did not make the tribunal American enough. Internationalism appealed, but only if the finished product suited both US aims and specific on-the-ground contingencies. Accordingly, some trial circles wished for a *more* autocratic MacArthur, or at least wanted him more actively engaged in IMTFE processes. Unsurprisingly, many Americans felt this way, particularly US servicemen and servicewomen. The first IDS head, Beverly Coleman, lamented MacArthur's hands-off approach. Coleman, who had followed the tribunal with interest after resigning his post in mid-1946, pleaded with MacArthur to exercise SCAP sentence review authority in November 1948. "As Commander United States Army Forces Pacific, and even as Supreme Commander for the Allied Powers, you might so have dissociated yourself from such matters in June 1946, at which time you could have regarded them as being a responsibility of the Tokyo Tribunal," Coleman argued. However, "as the reviewing authority whose duty arises upon the announcement of the tribunal's judgment in November 1948, I do not see how you can escape careful consideration of points brought officially to your attention in 1946."³⁹

MacArthur espoused inconsistent personal ideas about internationalism,⁴⁰ but he understood the importance of rhetoric and the value of the public appearance of common

³⁸ Humphreys, *Via Tokyo*, 29.

³⁹ Beverly M. Coleman to General Douglas MacArthur (16 November 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8. Coleman may still have been smarting from a letter sent at the time of his resignation which announced SCAP's intention to "dissociate" from the IMTFE. See John B. Cooley for the Supreme Commander of Allied Powers to Beverly M. Coleman (31 May 1946), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

⁴⁰ Before the war, MacArthur warned against the threat internationalism posed to sovereignty. "Any organization which opposes the defense of homeland and the principles hallowed by the blood of our ancestors, which sets up internationalism in place of patriotism, which teaches passive submission of right to the forces of the predatory strong, cannot prevail against the demonstrated staunchness of our position." Letter to the Editor of *The World Tomorrow* Concerning the Results of a Poll of Clergymen on the Question of the Military Obligations of the Citizen (2 June 1931), in Edward T. Imparato, *General MacArthur: Speeches and Reports 1908-1964* (New York: Turner Publishing Company, 2000), 24. As an international figure in an international Occupation, MacArthur became more positive. On 13 July 1947, for example, the Supreme Commander extolled an FEC policy directive on the post-surrender treatment of Japan. "It not only ratifies the course which thus far has been taken," he averred, "but signifies a complete unity of future purpose among the eleven nations and peoples concerned." General Douglas MacArthur, Comments on Far Eastern Commission Policy Directive (13 July 1947), in Imparato, *General MacArthur: Speeches and Reports 1908-1964*, 149. After his embarrassing experiences in Korea, MacArthur railed against the "false prophets of internationalism" and reportedly denounced the "fallacious" notion of collective security "because a chain is no stronger than its weakest link." "MacArthur Warns against Internationalism," *Prescott Evening Courier*, 2 February 1955, 4.

purpose. This sensitivity proved a formative influence in Tokyo. Thus, concerns among the IMTFE's international partners about the "danger" inherent in MacArthur's powers turned out to be largely unfounded. In practise, Coleman's criticism of non-action hit closer to the mark. Perhaps surprisingly, MacArthur's attitude and action towards the IMTFE manifested determined non-intervention. The best explanation for this seeming paradox lay in the Supreme Commander's very self-importance. MacArthur conceived his mission as much more than an American one. He saw it as a historic, global responsibility. In intention, conception, and practice, therefore, the IMTFE formed part of an international Occupation project. The Supreme Commander imagined himself an international agent of global importance. Being American meant being international. MacArthur explained this vision to a British political representative in Tokyo. "He thought the action of the defence attorneys in taking this appeal to the United States Supreme Court had been based on a complete misunderstanding of his international status," reported the official. "The convening of the Court and the drawing up of the charter," MacArthur argued, "had been effected by him not in his capacity as an American official but as an 'international' official in whom had been vested the right of the ten [countries] concerned in addition to the those [sic] of the United States."⁴¹ Postwar idealism fused national and international identities and interests, at least within the confines of budding global governance structures. Supreme Court review did not threaten the Supreme Commander's ego or authority. In fact, the process complemented MacArthur's grandiose image of the IMTFE's, and his own, place in history. "It is not my purpose, nor indeed would I have that transcendent wisdom which would be necessary to assay the universal fundamentals involved in these epochal proceedings designed to formulate and codify standards of international morality," an official SCAP pronouncement read. "No mortal agency in the present imperfect evolution of civilized society seems more entitled to confidence in the integrity of its solemn pronouncements. If we cannot

⁴¹ Cecil Day, Cabinet Offices, London to Secretary of External Affairs, Wellington (4 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

trust such processes and such men we can trust nothing.”⁴² Because of the Supreme Commander’s tendency to issue prolix moral statements for public consumption rather than substance, MacArthur’s colourful language must be taken with a grain of salt. However, his behaviour towards the IMTFE demonstrates a sincere commitment to his work’s international scope, a commitment completely in line with his exaggerated sense of self-worth.⁴³

Given MacArthur’s willingness to intercede dramatically in many spheres of influence, the Supreme Commander’s actions toward the IMTFE reveal a peculiar deference to judicial authority and independence.⁴⁴ The passages quoted above illustrate a second aspect of MacArthur’s personality that mitigated potential abuse of authority at the IMTFE. He consistently bowed to court opinion, even when privately displeased about its progress because part of MacArthur’s self-image as an international and American agent stemmed from a firm commitment to the ideals of justice – as he conceived them. Even if US jurisdiction held primacy in Tokyo, once court sessions began MacArthur usually did not, and would not, exercise undue influence. The official statement accompanying SCAP’s sentence review reflected MacArthur’s respect for legal processes, as well as his own sense of limitations in legal matters. “In so far as my own immediate obligation and limited authority extend in this case,” the statement read, “I can find nothing of technical commission or omission in the incidents of the trial itself of sufficient import to warrant my intervention.” SCAP concluded, “No human decision is infallible but I can conceive of no judicial process where greater safeguard was made

⁴² General Douglas MacArthur, General Headquarters, Far East Command, Public Information Office (24 November 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

⁴³ The FEC shared MacArthur’s view. On 10 December 1948, its “Committee No. 5” on War Crimes pronounced “without reservation that it regards the International Military Tribunal for the Far East as an international court, appointed and acting under international authority; and that it regards the action of the Supreme Commander for the Allied Powers . . . in approving, after consultation, the sentences imposed by the tribunal, as in accordance with FEC policy decision of April 3, 1946, and as taken in accordance with the authority and direction of the Far East Commission.” FEC – Confidential – Enclosure ‘B’: Statement Prepared by Committee No. 5 (10 December 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

⁴⁴ John Dower, labels MacArthur the “unchallenged overlord of occupied Japan” who used his influence to pursue a “radically reformist agenda” which included creating a new Japanese constitution, revolutionising suffrage in Japan, redistributing land and overhauling land tenure, dramatic economic restructuring, and massive political purges. Dower, *Cultures of War*, 237. See also: Dower, *Embracing Defeat*.

to evolve justice.”⁴⁵ As with most MacArthur statements, particularly public ones, a certain level of scepticism must be exercised. He felt quite comfortable making dramatic pronouncements steeped in idealistic language. However, in this case, MacArthur’s actions behind the scenes suggest a genuine uncertainty around court protocol. Despite initial judicial anxiety about SCAP interference, MacArthur managed to allay the fears of even the prickliest judges. “In my last letter,” Justice Northcroft told his Prime Minister, “I referred to the necessity for care on the part of the Court to prevent any appearance of interference with its integrity from the Supreme Commander.” After a March 1946 meeting with MacArthur where “the whole matter was canvassed and assurance given by the General that he was jealous of the independence of the Court as would be the members of the Court themselves,” Northcroft admitted to previously “misunderstanding” the SCAP’s attitude. “Sir William [Webb] and I left him completely satisfied that whatever may have been the position previously there was now no fear of interference.”⁴⁶ Similarly, in response to Beverly Coleman’s threat to resign, MacArthur’s aide John Cooley explained his commander’s hesitance to intervene. “The action of General Headquarters in this connection has been primarily that of an agent of the court,” Cooley told Coleman. “It is considered inappropriate to take final action upon your application prior to receipt of word from the tribunal itself.”⁴⁷ As explained earlier, MacArthur’s unwillingness to intercede on this and other issues made Coleman rue the lost opportunities of SCAP power.

This is not to say that MacArthur entirely refused to put his weight behind efforts to enforce or expedite IMTFE issues. However, he did so only when convinced matters had been arrived at legitimately by the court. The resignation of US Justice Higgins proves this point. As explained previously, Higgins’ withdrawal, and particularly his replacement by General Cramer,

⁴⁵ General Douglas MacArthur, General Headquarters, Far East Command, Public Information Office (24 November 1948), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

⁴⁶ E. H. Northcroft to Peter Fraser, Prime Minister, New Zealand (11 March 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

⁴⁷ John B. Cooley to Beverly M. Coleman (31 May 1946), NZ Archives, EA2 1948-29A 106-3-22 Part 8.

seriously undermined the IMTFE's already tenuous jurisdictional legitimacy. Diplomatic circles voiced mixed opinions about the Higgins-Cramer controversy but never fully mobilised to intercede. The UK Attorney General, for example, told British Prosecutor Comyns Carr, "It seems to me undesirable and even improper that anyone should be appointed as a substitute judge now."⁴⁸ Yet he also agreed with Comyns Carr's assertion that "nobody took a sufficiently strong attitude to prevent his doing it."⁴⁹ In part, a series of unfortunate coincidences prevented effective diplomatic intervention by disgruntled governments on the issue. The timing of Higgins' formal resignation proved awkward. As Comyns Carr explained, word of Higgins' resignation and Cramer's replacement reached the public before any official decision. "We did not get information on which we could act soon enough" because "at the critical moment, the court went on strike owing to failure of American engineers to install air conditioning and retired to the hills." In addition, MacArthur happened to be "[in] Manila for their Declaration of Independence."⁵⁰ Leaked information and problematic timing severely hamstrung what governments could do to effect change, and the Cramer replacement became a *fait accompli*. By respecting and supporting the court's judicial and international authority, therefore, MacArthur's inaction also produced a controversy linked to allegations of political victors' justice in Tokyo.

Given this situation, governments issued pragmatic and measured protests to Washington. On 11 July 1946, New Zealand's Minister of External Affairs gave anaemic directions to its Washington representative, Berendsen. Though convinced that Cramer's appointment violated a "fundamental principle of law . . . in all countries of the world," the ministry conceded, "We would be disposed to agree to the appointment of a successor" if it meant saving the tribunal itself. "The only other course to take in justice is to abandon the present proceedings and start the trials de novo. This would be a most unacceptable waste of time and effort," the minister

⁴⁸ Attorney General to A. S. Comyns Carr (9 July 1946), IWM Papers, FO 648, Box 152, Folder 4.

⁴⁹ A. S. Comyns Carr to Attorney General (16 July 1946), IWM Papers, FO 648, Box 152, Folder 4.

⁵⁰ Ibid.

informed Berendsen. "We would wish you to make the strongest possible recommendations against any proposal which would involve the abandonment of the present trial proceedings."⁵¹ In other words, object, but not at the cost of the IMTFE. Berendsen replied that Sir George Sansom (British representative to the FEC), Dr. Herbert Evatt (Australian Minister of External Affairs), and other diplomats on the ground in Washington agreed. "It would require the very strongest representations," Berendsen admitted, "to secure a reconsideration of the United States position." With Cramer already appointed, "It appears that from the practical point of view the situation is irretrievable."⁵² Other than suggesting a compromise that would allow a US appointee in a limited "observer" role, the New Zealand government demurred. A subsequent meeting with Berendsen, Sansom, US General John H. Hilldring (Assistant Secretary of State for Occupied Areas), and Judge Charles H. Fahy (Legal Adviser of the USDS) in early September 1946 reached a foregone conclusion. After "the matter had been fully canvassed as to what, if anything, could be done," Berendsen reported, the group decided, "any step that could now be taken to alter the position would do harm rather than good." They had only two available courses: "hear the whole case de novo" or "withdraw the American Judge from the Tribunal

⁵¹ Minister of External Affairs, Wellington to New Zealand Minister, Washington (11 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁵² New Zealand Minister, Washington to Minister of External Affairs, Wellington (16 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3. This formed an interesting meeting of the minds. Berendsen was, or at least became, an avid participant in international organisation. He created the New Zealand Department of External Affairs and contributed to the assemblies of both the League of Nations and United Nations. Carl Berendsen, *Mr. Ambassador: Memoirs of Sir Carl Berendsen*, ed. Hugh Templeton (Wellington, NZ: Victoria University Press, 2009), Carl Berendsen and Alister McIntosh, *Undiplomatic Dialogue: Letters between Carl Berendsen and Alister McIntosh, 1943-52*, ed. I. C. McGibbon (Auckland, NZ: Auckland University Press, 1993). Dr. Herbert Evatt emerged as a committed postwar internationalist. He helped draft the Universal Declaration of Human Rights and served as President of the UN General Assembly (1948-1949). On the other hand, he was also a staunch supporter of the "White Australia" policy in the 1920s, and fiercely anti-Japanese before, during, and after the war. David Day, *Brave New World: Dr. H.V. Evatt and Australian Foreign Policy, 1941-1949* (St. Lucia, Qld.: University of Queensland Press, 1996), Alan Renouf, *Let Justice Be Done: The Foreign Policy of Dr. H.V. Evatt* (St. Lucia, Qld.: University of Queensland Press, 1983), "Dr. Evatt's Statement," *Time Magazine*, 1 September 1945, 4, "Thumbs Down on Japs, Evatt Urges," *Vancouver Sun*, 18 August 1945, 6, "Evatt Impatient over Fate of Japanese," *Sydney Morning Herald*, 4 February 1946, 3, Herbert Vere Evatt, "'Japan Is Still a Menace'; We Were Tricked Once, Says an Australian Statesman; Now We Must Ask Good Faith in Deeds as Well as Words," *New York Times Magazine*, 3 February 1946, SM6. A career diplomat and historian of Japan, Sir George Sansom felt deeply skeptical about the US Occupation's ambitious social engineering. Katharine Sansom, *Sir George Sansom and Japan: A Memoir* (Tallahassee, FL: Diplomatic Press, 1972). See also: Dower, *Cultures of War*, 406.

altogether.”⁵³ Neither option seemed viable. Unsatisfied but understanding, Wellington thanked Berendsen. “The legality and relevance of the arguments produced by the Americans in support of the action they took are not very convincing,” but “there should be a United States Judge on the Court.”⁵⁴ As a resigned missive from Foss Shanahan to R. H. Quilliam noted, “the propriety and legality of the United States action must remain for the judgment of history.”⁵⁵ Such compromises formed the negotiated backbone of IMTFE internationalism and highlight the messy relationship between political necessities and the working of international justice, a messiness which exposed the court to criticism then and now.

Upon return from Manila, MacArthur did not respond to the controversy with the heavy-handedness one might expect. He made no attempt to force Higgins to stay or refuse the resignation. Instead, the Supreme Commander promptly accepted Higgins’ resignation and replaced him with Cramer. Some individuals saw MacArthur’s alacrity itself as inappropriate unilateral behaviour. Quilliam, for example, asked Wellington to intercede and protested the fact that MacArthur “has not consulted” Associate counsel who were “all . . . strongly opposed in principle.”⁵⁶ “It is at least arguable that once [the] Supreme Commander has made eleven appointments he is *functus officio* and no further appointments can be made,” Quilliam explained.⁵⁷ Comyns Carr also complained, “[MacArthur] has declined to consult Prosecutors some of whom think he has no power to make any substitute appointment and all agree that it is most undesirable at this stage.”⁵⁸ “Apart from [the] question . . . as to whether under the terms of the Charter such replacement can be legally made at this stage of the proceedings,” wrote Canadian prosecutor H. G. Nolan, “all Associate Prosecutors are of opinion that a replacement

⁵³ New Zealand Minister, Washington to Minister of External Affairs, Wellington (10 September 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁵⁴ Minister of External Affairs, Wellington to New Zealand Minister, Washington (20 September 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁵⁵ Foss Shanahan to R. H. Quilliam (20 September 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁵⁶ R. H. Quilliam to Prime Minister (8 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁵⁷ R. H. Quilliam to A. D. McIntosh (9 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁵⁸ A. S. Comyns Carr to Attorney General (8 July 1946), IWM Papers, FO 648, Box 152, Folder 4.

now will expose the proceedings to serious attacks from Defence Counsel on grounds of unfair trial; Associate Prosecutors [were] not asked to advise Supreme Commander.”⁵⁹ In truth, the decision to accept Higgins’ resignation and appoint Cramer became neither as unilateral, nor as roundly objected to, as Quilliam, Comyns Carr, Nolan, and others alleged. In MacArthur’s absence, the SCAP War Crimes Section did refer the matter to the prosecution to assess the need to create a Charter amendment permitting judicial replacements. In fact, Quilliam had described the ensuing meeting to superiors. On 5 July 1946, despite a “sharp difference of opinion,” Associate Counsel reached consensus “that a new appointment would be technically valid.” Thus, while prosecutors may not have liked the optics or the “principle” of the resignation, a majority, at least, found it legally valid. All the same, Quilliam and others remained unsatisfied and “very concerned about this matter.” “It is contrary to my ideas of British justice,” Quilliam explained. No “sufficient” reason had been supplied for the resignation. Rather than risk “more than justified” criticism, Higgins should have been pressured to stay. “If he still refused,” Quilliam concluded, “no substitute appointment should [have been] made.”⁶⁰

Nevertheless, this incident illustrated MacArthur’s unexpectedly deferential role in Tokyo justice and the contested and fluid construction of internationalism at the IMTFE. SCAP expedience in allowing Higgins’ resignation undercut political leverage available to participating powers. Holding the trial without US representation became impossible, but appointing a replacement judge midstream appeared improper. Moreover, forcibly removing a replacement judge in the public eye would have been political, legal, and symbolic poison for every party involved. Viewed cynically, this sequence of events could be interpreted as proof of MacArthur’s authoritarianism and evidence of US dominance at the tribunal. It certainly reflects MacArthur’s decisiveness. In truth, however, SCAP’s actions highlight the Supreme Commander’s regard for judicial voice in Tokyo. By the time MacArthur returned from the

⁵⁹ H. G. Nolan to Canadian Embassy, Washington (8 July 1946), IWM Papers, FO 648, Box 152, Folder 4.

⁶⁰ R. H. Quilliam to A. D. McIntosh (9 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

Philippines on July 6, the Supreme Commander's actions suggest that he considered the decision final and out of his hands. In MacArthur's opinion, discussion and debate about the decision's legitimacy remained the purview of the tribunal alone. His job meant executing and finalising whatever decision the court made. If the Bench, particularly Webb, accepted Higgins' decision, then so too did MacArthur. Indeed, some prosecution members regretted SCAP's diffidence on legal matters. "MacArthur's view surprisingly is that his only duty is to make a formal appointment of any judge nominated by any nation," Comyns Carr reported. "It now appears that it was owing to the insistence of Webb and contrary to MacArthur's views that any substitute was appointed at all."⁶¹ New Zealand officials concluded, "It was Sir William Webb (Australian member) Chairman of the Tribunal, who informed MacArthur that appointment of a new Judge was valid and within the terms of the Charter. . . . Webb was really responsible for what had happened."⁶² Once the processes had been completed, MacArthur acted firmly to assure that Cramer's appointment would not be forestalled. However, as with his approach to the IMTFE more generally, MacArthur did not unduly interfere with the tribunal to force through an unconsulted decision, even when doing so could have helped the IMTFE save face in the court of public opinion.

Other incidents illustrate the Supreme Commander's hands-off approach to the IMTFE. MacArthur had plenty of opportunities to flex authoritative muscles and directly influence the trial. At times, participants demanded MacArthur act decisively to change the trial's course, but he did not. R. H. Quilliam's rivalry with Chief Prosecutor Keenan, for example, made the New Zealander hope for and actively pursue SCAP intervention. In late June 1946, Quilliam reported to Wellington that he felt "very pleased" about "action" finally being taken on the Keenan front. The break came after Quilliam "strongly urged" several senior US attorneys to go to GHQ. "I

⁶¹ A. S. Comyns Carr to Attorney General (16 July 1946), IWM Papers, FO 648, Box 152, Folder 4.

⁶² Foss Shanahan, Prime Minister's Department, Wellington to R. R. Cunninghame (4 October 1946), NZ Archives, EA2 1947-27A 106-3-22 Part 4.

felt sure that if the view of these three Americans and the Associate Prosecutors were made known to General MacArthur, he would take some action.” Carlisle Higgins (acting chief of counsel in Keenan’s absence) visited MacArthur’s Chief of Staff on 24 June 1946. After the meeting, Higgins told Quilliam and Canadian Prosecutor Nolan that he believed Keenan would be forced to resign. “It has been arranged that an Officer who has strong influence over Mr. Keenan will go to Washington at once with the object of persuading him to resign on the grounds of ill health,” a satisfied Quilliam told his supervisor.⁶³ A week later, Quilliam speculated, “An Officer has gone to Washington and will, I think, obtain his resignation. If he does not succeed SCAP must surely act. They know his unfitness and in all the circumstances it would be scandalous to allow him to go on.”⁶⁴ The Keenan-Quilliam rivalry reveals much about MacArthur’s standoffishness in the face the tribunal’s built internationalism. First, Quilliam and others complained about Keenan for months before MacArthur reluctantly agreed to an official meeting. Second, MacArthur’s Chief of Staff handled the matter, not the Supreme Commander himself, indicating a certain level of non-intervention or in the very least a sense of propriety regarding undue influence. Finally, as we know from other chapters, no one compelled Keenan to resign. The IMTFE had no unilateral, unchallengeable authority guiding things behind the scenes – not MacArthur, not Washington. In politics and process, the tribunal emerged as a contested and constructed international body built on diplomacy, compromise, and idealism. Indeed, this encounter created the conditions for later critiques.

The Empire Bloc: British Commonwealth Influence in Tokyo

“Only if one focuses on administrative matters, staffing and behind-the-scenes immunity deals with the emperor and other suspects, does America’s presence appear to be all powerful,” argues Yuki Takatori. “Once one begins to examine aspects of the trial itself, that is, the jurisdiction, the indictment and the judgment, British leadership looms just as large, and

⁶³ R. H. Quilliam to A. D. McIntosh (25 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁶⁴ R. H. Quilliam to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

sometimes larger, than American.”⁶⁵ This chapter goes further still, arguing that on all levels the IMTFE became an international not American trial or Commonwealth entity. Where Takatori explores Commonwealth impact on official trial components – “the jurisdiction, the indictment and the judgment” – this section takes a different approach. First, it explores the roots and experience of Commonwealth collectivity in Tokyo as a cultural phenomenon. In addition to obvious structural and diplomatic ties, an “Empire Bloc” in Tokyo developed subconsciously, reflecting shared ideas of Britishness and Commonwealth community. On the ground, British cultural solidarity became a powerful tool. This section also shows the Empire Bloc in political action. As the main counterbalance to US influence, but not its replacement, the Commonwealth collective played a constitutive role in producing an international IMTFE experience and its disputed legacy. Anglo-American antagonism helped create an inner dissonance that leached into public opinion of the court itself. Behind the scenes, personal, political, and cultural rivalry between the British and US blocs wove thick strands of discordant diplomacy which likewise reinforced internal views of a political court.

British Commonwealth influence figured prominently in Tokyo.⁶⁶ The collective identity attributed to ‘British’ representatives – a nebulous grouping that included most, though not all, participants from Australia, Canada, New Zealand, the United Kingdom, and, sometimes, India and Burma – developed from within and out. “Although they may have differences among themselves from time to time,” Chief Prosecutor Keenan noted, on most issues the British “gather together under one roof and the vote is five to one, and they know it and take full advantage of it. It is simply impossible to get the idea out of their minds that this is not a British

⁶⁵ Takatori, “America's War Crimes Trial?,” 550.

⁶⁶ Although richly textured and distinctive constructions, this chapter uses “British Commonwealth,” “Empire Bloc,” “British,” “Britishness,” “Commonwealth Bloc,” and “Commonwealth” interchangeably. Partly a semantic choice, this terminology also reflects realities on the ground in Tokyo. As I demonstrate, despite fundamental differences on the world stage, especially between “British” and “Commonwealth” countries, at the IMTFE being “British” emerged as a largely collective identity and experience for participants from Australia, Canada, New Zealand, and the UK. As discussed in the previous chapter, Indian and Burmese representatives operated to a degree outside the Empire Bloc, an indication of lasting colonial racism.

trial to be held according to British rules.”⁶⁷ Keenan particularly resented Commonwealth judges in court. “British judges, five of them out of the eleven, have the power to run this show and they exercise it. If our country ever enters into a deal where one Empire has five votes to our one, I shall be greatly surprised. They smile about it when they are appointed, but when the time comes to make decisions and domineer, they do not fail to do it.”⁶⁸ American Prosecutor Robert Donihi had a similar impression. “The British were very adroit at belittling American participation . . . they were also very adroit at pulling, in a very pleasant kind of way, credit to themselves . . . We could see that the Americans were not going to play a very large role.”⁶⁹ The Empire Bloc’s political weight threatened even the most influential non-British IMTFE participants.

Commonwealth collectivity extended beyond *pro forma* political allegiance. The Empire Bloc stemmed from shared values, cultural affinity, social closeness, and a committed belief in the benevolence of British imperialism, something missed by most scholars.⁷⁰ Various social and human contingencies divided Commonwealth participants, but pride in British history and progress bonded members from diverse backgrounds and nationalities within the Empire. In June 1946, for example, Harold Evans applauded the “good show” put on by the British Commonwealth Occupation Forces on Empire Day (24 May 1946). “I’m sure it was important to impress the Americans,” he wrote. “By all accounts they were impressed.”⁷¹ Evans’ boss, Justice Northcroft, felt similarly proud of British glory and eager to have his American associates know it. In July 1946, Northcroft thanked the New Zealand Minister of External Affairs for sending portraits of the King and Queen of England. “I am having [the photographs] framed, and I have fixed the ‘dead-line’ for 4th July, that being Independence Day . . . It seemed to me that I might

⁶⁷ Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe – Krould, Sequence: 746-755).

⁶⁸ Joseph Keenan to Charlotte Keenan (16 December 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe – Krould, Sequence: 756-759).

⁶⁹ Donihi Interview, Part I.

⁷⁰ Mark Mazower’s work on the founding of the United Nations also highlights the centrality of British Commonwealth leadership in early postwar international organisations. Mazower, *No Enchanted Palace*. Understandably, the veneration of British imperial munificence alienated racial and colonial minorities in Tokyo.

⁷¹ Harold Evans to Family and Friends (15 June 1946), Evans Papers, Box 16, Item 1.

assert a little British independence by using that day to decorate my room with the pictures of our Sovereign and his Queen.”⁷² The dark history of empires makes the close association among UK and Dominion personnel somewhat surprising. However, most Empire Bloc participants shared a common Anglo-Saxon heritage and all ‘British’ personnel, including Burmese and Indian representatives, arrived with comparable professional experience within local hierarchies of authority and government. Few marginalised peoples worked at the IMTFE. Moreover, the unique international space created in Tokyo also diminished potential points of imperial tension. Individuals who might have been political antagonists in a different setting bonded at the IMTFE when surrounded by more immediate competitors such as the US.

As discussed elsewhere in this dissertation, Empire Bloc closeness resulted in part from practical circumstances. At least initially, most British Commonwealth participants lived together at the Canadian Legation. The more the merrier. R. H. Quilliam typified the mutual delight of being ‘British’ together. Quilliam noted early on, “one of the advantages of the British Prosecutors living together,” became “the opportunity of discussing matters quietly and fully.”⁷³ Although disappointed by British prosecutor Maurice Reed’s return for London in May 1946 – “to the sincere regret of all” – the New Zealander happily reported that a full house remained in the Legation including British prosecutors Comyns Carr, Christmas Humphreys, and Rex Davies, Australians Alan Mansfield, Allister MacDonald, and Thomas Mornane, Canadian H. G. Nolan, and Indian prosecutors Govinda and Krishna Menon.⁷⁴ Christmas Humphreys described the coproduction of Commonwealth-British identity: “We became in fact a Commonwealth Embassy and saw to it that others regarded us as such.”⁷⁵ By creating an effective and influential political alternative to US dominance, the British group built IMTFE internationalism, but it also sowed seeds of internal dissension which ultimately contributed to the court’s disputed legacy.

⁷² E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁷³ Entry: 10 March 1946, Quilliam Diary.

⁷⁴ Entry: 19 May 1946, Quilliam Diary.

⁷⁵ Humphreys, *Via Tokyo*, 31.

The language of participants reflected Empire Bloc collectivity. Consciously and unconsciously, Commonwealth personnel self-identified as “British.” In one of many negative reports about Chief Prosecutor Keenan, R. H. Quilliam informed the New Zealand government, “*We British Prosecutors* are becoming more and more impatient at the absence of any information with regard to Keenan’s scheme – if he has one – for the conduct of the Trials.”⁷⁶ Similarly, Quilliam remarked a few months later, “it took quite a long time for me (and also *my colleagues from the British Commonwealth*) to realise just how defective the organisation was and how incapable Mr. Keenan was as its Leader.” After much deliberation with “the *other British Prosecutors*,” Quilliam and company “decided that something must be done.”⁷⁷ One of the more interesting examples of semantic imperial commitment came after the tribunal. Harold Evans wrote to fellow IMTFE critic, Indian Justice Radhabinod Pal, “I hope for no good things from these trials, and put the whole subject down with a lament *as an Englishman: if only we (British) had had the courage of our convictions*.”⁷⁸ Linguistic solidarity produced unintentional contradictions revealing the malleable nature of Commonwealth identity in Tokyo. The language used by Quilliam to describe a meeting with Keenan to distinguish between Dominion and UK participants suggested just the opposite. “*The four British Prosecutors*” met with Keenan in March 1946 to “to remove what appeared to be a misunderstanding . . . that the United Kingdom Prosecutor in some way represented the *other British Prosecutors* . . . *We realise* fully the importance of avoiding or overcoming any misunderstanding and have *done all we can* to ensure complete co-operation and good relations.”⁷⁹ Outside Tokyo, New Zealand, Canadian, and Australian governments stressed common British enterprise to their IMTFE representatives. “I

⁷⁶ R. H. Quilliam to Foss Shanahan (26 March 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2. [Emphases added].

⁷⁷ R. H. Quilliam to A. D. McIntosh (25 June 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3. [Emphases added].

⁷⁸ Harold Evans to Radhabinod Pal (27 November 1950), Evans Papers, Box 16, Item 1. [Emphasis added]. Evans wrote after reading Lord Hankey’s devastating critique. See: Hankey, *Politics, Trials, and Errors*.

⁷⁹ R. H. Quilliam to Foss Shanahan (18 March 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2. [Emphases added].

am sorry that you should have found some lack of consideration in the treatment extended to *you and the other British representatives* at present in the Tokyo area,” Foss Shanahan responded to complaints by Justice Northcroft. “It has, as you know, been agreed that the responsibility for the administration and care of British civilians in Tokyo will be assumed by B.C.O.F. [British Commonwealth Occupation Force].”⁸⁰ The Australian contingent in Tokyo demonstrated some independence, mostly because President Webb’s personality and status set him apart from others. Nevertheless, Webb identified strongly as “British.” During a memorable exchange with defence counsel Aristides Lazarus regarding Anglo-American wartime policies, Webb told the court, “I am not going to take back a thing I have said about this attitude of yours [Lazarus’]. . . Through it all, I remain a *British judge*, an Australian judge, and I will never be anything else.”⁸¹

Behaviour also delineated the bounds of the Empire bloc. More correctly, “improper” behaviour by non-Commonwealth representatives reinforced the sense of British exceptionalism. “These American Defence counsel behaved in the most unseemly fashion,” Justice Northcroft complained. “[They are] constantly on their feet with the most unmeritorious, technical, and for the most part stupid, objections and protests to almost every word that was said.”⁸² Likewise, Christmas Humphreys wrote, “The Americans produced few men of first-class standing, and many of them had little experience of crime.” In contrast, “The five who came from the

⁸⁰ Foss Shanahan to E. H. Northcroft (26 July 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2. [Emphases added].

⁸¹ *Transcripts*, 20481-20482. [Emphasis added].

⁸² E. H. Northcroft to A. D. McIntosh (2 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

Commonwealth were worthy representatives of the countries concerned.”⁸³ Being “British” meant acting a certain way. Only individuals who matched the conservative probity of Commonwealth participants escaped opprobrium. Most British representatives, for example, respected American prosecutors Frank Tavenner and Carlisle Higgins. Indeed, Higgins and Tavenner operated essentially as honorary members of the Empire bloc, a fact which points to the slippery nature of identity in contested international spaces. After another blow-up over Keenan in July 1946, for example, Quilliam reported, “The British Prosecutors and also Higgins and Tavenner are very angry at what has occurred and also very alarmed.”⁸⁴ Tavenner’s skill set and *dignitas* particularly appealed to British sensibilities. The Virginian Tavenner acted as head of the IPS during most of Keenan’s frequent absences. An April 1947 memorandum noted how “very glad” Quilliam and others felt to have Tavenner’s leadership. The IPS made progress “much more satisfactorily than at any other stage. Mr. Tavenner is showing excellent qualities as leader.”⁸⁵ Harold Evans noted a similar level of satisfaction with Tavenner, who “has for the

⁸³ Humphreys, *Via Tokyo*, 81. Humphreys’ assertion makes sense given the many personnel controversies. British Commonwealth countries sent capable representatives. The British government, for example, internally promised to “contribute the very best British talent to the task.” UKLIM, Tokyo to FO, London (7 February 1946), British Library, IOR/L/PS/12 458 Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947. Poor performance in Tokyo, however, did not mean uncaring personnel choices. Chief Prosecutor Keenan may have been a disappointment, but he was not without talents. Robert Donihi, for one, was an admirer. “Keenan was large in many ways,” Donihi recalled, “I thought he was a brilliant man, a genius.” Moreover, Keenan’s record convicting criminal conspiracies suited American views of Japan’s leaders. “[Keenan was] the former Chief of the Criminal Division, Director of the Justice Department’s Criminal Division, and was known as a gang-buster in his time. He was responsible for the Lindbergh Anti-Kidnapping Act. He was responsible for a great many prosecutions of the gangs back in the Thirties. Roosevelt liked him, and called him ‘Joe the Key.’ He took him to the White House as his liaison to the Senate.” Donihi Interview, Part I. Keenan went in confident that he would convict Japanese leaders just like so many other “gangs” in his career. “The story here is the same as one might find everywhere,” he wrote. “A small group of people with a lust for domination and power willing to descend to any means of guile, intrigue, deception and even brute force, to implement all agencies they could and all individuals to hold themselves in power and obtain vain glory.” Joseph Keenan to Charlotte Keenan, (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe – Krould, Sequence: 746-755). Other US appointments reflected determination to “bust” Japan’s “gang.” A number of American IPS members were experts on anti-trust, conspiracy, and personal and corporate war fraud including Grover Hardin, Hugh Helm, Osmond Hyde, and John Darsey. Harold Evans to A. D. McIntosh (27 November 1946), NZ Archives, EA2 1947-27A 106-3-22 Part 4. It would be a mistake, therefore, to read the appointment of Keenan or other Americans as anything but a determined commitment to bring Japan’s leadership to justice misguided perhaps but not apathetic.

⁸⁴ R. H. Quilliam to A. D. McIntosh (26 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

⁸⁵ First Secretary, New Zealand Legation, Washington to Foss Shanahan, for the Secretary of External Affairs (8 April 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

time being (+it is to be hoped for good) replaced Mr. Keenan as chief of the prosecution. He is both able and responsible – besides being an exceedingly nice person.”⁸⁶

Conscious of loyalties and the political ramifications of Empire bloc unity, Commonwealth representatives often naturally submitted to UK leadership. When Northcroft considered resigning in December 1947 to protest the continued absences of other judges, he deferred to both New Zealand and British authority. “Withdrawal from the trial would be a very serious step to take,” Northcroft wrote, “[but] the situation is well understood in other countries, notably Great Britain, and if they are not prepared to take a strong line, then it hardly lies with New Zealand to point the way.”⁸⁷ Elevating Commonwealth objectives over personal and national considerations led to conflicting responses. Quilliam, we have seen, felt a deep affinity to Britain and associated closely with Commonwealth counterparts. However, he knew that associating *only* with the British team could hurt overall IPS cohesion. In the first summer, Quilliam admitted he and other Commonwealth prosecutors became “very anxious to avoid the appearance of a British cabal,” especially regarding their growing infuriation with Keenan. Although they desperately wanted to confront the Chief Prosecutor, doing so in an Associate Counsel meeting could “make it appear that there was a British bloc against Keenan.” No matter how warranted, “If such a meeting were held,” there existed a “grave risk” of entrenching “a definite split among the Prosecutors with the British standing on their own.”⁸⁸ Quilliam may have worried about the appearance of an Empire bloc, but he did not, perhaps could not, disentangle the ties of his deep loyalty to the Crown, British ideals, and the socio-cultural bond

⁸⁶ Harold Evans to Parents (8 March 1947), Evans Papers, Box 16, Item 1.

⁸⁷ E. H. Northcroft to Foss Shanahan (30 December 1947), NZ Archives, EA W2619 53 106-3-34 Part 1.

⁸⁸ R. H. Quilliam to A. D. McIntosh (26 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

to his Commonwealth brethren.⁸⁹ As conflict with Keenan and general dissatisfaction came to define his IMTFE experience, Quilliam's Commonwealth connection became a safety net. The division between British prosecutors and "others" became entrenched in the New Zealander's mind. After leaving Tokyo, Quilliam claimed Keenan consciously tried "to prevent the British Commonwealth representatives from taking a prominent part in the proceedings."⁹⁰ Quilliam's initial apologetic concerns about "appearing" uncooperative hardened into defiant allegations of deliberate exclusion of the British by trial's end. Such political and personal discord seeped into public discourse of the court, its outcomes, legitimacy, and legacy.

Collective British identity manifested in political action. The Empire Bloc became more than an idea and a social choice; it emerged as a valuable diplomatic tool. Commonwealth powers helped make the IMTFE an international, not American, court. Their influence also produced a more contested experience. "We could learn a great lesson from these proceedings in our international relations," Chief Prosecutor Keenan vented in November 1947. "We cannot permit ourselves ever to be in a situation where we have one vote and the British Commonwealth five. It simply doesn't work out."⁹¹ Generally "disposed" to leave "arrangements for staffing, procedure, etc." to the US, British Commonwealth officials resisted

⁸⁹ Personal incompatibility exacerbated tensions between Keenan and the Commonwealth prosecutors. As early as July 1946, Quilliam, Comyns Carr, and Alan Mansfield, along with American Eugene Williams, visited SCAP to ask unsuccessfully for Keenan's replacement. Entry: 16 July 1946, Quilliam diary. When Keenan returned a couple weeks later, Quilliam felt astounded to see little improvement in his behaviour. "He has not communicated with me or Nolan or Mansfield. [Comyns] Carr called on him!! Apparently he is going to carry on as if nothing has happened." Entry: 26 July 1946, Quilliam Diary. Subsequent attempts to displace Keenan also failed. Donihi describes another incident. "Because of Keenan's capacity for explosion, and because the fact that Keenan was drinking," Donihi reported, a contingent of allied prosecutors asked MacArthur to remove Keenan. Carlisle Higgins went "as an observer" and described to Donihi that MacArthur defended Keenan as a "great man" and told the group that they "might look back in later years on this thing and feel ashamed if they did something to one of their colleagues that wasn't quite in keeping with what needed to be done." Donihi Interview, Part I.

⁹⁰ Quilliam, Report on Proceedings.

⁹¹ Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan, (Igoe - Krould. Sequence 746-755).

American influence over more consequential issues.⁹² As discussed earlier, “British” pressure helped internationalised MacArthur’s powers. The Empire Bloc also proved effective in creating an international bench. In fact, initial US plans suggested a judiciary dominated by major powers in line with the Nuremberg Model. “The Government of the United States is requesting the Government of China, the United Kingdom, and the Soviet Union each to designate five [judges],” read an October 1945 New Zealand Government cable. “The Government of Australia, Canada, France, the Netherlands, and New Zealand [will] designate three.”⁹³ Unsurprisingly, proportional representation did not sit well with the ‘lesser’ powers. In December 1945, the Australian Minister of External Affairs wrote to his New Zealand counterpart,

We cannot accept the United States proposal for differentiation in the number of nominees for international courts from each of the Allies concerned. Australia’s contribution to the defeat of Japan, the suffering of our nationals at the hands of the Japanese militarists and our active participation and special concern in all phases of the task of bringing Japanese war criminals to justice entitles us to equal representation with other powers in the constitution of international courts. We hope that you will share and fully support this view.⁹⁴

Wellington and other governments agreed. In response, the British Dominion Affairs Secretary announced, “We [also] consider that there should be equal representation for each of [the] participating Governments and suggest that each should be asked to nominate only 3 members.”⁹⁵ American authorities ultimately bowed to Commonwealth pressure. The Tokyo Bench had only one representative from each state, major power or otherwise.

⁹² Secretary of State for Dominion Affairs, London to Minister of External Affairs, Wellington (4 December 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2. This attitude persisted throughout the trial’s early stages. In January 1946, New Zealand representative in Washington Sir Carl Berendsen reported, “The present attitude of the British Prosecutor is that the political side of the trials should be left largely to the Americans and that the United Kingdom would confine themselves to dealing with criminal acts which occurred in their own territories.” Charge d’Affaires, New Zealand Legation, Washington to Minister of External Affairs, Wellington (24 January 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

⁹³ First Secretary, New Zealand Legation, Washington to Secretary of External Affairs, Wellington (19 October 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

⁹⁴ Minister of External Affairs, Canberra to Minister of External Affairs, Wellington (1 December 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

⁹⁵ Secretary of State for Dominion Affairs, London to Minister of External Affairs, Wellington (4 December 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

The push to secure Indian representation at the IMTFE further illustrates Commonwealth governments' effectiveness when working together, not to mention the unintended consequences and complications their influence had on the court's memory and history. In early February 1946, the "British" diplomatic community mobilised in support of Indian Office calls for IMTFE membership. On 8 February, the British Foreign Office asked the UK Liaison Mission in Japan to "Please support Indian Agent General when he raises matter in the Commission," suggesting "You may find it helpful to secure cooperation of Commonwealth Members of the Commission in supporting him."⁹⁶ In spite of "fear that this is a lost cause," a subsequent cable announced, "I consider that it is open to us to take diplomatic action in any event if we are unable to secure compliance with [our] wishes in Tokyo. . . If the Indian government continues to press for the admission of an Indian Judge, I think we should support them."⁹⁷ "Diplomatic action" included marshalling support from other "British" governments. On 12 February, the Dominion Office cabled Canadian, Australian, New Zealand, and South African governments. Citing the "contribution of India to defeat of Japan," and its "position as a member of Far Eastern Commission," the missive encouraged Dominion governments to push Washington "to reverse United States decision against Indian representation."⁹⁸ Due in part to this spectrum of support, India ultimately gained a place at the tribunal. Constance Wolfe of the Indian Office, and later the IPS, playfully circulated a clipping from the *New York Herald Tribune* dated 23 March 1946 incorrectly reporting, "British Give Up Fight to Put an Indian on Bench." After reading the article, one colleague gleefully noted, "Thanks very much! Very interesting. He spoke a bit too soon and forgot that we British 'never know when we are beaten!'"⁹⁹ Indian representation did not help Britain or the Commonwealth in the end. Indeed, Indian Justice Pal's vocal dissent

⁹⁶ FO, London to Maurice Reed, UKLIM (8/10 February 1946), IWM Papers, FO 648, Box 152, Folder 3.

⁹⁷ Maurice Reed, UKLIM to FO, London (12/15 February 1946), IWM Papers, FO 648, Box 152, Folder 3.

⁹⁸ Dominion Office, London to Canada, Australia, New Zealand, South Africa (12 February 1946), British Library, IOR/ L/PS/12 458, India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

⁹⁹ Constance Rolfe, India Office to F. F. Garner (29 April 1946), British Library, IOR/ L/PS/12 458, Telegrams India Foreign Office, Japanese War Criminals – Major War Crimes – October 1945-December 1947.

became an unwelcome embarrassment. Efforts to gain India a seat at the table, however, reveal both the influence and deeply imperial presumptions of the Empire Bloc in Tokyo.

Scoring diplomatic victories became impossible without making concessions, and appointing an Indian judge came with a cost. In order to secure Indian representation on the Bench, Commonwealth diplomats had to relent on pressuring for strong FEC – i.e. not SCAP – sentence review powers. As mentioned, the result formed a jurisdictional compromise. MacArthur maintained review powers, contingent on FEC consultation and endorsement. Gaining rubber-stamp authority for the FEC over SCAP’s sentence review may seem a somewhat hollow victory. However, Commonwealth pressure did push US authorities away from original plans for sentence review authority resting with the American Joint Chiefs of Staff. Sir Carl Berendsen and others rightly dismissed this notion as “inappropriate” for an international trial. Besides, caving on MacArthur’s review authority represented a relatively easy concession for the Empire Bloc to make. At least on paper, reconceptualising SCAP as an international not American figure technically decoupled the US from sentence review authority. By limiting MacArthur’s powers on post-trial sentence review, British influence also helped ensure court autonomy *during* proceedings. Moreover, some ‘British’ members welcomed MacArthur’s authority. The New Zealand government, for one, found it “more desirable to establish the Supreme Commander as the final authority” on sentences with the FEC and “a competent organ, representative of all states concerned, established to deal with [broader] questions of war crimes.”¹⁰⁰ Comyns Carr and other British IPS members reported that they “did not, repeat not, think it particularly objectionable to leave this task to the Supreme Commander, but . . . thought it improper for [MacArthur] to have power to increase and even waive

¹⁰⁰ Minister of External Affairs, Wellington to New Zealand Minister, Washington (18 December 1945), NZ Archives, EA2 1946-31A 106-3-22 Part 2.

sentence.”¹⁰¹ Thus, by ‘giving up’ review prerogatives (which they did not feel that strongly about) to gain representation of India on the Bench (which they very much desired), the Empire Bloc gained a rare double coup in diplomacy. In other words, in order to gain at least a greater semblance of international involvement in the trial, and to get an Indian judge on the Bench, the British ‘conceded’ what they already wanted. It is clear, therefore, that Empire Bloc power undercut American influence in Tokyo. But did this produce an Anglo-American court, or something more? As the next section indicates, the contributions of “other” nationals secured the IMTFE’s place as a truly international experience and construct, an internationality that formed the root of its inborn contradictions and accordingly jaded reputation.

A “True International Trial”

Reflecting on the IMTFE as a “true international trial,” prosecutor Robert Donihi remarked, “I always felt if you’re going to use the term ‘international’ you’d better be on the sound ground of having more than just international law on your side. You really ought to have some substance in it by some other countries participating.”¹⁰² Together, US and British Commonwealth groups made up the majority of states represented in Tokyo, managed the bulk of the tribunal’s administrative burden, and held greatest sway over its legal procedures. To some extent, Anglo-American dominance and rivalry pushed representatives from other countries to the relative periphery. However, periphery did not mean exclusion. ‘The international’ is a complex idea and constructing internationalism a multi-faceted process. “Other” powers and their personnel from outside the Anglo-American majority contributed to making the IMTFE a multilateral institution. These countries lacked the diplomatic and administrative muscle of Anglo-American counterparts, yet this section proves that they actively, and successfully, pursued political agendas in Tokyo. The commitment of these “other” states to

¹⁰¹ Maurice Reed, UKLIM to FO, London (12/15 February 1946), IWM Papers, FO 648, Box 152, Folder 3. To balance the tribunal, the appointment of an Indian judge also meant appointing a Filipino judge, but this appointment represented a fairly minor concession to make. The Commonwealth still dominated numerically.

¹⁰² Donihi Interview, Part I.

the court's ideals and processes played an under-recognised role in shaping justice in Tokyo, and in establishing the IMTFE as both an international court and an outgrowth of global governance. In Tokyo at least, greater internationality meant increased complexity, higher stakes, and more fractured processes, which, in turn, built a more divisive historical and legal afterlife.

As Donihi suggests, “international” is a laden term. It implies substantive contributions from multiple states and an event of global significance. A “truly international trial,” therefore, would be a court of grand proportions on the world stage; a priority international commitment of participant governments. So, did the IMTFE experience constitute ‘true’ internationalism, or just many competing nationalisms? Dutch sources reveal a commitment to both national interests and international processes. In July 1948, Justice Röling’s wife Lies met with Dutch Prosecutor Borgerhoff-Mulder in The Hague, who suggested the “*Buitenlandsche Zaken* (Foreign Affairs Ministry) has actually very little interest in the Tokyo process.”¹⁰³ Understandably miffed, Röling pushed superiors for answers. In August 1948, Dr. H. N. Boon (Chief of the Diplomatic Affairs Division in the Ministry of Foreign Affairs and a close friend of Röling) assured the Dutch judge, “Your wife’s impression that there is not a lot of interest by foreign affairs is incorrect.” In fact, Boon told Röling, “on several occasions experts on foreign affairs and also on war crimes have had considerable discussions about [the IMTFE].”¹⁰⁴ All the same, Röling’s increasingly conviction not to join the majority judgment’s expansive interpretation of law worried Dutch officials mindful of the tribunal’s internationalist legacy. Röling dismissed the aggression counts for lack of precedent and his formalist sensibilities prevented the Dutch judge from finding concord with inventing international legal practise and norms in Tokyo. “The draft of the judgment has advanced, and the more I see it the more I am horrified to associate my

¹⁰³ B. V. A. Röling to Dr. H. N. Boon, Chief of Diplomatic Affairs Division, Ministry of Foreign Affairs (6 July 1948), Röling Papers, Box 27. I am indebted to Frederik Vermote for help with translation. Original text: “*B.Z. [Buitenlandsche Zaken] voor het proces in Tokyo zou bestaan.*”

¹⁰⁴ H. N. Boon to B. V. A. Röling (18 August 1948), Röling Papers, Box 27. Original text: “*De indruk van je echtgenote, dat er weinig belangstelling op Buitenlandse Zaken voor het proces bestaat, is in zoverre onjuist dat er wel degelijk en bij herhaling door terzake kundigen zowel op Buitenlandse Zaken als op andere bij de berechting van de oorlogsmisdadigers betrokken degelied heft tot de jou bekende gedachteswisseling.*”

name with it,” Rölöng told Boon. “Said in strict confidence, I fear that it is worse and more disputable in court than anyone can possibly imagine.”¹⁰⁵ His growing reservations underscore the divisive risks inherent in blending, or attempting to blend, multiple national interests and conventions into a universalising internationalist framework.

A nervous Dutch foreign ministry spent over a year desperately talking Rölöng off the ledge. In October 1947, Pim van Boetzelaer van Oosterhout, the Minister of Foreign Affairs, “personally” asked Rölöng to desist. “Voting against [the Majority] would be very undesirable on political grounds.” The Dutch government stood committed to the ideals of *international* justice promised at the London Conference and at the UN General Assembly, van Boetzelaer argued. Rölöng’s dissent could jeopardise these efforts with profound “repercussions regarding the shaping and confirming of international law.” Although “accepting and respecting fully . . . your freedom and inviolability as a judge,” van Boetzelaer nonetheless pushed Rölöng to keep his doubts “within the council room and [with] nothing . . . noted in the public sentence.”¹⁰⁶ Dutch officials recognised that the IMTFE lacked a degree of legal foundation, but stressed compromise. At this stage of development, international justice required consensus, not dissent, especially so late in the judicial process. A united front represented the only way to establish operative international norms to deter future aggression and criminality. By mid 1948, the increasingly anxious Ministry grew more forceful. “I would like to ask you,” van Boetzelaer told Rölöng in a message marked *geheim* (“secret”), “to find a solution . . . So that it would become possible that you could sign the verdict without further ado.” A dissenting opinion would be

¹⁰⁵ B. V. A. Rölöng to H. N. Boon (6 July 1948), Rölöng Papers, Box 27. Original text: “*in strict vertrouwen gezegd, ik vrees dat het slechter en aanvechtbaarder is dan iemand zich kan voorstellen.*” [Emphasis in original]

¹⁰⁶ Pim van Boetzelaer van Oosterhout, Minister of Foreign Affairs to B. V. A. Rölöng, Tokyo (28 October 1947), Rölöng Papers, Box 27. Original text in order of excerpt: “*persoonlijk . . . tegenstemmen zeer ongewenst is op politieke gronden waarbij . . . Inzake de vorming en bevestiging van international recht . . . hoewel Uw vrijheid en onaantastbaarheid als rechte ten volle respecterend en consequenties van Uw benoeming aanvaardend . . . Mocht U alsnog tot de afwijzing van het vonnis besluiten dan wordt gehoopt dat Uw overwegingen in de raadkamer zullen blijven en daarvan in het vonnis niets blijkt.*”

“very undesirable” and the government “strongly urge[s] you to sign the judgment.”¹⁰⁷ The pressure incensed Röling. The telegram “struck me deeply,” he protested to Boon. “I just cannot understand how it is possible that a Dutch judge is being urged to sign a judgment especially when the Dutch government does not even know the contents of said judgment.”¹⁰⁸ Röling’s response revealed the power of personality inside institutional frameworks, and demonstrated the danger of equating individual participants to blind representatives of states on the world stage.

In November 1948, Boon made a final, ultimately unsuccessful, attempt to dissuade Röling. “It was never the intention of the government to pressure you in any way,” assured Boon. “It just seemed like a good idea to bring you up to date with the opinions in The Hague.” All the same, Boon opined that Röling would do well to keep the government’s concerns “in the back of your mind,” since “The political consequences of your vote regarding the war criminals could be seen as undesirable from the point of view of the Dutch government.” The public would not care about the academic and judicial nuances at stake, Boon pleaded, “It will only ask whether or not the war criminals have been sentenced.” As a friend, Boon suggested a compromise. “If you are not willing to sign the majority, then it should at least seem clear that you approve of sentencing the war criminals.” If not, Boon warned, “then you can imagine that this could easily lead to serious critique both in the Netherlands and Indonesia amongst the thousands of victims and

¹⁰⁷ Minister of Foreign Affairs to B. V. A. Röling, NETMILMIS (Netherlands Military Mission) (15 July 1948), Röling Papers, Box 27. Original text: “*Ik U verzoeken voort te gaan en een oplossing trachten te bereken conform . . . waardoor mogelijk genaakt wordt dat U het vonnis zonder meer kunt tekenen. . . . de Nederlandse Regering handhaaft haar mening dat de publicatie van een ‘dissenting opinion’ zeer ongewenst is, doch zij verzoekt U met klem het vonnis te ondertekenen met de aantekening, dat dit gescheidt als bewijs van meerderheidsbeslissing, niettegenstaande afwijkende mening ten opzichte van sommige punten.*”

¹⁰⁸ B. V. A. Röling to H. N. Boon (6 July 1948), Röling Papers, Box 27. Original text: “*Dat mij zeer heft getroffen. Ik kan tevens niet begrijpen hoe het mogelijk is, date en Nederlandsche rechter het een vonnis betreft, waarvan de inhoud aan de Nederlandsche Regeering niet bekend is.*”

families of victims.”¹⁰⁹ National, colonial, or international consequences did not move Röling. He believed that keeping silent would be the gravest injustice. Publishing dissent would show everyone, including the Japanese, that the tribunal’s judgment came from a reasoned and not predetermined process. “This would be preferential as a precedent,” Röling argued, “Because the other option [self-censure] is more like a Nazi-German or Soviet-Russian way – definitely not the Dutch way!”¹¹⁰ Röling eventually submitted a lengthy dissenting opinion and has long been associated as a critic of the tribunal. Unfortunately for Röling, Boon and the Dutch government’s concerns proved prescient. Röling’s dissent has tarnished the tribunal’s international image and legacy since publication. In conception and contribution, the Dutch contingent added to the composite essence of IMTFE internationalism. Conflict between Röling and his government exemplified the complex and contested production of international justice in Tokyo and elsewhere. Röling’s ultimate autonomy in the matter reveals ways in which the inner workings of the court and its personnel interpreted and often transcended external pressures, with damaging consequences for the IMTFE’s place in law and history.

Other countries outside the Anglo-American majority also added to Tokyo’s international edifice. Incomplete access to sources limits the extent that this chapter can detail external political involvement from these countries. However, the behaviour of national representatives

¹⁰⁹ H. N. Boon to B. V. A. Röling (18 August 1948), Röling Papers, Box 27. Original text: “*Laat ik voorop stellen dat het nimmer in de bedoeling van de Regering heft gelegen om op enigerlei wijze pressie uit te oefenen op de beslissing, die je zult nemen. Slechts schijnt het nuttig om je in kennis te stellen met de opvattingen, welke inzake bepaalde punten in den Haag leven. Vanzelfsprekend zou het de Regering aangenaam zijn als met deze opvattingen rekening werd gehouden en het laatste telegram in antwoord op je brief van 3 Juni behelst danook een verzoek in di richting, waaraan je al dan niet gevolg kunt geven. Je zult mij willen verontschuldigen, dat ik niet inga op de juridische aspecten van de zaak aangezien ik daarin volkomen onkundig ben. . . . Niettemin kunnen de politieke gevolgen van je stem inzake de berchting van deze oorlogsmisdadigers in verschillende opzichten van het standpunt der Nederlandse Regering bezien onaangenaam zijn en het is daarop dat ik nog even zou willen wijzen. Het publiek zal zich geen rekenschap kunnen geven van de juridische betogen, welke aan het vonnis ten grondslage liggen. Het zal slechts vragen of de oorlogsmisdadigers worden veroordeeld of niet. . . . Indien dit niet het geval is en je in een dissidentie opinie tot de conclusie komt dat de juiste toepassing van het Charter niet tot een veroordelen van alle of een deel der schuldigen kan leiden, dan zul je kunnen voorstellen dat dit makkelijk aanleiding kan geven tot ernstige critiek zowel in Nederland also in Indonesië bij de duizenden slachtoffers en verwanten van slachtoffers van de Japanse oorlogsmisdadigers.*”

¹¹⁰ B. V. A. Röling to H. N. Boon (6 July 1948), Röling Papers, Box 27. Original text: “*Als zoodanig is dit een wenschelijk precedent, verkieslijker boven het stelsel . . . het andere system doet mij nazi-duitsch of soviet-russisch aan, zeker niet Nederlandsch!*”

in Tokyo reveals otherwise obscured diplomatic priorities. For example, ensuring that the indictment, proceedings, and judgment covered crimes against “their” people suggested either political agendas or national preoccupations. Although an integral process and by-product of IMTFE internationality, parochial advocacy also proved disruptive. After leaving Tokyo, Quilliam complained about “The insistence by certain Nations on there being included in [the indictment’s] counts affecting these Nations in respect of which the evidence is perhaps not convincing.” In particular, Quilliam criticised Russian and Chinese prosecutors for forcing in questionable and unsubstantiated allegations of Japanese transgressions in their respective territories. Quilliam’s specifically protested the eventually successful Russian pressure to include counts relating to alleged Japanese aggression in the Khalkin-Gol River and Lake Khasan regions of the Mongolian hinterland. The resulting Counts 51 and 52 of the indictment relied on “conflicting and possibly insufficient” proofs, argued the New Zealander. Quilliam similarly criticised Chinese insistence on counts 48, 49, and 50 regarding the alleged murder of disarmed soldiers and civilians in Changsha, Hengyang, Guilin (Kweilin), and Liuzhou (Luchow) in southern China. Evidence for “at least two of these Counts” the New Zealand prosecutor decried, “is manifestly inadequate.”¹¹¹ Personally opposed to including either set of counts, the New Zealander understood the political expediency involved. Living with and building compromise formed the bedrock of international justice and organisation in Tokyo, yet, such compromises also contributed to court’s discordant findings. For example, critics often use

¹¹¹ Quilliam, Report on Proceedings. Given the deep scars of war in China, Chinese commitment to the IMTFE should not be remarkable, but it may have surprised some participating governments. An Australian government representative in China noted a “very casual attitude of the Chinese to the defeated Japanese.” He also complained that Chinese authorities obstructed evidence gathering by two visiting IPS investigators (Thomas Morrow and Daniel Sutton). “I report their experience only to reinforce what you probably already know, namely, that the Chinese show no interest whatsoever in the prosecution of Japanese war criminals.” Report from Australian Representative, Chungking (3 April 1946), NZ Archives, EA2 1946-31A 106-3-22 Part 2. In another internal Australian memorandum, the Australian Ambassador to China expressed scepticism about a judicial report made by Dr. Hsieh Kwan-sheng, Minister of Justice at the People’s Political Council in May 1947. “The report of the Minister of Justice presents a strange contrast to the attitude which the Chinese Government maintained throughout the proceedings of the War Crimes Commission (Far Eastern and Pacific Sub-Commission) in Nanking . . . The figures given in the Minister’s report are surprisingly high, particularly for war criminals.” D. B. Copland, Australian Ambassador, China to H. V. Evatt, Minister of External Affairs, Canberra (21 June 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

the charges regarding Japanese aggression against the Soviet Union to expose the IMTFE as a slavishly political trial. As explained previously, the Soviet counts figured in the dissents of Justices Bernard and Röling whose objections remain central to victors' justice critiques.

At times, being international in Tokyo meant taking very national stands. Chinese Prosecutor Hsiang's actions in court during Justice Cramer's controversial first day aggravated his British colleague Comyns Carr. "Hsiang caused considerable embarrassment to prosecutors by publicly welcoming Cramer in court," Comyns Carr complained, "despite [the] agreement among prosecutors themselves to say nothing at all, since their efforts to get the decision to appoint Cramer reversed had been unsuccessful."¹¹² It is not clear why Hsiang made this stand. Possibly, he broke ranks at the urging of a Nationalist government growing ever more desperate to keep US support against communist forces. At the very least, Hsiang's actions reflected keen personal awareness of national interests. French concerns came to the fore in September 1946 when prosecutor Robert Oneto protested the court's language policy. Quilliam described the "international crisis" which followed bench refusal to let Oneto speak French. "The Tribunal has behaved very foolishly and got everything into an awkward mess," Quilliam wrote. Reportedly, both the French and Russian contingents considered withdrawing.¹¹³ Walter McKenzie described the "merry-go-round" during the proceedings. "Oneto read his opening statement in French, but when he tried to read documents in English, the Tribunal and Court reporters and interpreters couldn't understand his English - neither could I."¹¹⁴ The court justified forcing Oneto to use English by citing its Charter provisions to simultaneously translate only two languages: English and Japanese. The existence of facilities for Russian translation regardless of Charter rules, however, particularly upset Oneto. Why should not the French be accorded the same distinction? Behind the scenes, French Justice Bernard shared his compatriot's outrage and expressed

¹¹² A. S. Comyns Carr to FO, London (24 July 1946), IWM Papers, FO 648, Box 152, Folder 4.

¹¹³ Entry: 1 October 1946, Quilliam Diary.

¹¹⁴ Walter McKenzie to Connie McKenzie (1 October 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - September 1946.

personal and national dissatisfaction on the issue to President Webb. “I communicated the text with my Government . . . The answer which I have received discloses the view of the French Government that the facilities of public diffusion of the proceedings thus granted to the USSR Delegation alone establish an exclusion prejudicial to the French,” wrote Bernard. “I would appreciate it if you would inform me of the steps you contemplate so as to correct the effects of this exclusion.”¹¹⁵ National politics formed an integral part of the international process and experience in Tokyo. By instigating controversies and creating apparent and actual inconsistencies, assertions of national interests also contributed to the IMTFE’s troubled image.

Other non-Anglo-American judges actively pushed home agendas. By asserting national interests behind the scenes, Chinese Justice Mei emerged as a key builder of the IMTFE’s international experiences and processes. For example, Mei frequently reminded colleagues of the court’s global constitution. “I have noticed that Oriental philosophers and writers are conspicuously lacking,” Mei critiqued Webb’s early ‘judgment’ on tribunal jurisdiction and natural law.¹¹⁶ Mei’s interaction with fellow judges regarding Manchuria proved formative in establishing bench and therefore international views of Japanese aggression in the region. Mei particularly attacked his French colleague’s defence of Japan’s legitimate “concessions” in North China. One such note called Bernard’s arguments “purely speculative” and “absolutely mistaken.” “You have failed to get a correct picture of the situation,” Mei wrote. Even though the Chinese judge called Bernard’s work “not of sufficient importance to warrant detailed discussion,” he answered the French judge’s charges in depth. “In passing judgment on the Manchurian question, we must take into consideration the whole of the evidence and look at it in the proper perspective,” Mei scolded. “One must not see only the tree and overlook the forest. This attitude is especially important for us who are deciding a case of such vast magnitude.” Mei could not accept or understand Bernard’s imperialist notion of territorial possession:

¹¹⁵ H. Bernard to W. F. Webb (6 September 1946), Webb Papers, Series 4, Wallet 4.

¹¹⁶ Mei Ju-Ao to W. F. Webb (8 December 1946), Bernard Papers, F° Δ rés 874-10-1-48.

Your remarks concerning the independence of sovereign states is really surprising to me. I can agree to the statement that few nations are really independent in every way. But here is the case where one nation invaded the frontier provinces of another and established therein a new state, which would not have been founded but for the presence of the invader's forces and the activities of his military and civil officers. Moreover, the invader retained for himself the direction and control of national defense and diplomatic affairs. Was there any semblance of independence in such a newly created state?¹¹⁷

The French judge's colonial convictions prevented Mei from convincing Bernard. However, Mei's arguments swayed fellow majority judges. An international construction, the IMTFE judgment also gained international *meaning* and significance in law, history, and memory – if not always for its most admirable traits.

International collaboration became a hallmark of the IMTFE experience. Justice in Tokyo rarely manifested as a straightforward one-way or even two-way interaction. On a numerically Anglo-American bench, Russian, Filipino, and Chinese judges constructed instead an international judiciary. Justices Zaryanov, Jaranilla, and Mei emerged as the fiercest defenders of majority decisions behind the scenes. For instance, a number of judges ridiculed President Webb's 1947 preliminary draft judgment. Northcroft denigrated the text: "It read like a student's not very good essay on international law . . . we were all of opinion that this would not do at all." Justices Zaryanov and Mei, however, became the most vocal critics. "One of them, the Russian, later wrote a memorandum criticizing [Webb's] draft," noted Northcroft. Justice Mei, "a mild, almost passive" man, "circulated a devastating criticism of this first draft. The President, who evidently thought highly of this first crude draft was naturally very angry, and subjected the

¹¹⁷ Mei Ju-Ao to H. Bernard (17 August 1948), Bernard Papers, F° Δ rés 874-10-52.

poor Chinaman to vulgar verbal abuse in Chambers before other Judges.”¹¹⁸ Filipino Justice Delfin Jaranilla took the Potsdam Declaration’s promise of “stern justice” seriously and remained one of the most protective guardians of IMTFE reputation and authority throughout proceedings. When Jaranilla flexed his judicial muscle, he rarely advocated lenience. Commenting on “contempt of court” in June 1947, for example, Jaranilla pushed for strong action. The Charter “clearly empowers the Tribunal to impose appropriate punishment for the violation of order at the trial,” the Philippines judge argued. “The Tribunal has ample power to impose some disciplinary measures for any misbehavior or contumacy by anyone before it.”¹¹⁹ Jaranilla’s propensity to defend the trial, reject anything that delayed the proceedings, and his sensitivity to suggested shortcuts in bringing Japanese leaders to justice, may reflect his personal history as a victim of the Bataan Death March. However, his obstinacy also demonstrates a deeper dynamic. The assertiveness of Jaranilla alongside his Chinese and Soviet colleagues in chambers marks unrecognised activity from these judges and reveals the tribunal’s contested and complex internationalist processes. The tribunal operated as an international, not simply

¹¹⁸ E. H. Northcroft to Humphrey O’Leary (18 March 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5. Webb’s papers include several drafts of a response to Mei’s critique. The message eventually sent to Mei felt severe, but the rough version – covered in angry hand-written notations – vituperative. W. F. Webb to Mei Ju-Ao (23 January 1947), Webb Papers, Series 4, Wallet 4. Webb’s over-reaction may have reflected racial politics of the era. As noted in this dissertation’s discussion of ventilation problems in the courtroom, Webb also demonstrated personal racism, especially toward Asian bodies and cultures. After returning home, for example, Webb gave a racially-charged interview to Australian press. “Australians are not deceived by the veneer of democracy too facilely assumed by the Japanese under American tutelage,” he told reporters. “We can find a degree of safety only in populating this White Australia and training its manhood to arms; in cultivating good relations with our neighbours; and in holding close to powerful friends. “Warning on Japan,” *Sydney Morning Herald*, 7 December 1948, 2.

Though critical, Mei’s note was cordial, signed off: “This memo is intended as reference for your good-self and the other 9 ‘charming brothers’ only.” Mei Ju-Ao to W. F. Webb (8 December 1946), Bernard Papers, F° Δ rés 874-10-1-48. Webb had help in writing his early judgment on jurisdiction. “Enclosed herewith is the first draft of a possible judgment of the majority of the Tribunal on the jurisdictional points,” wrote the President. “Mr. [William E.] Cuppaidge and Miss [Betty E.] Renner have collected the material upon which the draft is based. I indicated the authorities I desired them to consult insofar as they were available in the universities here, but Miss Renner has obtained many beyond those indicated by me and has put the results in essay form for which I will make available to the Judges if they so desire. Similar assistance in the collecting of authorities on Natural Law indicated by me was also sought from a professor in a European university here. He, too, added many authorities not mentioned by me and has placed them all in essay form which I am also prepared to make available to the Judges. Public International Law has always been a compulsory subject for the Queensland Bar and the classical view has been taught for that purpose. Hence, my ideas on the subject as expressed in this draft. I know there are other views about this difficult subject.” W. F. Webb to All Members (27 November 1946), Bernard Papers, F° Δ rés 874-10-1-48.

¹¹⁹ D. Jaranilla to All Members (13 June 1947), Webb Papers, Series 4, Wallet 4.

American or British Commonwealth, body. Though less powerful than their numerically dominant Anglo-American competitors, the ‘other’ countries in Tokyo wielded enough authority to assert national agendas in court, secure political concessions behind the scenes, and establish alternate judicial narratives in chambers.

In form and function, the tribunal’s internationalism safeguarded against dominance by any one power or political grouping. For example, Chief Prosecutor Keenan cultivated relationships with non-Commonwealth IPS members to serve as ballast against the Empire Bloc’s political weight. In much the way that housing fostered ties among “British” members, living in Hattori House drew American, Dutch, French, and Filipino prosecutors closer. “They plan to have the Dutch, French and Philippines prosecutors there,” an excited Walter McKenzie told his family upon moving into the house. “It should prove interesting.”¹²⁰ The “interesting” mix had social and political outcomes. The “other” national groups often buttressed Keenan’s ideas, while using this advantage to assert their own agendas. Their presence and opinions ensured that the IPS developed as a complex encounter and an international amalgam, not a bilateral Anglo-American production. New Zealand prosecutor Quilliam, for example, resented international cooperation when it prevented the Commonwealth contingent from getting its way.¹²¹ Quilliam blamed his inability to remove Keenan from Tokyo on “other” powers in Tokyo. The Chief Prosecutor “[will] almost certainly be able to obtain the support of the Philippine and Chinese Prosecutors and the French and Dutch Prosecutors are unlikely to stand

¹²⁰ Walter McKenzie to Family (3 April 1946), McKenzie Papers, Box I, Folder: Correspondence with Wife and Family - April 1946.

¹²¹ Pedro Lopez particularly irked Quilliam. “The Philippine Prosecutor . . . supported by the Russian, required an amendment which the British Commonwealth Prosecutors were unable to accept,” Quilliam wrote about the indictment. “The object of the proposed amendment was to include either as a separate Count or as a kind of preamble, a comprehensive indictment of the Japanese in picturesque and extravagant loose language.” The actual language criticised by Quilliam is relatively tame. “The statement contained such expressions as ‘sacred Treaties,’ ‘the peace-loving Countries of the World,’ and ‘the rulers of Japan.’” This reveals two things about the New Zealander. First, it highlights the conservatism of Quilliam and his Commonwealth colleagues. Second, the strength of Quilliam’s reaction to only moderate hyperbole demonstrates how resistant Empire bloc participants became to any challenge. R. H. Quilliam to A. D. McIntosh (24 April 1946), NZ Archives, EA W2619 53 106-3-34 Part 1.

out against him.”¹²² Small wonder Keenan delighted to his wife in November 1947 that “Brigadier Quilliam, left this week with his wife to return permanently to New Zealand, and the British prosecutor told me today that he expects to leave after the summation.” Not only was his rival Quilliam departing, but also, “The French and Dutch prosecutors show no particular interest in moving at all. Pedro Lopez is over here with his family and they live very comfortably at the beautiful Fujiya Hotel as guests of our government. The Chinese are still here in force.”¹²³ A veteran of backroom intrigues, Keenan understood when political calculus turned in his favour.

Quilliam regularly bemoaned the hassle of internationality. As the most multinational trial division, the IPS navigated choppy political waters. “I should explain that it is very difficult to obtain unity among the associate prosecutors,” Quilliam noted. In a racially imbued comment on the national and cultural predilections of his colleagues, the New Zealander concluded:

The Russian nearly always takes an independent course. . . . The French and the Dutch are quite incapable of appreciating matters of this kind The Chinese prosecutor has, as might be expected, no conception of the importance of time. In any case, he and the Philippines prosecutor almost invariably in case of dispute follow Keenan, without attempting to explain why they do so.¹²⁴

Dutch, Chinese, French, Philippines, Soviet, and American prosecutors made strange bedfellows, and it would be a mistake to assume they consistently operated as a monolithic anti-Commonwealth bulwark. The salient point here is that the “other” parties did not serve as pawns of Anglo-American interests and competition. Rather, the above demonstrates the agency of each nation’s representatives and interests. The IMTFE became an international trial and an internationalist construction with all the “political football” that accompanies such an institution. Though groundbreaking and impressive, the resulting internationality also laid the inevitable foundations of dangerous discourse, internal dissonance, and political justice.

¹²² R. H. Quilliam to A. D. McIntosh (26 July 1946), NZ Archives, EA2 1946-30B 106-3-22 Part 3.

¹²³ Joseph Keenan to Charlotte Keenan (4 November 1947), Keenan Papers, Box 2, Folder 6: Letters from Joseph B. Keenan (Igoe – Krould, Sequence: 746-755). Quilliam’s more cynical view suggested that Dutch and French contingents felt “sorry to leave this country, where the conditions are so much more comfortable than in their own countries.” R. H. Quilliam to Foss Shanahan (2 July 1947), NZ Archives, EA2 1947-26C 106-3-22 Part 5.

¹²⁴ Quilliam’s statement on Hsiang also reflected racist views of Asian laziness. R. H. Quilliam to A. D. McIntosh (24 April 1946), NZ Archives, EA W2619 53 106-3-34 Part 1.

Illustration 20: Members of the IMTFE



An international judiciary: Judges and generals; colonised and colonisers; common and civil law jurists: eleven countries were represented on the Tokyo Bench. Back row (*l-r*): Pal (India), Röling (the Netherlands), McDougall (Canada), Bernard (France), Northcroft (New Zealand), and Jaranilla (the Philippines). Front row (*l-r*): Patrick (Great Britain), Cramer (US), Webb (Australia), Mei (China), and Zaryanov (USSR) ©US Army Signal Corps.

Illustration 21: The International Prosecution Section in Court



An international prosecution: Civilian, military, male and female IPS Members from different cultures and nationalities discuss their case in court. ©US Army Signal Corps, FEC-48-2863. Access courtesy of Nationaal Archief, Den Haag, Röling Papers – 2.21.273, Box 1.

Illustration 22: The International Defence Section Imperial Duck Hunting Excursion



An international defence: IDS members at a February 1947 duck-hunting outing and dinner party hosted by Viscount Matsudaira, Minister of the Imperial Household. ©US Army Signal Corps, FEC-47-71010. Access courtesy of Frances Guthrie Collection, MS 3111, William M. Randall Library Special Collections, University of North Carolina Wilmington, Box 2, Folder 6.

Conclusion

This chapter and the previous show the IMTFE's international character in diplomatic and global contexts. Both chapters identify forgotten international contributions to Tokyo, including work by Burmese and Indonesian personnel outside the eleven main states represented on the bench. Earlier chapters revealed how internationalism shaped and became shaped by the IMTFE's personal, emotional, administrative, legal, social, and cultural milieus. The tribunal's political and organisational structure had some markings of an American institution. However, as an experience and entity, the IMTFE emerged as international to its core, with a multinational cast of prosecutors, judges, translators, investigators, and administrative staff. Internationalism explains both the tribunal's on-the-ground operation and its place in history. The construction of internationalism meant an intense social, cultural, political, and legal encounter. Being international required collaboration and compromise as well as diplomatic manoeuvring and forced concessions. The IMTFE formed a remarkable international tribunal and multilateral

institution as much for how different groups worked together as for dissonance, political or other. Thus, the tribunal became an important *symbol* of internationality both in the global context of its era, and in the development of international judicial regimes and norms. Unfortunately, the internationality which developed behind the scenes manifested publicly as discord and dissent, and these flaws are what attract scholars. Critics therefore found and will continue to find significant problems with the tribunal's procedure, its fairness, its findings, even its very premise. Legally and morally, it may have been a step backwards from the ground broken in Nuremberg, yet in composition and operation as a multilateral institution, it represented a step forward.

To a degree, the IMTFE reflected continued great power dominance, but only as part of a wider, more complex interface. Moreover, the blend of great power influence and internationalism in Tokyo typified postwar global governance. Compared to earlier League of Nations models, the emerging UN system contained built-in guarantees of great power authority. However, in response to shifting global realities, the actual ground-level and institutional practice of multilateralism became a fundamentally international encounter. The war and its aftermaths embedded 'true,' albeit messy, internationalism into the politics and processes of a world system accustomed to unilateralism and empire. The IMTFE reflected this change. The court's 'trial within' sculpted outside political pressures to suit localised contingencies in Tokyo, in the same way that internal dynamics transcended and transformed external global movements, abstract legal ideas and practices, supplemental logistical exigencies, loaded cultural preconceptions, and expected social norms. The significance of the internationalism constructed in Tokyo lies both in what it became, and in what it *represented*: A new era of international justice and organisation built on promise and pragmatism, form and function. Nuremberg embodied the principles of new internationalism, but not its complex multi-polarity. Tokyo, on the other hand, embodied the exaggerated principles, lived experience, negotiated processes, and contested outcomes of a reinvented era of internationalism.

CONCLUSION: “Almost Accomplished” – Irony, Amnesia, and Promise: Tokyo’s Legacy

The IMTFE constructed internationalism and internationalism constructed the IMTFE. The tribunal in Tokyo embodied the experience and essence of a new kind of global governance, entirely of its time but with timeless implications. This dissertation proves that extremely localised, epochal, and functional dynamics shaped and dominated the grand ideals represented in the IMTFE. In October 1952, Japan’s “National Offenders’ Prevention and Rehabilitation Commission” advocated clemency for all still-incarcerated Class ‘A’ war criminals. “For seven long years they have already served in prison, leading a penitential life,” the Commission pleaded. “The purpose of punishment is, therefore, considered to have been *almost accomplished*.”¹ The Commission’s words aptly, if inadvertently, summed up the IMTFE’s post-trial legacy. In many ways, it “almost accomplished” international justice in Tokyo. The tribunal emerged as a site of deep, almost tragic, irony. In history and historiography, law and memory, the court remains a largely embarrassing and abandoned endeavour. Its most ambitious, innovative, meritorious aspects became its most stunning downfalls. The best things the tribunal did, was, and attempted, formed the IMTFE’s most spectacular failures. Experiences and characteristics of the court which should be remembered, even celebrated, instead have become reviled as hypocrisies. It promised conclusive postwar accountability and concrete legal mechanisms for a better future. Instead, it ended up dismissed as an ineffective manifestation of victors’ justice reduced to a jurisprudential afterthought. The ‘trial within’ Tokyo submerged the ambitious principles of international justice in the dense, convoluted processes of multilateral institution. This concluding chapter demonstrates that forgotten justice in Tokyo took root in the essential personal, social, cultural, political, legal, logistical, and international terrain of the IMTFE’s time, place, and operation, despite its fractured and fractious afterlife.

¹ Shirane Matsusuke, Chairman, National Offenders’ Prevention and Rehabilitation Commission RE Decision on Recommendation on Release by Clemency of ‘A’ Class War Criminals (20 October 1952), Library and Archives Canada, Ottawa, Ontario, Record Group-25, Volume 6375, Folder 4060-C-40 Part 5.1. Hereafter “LAC.” [Emphasis Added].

The IMTFE experience suggests that the failings of internationalism are easier to identify, condemn, and remember than its inherent difficulties are to understand. Blatant missteps stand out more than functional accomplishment. As a result, critical contemporary media and academia reports on the IMTFE set the tone for the court's enduring reputation for failure and injustice. The popular press remarked that after having "dragged on" for two and a half "dreary years,"² the tribunal finally "creak[ed] towards climax,"³ with little hope for long-term acclamation. *Life* magazine even expressed gratitude that the "halting, *often-bungled* trial of 25 Japanese war leaders *finally* came to an end."⁴ *Le Monde* lambasted the IMTFE as too long, cumbersome, and confusing. By saturating the proceedings with 'expert' testimony, technicalities, and dense evidence the court had 'lost' its Japanese audience and missed a historic opportunity for justice and reconciliation.⁵ Contemporary scholarly analyses also undercut the IMTFE's credibility and image. The *Indian Law Review*, for example, echoed the sentiments of its compatriot judge Pal. "To a mere lawyer the trials appear as crude and ineffective attempts at clothing the sword with something like a wig," wrote K. K. Basu: "*Vae victis!* ['Woe to the vanquished']."⁶ The periodical *Commonweal* used Tokyo to disparage the entire internationalist edifice under construction. "Add this to Nuremberg. What do we get? A very uncomfortable feeling in this department. The numerous, long, and able defenses of the various war crime trials have made us loath to try to argue out the issues," it remarked. "They have not settled our stomach or quieted our mind or made our conscience serene. Certainly our emotions continue to react definitely and

² "For Posterity," *Time Magazine* 52 (20 December 1948): 26.

³ John Profumo, "The Allied Task in Japan: Problems of Administration," *Times of India*, 12 November 1948, 6.

⁴ "Japan's War Leaders Sentenced to Hang," *Life* 25 (29 November 1948): 40. [Emphases added]

⁵ The French paper wrote: "*Le procès fut trop long: deux ans et demi, plus de huit cents audiences. Il fut aussi trop lourds: à travers les 2282 documents versés aux débats, les dépositions des 205 experts, les Japonais qui suivirent l'affaire n'ont-ils pas été perdus? . . . La période [en cours d'investigation, était] beaucoup plus longue que celle qui fut explorée à Nuremberg.*" "Avant L'exécution Du Général Tojo - Le 'Nuremberg Japonais' N'a Peut-Être Pas Convaincu L'opinion Nippone," *Le Monde*, 1 December 1948, 1C, 2E.

⁶ K. K. Basu, "Tokio Trials," *Indian Law Review* 3 (1949): 30.

strongly against the whole business of the trials and condemnations.”⁷ Even supportive commentary felt forced. Robert Walkinshaw’s contention that “The important fact is that, with all their imperfections, these were courts, rather than blank walls and firing squads,” reflected a common sentiment.⁸ Ultimately, negative reports held more weight in the court of public opinion, a fact which helps explain the IMTFE’s trouble place in law, memory, and historiography.

Ironies and tragedies characterised all levels of tribunal encounter. Like all multilateral institutions, the IMTFE became a site of intimate personal interaction. How individuals responded to each other created strands of both dissonance and connection behind the scenes in Tokyo. The interweaving of these opposing threads among and within operational divisions produced the IMTFE experience. Unravelling these threads represents an important step in understanding the phenomenon of international justice in Tokyo, and in reconceptualising the IMTFE on both personal and institutional levels. Three individuals, Chief Prosecutor Keenan, Indian Justice Pal, and President Webb, dominate IMTFE knowledge and memory. For largely justifiable reasons, few remember or describe these personalities fondly. Webb a bully, Keenan a drunken shamble, and Pal a dissenting killjoy: these personnel images guide perception of the tribunal. From this platform, most assume, without interrogation, the notion that the IMTFE formed a repository for professional castoffs and dilettantes, especially compared to Nuremberg’s cast of luminaries. Indeed, some judges and prosecutors were ‘second-choice,’ even ‘third

⁷ "International Hangings," *Commonweal* 45, no. 165 (16 November 1948): 165.

⁸ Robert B. Walkinshaw, "The Nuremberg and Tokyo Trials: Another Step toward International Justice," *American Bar Association Journal* 35 (April 1949): 301.

choice' candidates,⁹ and certain individuals patently failed to rise to the occasion in Tokyo.¹⁰ However, despite their faults, most IMTFE personnel were competent individuals who worked diligently at their task. No organising government deliberately sent "embarrassments" and they expected greatness even from individuals who ended up underperforming. For example, in some ways, President Webb arrived as one of the most qualified of all Tokyo representatives, with vast war crimes experience and very high judicial stature in Australia, but left mostly reviled.¹¹

Concentrating on the failings of few overlooks the IMTFE's positive personnel dimensions. Marshalling hundreds of individuals to administer justice in postwar Japan during a time of monumental upheaval represented an accomplishment in itself. The tribunal signified an impressive mobilisation of people and resources. Moreover, most participants came eminently qualified. Many had previous experience in war crimes and other postwar international projects. Among the Associate Prosecutors, for example, Australian Alan J. Mansfield represented his country at the United Nations War Crimes Commission in London. Pedro Lopez had been part of

⁹ American Justice Cramer became judge only after the first US representative Higgins resigned. Higgins, it turns out, was also not the initially preferred choice. Joseph Keenan, for one, pushed for the appointment of a more recognised judicial figure like Willis Smith (President of the American Bar Association), Roscoe Pound (Dean of Harvard Law School), and Walter Armstrong (former President of the American Bar Association). On 21 January 1946, Keenan protested Higgins' appointment. "I feel sure you would want me to let you know that an appointment of a *nisi prius* judge would not fit in with any of the other appointments being made by the Allied Nations from the standpoint of prestige and rank." Keenan became more direct to the Judge Advocate General department saying he felt "disturbed" that Higgins was being considered. If appointed, Keenan asserted, Higgins would be a "distinct embarrassment. . . . The appointments and nominations received from other nations comprise a panel of jurists of world-wide reputation and distinction. With all due respect for Judge Higgins, he is a justice of the Superior Court (a court of intermediate grade) and the fact that he is known only locally in his state would not constitute an appointment comparable to the foreign members who have been nominated." Keenan concluded, "I suggest that if Mr. Willis Smith is not available that Dean Roscoe Pound, a figure in the law widely known throughout the United States and abroad for legal attainments, be selected, or some former president of the American Bar Association such as Walter Armstrong." Joseph Keenan, Correspondence, MacArthur Memorial, RG-9, Box 159 Blue Binders Series: War Crimes (WC 1-320) 12 September 1945 – 17 November 1948. Yuki Takatori's work on Justice Higgins reveals that other prominent jurists, such as Phil Gibson (Chief Justice of the California Supreme Court) and James V. Allred (former Governor of Texas and judge of the US District Court for the Southern District of Texas), were also considered. Takatori, "The Forgotten Judge at the Tokyo War Crimes Trial," 119-20. Other chapters reveal that the eventual Indian representatives were also not first choice candidates. Neither was French Justice Bernard.

¹⁰ "In a Tribunal of international standing these appointments are of very great importance and should be made solely with reference to especial suitability," Justice Northcroft reported to the New Zealand government at trial's end. "Considerations of national prestige, or even of national jealousy, should not become the dominating factor in the choice of a President. Still less should domestic political convenience be allowed to determine the appointment of the Chief Prosecutor." Northcroft, Letter to PM.

¹¹ After all, the Australian government chose Webb to lead war crimes commissions during the war and appointed him a High Court justice in May 1946. Webb's involvement in Australian war crimes investigations gave him unique experience for the IMTFE, but also opened the President to criticism for prior knowledge of the case.

the Philippines delegation at the United Nations Conference in San Francisco in 1945, Head of the Philippines delegation to the Preparatory Commission of the UN in London, and led his country's delegation to the First UN General Assembly. Soviet prosecutor Golunsky also contributed to San Francisco, as well as its Dumbarton Oaks conference precursor (1944). A member of the French Resistance during the war, Robert Oneto served as a Chief Justice of the Special Court for war crimes at Versailles. Similarly, before joining the IPS in Tokyo, Dutch prosecutor Borgerhoff-Mulder worked as a judge at the Special Court for Political Delinquents and War Criminals in The Hague. A former Rhodes Scholar, Canadian prosecutor Nolan served as Vice-Judge Advocate General for the Canadian Army during the war.¹² Others had specific IMT experience. Americans prosecutors John Darsey, John F. Hummel, Henry Sackett, John Brabner-Smith, English prosecutor Maurice Reed, and court reporter Philip Kapleau all arrived in Tokyo from Nuremberg courtrooms.¹³ As discussed elsewhere, the defence also contained qualified individuals. Victor Swearingen, for example, urged prosecutor Walter McKenzie to "get acquainted with the members of the Defense Panel, whom I believe are a very capable group of lawyers."¹⁴ Personnel and performance issues usually resulted not from talent but from fit.

¹² US Army Forces, Pacific, Public Relations Office, "Partial List of Attorneys of the International Prosecution Section," NZ Archives, EA2 1947-27A 106-3-22 Part 4. The list is attached to: Harold Evans to A. D. McIntosh (27 November 1946), NZ Archives, EA2 1947-27A 106-3-22 Part 4. Justice Cramer came well-recommended. Victor Swearingen from the US War Department told his friend, prosecutor Walter McKenzie, that Cramer "is well-qualified for this appointment and I am certain he will discharge his duties in a most capable manner. I have known him since 1939 and have the highest regard for him personally and for his ability." Victor Swearingen to Walter McKenzie (15 July 1946), McKenzie Papers, Box I, Folder: Correspondence – July 1946.

¹³ Harold Evans to A. D. McIntosh (27 November 1946), NZ Archives, EA2 1947-27A 106-3-22 Part 4. See also Donihi Interview, Part II. When Reed returned home, Comyns Carr asked London for "somebody [else] with experience of the Nuremberg trial [to] join the team." D. S. Scott-Fox, War Crimes Section, FO to UKLIM (13 February 1946), IWM Papers, FO 648, Box 152, Folder 3. The response illustrates British diligence in selecting even assistant-level staff. "[We] have made repeated efforts all over the country to find a man to replace Reed without success," a cable read. "Would you accept a particularly well qualified British woman who has been in Office of US Chief of Counsel at Nuremberg [?]" Comyns "would" and Marjorie N. Culverwell was appointed. JBBJ, London to British Division, IPS (23 March 1946), IWM Papers, FO 648, Box 152, Folder 3.

¹⁴ Victor Swearingen to Walter McKenzie (15 May 1946), McKenzie Papers, Box I, Folder: Correspondence – May-June 1946. Defendants personally selected their Japanese counsel and by in large they proved a competent and accomplished group. Head of IMTFE security Aubrey S. Kenworthy, and defence attorney George Furness both worked at the Manila trial of General Tomoyuki Yamashita. Aubrey S. Kenworthy, *The Tiger of Malaya: The Story of General Tomoyuki Yamashita and 'Death March' General Masaharu Homma* (New York: Exposition Press, 1953), A. Frank Reel, *The Case of General Yamashita* (London: Octagon Books, 1971), Lawrence Taylor, *A Trial of Generals: Homma, Yamashita, MacArthur* (South Bend, IN: Icarus Press, 1981).

Individual responses to specific demands of IMTFE employment revealed personal vices, shortcomings, and strengths which colour the court's memory.

A deep irony also existed in tribunal administration, particularly its role in a broader occupation project. The Occupation professed to spread pluralism, equality, freedom, and to promote a smooth transition of Japan from violent empire to peaceful democracy. Yet, the methods of transition used by SCAP and the FEC, including the IMTFE, manifested as distinctly imposed, hierarchical, and neo-colonial endeavours. Security protocols in Tokyo based on embellished fears of Japanese recidivism exemplified organisational paradox. Borgwardt noted similar "idiosyncratic security measures" in Nuremberg. Whereas Tokyo participants generally appreciated the protection from a threatening "other," Borgwardt argues that in Germany the bloated safety scene led to "feelings of constriction" and an "unwelcome reversion to wartime conditions" in trial participants.¹⁵ The IMTFE's inflated cloud of insecurity harbingered post-conflict and combat situations in Vietnam, the Balkans, Afghanistan, and elsewhere, especially the over-sanitised and securitised "Green Zone" in US occupied Iraq;¹⁶ another way the IMTFE experience proved both unique and (to a degree) universal. More broadly, the approach to occupation and transition employed in Tokyo presented an ill-formed and ill-conceived model for future interventions by global powers into the affairs of others. Although recent courts and institutions have used narrower geographical and temporal scopes, the transnational work done in Tokyo presaged modern international justice with all its inborn contradictions and inconsistencies.

The IMTFE's legal legacy likewise became a tragic tale in the classical sense. Missing its innovations and intent, cynical commentators enumerate a long list of faults in IMTFE law. To critics, the court's ideals never corresponded to political "realities" and its findings, predictably,

¹⁵ Borgwardt, *A New Deal for the World*, 203.

¹⁶ For views "inside" and "outside" the Green Zone see: Rajiv Chandrasekaran, *Imperial Life in the Emerald City: Inside Iraq's Green Zone* (New York: Alfred A. Knopf, 2006), Dower, *Cultures of War*, Dahr Jamail, *Beyond the Green Zone: Dispatches from an Unembedded Journalist in Occupied Iraq* (Chicago: Haymarket Books, 2007), Thomas S. Mowle, *Hope Is Not a Plan: The War in Iraq from inside the Green Zone* (Westport, CT: Praeger Security International, 2007), Peter W. Van Arsdale and Derrin R. Smith, *Humanitarians in Hostile Territory: Expeditionary Diplomacy and Aid Outside the Green Zone* (Walnut Creek, CA: Left Coast Press, 2010).

failed to alter the practices of states and political leaders. John Dower uses the US' particular failure to live up to justice ideals to lambast the recurrent "victory disease" of triumphalism that has poisoned American contributions to post-conflict arenas from Tokyo to Baghdad; a continual pattern of "winning the war, losing the peace" that has left no room for sincere transitional justice.¹⁷ Though fascinating, Dower's work takes Tokyo's contradictions as a given rather than a complicated outgrowth of an inherently contested set of circumstances. He uses the IMTFE because it fits neatly into a broader narrative of belligerent American exceptionalism. Even in the detailed discussion of the tribunal in his enormously subtle account of the Japanese Occupation, Dower sees only a US and Japanese experience and proceedings. He acknowledges the court's co-production and importantly highlights Japanese agency in the process, but largely skirts over the involvement of other countries and ignores the IMTFE's implications as an institute of global governance.¹⁸ As Dower and others suggest, the law in Tokyo had many faults, but its legal experience extended beyond simple victors' justice / bloodlust / vengeance paradigms. This dissertation demonstrates that in court and behind the scenes, the IMTFE developed more genuine, collaborative, nuanced, and international legal processes than normally recognised.

Tokyo jurists negotiated a spate of legal cultures, sensibilities, practices, and philosophies with few guidelines or precedents. Together, prosecutors, defence attorneys, and judges created international law, improvising procedures and precedents as they went along. While inventing jurisprudence defies the norms of most legal systems, the IMTFE jurists operated within the boundaries established by an internationally legitimated charter, no matter how questionable this

¹⁷ Dower, *Cultures of War*. Similarly, Thomas Schoenbaum laments the legalistic "path not taken" by the US and international organisations to promote international peace and human security. Thomas J. Schoenbaum, *International Relations: The Path Not Taken: Using International Law to Promote World Peace and Security* (Cambridge: Cambridge University Press, 2006). Samantha Power also criticises US hypocrisy and inaction in the face of mass human rights violations and atrocities. Samantha Power, *A Problem from Hell: America and the Age of Genocide* (New York: Basic Books, 2002). See also Stephen Wertheim's recent work on legalism and the League of Nations. Stephen Wertheim, "The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920," *Diplomatic History* 35, no. 5 (November 2011): 797–836.

¹⁸ Dower, *Embracing Defeat*, 443–85.

legality appears in hindsight. IMTFE jurists deserve more recognition for their sincere commitment and engagement in a complicated and thankless task. In the end, the court gathered and processed masses of transnational material from dozens of countries. In doing so, the IMTFE documented a multitude of crimes, researched decades of world history, and built a trove for future generations. The bench found sufficient common ground among seven socially, legally, culturally, and politically diverse majority judges to produce a comprehensive, if not entirely satisfactory, judgment. Instead of these accomplishments, the world and its courts remember judicial double standards (unexplored Allied crimes, amnesty for Japan's bacteriological warfare experts), trial omissions (Emperor Hirohito, the *zaibatsu* business elite), procedural biases (prejudice against defence evidence, overreliance on hearsay and affidavits), probative mishaps (overextension of the conspiracy charge, factual errors), and dissenting opinions (from Bernard, Pal, Röling, and, in spirit – Webb). Fairness demanded a long trial, especially given the enormity of the evidence compiled, the scope of the indictment, and the number of accused. Yet, the requirements of truly consultative international justice necessarily delayed the proceedings. IMTFE participants faced mounting personal, professional, and political pressure to conclude the trial. The only solutions meant going against the defining ideals of legal pluralism.¹⁹ The significance of the IMTFE's difficulty in attaining fundamental principles of justice lies not in its unique set of circumstances, but rather, how the IMTFE's challenges reflected the inevitable difficulties of enacting international justice, in the past and today. In form and function, IMTFE jurisprudence presaged the capacity and complication of modern international justice. The deep irony remains, however, that the court remains a legal afterthought despite its unquestionable relevance to the operation of modern courts.

¹⁹ Judicial efforts to expedite IMTFE proceedings illustrated the cost and compromise of international justice in action. A compromise protocol emerged to make the IMTFE as fair, independent, and fast as possible. Significant power existed for the Bench to intervene, the accused had the right to make unsworn statements at end of trial, and the general evidence procedures became inquisitive rather than adversarial. With the Australian Webb in charge, Anglo-American style became the default, but his predilection for autocracy meant that the President embraced the active role of a civil judge as well. The forced procedural flexibility of the IMTFE should have been appealing, but like many compromises, the IMTFE procedures pleased no one and angered many.

Tokyo's inner political experiences and international relations have engendered a similarly skewed perspective on the tribunal. Scholars too often dismiss postwar idealism and faith in global governance as transitory at best, utopian at worst. Philippe Sands, for example, applauds the first steps in Tokyo and Nuremberg, but concedes that for decades the IMTs represented desolate beacons of justice in a sea of cynicism, violence, and impunity.²⁰ Hundreds of international wars waged between the end of World War II and the 1990s with virtually no alleged war criminal held accountable. Similarly, John Hagan laments the judicial "dead zone" initiated by international tensions and geopolitical machinations in the Cold War.²¹ Eugene Davidson argues that the IMTs patently failed to bring international peace, protection, or justice, in spite of promises to the contrary. The decades following the trials experienced constant warfare highlighted by great powers intervening at will in the affairs of less powerful states.²² The irony of the IMTFF's grand political aspirations, therefore, became its fleeting impact on political memory and world affairs. But again, this irony reflects more what happened *after* Tokyo than the court's actual operation. By overemphasising the IMTFF inability to shape future events, critics miss its complex past. First, the postwar idealism that birthed Tokyo grew out of an unimaginably violent war which left deep, visceral scars on human and international psyches. The Cold War and other developments may have obfuscated the promises made in Tokyo and elsewhere, but the determined (and tempered) 'never again' mentality embodied by the IMTFF and related institutions was entirely authentic and appropriate for its era. Secondly, alongside its contemporaries, the tribunal represented but one stage in a continuum of internationalism and justice. Tokyo built on the legacy of predecessors in Leipzig, Istanbul, and Nuremberg. Though imperfect, the IMTFF, in turn, generated lessons – political and otherwise, influential or not – for

²⁰ Sands, *From Nuremberg to The Hague*.

²¹ Hagan, *Justice in the Balkans*.

²² Eugene Davidson, *The Nuremberg Fallacy: Wars and War Crimes since World War II* (New York: Macmillan, 1973). Vietnam War cynicism unquestionably influenced the first edition of *Nuremberg Fallacy*. A 1998 re-issue of Davidson's work maintains the critical stance. Eugene Davidson, *The Nuremberg Fallacy* (Columbia: University of Missouri Press, 1998).

progeny in Arusha, Freetown, Phnom Penh, and The Hague. In hindsight, the IMTFE may not pass muster, but the tribunal operated only within the tumult, ideals, and exigencies of its age.

The enduring myth of “American” justice remains one of the IMTFE’s strangest ironies since the tribunal operated as an intensely international process. Indeed, the court’s internationality created both its most impressive feats and most troubling hypocrisies. As a functioning multilateral institution, the tribunal gravitated between allegory and actuality. It symbolised multinational cooperation but struggled with intercultural relations. Japanese and American defence counsel, for example, confronted entrenched wartime hatred, racism, and cultural disjunction and took steps to break down barriers within the IDS. Even though Occupation policy forbade personal “fraternisation” with the Japanese, US members socialised with their colleagues from Japan who, in turn, risked censure to extend hospitality. Yet at the same time, all IMTFE personnel worked a trial with racist underpinnings. Thousands of “native” victims of Japanese atrocities throughout Asia saw little time in court, though the tribunal appropriated their trauma and nameless masses to establish Japan’s guilt. The bench included no representatives from Korea, Indochina, Thailand, Indonesia, or Micronesia, and apart from Justice Mei, the only non-Caucasians (Jaranilla and Pal) came from within imperial infrastructures. Many American, British, Dutch, and French participants processed life and law in Tokyo through colonial gazes. The internationalism constructed at the IMTFE proved unlike the conventional great-power Nuremberg model. It manifested as a messy, contentious, and contradictory encounter: the essence of modern global governance. In order to create balanced views of the accomplishments and shortcomings of the IMTFE and related institutions, scholars past and present need first to acknowledge the inherent difficulties of being international in a world suffused by promises of global community but still dominated by sovereign nation states.

The exaggerated aspiration and audience of international work only amplified the perception of IMTFE failure. Perhaps the tribunal’s greatest tragedy became how quickly any

semblance of legitimacy and achievement fell apart after trial's end. Within years of the court's last days, the world saw an utter collapse and erasure of the IMTFE experience: tenuous political alliances disintegrated, legal promise evaporated, ideals were sacrificed, sentences eroded, even personal relationships faded, swept up in historical distance and global currents. Nothing embodies this collapse better than the parole and release of IMTFE defendants. By 1957, every war criminal sentenced in Tokyo had been released or had died in prison.²³ The processes behind parole reflected a new era of international relations and organisation, and cemented IMTFE ironies. Pressure to release the war criminals mounted from within and out. Beyond Japan's borders, the trial's community of dissent expanded and developed into an organised and influential clemency movement.²⁴ Justices Pal and Röling – who remained lifelong friends²⁵ – became lodestones for IMTFE critics. Despite his adamant refusal to accept Tokyo's legitimacy, Pal also became an internationalist convert whose followers included judicial assistant Harold Evans. "It is difficult to explain why I write to you at the present time without appearing (to myself, at any rate) slightly absurd," Evans wrote Pal in August 1950. "But you, I feel, are the kind of person who will be in sympathy with the feelings I will attempt to describe."²⁶ In response, Pal recommended Lord Hankey's recently published critique of the tribunal, *Politics*,

²³ For parole and clemency see: LAC, RG-25, Volume 6196 (File 4060-C-40 Part 11); Volume 6375 (File 4060-C-40 Part 5.1-6.2); and Volume 6377 (File 4060-C-40 Part 7.1-8.2). In 1959, participating governments dismantled the war crimes infrastructure. "Since all war criminal have now been released, we would see no objection to the repeal of the 1952 Law [Japanese War Crimes Legislation]," Wellington told its Tokyo Ambassador. "Unless your British, Australian or Canadian colleagues receive instructions indicating that their Governments are not prepared to agree, you may advise the Japanese authorities accordingly." Secretary of External Affairs, Wellington to Ambassador, New Zealand Embassy, Tokyo RE: Proposed Repeal of Japanese War Crimes Legislation (7 April 1959), NZ Archives, AAEG 6956 W3252 Part 3.

²⁴ For communication among IMTFE clemency advocates see: Röling Papers, Box 28, and Evans Papers, Box 1, Folder 1 and 2.

²⁵ In 1959, for example, Pal addressed a letter to "Dear Bert" and signed it off "With love for your children and with the kindest regards to your dear wife and to yourself, Yours affectionately." Radhabinod Pal to B. V. A. Röling (14 August 1959), Röling Papers, Box 28.

²⁶ Harold Evans to Radhabinod Pal (2 August 1950), Evans Papers, Box 16, Box 1. Northcroft rejected Evans' new ideas. "I have a clear conscience myself as to the justification of my judicial function at Tokyo," Northcroft averred. "I have not the slightest desire to exacerbate myself by reading criticisms of what I did or did not do right or wrong at Tokyo. It was kind of you to suggest that I might have an opportunity of reading Hankey's book but, if it were presented to me bound in morocco with a special presentation plate and all the rest of it, done in the finest gold leaf, once I knew what it was about I would refuse to read the darned thing." E. H. Northcroft to Harold Evans (8 June 1950), Evans Papers, Box 16, Folder 1.

Trials, and Errors. “It is worth reading particularly at this moment of our international life.”²⁷

Röling also galvanised dissent and lent credibility to the transnational clemency network. In 1950, the Dutch judge asked Hankey to help pressure governments to release IMTFE convicts, confiding that Canada’s former Tokyo legation head, Herbert Norman, had already pledged support. Röling also promised to explore backing in India and France, presumably by contacting Pal and Bernard. In the US, Defence counsel Ben Bruce Blakeney, William Logan, Floyd Mattice, and others joined the movement.²⁸ Trial records, oral histories, and retrospectives written by members of this extended community of dissent helped shape later scholarly critiques of Tokyo.

Responding to these pressures and for their own internal motivations, US authorities organised an international “parole board” in September 1952.²⁹ The ensuing parole system signified an altered set of on-the-ground and external forces. First, Japan’s position in the postwar mindset had shifted dramatically. With the Cold War now firmly entrenched and the Korean embroilment underway, Japan’s importance as a Western ally overrode all other considerations. Japanese politicians and advocates used this advantage to increasing effect with SCAP authorities fixed on creating an Occupation exit strategy. Parole work also emerged as a tool in the global political arena. In a pointed maneuver, American authorities linked board membership to ratification of the 1950 San Francisco Peace Treaty. This no-signature-no-service move cut the

²⁷ Radhabinod Pal to Harold Evans (15 August 1950), Evans Papers, Box 16, Folder 1. See: Hankey, *Politics, Trials, and Errors*. Pal continues to be a beacon for critics. The “homage” to Pal erected at Tokyo’s Yasukuni Shrine extols his “bravery and dedication.” Pal alone understood that the IMTFE represented “none other than formalized vengeance sought with arrogance by victorious Allied Powers upon a defeated Japan. He attested that the prosecution instigated by the Allies was replete with misconceptions of facts, being therefore groundless. . . the insightful view presented by Dr. Pal has now gained recognition which it should deserve in the academic circle of international law.” Pamphlet from Yasukuni Shrine, Tokyo. In author’s possession. See also: <http://www.yasukuni.or.jp/english/precinct/monument.html> (accessed 6 August 2010).

²⁸ In April 1950, Blakeney responded to a letter from Röling that it was necessary “to get some Governments to move the matter there . . . of course the Governments of the dissenting judges at IMTFE were the obvious ones. I have already written to Judge Pal to that effect.” B. B. Blakeney to B. V. A. Röling (20 April 1950), Röling Papers, Box 27. Röling’s papers also include letters from other likeminded individuals including IMTFE defendant Tōgō’s wife, and – after his release from prison – Shigemitsu himself.

²⁹ “The United States established on September 5 a clemency and parole board to consider the recommendations made by the Japanese Government for clemency, reduction of sentences or parole with respect to the sentences.” A. R. Menzies, Canadian Embassy, Tokyo to Under-Secretary of State for External Affairs, Ottawa (8 September 1952) LAC, RG-25, Volume 6375, Folder 4060-C-40 Part 5.1.

Soviet Union, China (now communist), and the Philippines out of the IMTFE tableau.³⁰ In an even more audacious feat of legal, historical, and factual gymnastics, Pakistan served on the committee in place of India.³¹ This substitution grew almost entirely out of political considerations. In addition to being the embarrassing home of tribunal critic Justice Pal, India had become an intransigent player in the Cold War that avoided conforming to either side of the bipolar spectrum. The convenient postcolonial construction understandably upset Indian authorities, who objected through various channels to no avail. For example, India protested to

³⁰ “At the working level the [US] State Department now agreed that the Soviet Union, China, India and the Philippines were not eligible to exercise clemency but that Pakistan was eligible,” noted an internal Australian memorandum. “[The] total exclusion was logical although of course individual governments might have regard to the position of the Soviet Union, China, etc. (e.g. the views expressed by the representative of these Governments on the INTFE [sic]), when considering requests for clemency especially in cases of primary concern to them.” External Affairs, Canberra to Australian Embassy, Washington (28 November 1952), LAC, RG-25, Volume 6375, Folder 4060-C-40 Part 5.1.

³¹ An American pronouncement justified the exclusion of India. “The language of Articles 11 and 25 [of the San Francisco Peace Treaty] taken together confines the exercise of this power to the following Governments, which have already signed and ratified the Treaty of Peace with Japan: Australia, Canada, France, the Netherlands, New Zealand, Pakistan, the United Kingdom, and the United States . . . Had India signed and ratified the Treaty of Peace with Japan, both India and Pakistan would, in view of the Governments concerned, have been eligible to participate in decision with respect to persons sentenced by the International Military Tribunal for the Far East.” United States Government, “Press Statement” (14 May 1954), NZ Archives, EA W2619 54 106-3-39 Part 1. Although unconvincing, even specious, in hindsight, the explanation’s spirit and arguments aligned with the period’s Cold War and postcolonial mentalities. Given the political conditions of the day, the US managed to secure widespread support for its position. The Dutch government, for example, commented to New Zealand counterparts, that it supported the notion that parole participation should be “confined to the Powers which have actually signed and ratified the abovementioned Treaty of Peace with Japan.” Further concluding, “The Netherlands Government consider that Pakistan as a successor State to British India, represented on the Tribunal, and at the same time as a signatory Power to the Treaty of San Francisco is entitled to participate in the exercise of clemency as defined in Article 11 of the said treaty.” L. M. De Brauw, Minister of the Netherlands, Wellington to Foss Shanahan, Deputy Secretary, Department of External Affairs Department, Wellington (18 September 1953), NZ Archives, EA W2619 54 106-3-39 Part 1.

India felt unsurprisingly displeased and concerned about the deep political implications of this move. “Krishna Menon paid a short visit to London in the course of which he asked for an ‘off the record’ meeting with our Legal Advisers,” remarked a British Commonwealth Relations officer in London. According to reports, Menon “was at pains to make clear” that “India was genuinely concerned lest other countries e.g. the United States, might on some future occasion make use of the replies given by them to India on the clemency question in order to try and establish that Pakistan is in fact a successor state to (undivided) India.” G. D. Anderson, Commonwealth Relations Office, London to L. Cole, New Delhi (5 August 1954), NZ Archives, EA W2619 54 106-3-39 Part 1. Foreign Office legal adviser Francis Vallat recorded the exchange with Menon on 27 July 1954. “Mr. Menon began by saying . . . Pakistan was not, in his opinion, entitled to sign the San Francisco Peace Treaty with Japan as a belligerent, since she did not exist as a separate state at the time of the war.” Menon’s final push evoked the confusion and enmity of decolonisation and Allied duplicity. “Sovereignty in international matters was not divisible between India and Pakistan . . . that the word ‘partition’ was a misnomer when applied to the arrangements made when India became independent. All that had happened was that India had agreed to give up certain Indian provinces in order to attain independence for herself.” Francis Vallat, Exercise of Clemency for Class ‘A’ Japanese War Criminal under Article 11 of the Japanese Peace Treaty: Claim of India to Participate in Discussions (27 July 1954), Confidential Memorandum, NZ Archives, EA W2619 54 106-3-39 Part 1.

the New Zealand Government about the “unwarrantable” and “unacceptable” arguments made to justify the “arbitrary exclusion of India from . . . and the arbitrary inclusion of Pakistan” to parole hearings. “Membership of the International Military Tribunal for the Far East was not extended to all the countries which were at war with Japan, but was limited, under the terms of the Charter of the tribunal, to a certain number of countries,” read an official complaint. Justice Pal “represented neither British India which was no longer in existence nor Pakistan which had come into being 15 months earlier. He represented only the Government of India.” Moreover, because “Pakistan was not in any sense a legal successor to Independent India, Pakistan cannot claim or be accorded, by third parties, the right to exercise a vote in the matter.”³² US machinations robbed the parole hearings of nearly all of the IMTFE’s hallmarks of internationality. It became an almost exclusively Anglo-American process.³³

Shigemitsu Mamoru became perhaps the most glaring IMTFE punitive contradiction. Sentenced to seven years imprisonment by the tribunal, Shigemitsu served only two. Thanks to the support and advocacy of Lord Hankey, Justice Röling, and attorney George Furness, not to mention Japan’s strategic repositioning as a staunch Cold War ally rather than World War enemy, Occupation authorities officially released Shigemitsu from Sugamo Prison on 21 November 1950. His discharge came despite protests from several IMTFE parties, and years before the establishment of a formal parole review board.³⁴ Aware of the debt he owed clemency advocates, Shigemitsu personally thanked Röling for his work and support. “Coming from the Judge who

³² K. M. Cariappa, High Commissioner for India, Wellington to T. Clifton Webb, Minister of External Affairs, Wellington (27 April 1954), NZ Archives, EA W2619 54 106-3-39 Part 1. India lodged a similar complaint one year earlier. M. S. Duleepsinhji, High Commissioner for India, Canberra to Minister of External Affairs, Wellington (11 May 1953), NZ Archives, EA W2619 54 106-3-39 Part 1

³³ France, Pakistan, and the Netherlands served on the parole board, but proceedings and decisions became dominated by the US, UK, Australia, Canada, and New Zealand.

³⁴ “The only protests appear to be those made by the U.S.S.R., the Chinese Communist Government and the Japanese Communist Party, as well as certain individuals, such as Judge Mei, who was a member of the IMTFE, and other individuals connected with the said governments or party.” Alva C. Carpenter, GHQ, SCAP, Recommendation for Parole of Shigemitsu, Mamoru (6 November 1950), NARA, RG-331: SCAP Legal Division, Box 1221 – Parole Completed Files. For Shigemitsu’s release notice see: GHQ, SCAP to Commanding General, Japan Logistical Command RE Parole of Convicted War Criminal (10 November 1950), NARA, RG-331: SCAP Legal Division, Box 1221 – Parole Completed Files.

participated in the Tokyo Trial and knows the case so thoroughly, your kind words are doubly appreciated,” Shigemitsu wrote the Dutch judge in early 1951. “I had read your ‘Dissenting Opinion’ well and admired so much your understanding of the case. As for the trial, I was rather glad that my whole work has come and substantially to the public through it, even under the hard judicial scrutinization [sic].”³⁵ To the chagrin of critics and relief of clemency advocates, Shigemitsu promptly returned to political prominence. By 1954, he had regained his wartime posting of Foreign Minister, and under his purview, the Japanese government worked to emancipate other imprisoned individuals. The prosecution did not build a convincing case against Shigemitsu, but his premature release and swift restoration lays bare the fleeting imprint of the IMTFE’s judicial and historical afterlife.³⁶ Shigemitsu’s release also reflects how the Cold War allowed the political rehabilitation of the Japanese Right. So, while the IMTFE itself managed to largely transcend Cold War politics, ultimately the conflict hijacked the court’s legacy.

Such rapid and complete reversals of trial accomplishments and outcomes illustrate the IMTFE’s unique constitution and timing, and how different it might have been in another era. *Ad hoc* international processes are by nature temporary. Institutions like the IMTFE create unique and rich international spaces with particular conditions and contingencies. Without the institutional structure, however, internationalism falls apart. Because they tend to follow upheaval and operate in transitional times, international courts become particularly transitory. Although the IMTFE developed as a creature of its specific time and place, its experiential lessons nevertheless speak to a broader essence of modern global governance in action. By focusing on the challenges confronted by jurists in Tokyo, this dissertation promotes a better historical understanding of both the complexity of the tribunal itself and the involute practise of internationalism and global governance more generally. The approach employed provides an

³⁵ Shigemitsu Mamoru to B. V. A. Röling (20 January 1951), Röling Papers, Box 28.

³⁶ In the ensuing decades, the tribunal and its findings have provided ammunition for all sides of a memory war, especially because of the speed with which many of its findings, sentences, and experiences disintegrated after the trial. The IMTFE has therefore had a troubling afterlife in history and memory politics.

accessible narrative vehicle to draw out broader lessons that the IMTFE has to share with current and future international courts and multilateral institutions about tempering expectations, and the need to manage perspectives as much as processes.

The stories told here explain more than simply what went on behind the scenes in Tokyo. The ‘trial within’ the IMTFE reveals fundamental truths about the core experience of global community. Using the IMTFE as a model, this dissertation captures, and rethinks, what it means to be “international,” what multilateral institutions look like at ground level, and how often-undervalued inner processes shape outcomes on the world stage. Scholars, jurists, politicians, and the public alike conspicuously overlook the tribunal’s contributions to international justice, except to point out cynical victors’ justice, Cold War and colonial hypocrisies, Japan’s historical amnesia, and the illusory promise of post-conflict accountability. Yet, the IMTFE cannot be blamed entirely either for ongoing debates about war guilt or for the halting progress of international justice. Certainly, participants at the IMTFE could have managed the challenges of international justice more effectively, but it would have been impossible to understand, predict, or avoid all the difficulties, and it is unreasonable to expect that such challenges can be circumvented. Indeed, disputed findings are – or should be anticipated as – the expected outcome of international courts which cannot possibly satisfy all interested parties. Little is gained, therefore, from exposing the failings of the IMTFE in the unbecoming light of hindsight. To move beyond either wholesale dismissal of the IMTFE or blind acceptance of its findings, this dissertation shifts understanding of the tribunal from what it could have or should have been to what it *was*: an ambitious, determined venture ultimately doomed by the intrinsic difficulties of its aims and operation. In this way, one begins to recognise the tribunal’s role in the fluid and incremental evolution of international infrastructures to confront global crimes and crises.

In spite of widely espoused binaries about the tribunal’s legitimacy, the IMTFE neither embodied an enterprise of solely lofty ideals, nor formed a purely cynical political tool for

vengeance. It was both, and it was neither. In the end, the tribunal represents an enigma: unique as a court and set of circumstances, but altogether common as an international organisation and multilateral institution. Although imperfect, the IMTFE became a key component of the world community's move to guarantee peace, security, and human rights in the postwar era. A pioneering example of multilateralism, the tribunal's personnel legacy, administrative accomplishments, accretion of evidence, legal innovations, and symbolic multi-polarity made important contributions to the development of international justice. Understanding how jurists and administrators negotiated justice in Tokyo holds instructive potential for future efforts of international justice and organisation, especially regarding the need to avoid both the actuality and appearance of injustice. More importantly, however, the IMTFE's 'trial within' reveals the very essence and experience of global community. This dissertation focuses on the bare details of the IMTFE in action, but it is a micro history with very macro implications. It reveals how the minutiae of internationalism become magnified and imbued with exaggerated significance on the world stage. Day-to-day administrative decisions, personality conflicts, intellectual disagreements, political currents, logistical challenges, shortcomings, and successes all became amplified by the promise and practice of international organisation in Tokyo. This dissertation imagines and explores being "international" in a world built around sovereignty authority. Using IMTFE experiences and feelings, it ultimately reinterprets internationalism as a complex, dynamic, and lived encounter rather than a staid set of ideals and practices.

A stark contrast, even disjuncture, developed between what IMTFE participants, the public, and now scholars believed the trial should be and what it actually became. This disconnect reflects a wider problem with being international in the global age. In the face of transnational crises, international organisations, courts, advocacy groups, governments, victim communities, and other bodies invariably promise more than they can possibly perform. In Tokyo, experiences overwhelmed expectations on almost every level. Justification for the court

appeared simple and straightforward, especially for foreign participants arriving as victors in the homeland of a brutal former enemy. The case against Japan seemed clear-cut and the facts of Japanese crimes and aggression supposed to be easy and evident. Observers and insiders predicted fast and effective proceedings followed by a conclusive and convincing judgment. United and victorious, the Allied powers espoused unprecedented levels of global community and pledged to construct unassailable infrastructures of global peace and human rights. Yet, the truth of the IMTFE became far more complicated in person and practice. Participants underwent profound emotional experiences. Immersion in a defeated, destroyed, and destitute Japan ruptured the sanitised and detached views of the war assumed by civilian personnel. Even for service men and women, working in Japan produced an unanticipated emotional response. Tokyo's devastated surroundings and abject populace presented a disconcerting mirror on the costs of total war. Under scrutiny, the case against Japan became less self-evident. Legal proceedings built on artificial assurances of objectivity and inflated promises of authoritative findings and judgments, emerged instead as a deeply and inherently contested undertaking. Expecting to find copious, accessible, and compelling evidence of Japanese misdoings, investigators faced deliberate obstruction, mass destruction of government records, and transnational logistical nightmares which often resulted in unconvincing proofs. Ambitious wartime alliances and political unity struggled through shifting global movements and deteriorating geopolitics. Through all these disappointments and difficulties, the internationalist experience in Tokyo evolved as a messy, involute, and negotiated process. Far from an anomaly, this dissertation argues that this complexity reflects a norm not only for international courts but also for all analogous multilateral responses to local emergencies and exigencies. Internationalism reflects laudable aspirations worth the effort put in by participants in Tokyo and elsewhere. However, unless mindful of the innate challenges, the promise of global community will remain unfulfilled and unfulfilling.

KURE, HIROSHIMA PREFECTURE, JAPAN – Wednesday 24 November 1948: At 3pm, Harold Evans and his wife Jutta boarded a twin-screw troop transport ship called the HMAS Westralia bound for New Zealand. The past few days had been a whirlwind. Leaving was not easy, and the “Going away madness” included at least two weeks of packing, touring, fêting, and farewells. “Last-minute presents didn't make it any easier either!!” Evans assured his mother. The night before, the couple had boarded an overnight train from Tokyo Station to “quite a send off.” Sad and drained, Evans nevertheless felt relieved and ecstatic to be going “home.”

After announcing himself “sick of the place” in May 1948, Evans had been plotting and predicting departure dates from Japan for almost a year. From Kure, the newlyweds enjoyed over two weeks “on our own” at sea, thankfully “unhindered” by Justice Northcroft’s avuncular yet slightly austere presence. The judge had decided to fly home instead. On Saturday December 11, the Westralia arrived in Auckland Harbour. Evans’ father had pre-arranged accommodation in the posh Trans-Tasman Hotel in the heart of the City of Sails. Auckland seemed small and sedate by Tokyo standards, and the couple enjoyed a leisurely two days of touring the city and visiting friends before catching a train bound for Wellington on Monday night, December 13. After a brief visit to his parents’ home in the upscale Karori neighbourhood, Evans and Jutta continued on to the new house they had purchased in the emerging south Wellington suburb of Rongotai. Both anticipated a return to normalcy.

The New Zealand Evans looked forward to, however, was not the same country he had left almost three years before. “I have to remind myself how long I have been away,” he wrote to his parents before leaving Tokyo. Now, home at last, life became uncertain. With Evans came his new German wife who admitted to being “homesick” – for Germany and Japan – before even boarding the Westralia. Deeply in love and eager to start a family together, the couple purchased their Rongotai house sight-unseen while still in Tokyo. Though optimistic, the two could not be sure that the daughter of a former German naval attaché would be welcomed in New Zealand’s capital. Evans was also at a career crossroads. “Because of my wife’s background I am not permitted to remain in the Diplomatic Service of External Affairs,” he wrote to the Wellington District Rehabilitation Officer. Done with government work, Evans contemplated a shift to professional pianist. Accepted to the music program at Yale University, he dreamed of pursuing musicianship in London, though he understandably worried about the financial ramifications of such a decision. Less excitingly, but certainly more lucratively, his father’s connections were hard at work pushing Evans into private legal practice. Eventually he became a magistrate.

Evans’ view of the IMTFE also changed. After reading Lord Hankey’s damning critique in 1950, Evans began to doubt the IMTFE project. Had it been “grossly improper” for the Allies to participate in Tokyo after “fixing of the law beforehand” in London? He asked Justice Northcroft in June 1950. Northcroft pronounced his conscience “clear,” but an unsatisfied Evans sought and found a more sympathetic ear in Justice Pal. Correspondence with the Indian judge in the early 1950s crystallised Evans’ transition from IMTFE champion to IMTFE critic. It is perhaps fitting that Evans’ Japan journey ended on a ship in Hiroshima harbour, for the nuclear attacks on Japan – not participation in the IMTFE – made the deepest impression on the New Zealander’s memory, psyche, and life. After returning home, Evans’ growing misgivings about the IMTFE gradually merged with nostalgia for Japan, anxiety about the omnipresent Cold War atomic threat, and an irrepressibly non-conformist personality streak to inspire a life of advocacy. Evans spent the rest of his days carrying on – and re-shaping – the IMTFE legacy not for what the tribunal explored, but for one thing that it ignored: nuclear warfare.

Evans' first public foray against atomic weaponry came in 1956, when he wrote to New Zealand Prime Minister Walter Nash calling for immediate unilateral suspension of nuclear testing. From that point forward, he stayed involved in a growing New Zealand anti-nuclear movement in the 1960s and 1970s that protested nuclear test sites in the Pacific and visits by US naval ships to the region. After retiring as a magistrate in 1979, Evans' activism expanded dramatically. In August 1980, he helped organise a Hiroshima commemoration service in Christchurch. Evans' next major step in attracting "large representative" awareness to peace issues came in 1987. On September 29, he published an 'Open Letter' in Christchurch's *The Press* that branded nuclear weaponry "a violation of international law, human rights, and a crime against humanity" and demanded the prohibition of nuclear weapons as a step towards complete disarmament. The letter had limited initial impact, but it marks the beginning of a period of intense activism for Evans. Throughout the late 1980s, Evans indefatigably pushed governments and citizens to condemn nuclear war by sending out countless 'open letters,' pamphlets, and articles. In the early 1990s, his crusade went from local to global. In 1992, he became instrumental in the founding of the World Court Project (WCP) which eventually attracted support from over 700 organisations and 4 million individual petitioners from around the globe. Ultimately, the WCP helped force the UN General Assembly and the International Court of Justice to condemn both the threat and use of nuclear weapons. Rooted in his formative – life-altering – experiences in Japan, Evans' activism until his death in 2006 provides testament to both the IMTFE's human and humanitarian legacies. Even though Evans himself rejected the IMTFE experience as a judicial enterprise, his life and advocacy reflect the court's enduring significance.³⁷

HANEDA AIRPORT, TOKYO, JAPAN – Sunday 17 November 1946: At 8:10 pm, Walter McKenzie, boarded a plane and left Japan for good. IMTFE proceedings would not finish for two more years, but the lawyer was done.

Like everyone leaving the tribunal, the days leading up to McKenzie's departure proved hectic. On November 6, he inventoried and packed material to ship home. November 7, McKenzie had photos and fingerprints taken at the Provost Marshall's for travel passes and hosted a brief farewell gift exchange with one of his favourite Japanese friends, Ginko Hosomi. November 9, McKenzie, fellow prosecutor Eugene Williams, and another friend, Ruth Hughes, loaded up on souvenirs and gifts at "Jap Department stores" in downtown Tokyo. Flight orders arrived from the Adjutant General's office on November 13. The next day McKenzie had the first of several medical clearance exams. He received customs consent from the baggage inspector on November 15 for: "4 boxes of official records (1 Valpac), 1 briefcase, 1 handbag, and 1 traveling bag." On November 16 – the day before his scheduled departure – McKenzie rushed from home to work and back again, shipping five more boxes of personal material back to Michigan, packing up his War Ministry Building office, and having his flight luggage weighed at the ATC transport terminal. He rounded the day off with a sentimental good-bye party from "the girls" at Hattori House. All the while, McKenzie worked furiously to complete his prosecution brief against the accused Itagaki and tie up multiple other professional duties.

Already exhausted when he boarded the plane at Haneda airport, McKenzie's long journey was only just beginning. Departing Tokyo on November 17, he did not arrive home in Detroit until December 1. His arduous route home included 40 total flight hours (stopping at Guam, Kwajalein, Johnston Island, Hawaii, San Francisco, and Los Angeles) and nine days driving (Los Angeles to San Diego, to El Centro CA, to Globe Mountain AR, to Las Cruces NM, to Midland TX, to Fort Worth TX, to Tulsa OK, to Alton IL, and finally to Detroit). En route, McKenzie lived through a perilous, nearly aborted, take-off from Guam in an improperly balanced and overweight plane,

³⁷ Reconstructed from Evans Interviews; and Evans Papers, Box 16, Folder 3.

engine trouble and delay in Kwajalein, a harrowing landing at Johnston Island – “nearly over-ran [the] island: several of us [moved] to [the] nose again to hold it down” – and stormy winter driving conditions through the Sierra Nevada, Sange de Cristo, and Sacramento Mountains. There were also moments of sweet homecoming and warm nostalgia. McKenzie’s wife Connie met him in California for the drive to Michigan. He savoured her company after a long absence. In Texas, the normally frugal McKenzie lovingly gave Connie pearl earrings from Japan “for our anniversary.” Even though the food at the Tortuga Inn in Los Cruces tasted only “fair,” the meal delighted McKenzie because his server fondly “reminded me of Aiko san,” one of the Hattori House staff.

McKenzie’s transition back to professional life in Michigan came suddenly. He arrived home on a Sunday and reported to his office the next day. “It is quite a change from my work over there,” he wrote to Gladys Thompson (his former secretary in Tokyo). “I sometimes wish I was back in Japan.” McKenzie’s connection and commitment to the IMTFE did not end with nostalgia. He remained deeply committed to IMTFE ideals, regularly lecturing about his experiences and the tribunal’s historical importance. In early 1947 alone, McKenzie gave “talks” to the Veterans of the North Russian Expedition (February 9); the Delta Theta Phi Law Fraternity (February 22); the Federal Business Men’s Association (February 25); the Holy Name Society’s Father and Sons Program (March 9); the Birmingham High Twelve Club (March 10); the Trenton Exchange Club (March 18); the Detroit Civic Study Club (March 24); the Oakland County Bar Association (April 14); the University of Michigan Law School (April 17); the Reserve Officers of Detroit (April 21); the Saginaw Caravan Club (May 14); and the Civitan Club of Detroit (May 21). He also published pieces in the Michigan State Bar Journal, the Journal of the National Association of Referees in Bankruptcy, and the Red Cross’ Home Service Digest.

McKenzie’s personal connection to the IMTFE also endured. Back in Michigan, he carried on correspondence with numerous IMTFE personalities, including secretaries Gladys Thompson and Eleanor Barc; prosecutors James J. Robinson, Grover Hardin, Pedro Lopez (Philippines), Brendan F. Brown, Eugene Williams, Willis Mahoney, W. G. F. Borgerhoff Mulder (the Netherlands), Hsiang Che-Chun (China), Alan J. Mansfield (Australia), Rowland W. Fixel, and G. Osmond Hyde; along with judge Delfin Jaranilla (Philippines), defence attorney Roger F. Cole, and key prosecution witness John Goette. These friendships, which crossed all internal trial divisions and cliques, reveal something of the essence of the behind the scenes IMTFE experience. In Tokyo. Together. Administering justice. These three facts bound all tribunal participants no matter what their personal, social, cultural, political, national, or legal background. The IMTFE became a collective negotiated encounter – not a staid legal apparatus, not a blindly vindictive process, not an imposed unilateral enterprise.³⁸

ATSUGI AIRFIELD, JAPAN – 10pm, Wednesday, 1 September 1948: Elaine B. Fischel climbed aboard her flight home with mixed feelings. “Leaving Japan made me melancholy and unbalanced between being happy to go home and sad to leave a place I loved,” Fischel later remarked. Worried that she would never return, Fischel spent days prior to her departure visiting old haunts. “I could not get enough of Tokyo and walked all over!”

The young aspiring lawyer knew that she was leaving a unique international experience. Fischel’s final days in Tokyo – almost hard to believe in other circumstances – characterised the transcendent essence of the IMTFE encounter. She played tennis, went to the beach, swam, and rode horses with her unusual friend Dutch Justice B. V. A. Röling. On August 21, she had a personal interview with General MacArthur in the Dai Ichi Building (SCAP GHQ), after writing the Supreme Commander a plucky letter “saying I had worked for the Occupation for two

³⁸ Experiences recreated from his diary and other correspondence. McKenzie Papers, Box 1 and Box 2.

and a half years and never met my boss.” John Brannon, one of Fischel’s bosses, hosted “a wonderful party” in her honour, attended by former and current Japanese luminaries, politicians, and colleagues. The family of IMTFE defendant Kido Koichi (William Logan’s client) invited Fischel to their Atami beach home for a farewell gathering. They gave her “a lovely pearl ring” in deep gratitude. The wife of Shimada Shigetarō (Brannon’s client) presented Fischel with a “tiny jewel box” adorned with the Imperial Seal. Fischel had “one last picnic in Meiji Park” with her Japanese secretary and “some of the lovely girls at the Kanda Kai Kan where I had stayed.” Her final night, Fischel danced with Prince Takamatsu Nobuhito, a friend and tennis partner, who took her home “in his chauffeur-driven car and gave me a wonderful goodbye with lots of bowing and smiling.”

Fischel’s first flight touched down in Guam on September 2, where she ran into an old friend from pre-IMTFE training. They spent an enjoyable few days touring the island. Next, she flew to Hawaii, again with a pleasant couple of days’ vacation/stopover. From Hawaii, Fischel flew to Seattle where her “trusty Ford” – shipped in advance – awaited. This car, purchased while in Japan, became a prized possession which Fischel had used to tour around much of the Japanese countryside. She felt excited to bring it “home.” Arriving in Seattle on September 8, she began a long drive down the coast to Los Angeles to meet with her mother and sister, whose husband had spent three and a half years in the Pacific with the 7th Army. The reunion proved a mixed bag. Everyone overjoyed in seeing each other, but Fischel’s position as a “defender of the enemy” still caused some awkwardness, especially with her brother-in-law. More worrying, Fischel’s mother noted that her daughter “looked awful - really really bad.” Working in Tokyo had worn Fischel out.

Yet, Fischel’s commitment to the IDS cause lasted well after her return stateside. On December 20, she travelled to Washington with John Brannon and William Logan to help present the IDS’ ultimately unsuccessful appeal to the US Supreme Court. Although disappointed with the court’s ruling, Fischel enjoyed her last IMTFE hoorah. “It was really exciting and thrilling,” she remembered. “I was proud of Bill Logan and John Brannon who were unfazed and stalwart in their appearance before the highest court in the land.” Such dedication came at both a personal and physical cost. The ordeal of her time in Japan, the long journey home, and continued pace of work back in the US took a serious toll on Fischel’s health. Shortly after the Supreme Court decision, she experienced a massive haemorrhage diagnosed as advanced active tuberculosis. As a result, she was forced to temporarily drop out of law school and live with her mother while recuperating in a remote part of New Jersey.

Disappointed by the court’s findings, especially regarding the specific defendants that she had worked so hard to exculpate, Fischel did not finish impressed with the IMTFE. “I do not believe in this trial and wonder what it has proved,” she wrote before leaving Tokyo. “We won’t know in my generation I guess.” But Fischel remained tightly bound with the IMTFE and modified her view of the tribunal once removed from the heat of legal battle. She corresponded with Justice Röling, defence attorneys John Brannon, Bill Logan, John Guider, and Okuyawa Hachiro, and Japanese elites Prince Takamatsu and Ambassador Nomura. In 1960, she visited Japan with her mother, and maintains a deep love for Japan and the law to this day. The personal and professional legacy of the IMTFE resonates in Fischel’s memories and life – a fitting conclusion to this project. “Having been an eyewitness to the destructive aftermath of the war,” Fischel poignantly concludes her memoir, “I finish my story remembering the beauty of Japan, the perfection of cherry blossoms and the kindness and appreciations shown by so many people from so many different cultures to a young American girl who was given the privilege to experience a piece of such a lasting historical moment.”³⁹

³⁹ The re-creation of Elaine Fischel’s travels is based on published and private sources. Fischel Interview; Fischel Papers; and Fischel, *Death among the Cherry Blossoms*.

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Appendix I: Charter of the International Military Tribunal for the Far East

Excerpt from: IMTFE. "Charter of the International Military Tribunal for the Far East" (26 April 1946), in *Charter, Indictment, and Japanese Constitution*, Northcroft Papers, Box 337.

I. CONSTITUTION OF TRIBUNAL

Article 1

Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

Article 2

Members. The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

Article 3

Officers and Secretariat.

(a) *President.* The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.

(b) *Secretariat.*

(1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.

(2) The General Secretary shall organize and direct the work of the Secretariat.

(3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide [sic]

Article 4

Convening and Quorum, Voting and Absence.

(a) *Convening and Quorum.* When as many as six members of the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.

(b) *Voting.* All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those Members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.

(c) *Absence.* If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

II. JURISDICTION AND GENERAL PROVISIONS

Article 5

Jurisdiction Over Persons and Offences. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) *Crimes against Peace:* Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *Conventional War Crimes:* Namely, violations of the laws or customs of war;

(c) *Crimes against Humanity:* Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6

Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 7

Rules of Procedure. The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

Article 8

Counsel.

(a) *Chief of Counsel.* The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal, and will render such legal assistance to the Supreme Commander as is appropriate.

(b) *Associate Counsel.* Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

III. FAIR TRIAL FOR ACCUSED

Article 9

Procedure for Fair Trial. In order to insure a fair trial for the accused the following procedure shall be followed:

(a) *Indictment.* The indictment shall consist of a plain, concise, and adequate statement of each offence charged. Each accused shall be furnished, in adequate time for defence, a copy of the indictment, including any amendment, and of this Charter, in a language understood by the accused.

(b) *Language.* The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.

(c) *Counsel for Accused.* Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

(d) *Evidence for Defence.* An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defence, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.

(e) *Production of Evidence for the Defence.* An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness of the document and the relevancy of such facts to the defence. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

Article 10

Applications and Motions before Trial. All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

IV. POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

Article 11

Powers. The Tribunal shall have the power

- (a) To summon witnesses to the trial, to require them to attend and testify, and to question them,
- (b) To interrogate each accused and to permit comment on his refusal to answer any question,
- (c) To require the production of documents and other evidentiary material,
- (d) To require of each witness an oath, affirmation, or such declaration as is customary in the country of the witness, and to administer oaths,
- (e) To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

Article 12

Conduct of Trial. The Tribunal shall

- (a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges,

- (b) Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever,
- (c) Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges,
- (d) Determine the mental and physical capacity of any accused to proceed to trial.

Article 13

Evidence

- (a) *Admissibility.* The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.
- (b) *Relevance.* The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.
- (c) *Specific Evidence Admissible.* In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:
 - (1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.
 - (2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.
 - (3) An affidavit, deposition or other signed statement.
 - (4) A diary, letter or other document, including sworn or unsworn statements which appear to the Tribunal to contain information relating to the charge.
 - (5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.
- (d) *Judicial Notice.* The Tribunal shall neither require proof, of facts of common knowledge, nor of the authenticity of official j [sic] government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.
- (e) *Records, Exhibits and Documents.* The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

Article 14

Place of Trial. The first trial will be held at Tokyo and any subsequent trials will be held at such places as the Tribunal decided

Article 15

Course of Trial Proceedings. The proceedings the Trial will take the following course:

- (a) The indictment will be read in court unless the reading is waived by all accused.

- (b) The Tribunal will ask each accused whether he pleads “guilty” or “not guilty.”
- (c) The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.
- (d) The prosecution and defence may offer evidence and the admissibility of the same shall be determined by the Tribunal.
- (e) The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.
- (f) Accused (by counsel only, if represented) may address the Tribunal.
- (g) The prosecution may address the Tribunal.
- (h) The Tribunal will deliver judgment and pronounce sentence.

V. JUDGMENT AND SENTENCE

Article 16

Penalty. The Tribunal shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just.

Article 17

Judgment and Review. The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

By command of General MacArthur:

RICHARD J. MARSHALL Major General, General Staff Corps,
Chief of Staff.

OFFICIAL: B. M. FITCH
Brigadier General, AGD,
Adjutant General.

Appendix II: IMTFE Summary of the Indictment

Excerpt from: IMTFE. "Summary of the Indictment," in *Charter, Indictment, and Japanese Constitution*, Northcroft Papers, Box 337.

On the 29th of April, 1946, an indictment, which had previously been served on the accused in conformity with the rules of procedure adopted by the Tribunal, was lodged with the Tribunal.

The Indictment (Annex No. A-6) is long, containing fifty-five counts charging twenty-eight accused with Crimes against Peace, Conventional War crimes, and Crimes against Humanity during the period from the 1st of January, 1928, to the 2nd of September, 1945.

It may be summarized as follows:

In Count 1 all accused are charged with conspiring as leaders, organisers, instigators or accomplices between 1st January 1928 and 2nd September 1945 to have Japan, either alone or with other countries, wage wars of aggression against any country or countries which might oppose her purpose of securing the military, naval, political and economic domination of East Asia and of the Pacific and Indian oceans and their adjoining countries and neighbouring islands.

Count 2 charges all accused with conspiring throughout the same period to have Japan wage aggressive war against China to secure complete domination of the Chinese provinces of Liaoning, Kirin, Heilungkiang, and Jehol (Manchuria).

Count 3 charges all accused with conspiracy over the same period to have Japan wage aggressive war against China to secure complete domination of China.

Count 4 charges all accused with conspiring to have Japan, alone or with other countries, wage aggressive war against the United States, the British Commonwealth, France, the Netherlands, China, Portugal, Thailand, the Philippines and the Union of Soviet Socialist Republics to secure the complete domination of East Asia and the Pacific and Indian Oceans and their adjoining countries and neighbouring islands.

Count 5 charges all accused with conspiring with Germany and Italy to have Japan, Germany and Italy mutually assist each other in aggressive warfare against any country which might oppose them for the purpose of having these three nations acquire complete domination of the entire world, each having special domination in its own sphere, Japan's sphere to cover East Asia and the Pacific and Indian Oceans.

Counts 6 to 17 charge all accused except SHIRATORI with having planned and prepared aggressive war against named countries.

Counts 18 to 26 charge all accused with initiating aggressive war against named countries.

Counts 27 to 36 charge all accused with waging aggressive war against named countries.

Count 37 charges certain accused with conspiring to murder members of the armed forces and civilians of the United States, the Philippines, the British Commonwealth, the Netherlands and Thailand by initiating unlawful hostilities against those countries in breach of the Hague Convention No. III of 18th October 1907.

Count 38 charges the same accused with conspiring to murder the soldiers and civilians by initiating hostilities in violation of the agreement between the United States and Japan of 30th November 1908, the Treaty between Britain, France, Japan and the United States of 13th December 1921, the Pact of Paris of 27th August 1928, and the Treaty of Unity between Thailand and Japan of 12th June 1940.

Counts 39 to 43 charge the same accused with the commission on 7th and 8th December 1941 of murder at Pearl Harbour (Count 39) Kohta Behru (Count 40) Hong Kong (Count 41) on board H. M. S. PETREL at Shanghai (Count 42) and at Davao (Count 43).

Count 44 charges all accused with conspiring to murder on a wholesale scale prisoners of war and civilians in Japan's power.

Counts 45 to 50 charge certain accused with the murder of disarmed soldiers and civilians at Nanking (Count 45) Canton (Count 46) Hankow (Count 47) Changsha (Count 48) Hengyang (Count 49) and Kweilin and Luchow (Count 50).

Count 51 charges certain accused with the murder of members of the armed forces of Mongolia and the Soviet Union in the Khalkin-Gol River area in 1939.

Count 52 charges certain accused with the murder of members of the armed forces of the Soviet Union in the Lake Khasan area in July and August 1938.

Counts 53 and 54 charge all the accused except OKAWA and SHIRATORI with having conspired to order, authorize or permit the various Japanese Theatre Commanders, the officials of the War Ministry and local camp and labour unit officials to frequently and habitually commit breaches of the laws and customs of war against the armed forces, prisoners of war, and civilian internees of complaining powers and to have the Government of Japan abstain from taking adequate steps to secure the observance and prevent breaches of the laws and customs of war.

Count 55 charges the same accused with having recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the laws and customs of war.

Appendix III: Defendants at the IMTFE

Bibliographical material from: IMTFE. “Biographical Index of Defendants and their Counsel” (9 September 1946), in *Biographical*, Northcroft Papers, Box 336.

*** Biographical sketches are based on court files. They summarise significant career postings and moments *from the tribunal’s perspective*, not necessarily trace the entirety of – or judge – the defendants’ careers, accomplishments, or alleged crimes.

Sentence information from: IMTFE. *Judgment: Part C*. Chapter IX: “Findings on Counts of the Indictment”; and Chapter X: “Verdicts,” pp. 1137 – 1211. Northcroft Papers, Box 321.

Accused who Received Sentences (25)

Araki Sadao

Background: Army. General (1933 -). War Minister (1931-1934); Member, Supreme War Council (1934-1936); Member, Cabinet Advisory Council on China (1937); Education Minister (1938-1939)

Sentence: Guilty on Counts 1, 27
Life Imprisonment

Doihara Kenji

Background: Army. General (1941 -). Commander, Special Service Section, Manchuria (1931); Commander-in-Chief, Japanese 5th Army, Manchuria (1938-1940); Commander of the 7th Area Army Singapore (1944-1945)

Sentence: Guilt on Counts 1, 27, 29, 31, 32, 35, 36, 54
Death by Hanging

Hashimoto Kingorō

Background: Army, Commanded artillery regiment at ‘Rape of Nanking,’ directed forces in shelling of the *HMS Ladybird* and *USS Panay* in Shanghai 1937

Sentence: Guilty on Counts 1, 27
Life Imprisonment

Hata Shunroku

Background: Army. General (1937 -). Command, Taiwan Army (1936-1937); Commander-in-chief, Expeditionary Force, Central China (1938-1939; 1940-1944); War Minister (1939-1940)

Sentence: Guilty on Counts 1, 27, 29, 31, 32, 55
Life Imprisonment

Hiranuma Kiichirō

Background: Politician. Vice President, Privy Council (1930-1936; President, Privy Council (1936-1939); Prime Minister (1939)

Sentence: Guilty on Counts 1, 27, 29, 31, 32, 36
Life Imprisonment

Hirota Kōki

Background: Politician and Diplomat. Ambassador to USSR (1930-1933); Foreign Minister (1933-1936; 1937-1938); Prime Minister (1936-1937); Member, Cabinet Advisory Council (1940 -)

Sentence: Guilty on Counts 1, 27, 55
Death by Hanging

Hoshino Naoki

Background: Civil Servant, Economist. Chief, General Affairs, Finance Department, Manchukuo Government (1932-1936); President, Planning Board (1940-1941); Chief Secretary, Minister of State (1941-1944) – Tōjō Cabinet

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Itagaki Seishirō

Background: Army. General (1941 -). Kwantung Army (1929-1937); War Minister (1938-1939); Chief of Staff, Japanese Army in China (1939-1941); Commander, Japanese Army in Korea (1941-1945)

Sentence: Guilty on Counts 1, 27, 29, 31, 32, 35, 36, 54
Death by Hanging

Kaya Okinori

Background: Civil Servant, Economist. Chief Secretary, Finance Ministry (1934-1937); Minister of Finance (1937-1938); President, North China Development Company (1939-1941); Finance Minister (1941-1944) – Tōjō Cabinet

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Kido Kōichi

Background: Civil Servant, Politician. Education Minister (1937-1938); Welfare Minister (1938-1939); Home Minister (1939-1940); Lord Keeper of the Privy Seal (1940-1945) – Chief advisor to Emperor Hirohito

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Kimura Heitarō

Background: Army. General (1945 -). Chief of Staff, Kwantung Army (1940-1941); Vice War Minister (1941-1944) – Tōjō Cabinet; Commander-in-chief, Japanese Army in Burma (1944-1945)

Sentence: Guilty on Counts 1, 27, 29, 31, 32, 54, 55
Death by Hanging

Koiso Kuniaki

Background: Army. General (1937-). Prime Minister (1944-1945); Governor General of Korea (1942-1944); Commander Japanese Army in Korea (1935-1936); Chief of Staff in Kwantung Army (1932-1934)

Sentence: Guilty on Counts 1, 27, 29, 31, 32, 55
Life Imprisonment

Matsui Iwane

Background: Army. General (1933 -). Commander-in-Chief, Japanese Forces, China (1937-1938) – during ‘Rape of Nanking’; Cabinet Advisory Council (1938-1940); President, Greater East Asia Development Society (1944 -)

Sentence: Guilty on Count 55
Death by Hanging

Minami Jirō

Background: Army. Commander, Japanese Army, Korea (1929-1931); War Minister (1931); Supreme War Councillor (1931-1934); Commander-in-chief, Kwantung Army (1934-1936); Governor General, Korea (1936-1942); Member, Privy Council (1942-1945)

Sentence: Guilty on Counts 1, 27
Life Imprisonment

Mutō Akira

Background: Army. Lieutenant General (1941 -). Instructor, Military Staff College (1930-1932); Kwantung Army Headquarters (1939-1942); Chief of Staff, 14th Area Army in the Philippines (1944 -) – under General Yamashita

Sentence: Guilty on Counts 1, 27, 29, 31, 32, 54, 55
Death by Hanging

Oka Takazumi

Background: Navy. Vice Admiral (1942 -). Section Chief, General and Military Affairs Bureau of the Navy (1938-1940); Chief, General and Military Affairs Bureau of the Navy (1940-1944); Vice Navy Minister (1944)

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Ōshima Hiroshi

Background: Diplomat – with military training and background. Military attaché, Berlin (1936-1938); Ambassador to Germany (1938-1939, 1941-1945)

Sentence: Guilty on Count 1
Life Imprisonment

Satō Kenryō

Background: Army. Major-General (1941); Lieutenant General (1945). Instructor, Army General Staff College (1935-1937); Chief, Military Affairs Bureau, War Ministry (1941-1944)

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Shigemitsu Mamoru

Background: Diplomat. Minister to China (1931-1933); Ambassador to USSR (1936-1938); Ambassador to Britain (1938-1941); Ambassador to Wang Jingwei's Nanjing collaborationist government (1941-1943); Foreign Minister (1943-1944) – Tōjō Cabinet

Sentence: Guilty on Counts 27, 29, 31, 32, 33, 55
7 Years Imprisonment

Shimada Shigetarō

Background: Navy. Admiral (1940). Chief of Staff, Combined Fleet (1930-1935); Commander of the Second Fleet (1937-1940); Commander, China Fleet (1940-1941); Navy Minister (1941-1944) – Tōjō Cabinet

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Shiratori Toshio

Background: Diplomat. Chief, Information, Bureau of the Foreign Office (1930-1936); Minister to Sweden, Norway, Denmark, Finland (1936-1939); Ambassador to Italy (1939-1940)

Sentence: Guilty on Count 1
Life Imprisonment

Suzuki Teiichi

Background: Army. War economist. Member of Military Affairs Section, War Ministry (1931-1933); Chief, Political Affairs Division, China Affairs Board (1938-1941); President, Cabinet Planning Board (1941-1942)

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Tōgō Shigenori

Background: Diplomat. Ambassador to Germany (1937-1938); Ambassador to USSR (1938-1941); Foreign Minister (1941-1942) – Tōjō Cabinet; Foreign Minister and Minister of Greater East Asia (1945)

Sentence: Guilty on Counts 1, 27, 29, 31, 32
20 Years Imprisonment

Tōjō Hideki

Background: Army. General (1940 -). Commander, Military Police Section, Kwantung Army (1935-1937); Chief of Staff, Kwantung Army (1937-1938); War Minister (1940-1941); Prime Minister and War Minister (1941-1944)

Sentence: Guilty on Counts 1, 27, 29, 31, 32, 33, 54
Death by Hanging

Umezu Yoshijirō

Background: Army. General (1940 -). Commander, Japanese Forces in China (1934-1936); Vice War Minister (1936-1938); Commander, Kwantung Army and Ambassador to Manchukuo (1939-1944); Chief of General Staff (1944-1945)

Sentence: Guilty on Counts 1, 27, 29, 31, 32
Life Imprisonment

Accused Not Sentenced (3)

Nagano Osami

Background: Navy. Admiral (1934 -). Commander-in-Chief, Combined Fleet (1937-1940); Member, Supreme War Council (1940-1941); Chief, Naval General Staff (1941-1944)

Outcome: Died during the proceedings (5 January 1947; pneumonia/heart attack)

Matsuoka Yōsuke

Background: Diplomat. President, South Manchurian Railway (1935-1939); Member, Cabinet Advisory Council (1940); Foreign Minister (1940-1941)

Outcome: Died during the proceedings (26 June 1946)

Ōkawa Shumei

Background: Public Intellectual, Ideologue. Author of books, articles, and speeches advocating Japanese expansion; Director General, East Asia Research Institute, South Manchurian Railway (1926-1931)

Outcome: Deemed mentally unfit for trial and discharged

Appendix IV: Cast of Characters – IMTFE Personnel in this Dissertation

Bibliographical material from: IMTFE. *Biographical*, Northcroft Papers, Box 336.

The Bench: Judges and Assistants

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| Henri Bernard | Judge representing France; filed dissenting opinion |
| Myron C. Cramer | Judge representing the US; replaced Higgins; Majority member; Periodically served as Acting President |
| William E. Cuppaidge | Australian Assistant to President Webb. Co-authored Webb's preliminary judgment on IMTFE jurisdiction |
| Harold J. Evans | New Zealand Assistant to Justice Northcroft. Initially also assigned to compatriot Associate Prosecutor R. H. Quilliam |
| John P. Higgins | Judge representing the US; resigned |
| Delfin Jaranilla | Judge representing the Philippines; Majority member; Filed concurring opinion |
| E. S. McDougall | Judge representing Canada; Majority member |
| Mei Ju-ao | Judge representing China; Majority member |
| Frances C. Morris | American researcher in the Office of President Webb |
| E. H. Northcroft | Judge representing New Zealand; Majority member; Periodically served as Acting President |
| Radhabinod Pal | Judge representing India; filed dissenting opinion |
| Lord Patrick | Judge representing Britain; Majority member |
| Quentin Quentin-Baxter | New Zealand Assistant to Justice Northcroft. Reputed to have written parts of IMTFE judgment |
| Betty E. Renner | American lawyer, and assistant to President. Co-authored Webb's preliminary judgment on IMTFE jurisdiction |
| B. V. A. Röling | Judge representing the Netherlands; filed dissenting opinion |
| Radha S. Sinha | Assistant to Justice Pal (India) |
| W. F. Webb | President of the Tribunal; Judge representing Australia; Filed separate opinion |
| James Yang | Assistant to Justice Mei (China); co-author of "Study on Prosecution's Phases on Japan's 'Aggressive' War" |
| I. M. Zaryanov | Judge representing USSR; Majority member |

International Defence Staff (IDS): Lawyers and Staff

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|-------------------------|--|
| Norris H. Allen | Early American Counsel; Resigned with Coleman |
| Benjamin Bruce Blakeney | American Counsel to Tōgō Shigenori and Umezu Yoshijirō |
| George F. Blewett | American Counsel to Tōjō Hideki |
| John G. Brannon | American Counsel to Shimada Shigetarō and Nagano Osami |

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| Alfred W. Brooks | American Counsel to Koiso Kuniaki, Minami Jirō, and Ōkawa Shumei |
| Charles B. Caudle | American Counsel to Shiratori Toshio |
| Roger F. Cole | American Counsel to Mutō Akira |
| Beverly M. Coleman | Initial Chief of Defence Division; Resigned |
| Owen Cunningham | American Counsel to Ōshima Hiroshi; Disbarred from court |
| Valentine Deale | Early American Counsel; Resigned with Coleman |
| Richard De Martino | American historical adviser, analyst, researcher |
| Elaine B. Fischel | American secretary to attorneys William Logan and John Brannon; initially secretary to Coleman (until his resignation) |
| James N. Freeman | American Counsel to Satō Kenryō |
| Fujii Goichirō | Japanese Counsel to Hoshino Naoki |
| George A. Furness | American Counsel to Shigemitsu Mamoru |
| John Guider | Early American Counsel; Resigned with Coleman |
| Frances A. Guthrie | American secretary to attorney Charles B. Caudle |
| E. Richard Harris | IDS Administration Supervisor; American Counsel to Hashimoto Kingorō |
| Joseph C. Howard | American Counsel for Kimura Heitarō and Ōshima Hiroshi |
| Joseph F. Hynes | Early American Counsel; Resigned with Coleman |
| Hozumi Shigetaka | Japanese Counsel to Kido Kōichi and Tōgō Shigenori |
| Ito Kiyoshi | Japanese Counsel to Matsui Iwane |
| Kiyose Ichiro | Japanese Counsel to Tōjō Hideki |
| Aristides Lazarus | American Counsel to Hata Shunroku |
| Michael Levin | American Counsel to Suzuki Teiichi |
| William Logan | American Counsel to Kido Kōichi |
| Floyd Mattice | American Counsel to Itagaki Seishirō and Matsui Iwane |
| William J. McCormack | American Counsel to Minami Jirō |
| Edward P. McDermott | American Counsel to Shimada Shigetarō |
| Lawrence J. McManus | American Counsel to Araki Sadao |
| Migita Masao | Japanese Counsel to Hoshino Naoki |
| Miyata Mitsuo | Japanese Counsel to Umezu Yoshijirō |
| Nishi Haruhiko | Japanese Counsel to Tōgō Shigenori |
| Okuyawa Hachiro | Japanese Counsel to Nagano Osami |
| Okamoto Toshio | Japanese Counsel to Minami Jirō |
| Samuel A. Roberts | American Counsel to Oka Takazumi |
| Roger S. Rutchick | American Counsel to Kaya Okinori |

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| David F. Smith | American Counsel to Hirota Kōki; Disbarred from court |
| Shiobara Tokisaburō | Japanese Counsel to Kimura Heitarō and Tōjō Hideki |
| Takayanagi Kenzo | Japanese Counsel to Suzuki Teiichi |
| Usami Rokurō | Japanese Counsel to Hiranuma Kiichirō and Shigemitsu Mamoru |
| Uzawa Somei | Chief of Defence; Counsel to Matsui Iwane and Shiratori Toshio |
| Franklin E. Warren | American Counsel to Doihara Kenji, Matsuoka Yōsuke, and Oka Takazumi |
| Frances Way | American administrator and clerk |
| Carrington Williams | American Counsel to Hoshino Naoki |
| George Yamaoka | American Counsel to Tōgō Shigenori; influential IDS binder behind the scenes; <i>Nisei</i> fluent in English and Japanese |
| Yanai Hisao | Japanese Counsel to Hiranuma Kiichirō and Shigemitsu Mamoru |
| Charles T. Young | Early American Counsel; Resigned with Coleman |

International Prosecution Section (IPS): Lawyers and Staff

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| Evelyn Alexander | American secretary to Chief Prosecutor Keenan |
| Eleanor Barc | American IPS stenographer and administrator |
| W. G. F. Borgerhoff-Mulder | Associate Prosecutor (the Netherlands) |
| John Brabner-Smith | American prosecutor; helped write IPS opening statement |
| Brendan F. Brown | American prosecutor; theorist; compiled list of conspiracy laws |
| Basil J. Buchko | American legal analyst and researcher for prosecution |
| Betty Burrowes | Australian IPS administrator |
| Arthur Comyns Carr | Associate Prosecutor (Great Britain); wrote Indictment |
| Denzel R. Carr | Chief, IPS Language Division |
| John J. Crowley | American prosecutor; part of fact-finding mission to China |
| Marjorie N. Culverwell | British assistant, administrator, and clerk |
| John Darsey | American prosecutor; chief US rival to Keenan |
| Rex Davies | British prosecutor; killed in plane crash during trial |
| Audrey Davis | American stenographer, friend of Elaine Fischel |
| Robert Donihi | American prosecutor |
| Joseph F. English | American prosecutor, analyst. Wrote 400-page index of Japanese conferences leading up to war |
| John W. Fihelly | American prosecutor; brought in to interrogate Tōjō; resigned when Keenan usurped Tōjō's cross-examination |
| Roland Fixel | American prosecutor |
| S. A. Golunsky | Associate Prosecutor, USSR |
| Valentine Hammack | American prosecutor. Nearly came to blows with Keenan |

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| Grover C. Hardin | American Prosecutor |
| Hugh Helm | American prosecutor. Expert on anti-trust, conspiracy |
| Carlisle W. Higgins | American Prosecutor; Personal assistant to Keenan; sometimes acting chief of IPS |
| Solis Horwitz | American prosecutor. Wrote Narrative Summary of Proceedings |
| Hsiang Che-Chun | Associate Prosecutor (China) |
| John F. Hummel | American prosecutor. Also worked in Nuremberg |
| Christmas Humphreys | British prosecutor. Zen enthusiast; latterly Zen scholar |
| Osmond G. Hyde | American prosecutor and investigator. Interrogator and special assistant; Expert on anti-trust, conspiracy |
| Elton M. Hyder | American prosecutor. Left by end of 1946 |
| Joseph B. Keenan | Chief Prosecutor (US). Disruptive leadership; intemperance and personality blamed for many IMTFE issues |
| A. T. Laverge | Dutch prosecutor |
| Pedro Lopez | Associate Prosecutor (the Philippines). Stayed for whole trial |
| Melville Laurence | British administrative assistant to prosecution |
| Grace Kanode Lewellyn | American prosecutor. Called by President Webb, the “first woman [ever] before an IMT” |
| Otto Lowe | American prosecutor. Personal representative of the Chief Prosecutor in Washington |
| Alan J. Mansfield | Australian prosecutor; close associate of President Webb; Australian representative to UNWCC |
| U. E. Maung | Burmese Prosecutor. Single-handedly compiled evidence on the ground in Burma; in Tokyo only very short time |
| Walter McKenzie | American prosecutor. Helped write IPS Opening statement |
| Margaret McKinney | (née Moose). American stenographer who married prosecutor Worth E. McKinney shortly before he died |
| Worth E. McKinney | American prosecutor. Married trial stenographer Margaret Moose; sudden death of heart failure in Ichigaya hallways |
| Govinda Menon | Associate Prosecutor (India). Selected after two British officials refused posting; left Tokyo in November 1946 |
| Krishna Menon | Indian prosecutor. Left in November 1946 |
| Frederick Mignone | American prosecutor. Legal realist training at Yale; published article about IMTFE after the trial |
| Roy L. Morgan | American chief interrogator for the preparation of the prosecution at the IMTFE; Associate counsel |
| Thomas H. Morrow | American prosecutor. Part of fact-finding mission to China |
| Henry G. Nolan | Associate Prosecutor (Canada). Rhodes scholar; Worked behind the scenes to have Keenan removed |

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| Robert Oneto | Associate Prosecutor (France). Publically protested IMTFE language policy; forced inclusion of French translation |
| Guido Pignatelli | American prosecutor; worked with Brendan F. Brown to complete (unfinished) IMTFE history; Italian royalty |
| Miriam Prechner | British administrator and clerk |
| R. H. Quilliam | Associate Prosecutor (New Zealand). Harsh internal critic of Keenan; resigned in protest in October 1947 |
| Maurice Reed | British prosecutor. Also worked in Nuremberg |
| Constance M. Rolfe | British administrative staff. Temporary Secretary and Shorthand Typist in Tokyo; previously in Indian Office |
| Henry Sackett | American Chief of Investigation Section; worked in Nuremberg |
| Wilianna Settle | American secretary and law clerk |
| Coomes Rustom Strooker | Indonesia assistant and researcher to Netherlands Division |
| Daniel N. Sutton | American prosecutor. Part of fact-finding mission to China; published article about IMTFE after the trial |
| Frank S. Tavenner | American prosecutor. Very influential IPS binder behind the scenes; <i>de facto</i> Chief of IPS when Keenan absent |
| Gladys Thompson | American secretary to prosecutor Walter McKenzie |
| A. N. Vasiliev | Soviet prosecutor. Resisted Cold War infiltration in court; Socially active and well-liked behind the scenes |
| Robert Wiley | American prosecutor. Inexperienced; replaced Quilliam on Kaya case before New Zealander actually left |
| Eugene Williams | American prosecutor. Special Assistant to the Chief of Counsel; left in February 1947 |
| Amos W. W. Woodcock | American prosecutor. Returned home to care for ill family member in February 1946 |

Administrators, Secretariat, and Others

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| Robert Crozier | American file clerk and administrator in Secretariat |
| Morris Gamble | American file clerk and administrator in Secretariat |
| Theodore Goulsby | American Executive Office, Administration division of IPS and Secretariat. Abrasive personality and ego frustrated staff |
| Jack Greenberg | American Chief Court Reporter |
| Philip Kapleau | American Court Reporter in Nuremberg and Tokyo. Had spiritual transformation in Japan; became prominent Zen monk and scholar |
| Aubrey S. Kenworthy | American Head of IMTFE Security, Provost Marshal, Office of the General Secretary |
| Daphne Spratt | American stenographer and court reporter, friend of Elaine Fischel |
| Donald S. Van Meter | American Marshall of the Court |