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## Building Criminal Accountability at the Global Level: *The New Zealand experience*

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### **1. Introduction**

The attempt the Allies made prior to the Great War to use international legal restraints on the use of force to control the political outlier – Germany – was unsuccessful.<sup>1</sup> In spite of this the Allies resorted to a legal response to condemn Germany’s conduct in 1919 at Versailles and then again to condemn Germany and another political outlier – Japan – in 1946 at Nuremberg and Tokyo, arguably only partially successfully. New Zealand joined in both attempts.

Why do small states like New Zealand participate in trials of the leaders of major powers for the crime of aggression? One might say cynically that these trials are used to launder the image of great powers like the United States in Tokyo for actions like the atomic bombing of Japan, and the smaller powers participate in support of their allies. However, these small States also act out of self-interest. These small states are often strategic (and geographical) outliers that are ultimately as defenceless against foreign predation as Belgium was to Germany in 1914 or New Zealand was itself to potential invasion by Japan in 1941. For small States the deterrent value of potential prosecution under international criminal law can serve as a tool of control of great powers.

To use an economic metaphor, it is one situation in which small States can try to switch from always having to be price takers – States that have little influence over international affairs – to price makers – States that do influence international affairs.<sup>2</sup>

The fact International law grants rights to weaker and powerful States alike can be perceived by weaker States as a mechanism for the control of the depredations of the more powerful.<sup>3</sup>

This paper explores the extent to which New Zealand self-consciously engaged in the use of international criminal law to try to both punish and deter leaders of global powers that threatened it. It focuses on the actions and thoughts of Prime Minister Massey, who co-chaired the International Commission on Responsibility of the Authors of the War and on the Enforcement of Penalties that sat in 1919 at the preliminary Peace Conference at Versailles, and the various New Zealand officials who worked in the International Military Tribunal for the Far East from 1946-1948 in Tokyo.

### **2. Massey in Paris**

As early as 1916 New Zealand was contemplating holding individual Germans accountable for war crimes. Consider this exchange in parliament<sup>4</sup>:

*Mr W H Field (Otaki) wished to ask the Prime Minister a question upon a matter which, not unnaturally, had taken a strong hold upon the public mind in New Zealand. The question was whether, now that our own men are fighting against, and are liable to be captured by, the Germans, it is not time for the voice of this country to be heard on the subject of the maltreatment of British prisoners in*

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<sup>1</sup> See I. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Ithaca: Cornell UP, 2014), 328 et seq.

<sup>2</sup> See Yee-Kuang Heng and Syed Mohammed Ad'ha Aljunied, ‘Can Small States be more than Price Takers in Global Governance?’ (2015) 21 *Global Governance* 435, 435.

<sup>3</sup> Hull, id., 320, relying on Michael Byers, ‘Custom, Power and the Power of Rules: Customary International Law from Interdisciplinary Perspective’ (1996-6) 17 *Michigan Journal of International Law* 122-3.

<sup>4</sup> *Hansard*, 7 July 1916, p.580 (my thanks to Brigadier Kevin Riordan (ret) for pointing me to this excerpt).

*Germany, and whether our Government will communicate to the Imperial Government this country's urgent request that Germany should be warned in unmistakable terms that every person guilty of ill-treatment of British prisoners will, after the conclusion of the war, have to pay the full penalty for his crimes.*

*The Right Hon Mr Massey (Prime Minister) would be glad to forward a message to the Imperial authorities through His Excellency the Governor ... with regard to the subject he had brought up. We were concerned and interested in every British soldier at Home.*

*Speaking as a citizen of New Zealand and as a citizen of the Empire, he could say that. But we had a special responsibility to our own soldiers, and if any maltreatment of New Zealand prisoners took place on the part of the Germans he, for one, would be inclined to apply the Mosaic law, and apply it to the very letter.*

It is one thing to make rhetorical statements of intent to resort to the *lex talionis* when one is a leader of a nation of a million souls located on the other side of the planet, another to realise this purpose. However, one of the strategies of small States seeking to be 'price-makers' in influencing international relations to its advantage is to 'bandwagon',<sup>5</sup> and the bandwagon in this case was the attempt to hold the Kaiser accountable for starting the war made at the post-War Peace Conference held at Versailles.

Before leaving New Zealand for Europe in 1918 Massey had made his feelings about war responsibility and where it lay clear: 'The Kaiser was a criminal, and should be made to answer for his crimes'.<sup>6</sup> In his view the Allied goal was to break the power of Germany "so that she will not again become dangerous for a century, or centuries, to come".<sup>7</sup> As a member of the 'Empire Delegation', Massey became an alternative British representative on the Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties, which studied the question of war guilt and investigated war crimes prior to the Peace Conference itself.<sup>8</sup>

The Commission was riven by a schism between those who favoured criminal prosecution for the authors of the war and those who could find no legal precedent for doing so.<sup>9</sup> Massey was chair of Sub-Commission I, on Criminal Acts, mandated *inter alia* to assemble the evidence necessary to establish the facts relating to culpable conduct which 'brought about the World War and accompanied its inception'. Sub-Commission II, on the Responsibility for the War, was then to decide on whether and if so how prosecutions should be instituted. Although he was relegated to the role of fact finder, regard for Massey's work in Sub-Commission I was high.<sup>10</sup>

Massey's work underpinned the Commission's finding that the war was 'premeditated by the Central powers', but Massey doubted whether it would be acted upon,<sup>11</sup> and the Commission concluded that in the absence of a positive legal obligation forbidding wars of aggression 'the acts which brought about the war should not be charged against their authors'.<sup>12</sup> In any event by the time its report was put before the Versailles conference opportunity for apprehending the wanted Germans and in particular the Kaiser had passed.<sup>13</sup> He felt very strongly that the fudged compromise decision eventually taken at Versailles to try the Kaiser for 'a supreme offence against international morality and the sanctity of treaties' rather than a criminal offence, an implicit recognition that the Kaiser had not violated a criminal law, was not the 'right thing' to do because of the latter's responsibility 'for the horrors of the war'.<sup>14</sup> This frustrated Massey as the *Daily Telegraph* reported at the time that 'no one has been more insistent on securing the trial and punishment of those guilty of crimes against the laws and customs of war.'<sup>15</sup>

Massey was among the politicians who sought to ascribe legal responsibility for the war to the Kaiser but who lost the argument with the legal experts who were less sanguine about legal responsibility.<sup>16</sup> He considered it a lost opportunity to take deterrent action. On his return to New Zealand in 1919 he said:

<sup>5</sup> Heng and Aljunied, 136.

<sup>6</sup> *Hansard*, 5 December 1918, p.822.

<sup>7</sup> *Hansard*, 28 November 1918, pp.538-540.

<sup>8</sup> Massey to Lloyd George, Jan 24, 1919, Lloyd George Papers 404.2, in Archives New Zealand (ANZ). See 'Report of the Commission to the Preliminary Peace Conference', reprinted in (1920) 14 *American Journal of International Law* 95.

<sup>9</sup> See K. Sellars, *Crimes against Peace and International Law* (Cambridge: Cup, 2013) 2-11.

<sup>10</sup> Pollock to Massey, 30 March 1919, Massey Papers 1398.1.

<sup>11</sup> Massey to Allen, 26 April 1919, Allen Papers 9.

<sup>12</sup> See 'Report of the Commission to the Preliminary Peace Conference', 120.

<sup>13</sup> See 'Report of the Commission to the Preliminary Peace Conference', 107, 112.

<sup>14</sup> *Hansard*, 2 September 1919, pp.42, 43.

<sup>15</sup> H.J. Constable, *From Ploughboy to Premier: A New Life of the Right Hon. William Ferguson Massey, PC* (John Marlowe Savage & Co Ltd, London, 1925), pp. 13-14.

<sup>16</sup> G. Simpson, 'International Criminal Justice and the Past' in G. Boas, W. Schabas, M. Scharf (eds.), *International Criminal Justice: Legitimacy and Coherence* (2012), p. 123, p. 132.

*"I do not think I am a particularly vindictive individual, and if it rests with me alone, and I was quite certain that Germany would not go to war again and was not going to repeat the crimes and offences she committed during the four years and a quarter of war I would say, "Go, and sin no more." But I know perfectly well we are not done with Germany. I know perfectly well that if we fail in our duty so far as punishment for the crimes committed is concerned that other nations looking on to-day who only want leaders and who would be willing to take the risks that Germany took and be guilty of the deeds Germany was guilty of in the hope they would be successful where Germany failed. We have to do something to those nations of which I am thinking – something that will frighten them; make them understand that if they commit a crime against humanity and law and order, so far as nations are concerned, they will be held responsible and punished accordingly."*<sup>17</sup>

The United States delegates on the commission had grumbled about the criticism of their legalistic approach (a line to which the Japanese delegation also adhered) that the Kaiser could not be held criminally responsible on the basis of his sovereign immunity.<sup>18</sup> Resentful of America's influence at Paris,<sup>19</sup> Massey commented: 'I was quite astonished to find that there were representatives from civilized communities who were strongly of opinion that heads of States should be exempted from punishment no matter what crimes had been committed.'<sup>20</sup> Ironically, all of this occurred at a time when New Zealand deferred to Imperial Britain in external affairs unless directly affected.<sup>21</sup>

Under Massey's leadership New Zealand joined the League of Nations to add weight to Britain's membership; he doubted the League's capacity to guarantee international peace because it was made up of small powers and considered their admission as a grave mistake that would render it ineffective.<sup>22</sup> In 1919 he said: 'I am not one of those who believe we have seen the last of war' and 'do not let anyone imagine that the League of Nations is going to put an end to war'.<sup>23</sup> He believed that only a combination of great powers that included the United States could enforce peace.<sup>24</sup>

### 3. New Zealand at Tokyo

During the inter-war period New Zealand gradually began to adopt a more independent approach to international affairs. It frequently aligned itself with small powers against Britain in the League of Nations, and favoured imposition of sanctions on German, Italy and Japan for violation of their international prohibitions on the use of force in Europe, Asia and Africa.<sup>25</sup> As a Minister at the time (and later Prime Minister) Walter Nash stated:

*"New Zealand called for League action in support of China: New Zealand urged the League to take up the cause of Republican Spain. New Zealand banned the shipment of scrap iron to Japan as far back as 1936. The policy of appeasement as it was pursued during these years in both in Europe and the Far East was vigorously opposed."*<sup>26</sup>

At the end of World War II New Zealand remained anxious about Japanese imperialism because of its relative incapacity to defend itself.<sup>27</sup> Prime Minister Peter Fraser's consciousness of this threat is revealed in this letter to the British Minister for Dominion Affairs:

*It will be necessary to effect radical changes in Japanese political, social and economic institutions if we are to prevent the rebirth of Japanese aggression and to promote conditions which will ensure that a co-operative Japan may later come into being."*<sup>28</sup>

Deterrence clearly preoccupied New Zealand and in this context is it not surprising that New Zealand had supported the efforts of other small States within the UN War Crimes Committee (UNWCC) to get the UNWCC to adopt a resolution condemning aggression as a crime.<sup>29</sup>

<sup>17</sup> Hansard, 2 September 1919, p. 41.

<sup>18</sup> 'Report of the Commission to the Preliminary Peace Conference', 149.

<sup>19</sup> G.A.R. Riddell, *Lord Riddell's Intimate Diary of the Peace Conference and after: 1918-1923*, (London: Gollancz, 1931), 307.

<sup>20</sup> Hansard, 2 September 1919, p. 41.

<sup>21</sup> Gerald Chaudron, *New Zealand in the League of Nations: The Beginnings of an Independent Foreign Policy, 1919-1939* (McFarland & Co, London 2012), p. 6.

<sup>22</sup> Hansard, 2 September 1919, pp. 39-40.

<sup>23</sup> Hansard, 2 September 1919, 39, 40.

<sup>24</sup> Hansard, 2 September 1919, 51.

<sup>25</sup> G. Daniels, 'New Zealand and the occupation of Japan' in I. Nish (ed.) *British Commonwealth and the Occupation of Japan, 1945-1952: Personal Encounters and Government Assessments* (Brill, 2013), p. 64.

<sup>26</sup> W. Nash, *New Zealand, A Working Democracy* (Duell, Sloan and Pearce, 1943), p. 36.

<sup>27</sup> Frederick Sherwood Dunn, *Peace-making and the Settlement with Japan* (Princeton, N.J.: Princeton UP, 1963), p. 125.

<sup>28</sup> Minister of External Affairs (Fraser) to Secretary of State for Dominion Affairs (Addison) 11 August 1945, DNZER.2, p. 44 cited in Daniels, p. 68.

The idea that punishment could contribute to a lasting peace was resurrected when New Zealand was asked to participate in the Tokyo War Crimes trials at the end of World War II. Although it commissioned its own report into war crimes,<sup>30</sup> New Zealand did not pursue prosecutions itself as most of its regular soldiers had fought in Europe and Africa and very few ex-POWs were prepared to go back to Japan to give evidence in court.<sup>31</sup> Present at the signing of the Instrument of Surrender on the USS Missouri in Tokyo Bay in September 1945,<sup>32</sup> in October New Zealand was invited to join the international body advising the US on governance of Japan, the Far Eastern Advisory Committee (FEAC), and when the scope of representation on the proposed Tokyo International Military Tribunal was expanded to include all the States that had had territorial interests threatened by Japanese imperialism in early 1946, New Zealand was invited by General MacArthur, Supreme Commander Allied Powers (SCAP) to nominate a judge and prosecutor.<sup>33</sup>

Initially reluctant, once the process of establishing the Tribunal was underway New Zealand's political leaders became more enthusiastic about joining and asserting an interest in prosecution of the Japan's war-time leaders<sup>34</sup> and sought to engender public support.<sup>35</sup> Announcing Justice Erima Harvey Northcroft's appointment, the Acting Prime Minister Walter Nash noted that New Zealand's participation was because of 'a special interest in the settlement in Japan and in the maintenance of peace and security in the Pacific' and because of the desire to ensure the punishment of wrong-doers and 'to establish once again and ensure recognition for all time of the rule of law in the relations of nations and peoples of the world.'<sup>36</sup> Foss Shanahan, Deputy Head of External Affairs wrote in 1946:

*I am anxious if possible to develop a public opinion in support of our participation in the Tribunal and the trial proceedings. Our people are singularly apathetic in matters of this kind and, in view of the importance of the Pacific, I feel we should do everything we can to develop and stimulate interest.<sup>37</sup>*

Although Count 10 of the charges laid at Tokyo charged planning, preparing, initiating or waging an aggressive war against New Zealand, the hopes of engaging the New Zealand people and of ensuring recognition of the rule of law at an international level were to prove vain.<sup>38</sup>

New Zealand's experience in Tokyo was largely negative. Strongly supportive of the indictment of Japanese leaders including Emperor Hirohito,<sup>39</sup> it was forced to accept the US view that Hirohito was a puppet and to join the recommendation that no further action be taken against him.<sup>40</sup> The New Zealand Associate Prosecutor at the tribunal, Brigadier R.H. Quilliam, was vehemently critical of this decision, and excoriated the technical management of the trial by the United States, in his reports to Wellington:

The fact is that the Americans have assumed the responsibility for the conduct of the trials and they have made a very bad job of it. Their basic error was in appointing [Chief Prosecutor] Keenan and in allowing him to continue in his appointment,

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<sup>29</sup> W.A. Schabas, 'Origins of Criminalization of Aggression: How Crimes Against Peace Became the "Supreme International Crime"', in M. Politi and G. Nesi (eds.), *The International Criminal Court and the Crime of Aggression* (Aldershot: Ashgate, 2004), p. 17, p. 31, fn 55.

<sup>30</sup> 'JB', *Japanese War Crimes: Interim Report and Critique*, to NZ Dept of External Affairs, File no. EA 106/3/22, part 1, Archives New Zealand.

<sup>31</sup> 'JB', *Japanese War Crimes: Interim Report and Critique*, to NZ Dept of External Affairs, File no. EA 106/3/22, part 1, Archives New Zealand.

<sup>32</sup> Y. Totani, *Justice in Asia and the Pacific Region, 1945-1952: Allied War Crimes Prosecutions* (New York: CUP, 2015), p. 8.

<sup>33</sup> Paragraph VI (a), UNWCC, Special Far Eastern and Pacific Committee, *Summary of Recommendations Concerning Japanese War Crimes and Atrocities*, SFEC I, 13 August 1945, File no. EA 106/3/22, Part 1, Archives New Zealand.

<sup>34</sup> Telegram from Secretary of State for Dominion Affairs to Minister for External Affairs Wellington, 24 October 1945, referring to US provisional proposals, File no. EA 106/3/22, Part 1, Archives New Zealand.

<sup>35</sup> Ann Trotter, 'New Zealanders and the International Military Tribunal for the Far East' (1989) 23 (2) *New Zealand Journal of History* 142, 142-3.

<sup>36</sup> Robin Kay (ed.), *Documents on New Zealand's External Relations II: The Surrender and Occupation of Japan*, Wellington 1982, no.650, pp.1507-8.

<sup>37</sup> Shanahan to Quilliam, 25 October 1946, Ministry of Foreign Affairs Archive, 59/2/49 Pt.1, cited in Trotter, *New Zealander's and the IMT*, 143.

<sup>38</sup> Trotter, 'New Zealander's and the IMT', 143.

<sup>39</sup> Memorandum from Department of External Affairs, Wellington, to NZ High Commission, London, 2 February 1946, File no. EA 106/3/22, Part 2, Archives New Zealand.

<sup>40</sup> Kay, *Documents*, No.178, pp.325-6, No.651, p.1509.

but there are many other causes, for which the Americans must be held responsible, that have operated to the prejudice of the trials.<sup>41</sup>

In his report on the trial made upon returning home, Quilliam recognized that the conviction and punishment of the persons responsible for the policy of waging wars of aggression in East Asia and the Pacific was the most important object sought to be achieved by the trial.<sup>42</sup> But he was critical of the fact that the Tribunal had been left to decide the question of the responsibility for the war, which allowed the Japanese defendants the opportunity to challenge the view that it was the aggressors, allowing it to try to exonerate Japan's conduct.<sup>43</sup> For this reason he was of the view that serious consideration should be given before the laying of a charge of crimes against peace again.<sup>44</sup>

The New Zealand Judge on the tribunal, Erima Harvey Northcroft, had a strong sense of his political function at Tokyo as a representative of a 'Common law' country intent upon establishing itself as a Pacific nation with an interest in Japan.<sup>45</sup> However, he too struggled with the way the trial was run; reporting home that the US was making a 'very bad job' of it.<sup>46</sup> He fell out (along with the Canadian Judge McDougal and the Scottish Judge Lord Patrick<sup>47</sup>) with the Australian President of the Tribunal, Sir William Webb.<sup>48</sup> Of their many clashes one stands out - Webb was bitingly critical of Northcroft's doubts as to whether Australia and New Zealand had been attacked or been attackers because they had declared war against Japan preemptively.<sup>49</sup> When Northcroft asked to be allowed to resign<sup>50</sup> the retired Chief Justice Sir Michael Myers of New Zealand was consulted by the New Zealand Prime Minister Fraser and gave three reasons why he shouldn't: the serious impact so late in the trial on the outcome, bringing the trial itself generally into contempt, and the negative impact on relations with the US and Australia. Northcroft reluctantly agreed to stay, but this episode suggests that while Northcroft himself may have come to the realisation that the broader goals that New Zealand had set out with were not going to be satisfactorily achieved, officials in Wellington shifted the goal to keeping its alliances intact,<sup>51</sup> something Massey would have been familiar with.

Whether the Allies valued that alliance to the same degree is questionable; when Webb was recalled to Australia the less experienced American Judge Cramer was appointed as acting President rather than Northcroft because of MacArthur's view of New Zealand's 'insignificance ... as a world power'.<sup>52</sup> Northcroft stuck to the task and along with McDougal and Patrick provided the majority judgment. In his report after judgment to the New Zealand Prime Minister he rejected Quilliam's notion that the Charter should have proclaimed that Japan's actions amounted to aggression noting that 'it would have made plausible the popular criticism that such trials are acts of vengeance or retribution visited by victorious nations upon the vanquished'.<sup>53</sup> Northcroft argued that while the Tokyo Trial served as a warning, ultimately its deterrent effect would depend on its level of support. He recommended against New Zealand's further participation in other ad hoc tribunals, and suggested New Zealand seek broader support before embarking on such an exercise again. His solution was the

<sup>41</sup> Letter to AD McIntosh, Secretary for External Affairs, Wellington, 2 July 1946, File no. EA 106/3/22, Part 3, Archives New Zealand.

<sup>42</sup> Brigadier R.H. Quilliam, *Report on the Proceedings of the International Military Tribunal for the Far East*, 15, File no. EA 106/3/22, Part 7, Archives New Zealand.

<sup>43</sup> Quilliam, *Report*, pp.18-19.

<sup>44</sup> Trotter, 'New Zealander's and the IMT', 155.

<sup>45</sup> Trotter, 'New Zealander's and the IMT', 147-8.

<sup>46</sup> Trotter, 'New Zealander's and the IMT', 150, citing Kay, Documents, no. 681, pp. 1610-15, no. 676, p.1594, no. 681, p.1613; Personal and Confidential Letter of 19 March 1947 from Justice McDougall to Sir Louis St Laurent, Canadian Secretary of State for External Affairs, annexed to a letter from Justice Northcroft to the Chief Justice of New Zealand, Sir Humphrey O'Leary, 21 March 1947, File no. EA 106/3/22, Part 5, Archives New Zealand.

<sup>47</sup> He was particularly close to the Scottish judge, like him a veteran – A. Trotter, 'Justice Northcroft' in Y. Tanaka, T. McCormack and G. Simpson (eds.), *Beyond Victor's Justice? The Tokyo War Crimes Trial Revisited* (Leiden and Boston: Nijhoff, 2011), p. 83.

<sup>48</sup> See N. Boister and R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal* (Oxford: OUP, 2008), 82-3.

<sup>49</sup> Memorandum to: All Judges, From: The President, 13 September 1948, Papers of William Flood Webb, Series 4, Wallet 19, 3DRL/2481, Australian War Memorial.

<sup>50</sup> Letter from Judge Northcroft to M Myers, Wellington, 18 May 1947, File no. EA 106/3/22, Part 5, Archives New Zealand.

<sup>51</sup> Trotter, 'New Zealander's and the IMT', 151.

<sup>52</sup> Letter from Gascoigne to Foreign Office, 11 November 1947, FO 371 63820, F15007, Public Records Office, United Kingdom, cited in M. Harries and S. Harries, *Sheathing the Sword: The Demilitarisation of Japan* (New York: Macmillan, 1987), p. 168.

<sup>53</sup> Mr Justice EH Northcroft, *Memorandum for the Right Honourable the Prime Minister Upon the Tokyo Trials 1946-1948*, p. 14, File no. EA 106/3/22, part 9, Archives New Zealand.

establishment of a permanent international criminal court as a matter of urgency with jurisdiction to try all major breaches of international criminal law, including crimes against peace.<sup>54</sup>

Northcroft was assisted in compiling the summary of the record for judgment by Quentin Quentin-Baxter, a Wellington barrister and later Professor of International law at Victoria University in Wellington and member of the International Law Commission. The highly regarded Quentin-Baxter worked a minor miracle, reading and summarizing all of the evidence relating to the principal charges of conspiracy to commit crimes against peace (a process that took nearly a year), providing an analysis that allayed some of Northcroft's apprehensions that the process at Tokyo was 'futile, valueless or worse'<sup>55</sup>. Participation in this process turned Quentin-Baxter into a believer in the value of such trials. In 1949 he told the New Zealand Law Conference:

The judgment of the Tokyo Tribunal does not purport to absolve the Japanese people from responsibility for their country's conduct, but it does show where that responsibility chiefly lies. In so doing it makes a constructive contribution to the task of rehabilitating the Japanese nation.<sup>56</sup>

Perhaps the most far-sighted New Zealand participant in the Tokyo Trial was RAF Flight Lieutenant Harold Evans who, on behalf of the Department of External Affairs, accompanied Northcroft to Tokyo as his secretary and assisted Quilliam in developing the case for the prosecution.<sup>57</sup> The author of a series of articles aimed at the New Zealand legal public in which he described the early phases of the trial and conceded that there had been criticism of its process,<sup>58</sup> in his communication with his superiors in Wellington he was blunter. He was, for example, scathing of US Chief Prosecutor Keenan's cross examination of Tōjō noting Keenan was 'entirely subject to his witness' and that Tōjō had put the self-defence rationale strongly.<sup>59</sup> After attending the Allied Council for Japan in 1948 he called it 'a debating society'.<sup>60</sup> Prior to Tokyo Evans's political prospects had been good as he had been personal assistant to Prime Minister Peter Fraser but in Tokyo he made the political error of marrying the German Naval Attaché, Admiral Paul Wenneker's, daughter. In his review of Tōjō's cross examination he cites

the opinion of one who has spent many years in Japan, who seems to know a good deal about the Japanese mentality, and for whose opinions I have formed a considerable respect over the last six months. He describes this unequal contest between Keenan and TOJO as "the greatest blow the occupation has yet sustained".<sup>61</sup>

One wonders whether he was relaying a German Admiral's view of the trial? Relegated to provincial Christchurch as a magistrate after the trial, the influence of Tokyo emerged in his post-retirement career as a major peace campaigner who helped engineering the International Court of Justice's advisory opinion on the legality of nuclear weapons.<sup>62</sup>

#### 4. Wellington

The increasingly strenuous criticism of the trial coming from its own personnel in Tokyo soon rang alarm bells in Wellington. The Secretary of External Affairs Alister McIntosh had responded to Quilliam in early 1946 that '[i]n practice, of course, the Americans must dominate the scene but there is no reason why the international forms should not be preserved.'<sup>63</sup>

<sup>54</sup> Northcroft, *Memorandum*, pp. 22-3.

<sup>55</sup> Letter from Erima Harvey Northcroft to Humphrey Francis O'Leary, Chief Justice, 18 March 1947 (Ministry of Defence Files) cited by Trotter, 'Justice Northcroft', 87.

<sup>56</sup> Q. Quentin-Baxter, 'The Task of the International Military Tribunal at Tokyo' (1950) 25 *New Zealand Law Journal* 7, pp. 13-8.

<sup>57</sup> Trotter, 'New Zealander's and the IMT', p. 148.

<sup>58</sup> H. Evans, 'The Trial of Major Japanese War Criminals' (1947) 23 *New Zealand Law Journal* 8, at p. 8.

<sup>59</sup> ANZ, File no. EA 106/3/22, Part 6, Evans to AD McIntosh, Secretary of External Affairs, New Zealand, 9 January 1948.

<sup>60</sup> Kay, *Documents II*, no.513, Associate to the New Zealand Member, IMTFE, to Secretary for External Affairs, 9 January 1948, p.1700 at p.1701.

<sup>61</sup> Kay, *Documents II*, no. 513, Associate to the New Zealand Member, IMTFE, to Department of External Affairs, 7 May 1948, p. 1701.

<sup>62</sup> See K. Dewes, 'Obituary: Harold Evans' by, *Peace Researcher* no. 33, November 2006, at <http://www.converge.org.nz/abc/pr33-132a.html>.

<sup>63</sup> Kay, *Documents II*, no.676, Secretary of External Affairs to the New Zealand Associate Prosecutor, IMTFE, 21 May 1946, p.1590 at p.1592.

In September 1946 Prime Minister Peter Fraser criticized the replacement of US Judge Higgins some way into the trial in a letter to the New Zealand ambassador in Washington.<sup>64</sup> It appears that at the Canberra Conference in 1947 Prime Minister Peter Fraser complained to the Australian Prime Minister about Tribunal President Webb's conduct of the trial.<sup>65</sup> By 1948 New Zealand had limited its goal to establishment of 'a code of international criminal law'.<sup>66</sup> It took a dim view of the US Supreme Court hearing an appeal from the Tokyo Tribunal because it was an international tribunal<sup>67</sup> and of the parole of the Tokyo prisoners without international agreement,<sup>68</sup> resisting US pressure for early release.<sup>69</sup> But it was unenthusiastic about participation in a further trial warning that their duration presented a 'grave danger of their becoming farcical or at least open to serious criticism'.<sup>70</sup> McIntosh described a Soviet suggestion that a new trial of Hirohito and those in charge of Japan's bio-warfare programme as 'irresponsible' and politically unwise, even if there was substance to the allegations.<sup>71</sup>

## 5. Conclusion

New Zealand's narrow aim in joining the post war reckonings in Paris and Tokyo was to achieve its traditional foreign policy objective; to show solidarity with its allies. It succeeded in doing so, although its experience raised doubts about how much they valued its solidarity.

The broader aim of contributing to the emergence of international norms that might serve to maintain its own security by deterring powerful outliers was not attained because of the failure of the trial to secure that norm. New Zealand's involvement in these international enterprises tracks a repetitive descent from the utopian ideal of ensuring respect for the global rule of law to an apology for the brutal realism which emerged: the pursuit of the goal of tying down of political outliers like Germany and then Japan in principles of global justice was frustrated by a range of factors beyond its control. Justice Northcroft's wistful complaint to his Prime Minister about its role at Tokyo sums up why:

*I suppose it is unlikely for a long time ... that there will be another invitation to send a New Zealand Judge on a similar errand. Were such a proposal to be made, however, I suggest it would require the gravest consideration if, as with this Tribunal, it were to be substantially an American affair.<sup>72</sup>*

What resulted was less a devastating critique of militarism than an apologia produced by men with the best intentions who might have been better off heeding the warnings of the dissenters at Versailles.<sup>73</sup>

At a personal level, the relationship of New Zealanders to these trials shifted from a naïve enthusiasm to dismay; what it taught New Zealanders is that they would have to be highly adaptable to have any influence in that new multilateral environment.

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<sup>64</sup> ANZ, File no. EA 106/3/22, Part 4, Fraser to NZ Minister in Washington, 20 September 1946.

<sup>65</sup> Lord Patrick to Gascoigne, 9 October 1947, LC02 2992, Public Records Office, United Kingdom, cited in M. Harries and S. Harries, *Sheathing the Sword: The Demilitarisation of Japan* (New York: Macmillan, 1987), 167.

<sup>66</sup> Kay, *Documents II*, External Affairs Wellington to First Secretary, New Zealand Embassy, Washington, 5 July 1948, referred to on p. 1717, fn 7.

<sup>67</sup> Kay, *Documents II*, no.735, Minister of External Affairs to the New Zealand Ambassador, Washington, 17 December 1948, p. 1731.

<sup>68</sup> ANZ, File no. EA 106/3/22, Part 11, Memorandum from External Affairs to the NZ Ambassador, Washington 19 June 1950.

<sup>69</sup> ANZ, File no. EA W2619 106/3/22, Part 13, Aide Memoire attached to Memorandum from Office of NZ High Commissioner to Secretary of External Affairs, NZ, 9 June 1954.

<sup>70</sup> Kay, *Documents II*, no.729, Counsellor, New Zealand Legation, Washington, to Secretary of External Affairs, 29 July 1948, pp. 1719-21.

<sup>71</sup> Kay, *Documents II*, no.452, First Secretary, New Zealand Embassy Washington, to Secretary of External Affairs, 28 June 1950, and no.453, Secretary of External Affairs to the First Secretary, New Zealand Embassy, Washington, 14 August 1950, pp. 1124-35.

<sup>72</sup> ANZ, File No. 106/3/22, Part 8, Northcroft to O'Reilly, 13 September 1948.

<sup>73</sup> Simpson, 'International Criminal Justice', p. 143.