Reluctant Vengeance: Canada at the Tokyo War Crimes Tribunal
(東京裁判におけるカナダの役割)

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SUMMARY IN JAPANESE: 国際問題に対するカナダの自由主義的理想論は、対極にある強い現実主義の存在故にその姿を変えた。カナダの国際活動に見られるこれらの二つの要素は、戦争犯罪に対するカナダの対応に顕著に表れている。カナダは軍事法廷にみられる「報復」という考えに懐疑的であると同時に、戦争の勃発を「国際法に照らし合わせた犯罪」として単純に位置づけることにも疑問を持っていた。第二次大戦後、アメリカ合衆国の圧力によりカナダは連合軍最高司令部による極東軍事裁判に参加することを、無条件に受諾することになった。しかし裁判の実態は、それまでカナダが抱いていた戦争裁判に対する猜疑心を一層強くする結果となった。近年の旧ユーゴ戦争犯罪法廷は、東京裁判に見られた法律と政治の問題を再び提起することとなった。この法廷におけるカナダの姿勢は、外交政策が伝統的な主権国家間の関係に基づくものから地球規模の理想論を重視したものへと変化していることを示している。

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At the end of WWII, Canada found itself in a position for the first time to develop an appropriate role for a middle power in world affairs. Free of a colonialist past and committed to world peace, Canada sought to contribute to the resolution of conflict through moral suasion, mediation and strong support for justice through international law. In support of this conventional picture, commentators typically point to Canada's active role in the establishment of the United Nations in 1945, Prime Minister Lester Pearson's Nobel Peace Prize for Canadian diplomacy during the Suez crisis in 1956, and Canada's continuing enthusiasm for peacekeeping operations. Less often mentioned is that fact that the one-worldism associated with Pearson and his Ottawa colleagues was moderated by a sharp sense of the realities of power politics. In practice, their liberal idealism was tempered behind the scenes with a considerable scepticism about the wisdom of crusades and an emphasis on agreements between sovereign nation states as the basis of international relations. The attempt by the Allied Powers to punish the "arch villains" of WWII for "crimes against humanity" makes a case in point.

The first warning of what was to come surfaced when Great Britain, under pressure from the governments-in-exile in London, proposed in October of 1941 that the Commonwealth and Allied governments issue a formal declaration condemning German atrocities and promising punishment by organized justice:

> ...brutalities which are being committed in occupied countries are contrary to the dictates of humanity; are a reversion to barbarism and will meet with sure retribution....Careful record is being kept...so that in due time the world may pronounce its judgment. With victory will come retribution.[1]

In response, President Roosevelt made a guarded public statement condemning what he called the frightful acts of desperate men, which only sowed the seeds of hatred and which would one day bring "fearful retribution." Prime Minister Churchill, less cautious than the American president and his own civil servants, immediately declared that "Retribution for these crimes must henceforward take its place among the major purposes of the war." Meanwhile the governments of the occupied countries issued their own joint declaration that the punishment of those responsible for war crimes was among their principal

war aims. With this encouragement, Churchill raised the issue again in his meeting with Roosevelt in July, 1942; the Americans responded by suggesting the establishment of a "United Nations Commission for the Investigation of War Crimes" to investigate atrocities and report from time to time to the Allied governments. On October 7, 1942, Lord Symon announced the establishment of the new Commission and the determination of the Allies to punish those whose actions violated every tenet of humanity.

Canada responded to these initiatives hesitantly and only reluctantly. The Cabinet agreed in principle to support an Allied statement condemning atrocities, and to allow Vincent Massey, the Canadian High Commissioner in London, to attend the public signing ceremony of the exiled governments' joint declaration, but strictly as an observer. In general, Ottawa regarded the problem of war crimes as essentially a European one, of concern mainly to the occupied countries. Canada's interest in the issue was slight, at best. Moreover, talk of revenge stirred up memories of the attempt to "Hang the Kaiser" as chief war criminal at the end of the First War—a misguided Imperial policy decision the wisdom of which Sir Robert Borden and others had doubted at the time, and, in hindsight, a practical fiasco.[2] The threat of retribution might have some potential utility as a weapon of political warfare which could be used to drive a wedge between the Axis leadership and ordinary people. "By punishing these war criminals, we are trying also to divide the German people and their leaders whom we brand as criminals," noted one official; "we hope that when things really start to go bad for the Axis, these people will remember our statements that we are only after the war criminal and that they will get rid of them."[3] Both the public and the government saw this as "wishful thinking." A survey of opinion in late 1942 found that most of those interviewed believed that threats of "getting even" would be likely to prolong the war by goading the Germans to fight to the end and not surrender.[4] The Cabinet agreed:

> It does not believe there will be extensive punishment of war criminals by judicial process after the war, and it believes it is poor political propaganda now—propaganda calculated to extend the duration of the war, and take the lives of many Allied soldiers, that gives to the enemy peoples the repeated assurance that the moment they lay down their arms, they will be killed. A man with his back to the wall will hardly be persuaded to surrender under such conditions.[5]

Meanwhile in London, plans for a United Nations Commission were pressed ahead. Asked to appoint a Canadian representative, Ottawa stalled, uneasy about getting drawn in. British officials warned that the Soviet Union wanted more than a fact-finding body; any suggestion, they cautioned, "of an International Court to try war criminals should be deprecated."[6] Norman Robertson, the Undersecretary at External Affairs, drafted a reply for Mackenzie King's signature politely declining the invitation, and the chairman of the new War Crimes Advisory Committee argued that there was no need to appoint anyone to the Commission "as it will be largely occupied with wholly European problems."[7] But a refusal would put the government in the awkward position of appearing unconcerned about the suffering of the victims of fascism. Granted that participation was a "waste of time," if the Commission confined itself to investigating and publicising atrocities, then representation carried no commitments as to the general policy Canada would follow in regard to war criminals. With this caveat, there would be no objection to Massey attending meetings of the Commission, since he was already in London. However, the ground rules were to be quite clear, as would Massey's role:

> ...you, as the Canadian representative, are instructed to exercise, so far as lies within your power, a moderating influence in the deliberations of the Commission....In other words, you are instructed to make it clear the position Canada takes is that it would be a mistake... to weigh too heavily punishment of war criminals as an expression of United Nations policy; that it is [*sic*] the interest of victory Allied statements on the subject should be restrained, and if possible, the temper of the avowals of retribution, progressively stepped down.[8]

Canadian participation in the work of the Committee would be limited to questions of direct concern to Canada, and continuing representation on the Committee would depend partly on the character of the Commission's work and of its personnel.[9]

There remained two Canadian interests to be resolved. The first involved specific acts against individual Canadians in violation of the "established rules and customs of war"—an issue with which the Department of National Defence was understandably concerned. The second was the matter of international law, and what, if anything, the prosecution of war criminals might con-

tribute in the way of precedent or confirmation. While the Crown's legal advisors produced lengthy memoranda cataloguing international treaties that might conceivable apply, their conclusions were ambiguous at best. The most relevant agreements appeared to be the Hague Convention of 1907, establishing "The Laws and Customs of War on Land", and the Geneva Convention of 1929, "Relative to the Treatment of Prisoners of War." Aside from internal contradictions and doubtful language, it was unclear whether the second superseded the first—a matter of some moment, since Japan was a signatory of the Hague Convention, but not the Geneva Convention. As to the question of "crimes against humanity," the best the lawyers could suggest was that a case might be made on the basis of the "spirit" of the Hague Convention, based on the wording of the Preamble:

> Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection...of the law of nations, *derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.*[10]

Nor did there appear to be any legal basis for an international tribunal, the proposal by the Vienna Conference of 1926 to establish an International Court having come to nothing. Obviously, a United Nations convention could establish such a tribunal, but "I fail to see," noted one advisor, "how it could be binding on the people of enemy countries whose Governments had not been signators to such a Convention." The Defence Department's legal expert agreed: while acknowledging that some international jurists "declare that the right to punish war criminals is something that comes from victory and that the victor should not be hampered by any difficulties in the path of effectively deciding what constitutes war crimes, and how war criminals shall be punished," the legal position was dubious:

> If there does not exist such [international] law, then the punishment of war criminals whether it purports to be according to legal principle and procedure or a matter of political expediency, is clearly a privilege flowing from victory and is in that sense, ex post facto legislation.[11]

His legal colleague at External seconded the general conclusion: "I have no doubts personally, that from a strictly moral point of view the United Nations would be entitled to demand the surrender of the war criminals and to try them, but we should be quite clear that this is not a legal procedure but a political procedure." The government should think carefully, he cautioned, before participating in any *ex parte* international tribunal, lest the result come back to haunt them.[12] What contribution such a tribunal might make to international law, if any, was difficult to foresee.

In sum, not a set of briefs calculated to fire the enthusiasm of the lukewarm policy-makers at External and especially not the ultra-cautious politician in the Prime Minister's Office. This left the matter of specific offences against members of Canada's armed forces. J.E. Read, External's legal advisor, noted that the actual number of incidents would likely be few, and mainly confined to the treatment of Canadian soldiers by the Japanese. In response to Mackenzie King's concern that the government be seen to be dealing with them in "an effective and dignified manner," Read suggested setting up a small committee with a non-government attorney in an honorary capacity to examine whatever evidence came to light: "the thought is that these modest arrangements" will provide the Canadian government all that is needed to pursue its interest in crimes against Canadian nationals. Norman Robertson, the Undersecretary at External, agreed. "This course," he advised the Prime Minister,"might well be a first step in dealing with a difficult and unsatisfactory problem."[13] King approved, and for the next two years the war crimes issue was put neatly at arm's length—into the hands of an obscure War Crimes Advisory Committee of minor functionaries headed by an "honorary advisor"—and safely off the front pages.[14]

While the tide in Europe and the Far East began to shift in the Allies' favour, the question of what would happen at war's end remained in limbo. Newspaper editors might complain that there was too much "fine talk" about how the U.N. was going to punish the aggressors: "it is to be hoped that the authorities are now laying the groundwork for these trials...."[15] In reality, little was being done. For the next year and a half, the special committee met sporadically and debated this or that aspect of war crimes and criminals, generally from the standpoint of the legal niceties involved. Committee members decided early on that Canada's interest in the "punishment of the arch-criminals, Hitler, Tojo, etc." would be "extremely limited," and that "their trials might have to rest on a political rather than legal basis." The committee focused instead on atrocities

committed against individuals by members of the enemy forces. In its first annual report, the committee noted that they had found little evidence of actual war crimes. While there had undoubtedly been some suffering by civilians, "these people were victims of [the] hardships of war" rather than atrocities of the military. While there was "insufficient evidence available to justify any conclusions

> as to the treatment to which military prisoners of war are being subjected....There is some justification for the view that atrocities committed may have been confined to the brief period of time before proper discipline was restored in the occupied territory."[16]

By now Arthur Slaght, who initially had been pleased to accept appointment as Honorary Counsel, had decided that the war crimes committee was a waste of time, while Vincent Massey—the Canadian High Commissioner in London and sometime delegate to the U.N. War Crimes Commission—reported to the Prime Minister that he felt, "speaking personally, that there was an element of unreality about this whole question."[17]

Reality arrived with D-Day. The alleged execution of Canadian POWs by the SS major general Kurt Meyer in Normandy, revelations of atrocities against the population of occupied Europe, and opening of the concentration camps put the issue back on the front pages and touched off demands for vengeance. Slaght abandoned his careful reading of the law, which he now thought too restrictive, and demanded that the perpetrators be publicly whipped. Meanwhile an aroused Canadian public was suddenly demanding that the government "mete out swift justice" to the "Fascists and their henchmen." Anyone, no matter how highly placed, who in any way condoned, aided or abetted the attack on democracy and civilization should be made to answer for their crimes—preferably by an "impartial court of international justice."[18] Even friends of the government were grumbling about why Canada was not pursuing the punishment of war criminals, and members of the advisory committee reported they were being asked the same question.[19]

The government handed out press releases pointing to the advisory committee and stressing the problems of prosecuting known criminals, while it considered the problem.[20] J.E. Read warned that the War Crimes Advisory Commit-

tee was getting out of control, and the likely result would be serious criticism of the government in both Parliament and the press. What to do? On the one hand the U.N. Commission was such a mess that

> it is now almost certain that the war crimes business will be a fiasco....it will take such a long time for the UN to make up their minds about anything that the whole problem will gradually peter out. It also seems certain that the war crimes in which there is a Canadian interest will be insignificant.[21]

On the other hand, "it is inevitable that the Canadian public should want the Government to establish some machinery for the punishment of those responsible" for war crimes. Unless the government responded to the public's demands, it would wind up being pilloried for its "failure to deliver a lot of non-existent war criminals." At the same time, the government had to respond in such a way that it could not be charged with any responsibility for the inevitable fiasco. The best solution, Read advised, was for Canada to make sure the whole responsibility for dealing with war criminals was put securely in the hands of the Allied countries, the U.N. Commission, and/or SHAEF. The Canadians should just turn over whatever information they might have, and keep itself at a safe distance. Robertson, the Deputy Minister at External, supported this approach.[22]

Hence, when asked in August, 1945 to adhere to the Moscow Declaration signed by Roosevelt, Stalin and Churchill in October of 1943 on behalf of the 32 United Nations, and to associate itself with the decision by the Big Four to set up an Inter-Allied Military Tribunal to try the Nazi "arch criminals" at Nurnberg, Canadian officials were unenthusiastic:

> It might be considered that the dignified response would be to adhere to this agreement. Having in mind the appalling mess made by the United Nations Commission, it is impossible seriously to criticize the Big Four for acting as a small group without consulting anybody. By adherence we would protect our technical position and, at the same time, accept responsibility for a course of events over which we have no control. On the other hand, it might be considered that we should not adhere to an agreement in the negotiation of which we had no part and in the carrying out of which

> we were not consulted.[23]

When pressed on the arguments that Canada would be the only U.N. member not adhering to the Declaration, that Britain was anxious that Canada be involved, and that only those states adhering to the Four Power Agreement could send observers to the trials, the Prime Minister responded curtly: "This does not impress me at all...."[24] Ottawa still had reservations about the legality of the tribunal, about the standards used to determine "which criminals are 'arch' and which are not," and about the U.S. expedient of declaring entire organizations—the Gestapo, S.S., etc.—"criminal conspiracies" and charging their members on that ground. While Canada took the position that its interest was confined to individual crimes against Canadian servicemen, the Americans argued that it was the larger design that mattered—not the prosecution of individual crimes "by men unbalanced by war," but the criminal policy and criminal system.[25] When it came time to vote on the question of whether "crimes against peace" and "crimes against humanity" were, in fact, war crimes, within the jurisdiction of the UN War Crimes Commission, Canada abstained.[26] The American view—that "speedy trials are more important than the presentation of meticulously prepared cases"—was one to which Ottawa was decidedly cool.[27] Other than its signature on the United Nations Charter, Canada kept its distance from what continued to be seen as a doubtful political exercise.

The politicians and bureaucrats might be content to stay aloof and debate high policy and international law; the soldiers took a decidedly more pragmatic approach:

> While the Commission and the Governments were frolicking in the heaven of legal concepts, the Armed Forces were engaged in the earthier occupation of getting evidence of war crimes on the spot. The several Supreme Commanders appear to have operated spontaneously and without any great direction ab extra.[28]

Canadian military authorities, who had set up their own war crimes investigating unit, shared in the rough-and-ready attitude of the troops toward dealing with the problem. Law was one thing, justice another, noted Lieutenant-Colonel Macdonald, the officer in charge: prosecutions were "not intended to involve legal technicalities, guilt or innocence being largely determined as a matter

of common sense." Colonel Orde, the Judge Advocate General, agreed:

> There is much to be said in support of this view, particularly having regard to all the circumstances which have led up to the prosecution...and the fact that we as conquerors propose to punish those of the defeated enemy who violated the commonly accepted tenants of decency and humanity.

"The question really boils itself down to policy rather than law," continued Orde: still, "to my way of thinking, it would be a violation of some of the fundamental principles for the maintenance of which we strove, if we were to adopt the 'tu quoque' attitude and did not give to an accused a reasonable and proper day in court."[29] By now, the Department of National Defence had collected evidence from returning soldiers and prisoners of war, and identified some 58 individuals it wished to prosecute. Two difficulties had to be dealt with: Canada had no acts or statutes covering war crimes, and no occupation force in the Far Eastern theatre to manage trials.

To remedy the first, the War Crimes Advisory Committee, with the support of the Deputy Ministers of Defence and Justice, recommended that Cabinet use the authority of the War Measures Act to issue an Order-in-Council covering the custody, trial and punishment of those on the Defence Department's list. In this way, an emotional debate on the floor of Parliament could be avoided, and the issue confined to "crimes involving death or grievous harm to Canadian civilians or service personnel."[30] The Prime Minister agreed, and the War Crimes Regulations (Canada) were issued the same week.[31] In a statement to the House of Commons in September, Mackenzie King downplayed the government's step, stressing that the new war crimes courts would be established under military law with personnel from the judge advocate general's staff familiar with the laws and usages of war, that the regulations were similar to those established by both Britain and the U.S., and that the proceedings would be conducted with "dignity, fairness and justice."[32] Despite King's attempt to mute the reaction, headlines in the evening papers made it clear that a restrained approach to the question of war crimes was going to be difficult to maintain.[33]

Somewhat surprisingly, the professional military men at the Department of National Defence tended to be among the most moderate in their objectives. Rather than retribution, DND seemed mainly interested in a recognition by

their former adversaries of wrongdoing. "It should be noted," observed the Deputy Minister, "that the Japanese were never signatories to the Geneva Convention prior to World War II, and that they do not therefore consider that what we define as War Crimes, were anything other than the operations of war." In the view of serving officers

> the definition of War Crimes appears to be well understood in text books on military and international law, but some recognition of a definition on the part of the Japanese would be most desirable....In other words...the Japanese should admit the existence of War Crimes...and should further admit that their nationals had committed them, and that it was equitable and just that such persons should have been tried for these crimes, and finally that their convictions and sentences were a logical result of their breach of moral, if not international, law.[34]

In practice, once the trials had been held and the sentences handed down, the chief Canadian military prosecutor recommended that those sentences be served in Japan where they might be mitigated by the application of local laws— pointing out that "Japanese law was quite generous in remitting sentences after a portion of same had been served." Given that the original point had been made by an acknowledgment on the part of the Japanese in the final Peace Settlement of the legitimacy of the military trials, then the Deputy Minister recommended that External consider a limited amnesty to include "all crimes not likely to merit capital punishment."[35]

Since there was no Canadian occupation force in the Far East, it would actually be impossible to convene military courts under the newly passed War Crimes Regulations to try the accused. Given that it was impractical as well as undesirable to move the prisoners back to Canada for trial, arrangements would have to be made with the United States (or in the case of crimes committed outside the U.S. zone of occupation, the British) for trial and punishment. Canadian authorities expected no problems in arranging an accommodation, and in the case of the British this proved true. The U.S., however, expected a *quid pro quo*: Canada's participation in an International Military Tribunal to be established by the Supreme Commander in Tokyo. As part of MacArthur's plan, Canada would be expected to contribute both a judge and a chief prosecutor.[36]

The Canadian authorities now found themselves backed into a corner. Ot-

tawa continued to see any Canadian interest as strictly confined to violations of the "rules of war" which had resulted in the death or serious injury of Canadian servicemen or prisoners of war. Doubts about the U.N. Commission's more ambitious goals remained as strong as ever. Although nearly all the cases of war crimes against Canadians identified by C.M.H.Q. took place in the Far Eastern theatre, Canada had refused to join the Far Eastern Sub-committee of the War Crimes Commission after the idea was strongly discouraged by External, based on the mess the Commission had created in Europe.[37] In fact, dissatisfaction with the situation in Europe led officials to suspect as early as May, 1945 that the United States might act on its own initiative in the Far East, and their suspicions were confirmed by Massey in mid-August (although the U.S. delegate to the War Crimes Commission claimed ignorance of any definite plans).[38] It was also clear from the reports of military personnel sent to Washington, that U.S. officials expected Canada to support SCAP's intentions.

Aside from meeting with their opposite numbers in the U.S. Judge Advocate General's office, Lieutenant-Colonel Jennings and Group Captain Strathy were also interviewed by Joseph Keenan from the U.S. Justice Department, already designated as the Chief Prosecutor for the Far East war crimes trials, and with Garretson from the U.S. State Department. "Both Mr. Keenan and Mr. Garretson," the Canadian officers reported, "emphasized that the United States wishes to avoid a repetition of the procedure followed in the preliminary arrangements for the Nuernberg trials." Instead, the charter and rules of procedure for trials in the Far East would be drawn up by General MacArthur, and then other governments approached to collaborate. Once other governments had agreed in principle to the U.S. policy, there would be no further negotiations with or reference back to those governments regarding the functioning of the "international" courts. Keenan also made it clear that even if no other governments chose to participate, "the United States is prepared to proceed with the trials of major war criminals under General MacArthur...but Mr. Keenan was naturally desirous that his hand be strengthened by full co-operation from the nations concerned."[39] Lest the visitors should miss the point, Keenan dropped the diplomatic niceties for some plain speaking about what was expected of the Canadian 'cousins':

> Mr. Keenan left no doubt in our minds that the United States is very anxious that Canada should appoint three judges, of whom at least one should

> be a civilian, preferably an outstanding Canadian judge....in our discussions it [also]seemed apparent that the United States authorities, and particularly Mr. Keenan, were most anxious that Canada should nominate a prosecutor....[40]

Given its reservations about the legality and wisdom of pursuing "arch fiends," Ottawa had confined its interest to what were now termed "minor" war criminals—also the main focus of an aroused public opinion. Canada had not been invited to participate in the Four Power Agreement and had not adhered to it.[41] But it was now trapped by circumstances. Canadian officials hoped that the Defence Department's list could be dealt with speedily, punishment meted out, the public satisfied, and the file closed. Without the assistance of the United States, that could not be done.

"If the Canadian interest in the punishment of such persons [individual Japanese accused of atrocities against Canadians] is to be protected," Robertson advised the Prime Minister, "...these arrangements should be concluded as soon as possible." King underlined the final phrase, and noted: "I agree."[42] But American co-operation came at a price: "I take it to be apparent," E.R. Hopkins observed dryly in briefing Robertson, "that these arrangements could be negotiated more readily if the United States plan, as a whole, is approved in principle."[43] The War Crimes Advisory Committee prepared a memorandum for the Cabinet approving the U.S. plan and authorizing the Minister of National Defence to appoint the judge and prosecutor requested by Keenan.[44] On January 19th, General MacArthur proclaimed the establishment of the International Military Tribunal for the Far East. Canada would now be a reluctant participant in exacting vengeance for the waging of aggressive war.

With Cabinet approval, the Canadian authorities moved quickly to confirm that the U.S. would handle the 'minor' cases that were Canada's principal concern, and to identify suitable appointments for the International Military Tribunal.[45] Meanwhile, Brigadier General Henry Nolan, the Vice Judge Advocate General and an experienced lawyer, was appointed Associate Prosecutor for Canada. The choice of judge proved more difficult, since the U.S. preferred a military officer of senior rank. When headquarters reported that the Canadian forces had no officers above Brigadier with suitable legal qualifications, it was decided instead to nominate a civilian with a military background.[46] External chose Justice E. Stuart McDougall, a judge of the Court of King's Bench, Que-

bec and a serving officer during WWI. Although his expertise was mainly in corporate law, McDougall's position in Quebec meant he was used to dealing with trials in two languages and this was thought to be an advantage. To deal with the individual cases in which Canada had a "vital" interest, Lieutenant-Colonel J.O.F.H. Orr, the head of the investigation section at National Defence headquarters, was put in charge of a Canadian War Crimes Liaison Detachment and despatched to Tokyo with a team to look after Canada's interest in the various lesser trials set up by the military authorities.[47]

In Tokyo, SCAP issued a final Charter for the International Military Tribunal for the Far East in late April, and the Tribunal brought down its indictment on April 29th of 28 Japanese leaders accused of conspiring to wage aggressive war and of crimes against humanity. While Canada had been advised that the U.S. felt a single trial of a small group of war criminals would not satisfy American public opinion, Ottawa was assured MacArthur intended that the trials should not drag on and seemed confident that the Tribunal would be able to complete it work in about two months.[48] Instead, to the growing dismay of Ottawa, the Tribunal threatened to drag on interminably.

The dismay deepened when reports began to arrive back from Tokyo. While officials continued to have reservations about the legitimacy of the Tribunal's objectives, Canada's participation had been rationalized on the grounds that the exercise would be "educational" for the Japanese public—that it would stimulate a sense of responsibility for national policy. But Herbert Norman's despatches dashed those hopes. The Japanese spectators, aside from those with a personal interest in the defendants, were mostly "courtroom habitués" and law students interested in the American and English style of jurisprudence. While the Japanese-language press did cover the proceedings "rather fully," Norman had it on good authority that their extensive reporting was not a response to public interest, but resulted from "the intervention of the Supreme Commander who discovered originally that the Japanese press was not paying proper attention to the trials and who intimated that it would be in the interests of" Japanese publishers if they gave the trials more coverage.[49] Whether that coverage was having the desired effect was also questionable. Reporting in the dailies tended toward description of the defendants or historical articles on international law; when writers did comment on the proceedings, the educational result sometimes fell well short of what SCAP might have hoped, as in the case of Tojo Hideki:

> In evaluating Tojo's testimony, most journals tended to be critical of the wartime leader, although in several cases there were innuendos of admiration....Moreover, much of the criticism expressed was on the basis of responsibility for defeat rather than for initiation of an aggressive war. Thus YAMATO TIMES (Nara, 29 December) noted that if Tojo were responsible for initiating a war which he feared could not be won he was consequently responsible for the defeat and should apologize to the people....

While Norman's despatches may have been disappointing, the comments of Brigadier Nolan and Justice McDougall were genuinely disturbing. The length of time covered by the indictment—more than fifteen years—the number of accused, and the hundreds of witness to be heard from led to a lengthy and drawn out trial. To make matters worse, Nolan reported, the difficulties in making a literal translation from English to Japanese meant the simultaneous-translation system installed in the courtroom rarely worked except in the case of previously translated prepared statements; meanwhile the American defence attorneys assigned to the defendants consistently delayed the proceedings by "every form of motion, objection and interjection known...."[50] MacArthur's promise of a speedy trial and quick resolution now seemed like wildly wishful thinking.

Aside from organizational problems, there were much more fundamental issues, as Justice McDougall made clear in his letters to Louis St. Laurent.[51] It appeared to McDougall that "the United States government either did not take the constitution of the Court seriously" or the "repercussions in Washington political and judicial circles from Nurnberg" resulted in incompetents being appointed to take charge in Tokyo. As a result, basic procedural issues were dealt with in a way that destroyed whatever credibility the Tribunal might have. As an example, McDougall pointed to the handling of pretrial defence motions attacking the jurisdiction of the Tribunal: instead of receiving a carefully argued response legitimizing the court and the Charter as an expression of international law, the motions were dismissed out of hand, with the reasons for dismissal "to be given later." As a result of this and similar procedural errors and high-handedness:

> We have now reached the point where it is obvious that not only is the

> trial futile but that the final judgment will have the effect of detracting from rather than adding to useful jurisprudence in International Law....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.[52]

To make matters worse, the President of the Tribunal insisted, despite his lack of experience, on running the trial and preparing the final judgment on his own. He refused to accept help or advice from the other judges, or even discuss basic questions with them.

Meanwhile the Bench was a shambles, with various members ignoring the Nurnberg Judgment and any attempt to uphold international treaties, preferring instead to make law by their own lights:

> Two of the members take the extraordinary view that not withstanding their appointment, they are entitled to hold that aggressive war is not a crime and in their opinion it is not a crime.... The President, after issuing a memorandum upholding aggressive war as a crime not on the basis of the Briand-Kellog Pact of 1928 and the other conventions referred to by Nurnberg, but on the basis of what is now being called Natural Law, then shifted his ground and now holds the view that the Charter is merely the giving effect to the "Contract" entered into by the Allied and Japanese Governments by the Instrument of Surrender of 2nd September 1945. Another member maintains that neither the Charter nor International Law govern the proceedings, but Natural Law which in his view is determined not by the opinion of the writers and philosophers from the earliest days but is determined by the feelings in the heart of each man (le bon coeur). The other members of the Tribunal have not expressed their views except with destructive criticism of the work of the others.[53]

The procedural errors, the willingness to ignore established precedents, the lack of consensus, and especially the determination of colleagues to invent their own theories of jurisprudence led Justice McDougall to a disturbing conclusion:

> I am convinced that the accused have not had and cannot have a fair trial.

> You will therefore not be surprised at the conclusion to which I have come that if the Canadian representation could be withdrawn, Canada would in future avoid the opprobrium of having her representative participate in a judgment which will do credit to no nation and in future cases, should they arise, be used to justify the vengeance of a successful belligerent.

In view of all of this, McDougall asked to be "relieved of the responsibility of contributing on Canada's behalf to what I am convinced will be an international tragedy."

When this bombshell arrived in Ottawa, Lester Pearson (who had replaced Robertson as Under-Secretary) immediately wired Tokyo, London and Washington. "If things are as bad as indicated," he queried, "would it be better for the Canadian member to resign or to continue to be associated with developments which may become increasingly difficult to justify?"[54] The replies were not encouraging. Hume Wrong, the Canadian Ambassador in Washington, explained that because of the need to be extremely circumspect, and because the Tribunal was under the control of the U.S. War Department, not the State Department, the only fairly definite bit of information gleaned concerned Keenan, the U.S. prosecutor. There appeared to be general agreement that "by reason of his intemperance, if not for other causes as well, he is a definite menace to the success of the trials"—which lent some credence to a part of McDougall's concerns.[55] Now in London as Canada's High Commissioner, Norman Robertson was more helpful. The British, Robertson discovered, had also had reports from Lord Patrick, the United Kingdom's member of the Tribunal, which confirmed "in all respects" McDougall's misgivings. Patrick had enclosed with his reports copies of similar letters from the New Zealand judge to his government. "The Lord Chancellor," Robertson cabled back

> is considering the position with the Foreign Secretary and Dominions Secretary, but as yet they do not see how our Governments and our representatives can be extricated from an extremely unsatisfactory and embarrassing position.[56]

The U.K.'s political representative in Tokyo had been asked to discuss the situation of the Tribunal informally with General MacArthur and to suggest a visit to Tokyo by the Chairman of the UN War Crimes Commission; in the

meantime, the British asked that Canada not act unilaterally or take any final decision with regard to Canada's representative on the Tribunal. "They consider that his withdrawal at this juncture would be most unfortunate." From Tokyo, Herbert Norman also urged caution:

> The retirement from the Tribunal early in the case of Mr. Justice Higgins, the United States member, caused bitter criticism in Tokyo, and particularly amongst Americans themselves, although he was at once replaced by Major-General Cramer. Apart from the legal question of the propriety of such a replacement after the commencement of the trial, it seems quite clear that it is now too late in the case for a replacement for Canadian members [*sic*] should he resign his appointment. That would leave the Tribunal without Canadian representation, would certainly tend to impair the prestige of the court, and in view of the fact that it is in its closing phase, even though it may still last for some time, would make such a unilateral withdrawal on Canada's part exceedingly difficult to justify.[57]

Meanwhile, MacArthur resisted the proposed interference by the UN War Crimes Commission—an idea which McDougall had already dismissed as ineffectual if not downright dangerous.

Given the circumstances, Ottawa could not approve McDougall's resignation on the grounds that it had not been functioning to Canada's satisfaction. But something had to be done before Justice McDougall decided to make good his threat to simply pack his bags and come home. The heat and humidity of Tokyo's notorious summers suggested a possibility. "If," speculated one External official, "Judge McDougall's personal health would be jeopardized by his staying another summer in Tokyo, I think it would be difficult for us to ask him to stay on, against his doctor's advice."[58] A letter for St. Laurent's signature was drafted accordingly, explaining that while the government could not, for diplomatic reasons, accept Justice McDougall's resignation

> At the same time....I do not feel I can ask you to remain another summer in Tokyo if you consider that such a stay would be gravely prejudicial to your health....would it be possible for you to take leave for the summer for reasons of health? If this could be arranged, it would give us an opportunity to discuss the whole situation there and come to some decision

as to whether you should return to Tokyo in the Autumn.[59]

Although the Tribunal did recess for the summer, the breathing space produced no solution to the problem. In the end, McDougall agreed out of a sense of duty to return for the final year of sittings. Not until November, 1948 would the Tribunal finally deliver its verdicts and sentences. As McDougall predicted, the judgment was marred by dissenting opinions and by statements by the French, Chinese, and Australian judges criticizing the indictment on the grounds that the Emperor had not been charged. Ottawa was just glad to see it over.

Having finally managed to extract itself from this unhappy experiment in international justice, Ottawa was determined not to get drawn in again. When Keenan, the U.S. Chief Counsel, proposed to try a further 50 "major war criminals" and SCAP approached Canada for its views, Ottawa had no interest in participating—if the U.S. was determined, the suspects could be tried by the Occupational Courts. In the end, most of the prisoners were released.[60] But SCAP tried again to enlist Canada for the trial of Lieutenant-General Tamura Hiroshi for crimes against humanity, on the excuse that Canadians were among the victims—but mainly, Norman advised, to try again to give the trial an "international flavour." The reaction in Ottawa was firm. External was convinced "...Canada should avoid further participation in the trials of Japanese war criminals," while the Department of National Defence was not interested. In Brooke Claxton's opinion, Canada had already participated fully. The attitude of Canadian officials was neatly captured by E.R. Hopkins' pencilled instruction on the correspondence: "Mr. Reid to note, smile, and file."[61]

Ottawa also declined to participate in further trials proposed by SCAP for 1949 of "B" and "C" class criminals. Nor did Canada take part in war crimes trials in Korea, which Canadian officials regarded as an illegal claim to authority by MacArthur. When the wartime Order in Council establishing war crimes regulations was later regularized by formal legislation (10 George VI Chap.73), the original definition of a war crime—"a violation of the laws or usages of war"—was confirmed, notwithstanding Canada's participation in the Tokyo Tribunal.[62] And Canada made no statement on the draft Code of Offense Against the Peace and Security of Mankind when it came to the floor of the United Nations during the Ninth Session of the General Assembly.[63]

One question remain to be dealt with: clemency and parole. Soon after the Tribunal handed down sentences, Herbert Norman was called to SCAP head-

quarters (along with representatives of the 10 other Allied powers) to advise MacArthur on the exercise of his right to grant clemency. Norman cabled Ottawa for direction and was told to attend and "exercise your judgement in any questions which may arise...." Norman protested and asked for an indication of Canada's position; rather than amplify on Canada's official views, Hopkins in Ottawa replied that Norman's instructions were "adequate."[64] Lacking any direction, Norman was forced, presumably as expected, to be noncommittal. When his turn came to speak, he advised MacArthur that

> I did not in any way challenge the judgment of the court but at the same time I was not for that reason opposed in principle to clemency....I went to the meeting prepared to discuss what I thought were two or three marginal cases where clemency might properly be employed, but the atmosphere at the meeting, although friendly, was not conducive to informal interchange of views....In the interview General MacArthur simply began by asking one after another whether we agreed with the judgment or not.[65]

The issues of the war crimes trials and their results would thus remain moribund for another five years—until the United States, having second thoughts of its own, proposed the grant of paroles to the war criminals convicted by the Tribunal.

In November of 1952, the Japanese government formally recommended, under Article 11 of the Peace Treaty, that the governments represented on the Tribunal approve the release of the remaining major war criminals being held in Sugamo prison. The U.S. State Department, anticipating the formal request, had already taken the lead in consulting the other governments in an effort to gain majority approval, in the first signs of what appeared to be a change in the U.S. position on war criminality:

> I know from my conversations with United States advisors at the Ninth General Assembly that United States views on the Nurnberg Charter and the Judgment have changed though they probably do not wish to say as much publicly.[66]

In fact, the U.S. had refused to support the General Assembly's Draft Code of Offenses Against the Peace and Security of Mankind, which was based on the

principles contained in the Charter and Judgment, and U.S. officials now maneuvered to ensure the prisoners' release. Although the British held that the majority decision under Article 11 of the Peace Treaty meant a majority of the governments represented on the Tribunal, the U.S. insisted that it meant a majority of the governments which participated in the consultation over clemency—with the Soviet Union and China excluded on the grounds that they had not signed the Treaty. Given Canadian doubts about the whole exercise, Canada was quick to support this position.[67] From the outset, External identified Canada's chief concerns as two: (1) that the majority in support of clemency be as large as possible, and preferably unanimous, and (2) any decision reflect a proper application of justice consistent with the maintenance of international law and order. What was meant by "justice" in the framework of war crimes became clear when the Deputy Minister of National Defence wondered how the two could be reconciled:

> If a Canadian decision judicially made, were to be subject to change because of opinions rendered by other governments concerned, then presumably there would be no point in a judicial review and Canada might simply poll these governments and then vote with the majority.[68]

The answer, as the officials at External explained patiently, was that there was justice and then there was "justice":

> The Deputy Minister apparently thinks that a Canadian review which takes the form of a joint consideration of all twelve cases and which takes into account political considerations could not be regarded as a judicial act. It has been the view of this Department...that the term "judicial" could be relative as well as absolute and that a review which gave an opportunity for political considerations to be given some weight would still be a judicial review though not so much of a judicial review as one which excluded such considerations.
>
> I doubt that the majority of governments concerned in view of the necessity to pay at least lip service to the importance of safeguarding the IMFTE judgment, would be willing to admit to us that they were prepared to base clemency decisions on political considerations, even if they were so prepared.[69]

Since the Defence Department's main interest remained the "minor" war criminals, External prevailed and the Canadian Cabinet directed the review committee to "take account of the fact that...considerations other than those of law may be of major importance in certain instances..." in determining clemency recommendations.[70] The other governments were polled and it was apparent there was a consensus for early release, with most favouring the British government's proposal of an unconditional discharge. The Cabinet approved this solution, but the U.S. was wary of the "mass release" formula, both because of the reaction of American public opinion and because the U.S. government was concerned that its approach not appear to be a complete reversal of the policy it had adopted at the end of the war.[71] To avoid both problems, the Americans proposed that individual prisoners be released on "parole" once they had served 10 years of their original sentence. Aside from its effect on public opinion, the actual difference was minor: the prisoners would be released one-by-one over several months and, since no elaboration of the term "parole" was included (and since the signatories had no way of enforcing parole terms in any case), it was, as the Canadian Ambassador at Washington pointed out, "synonymous with outright release."[72] The last Class "A" war criminal, Sato Kenryo, was paroled on March 30th, 1956. "...I think," observed Arthur Menzies upon the release of Sato Kenryo, "that the problem of Japanese war criminals has now come to an end for the Canadian Government."[73]

The file would remain closed for almost forty years. Not until the end of the Cold War would "war crimes" again claim Canadian policymakers' attention. In the interval, Canada greatly expanded its role in world affairs, seeking to promote peace through international co-operation. In pursuit of this goal, it preferred to 'let the dead past bury its dead,' and to concentrate instead on eliminating the evils of war by eliminating the causes of war. But the recent establishment of the Hague Tribunal—the International War Crimes Tribunal for the Former Yugoslavia—and its unprecedented decision to indict Slobodan Milosevic for "war crimes" raised again the questions of international law and power politics that surrounded the Tokyo Tribunal. As a result, Canada finds itself once more grappling with the dilemma of war crimes and their prosecution in an international community. Canada's participation in the work of the Tribunal, including the presence of Louise Arbour (subsequently appointed to

the Supreme Court of Canada on 15 September 1999) as chief prosecutor for both the Yugoslavia and Rwanda tribunals contrasts sharply to its reluctant involvement at Tokyo. In particular, Canadian support for the Tribunal's claims to supranational powers, including the aggressive assertion of Western concepts of criminal law regardless of the limits traditionally imposed by national sovereignty, signals the shift that has taken place in Canada's approach to foreign relations since 1945. Increasingly Canada has come to see its commitment to internationalism more as a commitment to a global idealism based on morality and human rights, and less as a commitment to an international order based on a framework of agreements between nations reflecting political interests and state power.

NOTES

1 "Punishment of War Crimes," Memorandum by Marcel Cadieux, 15 April 1943, National Archives of Canada, Department of External Affairs, RG25/3033/4060-40C/2. In reality, British officials were less than enthusiastic about the idea: "In view of the experience at the end of the last war we think that a commitment to hunt down and try Germans guilty of atrocities might prove embarrassing. We can safely leave the Germans to the vengeance of their neighbours and we wish to keep our hands free...." Dominions Office to Governor General for Canada, 13 October 1941.

2 RG25/3033/4060-40-C/2/4. Charged under the provisions of the Versailles Treaty by a "Commission of Responsibility"—15 jurists representing 10 powers—for a supreme offense against international morality and the sanctity of treaties, the Kaiser fled to the Netherlands before the tribunal could act. The Netherlands, in turn, refused to surrender him on the grounds that the tribunal was an instrument of political power, not a criminal court. Of the 344 other government officials and high ranking officers named, only six were eventually convicted; all received light sentences and most were allowed to subsequently escape. It was not, in retrospect, an encouraging precedent.

3 *Ibid.*

4 *Ibid., Financial Post*, 24 October 1942.

5 Note for the Undersecretary, 26 July 1943, RG25/3247/5908-40/1

6 Great Britain, Secretary of State for the Dominions to Canada, Secretary of State for External Affairs, 6 August 1942, MG26 J1/334/285968; 13 November 1942, MG26 J1/337/286655. At this point in the war the Prime Minister, Mackenzie King, also acted as Secretary of State for External Affairs.

7 Robertson to Mackenzie King, 28 November 1942, RG25/3247/5908-40/1; Arthur Slaght to J.H. Read, 22 December 1943, RG25/3247/5908-40/1.

8 "Canadian Participation in the United Nations Commission for the Investigation of War Crimes," 26 July 1943, RG25/3247/5908-40/1.

9 "Canada and the Punishment of War Crimes," 2 November 1943, RG25/3247/5908-40/1. Questions of direct concern to Canada were defined in the Cabinet's decision, as "cases affecting Canadians or members of the

Canadian armed forces"—a definition that excluded "crimes against humanity" or "crimes against morality."

10 NAC, Department of National Defence Memorandum by R.E. Curran, "In the Matter of War Crimes and Criminals," 18 January 1944, RG25/3247/5908/1. (Italics added.)

11 R.E. Curran, "In the Matter of War Crimes and Criminals," p.13.

12 Cadieux, "Punishment of War Crimes," p.25.

13 J.E. Read to Norman Robertson, 14 September 1943; Robertson to W.L.M. King, 26 September 1943, MG26 J4/375/3935.

14 The committee, consisting of Arthur Slaght, an Ottawa lawyer, as Honorary Counsel, Charles Stein from Justice, Group Captain Strathy from National Defence, with Lt. Commander Curran (later E.R. Hopkins) as Secretary and Read as Chair was eventually set up in November, 1943. In response to requests by journalists for information about war crimes Read argued against giving the Committee's work any publicity and Robertson agreed, noting that he saw "no useful purpose in giving further details...." Minute by Robertson on J.E. Read to Deputy Minister, External Affairs, 29 January 1944, RG25/3247/5908-40/1.

15 "Let's Not Blunder This Time," *Financial Post*, 16 January 1943. The editor reminded readers that previous attempts at punishing war criminals had been a "feeble spectacle." "Surely," he urged, "this time we can do better."

16 Minutes of the War Crimes Special Committee, 29 December 1943, RG25/3246/5908-40/1; First Annual Report of the War Crimes Advisory Committee, 31 December 1944, RG25/3728/5908-40/3. The Committee's report must have been particularly frustrating for officials at the Department of National Defence who had advised that "while we have very little evidence relating to war crimes committed by German personnel, there is a large volume of material covering atrocities committed on Canadians and others by the Japanese."

17 Vincent Massey to Secretary of State for External Affairs, 28 January 1944, RG25/3247/5908-40/1.

18 See, e.g., City of Toronto to W.L.M.King, 29 September 1944, RG25/3247/5908-40; Vancouver Labour Council to King, 28 May 1945; Niagara Falls District Trades and Labour Council to King, 17 May 1945; RG25/3247/5908-A-40; J.L. Kidd, Sudbury Mine and Smelter Workers Union to King, 24 September 1945; RG25/3641/4060-C-40C/1. Slaght thought that public whippings would have a healthy effect on the rest of the enemy population, and was frustrated when corporal punishment was dropped from Canada's draft regulations. A. Slaght to J.E. Read, 30 June and 5 July 1945, RG25/3728/5908-40/4.

19 N. Crawford to J.E. Read, 18 September 1945, RG25/3728/5908-40/4.

20 "Canada Helping Atrocities Probe," Montreal *Standard*, 16 June 1945.

21 Vincent Massey to W.L.M. King, 28 January 1944; RG25/3247/5908-40/3;J.E. Read, "Memo for the Deputy Minister," 16 January 1945, RG25/3728/5908-40/3.

22 J.E. Read, "Note for the Undersecretary," 13 November 1944, RG25/3247/5908-40; "Memo for the Deputy Minister," 16 January 1945; "Memo for the Prime Minister," 8 February 1945, RG25/3728/5908-40/3. "I think Mr. Read's appreciation is correct," noted Robertson for the Prime Minister.

23 J.E. Read, "Note for the Under Secretary," 29 August 1945, RG3640/4060-40/6.

24 Minute on N. Robertson to W.L.M. King, 17 November 1945, MG26 J4/375/3935.

25 Statement by Lt. Colonel Walker, Minutes of the Seventieth Meeting, U.N. War Crimes Commission, 18 July 1945, RG3640/4060-40/6.

26 Massey to Secretary of State for External Affairs, 7 February 1946, RG25/3640/4060-40C. Other countries

abstaining included China, France, New Zealand, Norway and the U.S.

27 High Commissioner at Washington to Secretary of State for External Relations, 3 August 1945, RG3640/4060-40/6.

28 E.R. Hopkins, "Report to the Heads of Divisions, Department of External Affairs," 5 June 1945, RG25/3641/4060-40C/6. Hopkins was Secretary of the War Crimes Advisory Committee.

29 R.J. Orde to J.E. Read, 12 September 1945, RG25/3728/5908-40/4.

30 War Crimes Advisory Committee, "Note for the Prime Minister," 21 August 1945, RG3640/4060-40/6.

31 Canada, P.C. 5831, 30 August 1945. Under the regulations, a "war crime" was defined as "a violation of the laws or usages of war committed during any war in which Canada has been engaged...after the ninth day of September 1939."

32 H.C. Debates, 13 September 1945, Statement by the Right Hon. W.L. Mackenzie King (Prime Minister).

33 "Canada Sets Up Courts for Trial of Foe Sadists: Can Order Execution of Huns or Japs...," Toronto *Telegram*, 13 September 1945. In practice, the average sentence of those prosecuted was ten years, with four of the fifty-three sentenced to death (not including Inouye Kanao —the "Kamloops Kid"—who appealed his original military conviction on the grounds that he was a Canadian, and was subsequently re-tried and executed for treason).

34 W.G. Mills, Deputy Minister, Department of National Defence to the Under-Secretary of State for External Affairs, 8 August 1947, RG24/2906/HQS8959-9-4.

35 *Ibid.*

36 Minutes of Extraordinary Meeting of War Crimes Advisory Committee, 21 September 1945, RG24/2906/4060-C-40C

37 E.R. Hopkins, "Memorandum for J. Read," 30 May 1945, RG25/3728/5908-40/3.

38 *Ibid.*; High Commissioner for Canada (London) to Secretary of State for External Affairs, 14 August 1945; 11 September 1945, RG25/3640/4060-40/6

39 R.D. Jennings and C.M.A. Strathy, "Trials of Major War Criminals," undated [26 November 1945], RG25/3728/5908-40C/5.

40 *Ibid.* The request for judges was later reduced to a single appointee, perhaps because more governments agreed to be involved than Keenan seemed to expect at this stage. A part of Keenan's eagerness that Canada agree to participate might be explained by the terms of the U.S. scheme: "The Supreme Commander for the Allied Powers should have the power (a) to appoint special international military courts (which term should be held to include tribunals of any type) composed of military or naval officers or civilians of *two or more of the United Nations*...." At the time of the Canadian visit, a month after the Note had been circulated, Keenan admitted that no replies had been received from the governments solicited. Canada's agreement would make it possible to style the trials the U.S. was determined on an "international tribunal". See "Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East," n.d. [October, 1945], RG24/2906/HQS8959-9-4. Italics added.

41 "Draft Memorandum to the Cabinet," 27 December 1945, RG25/3642/4060-C-40/3.

42 "Memorandum for the Prime Minister," 12 January 1946, MG26 J4/375/F3935

43 E.R. Hopkins, "Far Eastern War Crimes," RG25/3247/5908-40/1.

44 War Crimes Advisory Committee, "Memorandum to the Cabinet," 27 December 1945, RG24/2906/HQS

8959-9-5/2.

45 Ironically, the expectation that the DND list could simply be handed over to the U.S. military for trial was disappointed when the U.S. attached a condition to its acceptance: Canada would also be expected to provide a senior officer to sit on the military tribunals. Now thoroughly committed, Canada agreed to the condition. Cabinet approval was given on 16 January 1946; a copy of the Cabinet resolution is on RG25/36/4060-C-40/5. A second officer was seconded to the British.

46 A. Ross, Department of National Defence to Under-Secretary of State for External Affairs, 31 December 1945, RG25/136411/4060-C-40/1.

47 RG25/3641/4060-C-40C; the c.v. of Nolan and of McDougall are in MG31/E43/1.

48 Great Britain, Secretary of State for the Dominions to Canada, Secretary of State for External Relations, 18 January 1946; Canadian Ambassador to Secretary of State for External Relations, 5 January 1946, RG25/3641/4060-C-40C/1

49 H. Norman, Canadian Liaison Mission, Tokyo to Secretary of State for External Affairs, Despatch No. 19, 23 January 1947, RG25/3642/4060-C-40/3.

50 H.G. Nolan to Brooke Claxton, Minister of National Defence, n.d. [June, 1948], RG25/3642/4060-C-40/3.

51 An ageing Mackenzie King turned over the portfolio of Secretary of State for External Affairs to St. Laurent in the fall of 1946, and Lester Pearson was promoted to Undersecretary. Two years later, St. Laurent would replace King as Prime Minister, and Pearson become Secretary on his way to the Prime Ministership.

52 S. McDougall to Louis St. Laurent, 19 March 1947 and 20 May 1947, RG15/89-90/029/42/104-5/5.

53 *Ibid.*; The United States had, in fact, proposed in March, 1946 that the Japanese government join the Allies in bringing charges against Japanese war criminals—an idea dropped after the British strongly opposed it on the grounds that it would give the impression that Japan was an innocent, even wronged, party. Great Britain, Secretary of State for Dominion Affairs to Canada, Secretary of State for External Affairs, 7 March 1946, RG25/3641/4060-C-40/2.

54 L.B. Pearson to Herbert Norman, 2 April 1947, RG15/89-90/029/42/104-5/5.

55 L.B. Pearson to Hume Wrong, 2 April 1947; Wrong to Pearson, 21 April 1947, RG15/89-90/029/42/104-5/5

56 L.B. Pearson to N.A. Robertson, 2 April 1947; High Commissioner for Canada in Great Britain to Secretary of State for External Affairs, 8 May 1947, RG15/89-90/029/42/104-5/5.

57 Norman to Secretary of State for External Affairs, Cypher No. 60, 5 April 1947, RGRG15/89-90/029/42/104-5/5.

58 "Memorandum for Secretary of State for External Affairs," 12 June 1947 [no signature], RG15/89-90/029/42/104-5/5.

59 Secretary of State for External Affairs to Canadian Liaison Mission, Tokyo (Personal and Secret for Judge McDougall), 12 June 1947, RG15/89-90/029/42/105-5/5.

60 H.G. Nolan to Head of Canadian Liaison Mission, 25 August 1947. The British reaction was much the same. See Great Britain, Secretary of State for Commonwealth Relations to Canada, Secretary of State for External Affairs, 3 December 1947, RG25/3642/4060-C-40/3.

61 E.H. Norman to Secretary of State for External Affairs, 26 October 1948; D.M. Johnson to Deputy Minister of National Defence, 27 October 1948; B. Claxton to Acting Secretary of State for External Affairs, 13 November 1948; Deputy Minister of National Defence to Under-Secretary of State for External Affairs, 22

December 1947; RG25/3642/4060-C-40/3.

62 As the author of the *War Time Trial Law Reports* noted, this was narrower than the jurisdiction established by the Charter of the International Military Tribunal which also included "what the Charter calls 'crimes against peace' and 'crimes against humanity'." United Nations War Crimes Commission, "Canadian Law Concerning Trials of War Criminals by Military Courts," RG25/3641/4060-C-40/10.

63 J.S. Nutt to G. Sicotte, 6 July 1955, RG25/36/4060-C-40/5.

64 Secretary of State for External Affairs to Canadian Liaison Mission, Tokyo, 16 November 1948; E.H. Norman to Secretary of State for External Affairs, 17 November 1948; RG25/3642/4060-C-40/3.

65 Left to his own devices, Norman later had second thoughts and wrote a lengthy personal letter to MacArthur explaining that as an individual he was opposed in principle to capital punishment, that he had recommended in the past, using examples from Japanese history, that exile to a remote island was seen as suitable punishment for political leaders convicted of the crimes of preparing and waging aggressive war—"offenses which today we would probably describe as political rather than criminal." However since the Charter of the I.M.T.F.E had provided for the death penalty, he had to accept it however much he personally disliked it. Norman then went on to encourage reductions of sentence in two cases, Shigemitsu and Togo, on humanitarian not legal grounds. E.H. Norman to L.B. Pearson, 24 November 1948, RG25/3642/4060-C-40/3.

66 J.S. Nutt to Sicotte, 6 July 1955, RG25/87/336/4060-C-40/9.

67 J.C. Parry, Legal Division Memorandum for the File, "Clemency for Japanese War Criminals," [n.d.] RG25/86-87/160/4060-C-40/6;as E.H. Norman pointed out, the U.S. approach not only avoided arguments over which China should be represented, but an all 'Western' review tribunal would be "almost certain to agree to any reasonable recommendation for clemency...." E.H. Norman to Acting Under-Secretary, External Affairs, RG25/36/4060-C-40/5.

68 C.M. Drury to Secretary of State for External Affairs, 23 March 1953, RG25/86-87/160/36/4060-C-40/5

69 C.F. McGaughey, Far Eastern Division, "Memorandum for Legal Division," 9 March 1953, RG25/86-87/160/36/4060-C-40/5

70 "Memorandum to Cabinet," approved 6 August 1953, RG25/86-87/160/36/4060-C-40/5. As A.M. Ireland noted, the U.S. now described major war criminals as having been convicted on "general" grounds—"a euphemistic term, meaning 'political' grounds—i.e., the making and waging of a war which eventually they lost. Of course they can be interned, but only because we won, not because of the law, which was only established after the fact." Ireland to A.. Menzies, 7 July 1955, RG25/36/4060-C-40/5.

71 Draft Memorandum to Cabinet, 5 August 1955; Record of Cabinet Decision, 16 August 1955, "Clemency for Major Japanese War Criminals," RG25/36/4060-C-40/6.

72 Two years later, the U.S. proposed, and the others agreed, to quietly reduce the sentences of the 'parolees' to time served, effectively terminating their parole. Memorandum for the Minister, 7 January 1957, RG25/36/4060-C-40/6.

73 A. Menzies to Legal Division, Department of External Affairs, 17 April 1956, RG25/36/4060-C-40/6.